

Date: March 29, 1979

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MEMBERS PRESENT:

CHAIRMAN PRICE	ASSEMBLYMAN BERGEVIN
VICE CHAIRMAN CRADDOCK	ASSEMBLYMAN MARVEL
ASSEMBLYMAN COULTER	ASSEMBLYMAN RUSK
ASSEMBLYMAN DINI	ASSEMBLYMAN TANNER
ASSEMBLYMAN MANN	ASSEMBLYMAN WEISE

MEMBERS ABSENT:

ASSEMBLYMAN CHANEY (excused)

Chairman Price called the meeting to order at 11:15 a.m. on March 29, 1979. The purpose of the meeting was to hear the subcommittee report on exempting sales tax on food.

Mr. Mann moved that the committee recind their action whereby they amended the Professional Practices Act. Mr. Marvel seconded the motion. The motion passed with Mr. Weise opposed and Mr. Chaney absent.

Mr. Mann then moved that the committee request this amendment to be run as a separate bill. Mr. Bergevin seconded the motion. the motion passed with Mr. Coulter voting against it and Mr. Chaney absent. The bill will be referred to Government Affairs Committee.

Assemblyman Tanner then presented the committee with his report on sales tax on food. A copy of his material is attached to these minutes as Exhibit A.

Mr. Mann inquired if it would be possible to place household goods into the bill even though the Assembly had passed a separate bill dealing with this. Frank Daykin, Legislative Counsel, stated that this would be in conflict.

Mr. Tanner went on to say that regardless of what happens there is going to be administrative problems and so they almost have to rely of regulations and rules in order to handle it on an on-going basis. Mr. Tanner presented copies of AB 59 and SB 204 to show the difference in them. He pointed out the various differences in the bill. The following are a few of things that Mr. Tanner pointed out:

Page 13, of SB 204 has the self-distruct clause which is not in AB 59.

Page 5 & 6 of AB 59 there is language added which would provide for the shutting down of a business if they haven't collected the tax. This is not found in SB 204, however there is language regarding revocation of permits found on page 16 of SB 204.

Page 9 in AB 59 and page 19 in SB 204 covers the 2% fee. In AB 59 it states 1%, however it will be necessary to

change this to 2% to be consistent.

Page 13, AB 59 and page 24 in SB 204. In AB 59 the deposit requirement has been raised to \$30,000 while it remains at at the present \$10,000 in SB 204.

Mr. Dini inquired if they were raising the bond for everybody again. Mr. Tanner stated that AB 59 would. Mr. Daykin stated that the 5 times is now in existing law and is found in both bills. What Mr. Tanner is suggesting is to get rid of any raise in the maximum.

Page 17 in AB 59 and page 27 in SB 204 covers the lien on the property. AB 59 raises it to 10 years and it is presently at 5 years which is reflected in SB 204.

Page 22 in AB 59 and page 32 in SB 204 covers the enforcement of the regulations. Section 111 of AB 59 gives the department the authority to create regulations and administer the law. SB 204 simply allows them to administer the law as created.

Mr. Tanner stated that his recommendation would be that they stay with the provisions in the current law and he called upon Mr. Daykin to explain why.

Mr. Daykin stated that the reason that SB 204 is drafted the way it is, is that the committee simply wanted to ask the people to repeal the administrative provisions and then the legislature would then re-enact them without change. Then at another session when the administrative provisions are under the legislature control, if they are by the vote of the people, then the legislature could consider individual changes on their merits, but not bury them in this omnibus bill. The reason the changes are in AB 59 is that they would made by deliberate amendment in early bills that were considered in the legislature but as noted, they can go through almost without being thought of in a bill this long and they should be thought of and fought over individually.

Mr. Mann asked Mr. Daykin to explain briefly the pros and cons of the bills. Mr. Daykin stated that the pro of changing is that maybe they are good changes and the con is that the bill as a whole does something very broad - it takes tax off food and does a lot of different things to the property tax - and these changes really should be considered individually.

