

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

550.1715

In the Matter of the Petition)
for Redetermination of State)
and Local Sales Tax;)
)
Q--- S--- F---) No. SR -- XX XXXXXX
)
)
_____ Petitioner)

The above-entitled matter came on regularly for hearing on Tuesday, July 15, 1975 in Inglewood, California

Appearing for Petitioner:

Mr. R--- J. K---, CPA
P---, S---, W--- & Co.

Mr. D--- P---, CPA
P---, S---, W--- & Co.

Mr. P--- D---, Sr., President
Q--- S--- F---, Inc.

Appearing for the Board:

Mr. R. B. Petersen, Prin. Auditor
Inglewood District

Mr. H. G. Johnson, Auditor
Inglewood District

Protested Item

Pursuant to an audit covering the period from 4/1/71 through 3/31/74, and a determination issued on February 4, 1975, Petitioner protests the assessment of sales tax on certain sales of crab and lobster. The measure of tax is \$131,422.

Contentions of Petitioner

The sales of crab and lobster in question were not sales of hot prepared food to go within the meaning of Section 6359(e) of the California Revenue and Taxation Code and Regulation 1603.

Summary of Petition

Petitioner is a corporation engaged in the business of wholesale and retail sales of fresh seafood. In addition to the fresh seafood market, Petitioner operates a snack seafood bar and sells beer and wine under an off-sale license.

The business operations commenced on or about April 1, 1971, and the audit under consideration is the first to be made of the corporation.

This controversy is over the assessment of sales tax on certain sales of crab and lobster that prior to January 1, 1972 were not taxed.

Petitioner maintains a fresh fish and other seafood market that includes a snack bar where one may purchase seafood.

Petitioner operates a fresh fish market that includes, at certain times of year, live crab and lobster along with other shellfish. In addition, the business operation includes sales of seafood from a snack bar and beer and wine sold under an off-sale license.

The operation is segregated, i.e., sales of fresh fish are sold from one section of the premises and are rung up on a cash register used only for such sales. The snack bar sales are rung up on a cash register used only for snack bar sales and the beer and wine sales are likewise rung up on a register used only for such sales.

Thus, the problem of separating or identifying the various types of sales does not exist.

Lobsters and crabs are sold on a live basis during certain times of the year. They are weighed live and then killed by placing them in boiling water. The process also cooks the meat to some degree depending on the length of time the shell fish remains in the hot water.

Statutes 1971, page 3711, in effect December 14, 1971, operative January 1, 1972 included certain deletions and additions to Section 6359 relating to food product sales exemptions. Subsection (e) was added which in effect generally provided that tax applies to food products when "sold as hot prepared food product". The law also provided that:

Hot prepared food products, for purposes of subdivision (e), include a combination of hot and cold food items or components where a single price has been established for the combination such as a hot meal, a hot specialty dish or serving, or a hot sandwich or hot pizza, including any cold components or side items. Subdivision (e) shall not apply to a sale for a separate price of bakery goods or beverages (other than bouillon, consomme' or soup), or where the food product is purchased cold or frozen; "hot prepared food products" means those products or items or components which have been prepared for sale in a heated condition and which are sold at any temperature which is higher than the air temperature of the room or place where they are sold.

Because the fresh live lobster or crab was killed by placing it in boiling water, it necessarily is still hot when turned over to the customer who purchased it unless, of course, it is allowed to cool before the customer picks it up. The fact that it is in a hot condition was the basis for concluding that it was a hot prepared food product within the meaning of the 1971 addition to Section 6359.

Petitioner contends that the law was not enacted to reach out and tax sales of live lobster and crab under the conditions described above.

Conclusions

The addition of subdivision (e) to Section 6359 resulted in an additional statutory exemption from a broad tax exemption on retail sales of food products sold for human consumption.

The issue here is whether the subdivision (e) exclusion was intended to include any and all food that, for whatever reason, happened to be above room temperature as a result of heating prior to sale. If it did, then there is no merit to Petitioner's argument.

