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April 15, 1994

BURTON W. OLIVER
Executive Director

Mr. R--- P---, CPA
XXXX --- Drive
P.O. Box XXX
--- ---, California XXXXX

Re: [No Permit Number]
Taxable Food Sales

Dear Mr. P---:

I am answering your letters to me dated March 7 and 9, 1994, following up on mine to you dated March 4, 1994. In my letter, I concluded, based on the information contained in your letter to me of December 21, 1993, your client's sales of cold food to go were subject to tax pursuant to Regulation 1603(c) ("the 80/80 rule"). You ask if my conclusion would be different taking into account your client's bulk sales of croissants and sales of sandwich fillings, both on a to-go basis. Again, as you did not identify the taxpayer this letter does not constitute specific written advice to the taxpayer under Revenue and Taxation Code Section 6596. Rather, it constitutes general comments regarding the applicability of California Sales and Use Tax Law to a set of hypothetical facts.

Attached to your letter of March 9, 1994, was a copy of your December letter attached to which is a schedule entitled "Sales Breakdown - In Percentages" showing what you believed to be the taxable and exempt sales, based on your review of the tax law and Regulation 1603. To-go sales of croissants, which I assume are the bulk sales, constitute 19.66% of total sales and those of the sandwich fillings constitute 17.06% of total sales. I calculated in my previous letter that your client's food sales were 93.24% of the total. I calculate that the bulk sales of croissants and the sales of sandwich fillings constitute 18.33% and 15.9%, respectively, of your client's sales of food products.

OPINION

To review, a retailer's sales of cold food sold on a to-go basis are subject to tax (1) it has facilities at which its customers may consume its food products; (2) it sells food products in a form for consumption at those facilities; (3) more than 80% of its total sales are of food products; and (4) more than 80% of its sales of food products are taxable under Regulation 1603(a), (b),

(e), or (f), without reference to the operation of the 80/80 rule. Under sub-division (f), sales of food in a form suitable for consumption at the facilities of the retailer are subject to tax. We have previously determined that bulk sales of individual items - e.g., a bag of doughnuts, muffins, or croissants - is in a form suitable for consumption at the facilities of the retailer. While the purchaser might not be able to eat a bag of croissants, he can pull out one and eat it at the restaurant before taking the rest away. To conclude otherwise would be to provide an avenue for wholesale evasion of the rule.

Therefore, the bulk sales of croissants are already taxable under Regulation 1603(f). We agree, however, that the sales of sandwich fillings are sales of food products not suitable for consumption at the retailer's facilities. Since I calculate those sales to be 15.9% of your client's total food sales, that means that 84.1% of those sales are subject to tax without reference to the 80/80 rule. Therefore I confirm my previous opinion that your client's sales of food to-go are subject to tax.

I hope this discussion has answered your question. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

JLW:es

cc: -- District Administrator