Mr. Tanner stated that he had one point to make and that was on page 12 of SB 204. The question had been raised and must be decided if the committee wants to go with the language in the bill regarding "food or human consumption" or does the committee want to go with Section 111 of AB 59 which would cover the whole thing by regulation. Mr. Tanner stated that he would prefer to see the definitions stay in, in the broad terms and then by regulation cover any changes that are needed later.

Mr. Daykin stated that he would think that the committee would want

the broad definition at least to be in the bill so that it can't be gutted by regulation afterwards; but the problem is that if they try to become too detailed they would have constant changes in brand names and kinds of foods that are offered. Mr. Daykin then pointed out the third page of Exhibit A which is the California regulations. He stated that this would be a classic example of what not to do in the statutes. He added that he would hate to see this type of thing in the statute that can only be amended by a vote of the people.

Mr. Weise inquired whether it would be necessary to state that food for human consumption does not include but is not limited to also or would they need something more than this type of language. Mr. Daykin replied that "does not include" is not exclusive. Other things could be included that are not on the list.

Mr. Daykin further stated that they may want to mention some exclusions, the ones that people are most likely to argue about, such as alcoholic beverages, pet foods, tonics and vitamins, prepared food for immediate consumption. It would be up to the committee how far they wanted to go in defining prepared food for immediate consumption; but Mr. Daykin stated that he would be just as happy to leave that up to the Tax Department to define by regulation. This would also be the section in the bill that would cause the most argument down the line.

Mr. Tanner stated that he would recommend going with the language of SB 204 with possibility going with the recommendation presented by Mr. Daykin of deleting definition of prepared food found on page 12 and 13 of SB 204 and also found on page 35.

Mr. Daykin stated that this would keep the administrative provisions exactly as they are now under present law.

Mr. Mann moved that the committee adopt the recommendations as presented by Mr. Tanner and Mr. Craddock seconded the motion. The motion passed with Mr. Chaney absent.

Mr. Weise inquired whether the other sections regarding enforcement and penalties would stay in. Mr. Daykin stated that they would and that they would stay in exactly the way it reads in present law. The new language is what the committee is re-enacting because they are asking the people in page 13 of SB 204, to repeal some of the sections of the bill and then the legislature would be re-enacting them with the same words. Then thereafter the legislature would be free to amend them as they are not now.

Mr. Rusk asked Mr. Daykin that if the committee was willing to introduce a separate resolution to come up with those portions of Question 6 that are constitutional and also wanted to put those aspects of AB 616 and put them into a resolution that the people would also have an opportunity to vote on, would this be possible.

Mr. Daykin stated that what could be done is to submit to the people an alternative constitutional amendment to Question 6,

doing those things that Question 6 does and are constitutional under the federal constitution. The problem is that the people won't get to vote on it until 1982; but the suggestion that he made is that the committee could introduce such a constitutional amendment at this time. They could also provide that in 1980, there would be an advisory vote to advise the 1981 legislature whether it should go ahead and approve that amendment the second time for ratification by the people in 1982. That vote would not be binding and would be like the ERA vote; but it would give them a proposition alternative to Question 6 upon which they could express their view.

Mr. Mann stated that what they had talked about was not an alternative to Question 6 but rather to take the main features of the committee's tax proposal and apply it to the constitution in order to sway the voters that it would be put into the constitution as well.

Mr. Daykin stated that the technique would be the same. If they put it into a constitutional amendment what they are doing here it would be handled in the same way. It would be introduced at this session, then the people would have the opportunity to have an advisory vote in 1980 but the 1981 legislature would have to approve it and the people would have to finally ratify it. Mr. Daykin went on to state that they cannot submit a statute to a popular referendum, only the people by petition can do this.