Obviously, the Legislature did not intend that all hot food be included because it wrote into the exclusion some conditions where it was not to apply; to wit, hot bakery goods and beverages other than bouillon, consomme' or soup.

The Board amended Regulation 1603 (18 Cal. Admin. Code 1603) following the enactment of the "hot food" exclusion, and in so doing more or less answered question, for administrative purposes, of what the law contemplated.

Regulation 1603(d)(1) [now 1603(e)1, 11/28/00] provides, in part, as follows:

On and after January 1, 1972, tax applies to all sales of hot prepared food products unless otherwise exempt. "Hot prepared food products" means those products, items or components which have been prepared for sale in a heated condition and which are sold at any temperature which is higher than the air temperature of the room or place where they are sold. The mere heating of a food product constitutes preparation of a hot prepared food product, e.g., grilling a sandwich, dipping a sandwich bun in hot gravy, using infra-red lights, steam tables, etc. If the sale is intended to be of a hot food product, such sale is of a hot food product regardless of cooling, which incidentally occurs. For example, the sale of a toasted sandwich intended to be in a heated condition when sold, such as a fried ham sandwich on toast, is a sale of a hot prepared food product even though it may have cooled due to delay. On the other hand, the sale of a toasted sandwich which is not intended to be in a heated condition when sold, such as a cold tuna sandwich on toast, is not a sale of a hot prepared food product. (Emphasis added.)

Food products can be prepared and sold at a temperature above room temperature as a result of the preparation process without there being any intent that they be sold in the above-the-room temperature condition as such; e.g., the toasted tuna sandwich.

Killing a lobster with hot water is in and of itself preparation, and while it is true that the heat also cooks the meat to some degree, the process and its resulting effect, is not necessarily a hot prepared food product within the meaning of the term as used in the statute. In other words, there is some question of whether it is "prepared" within the meaning of the word as used in the phrase "hot prepared food". Fresh killed lobster and crab still need to be cleaned before eaten.

The regulation speaks of the "mere heating of a food product" as constituting preparation. Again, this is not an all inclusive provision, and it would appear that it is meant to cover situations such as where a person purchases a cold coffee snail and orders it buttered and heated before serving, or where a person purchases a cold piece of apple pie and orders it warmed before serving.

Generally, it is customary to cool crab before it is eaten. Cracked crab is served cold. Crab and lobster meat in salads is served cold. Lobster is customarily cut in half, cleaned and baked with condiments before being served in a heated condition.

Thus, the question here turns on intent; was it the intent of the buyer and/or the seller of the live lobster and crab that the product be hot when purchased from the fresh fish counter; or was the product inescapably above room temperature as a result of being killed by using hot water?

It would be the exception, not the rule, if a live lobster or crab was purchased, killed by submersion in hot water, and immediately eaten in the hot condition because the customer wanted it hot.

Lobster and crab, when sold live, are sold live to prove without question or guarantee that they are fresh. The customer purchases it live, has it killed and because he does not wait for it to cool he takes it in an above-room-temperature condition. What was his intent?

Evidence of intent as far as sales of fresh lobster and crab is concerned can be seen from the way they are customarily sold when not offered for sale in a live condition. Pre-killed lobster and crab, with no additional preparation for immediate consumption, are kept on a bed of ice in the meat counter or under some other form of refrigeration. They are not kept in a warming oven, steam cabinet, under infra-red heat, or in any other way kept warm while held for sale. Initial heat from the killing process was not intended to remain in the product until it is sold or eaten as in the case of fried chicken or pizza that is kept warm up to the time of sale.

In sum, when a person purchases a live lobster or crab from a fresh fish market, and it is killed for him with hot water, the intent is not to purchase a hot prepared food product, and it therefore is not a sale of a hot prepared food product within the meaning of the term.

Q--- S--- F---, Inc.
SR -- XX XXXXXX

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August 4, 1975
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Recommendation

Redetermine. Delete the assessment of tax on receipts from the sale of live lobster and crab sold over the fresh meat counter.

Robert H. Anderson, Hearing Officer

AUG 4, 1975

Date