Mr. Rusk stated that if they wanted to make the \$3.64 rate a part of the constitution, what would be the appropriate alternatives to accomplish this. Mr. Daykin stated that if they wanted to make it part of the constitution, the course of action would be at this session the adoption of a joint resolution to do so. Then at the next session it would have to be readopted and then the people would vote on it in 1982. The only thing that could be done to vary that and it would have no legal effect, is to submit the proposal to an advisory vote in 1980.

Mr. Craddock inquired whether this advisory vote could be staged as an alternative to Question 6. The people could still vote on both issues. Mr. Daykin stated that this would be true and both could be passed by an overwhelming margin but the advisory vote would become moot.

Mr. Weise stated that he felt that having the advisory question would be rather confusing. He pointed out that Question 6 would not be on the next ballot and trying to explain two different tax measures on the ballot would be difficult. He stated that he would strongly support developing a joint resolution to put the \$3.64 rate into the constitution. He stated that he felt that this would help obtain the public's confidence.

Mr. Rusk inquired of Mr. Daykin if there was any other aspects of Question 6 that the committee might want to include in a resolution. Mr. Daykin stated that they might want to include limitations on state spending. The reason that it is only a limitation on the budget is the constitutional rule that one legislature cannot bind another but they could invite the people to bind it.

Mr. Rusk inquired if this is one of things that Question 6 accomplishes Mr. Daykin stated that it did not and that was one of Question 6's great weaknesses is that there is no spending limitation.

It was decided that Chairman Price would appoint a subcommittee to but that a resolution should be drafted.

Mr. Craddock stated that he could not support putting the \$3.64 rate into the constitution without first recognizing the status of gaming and tourism in this state. Mr. Daykin stated that under the \$3.64 rate he could draft a statute that could produce from the property tax twice what the \$5.00 does right now.

Mr. Craddock stated the worst that he could see out of Question 6 passage is a court case and restraining order against the enforcement of it because it appears to be unconstitutional. There are many people that favor the passage of Question 6 because they feel that it would be in litigation 5 to 8 years before it could be enforced.

Mr. Mann pointed out that there has been no delay with Proposition 13 in California. He stated that one of the features that he feels should be included is a stringent rule that the legislature cannot at its whim change this tax. He stated that some modification should be made where the people are convinced that their rebellion is not going to be addressed by letting the legislature undo everything that has been done.

Mr. Weise stated that he would like to get the mechanics going to have the resolution drafted and then the committee or subcommittee could further study the issue.

Mr. Rusk moved for committee request a draft of a resolution to have the \$5.00 rate lower to \$3.64. Mr. Weise seconded the motion and the motion passed with Mr. Dini opposed to it and Mr. Chaney absent.

Mr. Mann stated that one of the objections that they are getting to the committee's tax proposal is the 2/3 majority. Many people want just a simple majority.

Mr. Bergevin stated that he felt that they should leave the 2/3 vote as that is what Question 6 calls for and that it would indicate to the people that the committee is trying to do something that is parallel to Question 6.

It was also pointed out that it was 2/3 of the people voting and that is not necessarily 2/3 of the total people. Mr. Daykin stated that in California it is 2/3 of the qualified electors and you almost never get 2/3 to the polls.

Mr. Price then appointed Mr. Weise, Mr. Rusk and Mr. Marvel to work on this resolution and appointed Mr. Rusk as the chairman of the subcommittee.

Mr. Miles stated that he had some figures on what it is going to cost to the Distributive School Fund to remove sales tax. He also stated that he has changed the numbers on the property tax as they have new assessed valuation figures from the Tax Department and the numbers are up a little. He stated that he would get all this figures together and present them to the committee at a later meeting.

Mr. Mann stated that he had met with some businessmen from southern Nevada and they had some objections to the projections. They indicated to him that in the first few months that they have had massive increases.

Chairman Price adjourned the meeting.

Respectfully submitted,

Sandra Gagnier
Sandra Gagnier
Assembly Attache

There is no doubt that some administrative difficulties are created once you decide to exempt food. If a food exemption bill is passed, it makes it very important to take the approach of S.B. 204 which would remove the administrative provisions of the sales tax law from the referendum requirement. This will allow some flexibility to deal with administrative problems more quickly.

It seems impractical to try and include all possible exemption conditions in the text of the Sales Tax Law. It would appear then, that it is most important for the Legislature to express its intent in the exemption language and provide sufficient authority for the Department of Taxation to interpret and enforce the law as intended. Section 111 of A.B. 2 and A.B. 59 seems to provide that authority.

24 Sec. 111. 372.725 Enforcement by department: Regulations.
 25 1. The department shall enforce the provisions of this chapter and
 26 may adopt regulations relating to the administration and enforcement
 27 of this chapter.
 28 2. The department may prescribe the extent to which any regulation
 29 may be applied without retroactive effect.

"(e) The gross receipts from the sale of food products for human consumption. 'Food products' as used herein includes cereals and cereal products, milk and milk products, oleo-margarine, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, spices and salt, sugar and sugar products other than candy and confectionery. 'Food products' does not include spirituous, malt or vinous liquors, soft drinks, sodas or beverages such as ordinarily dispensed at bars and soda fountains or in connection therewith, nor does the term 'food products' include the furnishing, preparing or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing or serving such personal property."

6359. Food products. There are exempted from the taxes imposed by this part the gross receipts from the sale of and the storage, use, or other consumption in this state of food products for human consumption.

"Food products" include cereals and cereal products, oleomargarine, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, spices and salt, sugar and sugar products, coffee and coffee substitutes, tea, cocoa, and cocoa products, and nonmedicated chewing gum.

"Food products" include milk and milk products, milkshakes, malted milks, and any other similar type beverages which are composed at least in part of milk or a milk product and which require the use of milk or a milk product in their preparation.

"Food products" include all fruit juices, vegetable juices, and other beverages, whether liquid or frozen, except bottled water, spirituous, malt or vinous liquors or carbonated beverages.

"Food products" do not include medicines and preparations in liquid, powdered, granular, tablet, capsule, lozenge, and pill form sold as dietary supplements or adjuncts.

None of the exemptions provided for in this section shall apply: (a) when the food products are served as meals on or off the premises of the retailer, or (b) when the food products are furnished, prepared, or served for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware whether provided by the retailer or by a person with whom the retailer contracts to furnish, prepare, or serve food products to others, or (c) when the food products are ordinarily sold for immediate consumption on or near a location at which parking facilities are provided primarily for the use of patrons in consuming the products purchased at the location, even though such products are sold on a "take out" or "to go" order and are actually packaged or wrapped and taken from the premises of the retailer, or (d) when the food products are sold for consumption within a place, the entrance to which is subject to an admission charge, except for national and state parks and monuments, or (e) when the food products are sold as hot prepared food products. "Hot prepared food products," for the 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 and the food products are sold in such combination, such as a hot meal, a hot specialty dish or serving, or a hot sandwich or a 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, consommé, or soup), or where the food product is purchased cold or frozen; "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.

*History.—*Stats. 1942, p. 1623, in effect September 9, 1942, added the former last paragraph, Stats. 1942, p. 4046, in effect September 28, 1942, deleted "milk and milk products" from first paragraph and completely revised the former text to last paragraph, making it the last paragraph; and the former last paragraph was made the third paragraph, with the words "milk and milk products" added and "which are purchased for consumption off the premises of the retailer" deleted. Stats. 1948, p. 2427, in effect September 17, 1948, added in the last paragraph "whether" and "or by a person with whom the retailer contracts to furnish, prepare, or serve food products to others." Stats. 1948, p. 3127, in effect January 1, 1948, revised the fourth paragraph and added the fifth paragraph, and added (d) to the sixth paragraph. Stats. 1970, p. 1057, in effect November 22, 1970, reworded wording of fourth paragraph. Stats. 1971, p. 2751, in effect December 14, 1971, operative January 1, 1972, deleted "other than candy and confectionery" from and added "non-medicated chewing gum", to second paragraph, and added (a).

*Sandwiches as "meals"; "paper napkins" as facilities.—*The sale of hot dog and hamburger sandwiches, even when served with beverages, from sandwich stands or booths where neither chairs nor tables are provided for customers, does not constitute a "meal" within this section. A "paper napkin" is not "tableware" within this section, since the rule of *evans* governs its application. *Treasure Island Catering Co., Inc. v. State Board of Equalization*, 19 Cal. 3d 181.

*Skintone sausage casings.—*Cellulose sausage casings used in manufacture of skintone wieners but removed and

returned prior to sale are not food products and do not become an integral part of food products within the meaning of this section. *Los Angeles Tax v. State Board of Equalization*, 101 Cal. App. 2d 96.

*Cardboard trays.—*The trial court was required in its finding that the selling of sandwiches and beverages on disposable cardboard trays constituted selling meals and beverages for consumption from trays. *Hart's Drive-In Corp. v. State Board of Equalization*, 145 Cal. App. 2d 457.

*Cheese Fruits.—*Cheese fruits were properly classified as candy or confections under this section as operative prior to January 1, 1972. *Minner Pub. Co. v. State Board of Equalization*, 23 Cal. App. 3d 121.

*Revenue and Taxation Code Section 6209(c) Held Constituted and certain restaurant meals, operators of drive-in premises (take out) might be exempt from sales and use taxes paid by them on sales of "take out" orders. Such orders are taxable under subparagraph (c) of section 6209 of the Revenue and Taxation Code when the food is purchased at a drive-in type of operation, whether it is consumed on the premises or not, although "take out" orders at conventional restaurants are exempt. The drive-in operators argued that subparagraph (c) and the Board's administrative thereof, was unconstitutionally vague and arbitrary, demonstrated between drive-in and conventional restaurants. The court, in holding the provision constitutional, found that the distinction made in the statute had its rational basis in the Legislature's desire to regulate competition and tax burdens between conventional restaurants and drive-in eating places of eating establishments where food was consumed in a usual manner, whether under one's own car or inside a restaurant. The court also found that the statute presented a standard sufficiently definite to be understandable to the average person. *Illustrated in example (b) of the Board's Revenue and Taxation Code Section 6209(c) v. State Board of Equalization*, 30 Cal. App. 3d 1079, *Revised in part* (3) *Rev. May 20, 1973*.*

*Subsequent to California Open Air Markets Act.—*Food items sold by employees to other employees of employer, are not includable within the operation, gross receipts and not subject to tax. *State Board of Equalization, Inc. v. California v. State Board of Equalization*, 46 Cal. App. 3d 294.

STATE OF CALIFORNIA—BOARD OF EQUALIZATION
SALES AND USE TAX REGULATIONS

BUSINESS TAXES GENERAL BULLETIN 65-7; January 2, 1970. Revised,
February 18, 1972 and December 21, 1972

Subject: TAXABLE ITEMS SOLD BY GROCERS.

(a) The listing of Taxable Nongrocery Items following this bulletin supplements Section 6 of Sales Tax General Bulletin 55-25 by expanding the list of examples of items which, for the purpose of administration of the Sales and Use Tax Law, are regarded as "other items not regularly sold in grocery stores" (Section (b), Regulation 1602.5). These commonly are referred to as "taxable nongrocery items".

(b) Following this bulletin is a listing of a considerable number of "taxable grocery items", the purchase and sale of which are to be taken into consideration when exempt food sales are calculated by the purchase-ratio method.

(c) While the lists do not purport to classify all "nongrocery" and "grocery" taxable items, it is hoped they will be useful as a guide in compiling sales tax returns. They will be observed by Board auditors in verifying tax returns made by grocers.

(d) By reason of a 1969 amendment to Section 6359, Revenue and Taxation Code, on and after January 1, 1970, tax-exempt food products include all fruit juices, vegetable juices, and other beverages, except bottled water, spirituous malt or vinous liquors or carbonated beverages, whether liquid or frozen. The exemption includes all powders, concentrates, or other bases for exempt beverages. Prior to January 1, 1970, fruit juice drinks containing less than 30 percent of natural or reconstituted fruit juices were considered to be taxable grocery items.

(e) The following changes are effective on and after January 1, 1972, as the result of a 1971 amendment to Section 6359 of the Revenue and Taxation Code:

(1) Candy, confectionery and nonmedicated chewing gum are included within the definition of a food product for human consumption. Included within the definition of food products are breath mints and nonmedicated lozenges. Items such as antacid mints, cough drops and medicated lozenges are not a food product and will continue to be subject to tax. Any chewing gum containing aspirin, laxative or other medication is not a food product and is therefore subject to the tax.

(2) Retail sales of "hot prepared food products" are subject to tax when sold for consumption on or off the premises of the retailer. The tax is applicable not only to sales of hot prepared food products by restaurant type operations but also to such sales by grocery stores, delicatessens, department stores, caterers and specialty shops selling chicken, pizza, barbecued spare ribs or other hot prepared foods.

"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. Hot prepared food products include but are not limited to such items as hot meals, hot specialty dishes, hot sandwiches, hot pizza, hot popcorn and nuts, and hot bouillon, consommé and soup.

Hot prepared food products also include any combination of hot and cold food items or components for which a single price has been established, and which are sold in combination for a single price. For example, a combination of coleslaw and a hamburger sold for a single price is subject to tax.

Hot bakery goods and hot beverages such as coffee, tea, cocoa, etc., also are "hot prepared food products" but are exempt from tax when sold for a separate price, unless sold within a place, the entrance to which is subject to an admission charge, or sold for consumption at facilities furnished by the retailer or sold by a drive-in operator.

(f) Whenever a grocer is in doubt as to the proper sales tax application to a particular item, he should make an inquiry by letter addressed to the Tax Counsel, Board of Equalization, P. O. Box 1799, Sacramento, 95805.

(g) This bulletin supersedes Business Taxes General Bulletin 64-6.

TAXABLE NONGROCERY ITEMS

accessories—auto	glassware
adhesive tape	gloves
ammunition	hair dye
appliances—household, auto	hair oil
auto cleaner, polish, waxes	hardware
baby oil	notebooks
batteries—auto	nursery stock
batteries—flashlight	pencils, pens and ink
books	pet supplies and equipment (not food)
bubble bath	pots and pans
cameras	powder (face or body)
chinaware	razors
cigarette lighters	razor blades
clothing	rubber bands
cosmetics	school supplies
deodorizers (body)	scotch tape
cushes	seed (except vegetable)
distilled spirits	shaving cream and lotion
drug sundries	shampoo and rinse
electrical supplies	shoe laces and polish
farm and garden implements	silverware
fertilizers	stationery
film	sun glasses
firearms	sun tan lotion
flashlights	thread
flower and garden seeds	three-in-one oil
flowers	tools
fuel and lubricants	toothpaste
furniture	toys
garden tools and supplies	

TAXABLE GROCERY ITEMS

aluminum foil	gum (medicated)
ammonia	insect spray, poison, bombs
ant poison	kleenex
antacid mints	kotex, tampax, coets, fems
asphalt tile cleaner	light bulbs and fuses
bag—lunch	lighter fluid,
bird seed	lozenges (medicated)
bleach—laundry	lye
bluing	matches
bottle brushes	mops, mop handles
brooms	moth protection—all kinds
candles	muffin papers
canning jars and lids	paper cups, plates, napkins,
carbonated beverages	table covers
cat food	paper towels, drinking straws
charcoal briquettes	parawax
lighter fluid	powder (cleaning)
cigarette fluid, wicks, flints	rolaids
cigarettes	rust stain remover
cigars	salt—ice cream
cleaners and polishes (household)	sandwich bags
clothes cleaning fluid	"Saran" wrap
clothes pins	scouring pads
coloring extracts	silver polish
cough drops	soap and detergent
deodorizers (air fresheners)	soft drinks (carbonated)
dietary supplements or adjuncts	sponges
dishcloths	starch—laundry
dog food	table covers—paper
drain cleaners (Drano, etc.)	tile cleaner
"Drizit"	toilet tissue
dye—clothes	toothpicks
facial tissues	upholstery cleaner
"Flex" drinking tube (straws)	"Vanish"
floor wax and applicators	water softener (laundry)
fly swatters	water softener salt
forks—wooden	wax paper
freezer tape	wax remover
fuel—cooking, heating	whisk brooms
furniture polish	"windex" sprayers
garbage bags	wood and plastic spoons, forks
glass cleaner, glass wax	

References. Sections 6006, 6010 2, 6012, 6339, 6339 1, 6363, 6363.5, 6363.6, 6374, Revenue and Taxation Code.
 Food Products Generally, see Regulation 1602.
 Alcoholic Beverages, tax reimbursement when served with, see Regulation 1700.
 "Free" meals with purchased meals, see Regulation 1670.
 Meals served to patients and inmates of an institution, see Regulation 1503.
 Vending Machines, when considered selling meals, see Regulation 1574.
 Meals at summer camp, see Regulation 1506(e).

(a) RESTAURANTS, HOTELS, BOARDING HOUSES, SODA FOUNTAINS, AND SIMILAR ESTABLISHMENTS. The term "boarding house" as used in this regulation means any establishment regularly serving meals on the average to five or more paying guests. The term includes a "guest home," "residential care home," "halfway house," and any other establishment providing room and board or board only, which is not an institution as defined in Regulation 1503 and Section 6363.6 of the Revenue and Taxation Code. The fact that guests may be recipients of welfare funds does not affect the application of tax. A person or establishment furnishing meals on the average to fewer than five paying guests during the calendar quarter is not considered to be engaged in the business of selling meals at retail.

Tax applies to sales of meals or hot prepared food products (see (d) below) furnished by restaurants, concessionaires, hotels, boarding houses, soda fountains, and similar establishments whether served on or off the premises. In the case of American Plan hotels and boarding houses, a reasonable segregation must be made between the charges for rooms and the charges for meals or hot prepared food products. Effective January 1, 1974, charges by hotels or boarding houses for delivering meals or hot prepared food products to, or serving them in, the rooms of guests are includable in the measure of tax on the sales of the meals or hot prepared food products whether or not the charges are separately stated. (Caterers, see (g) below.)

Soufflé cups, straws, paper napkins, toothpicks and like items that are not of a reusable character which are furnished with meals or hot prepared food products are sold with the meals or hot prepared food products. Sales of such items for such purpose to persons engaged in the business of selling meals or hot prepared food products are, accordingly, sales for resale.

(b) "DRIVE-INS." Tax applies to sales of drinks or foods ordinarily sold for immediate consumption on or near a location at which parking facilities are provided primarily for the use of patrons in consuming the products purchased at the "drive-in" establishment, even though such products are sold on a "take out" or "to go" order and are actually packaged or wrapped and taken from the premises of the retailer. Food products when sold in bulk, i.e., in quantities or in a form not suitable for consumption on the retailer's premises, are not regarded as ordinarily sold for immediate consumption on or near the location at which parking facilities are provided by the retailer. Accordingly, with the exception of hot prepared food products (see (d) below), sales of ice cream in bulk containers (pints, quarts, etc.), doughnuts, and other individual food items in quantities obviously not intended for consumption on the retailer's premises, sold without eating utensils, trays or dishes and not consumed on the retailer's premises, are exempt from tax. Any retailer claiming a deduction on account of food sales of this type must support the deduction by complete and detailed records.¹

(c) PLACES WHERE ADMISSION IS CHARGED.

(1) GENERAL. Tax applies to sales of food products when sold within, and for consumption within, a place the entrance to which is subject to an admission charge, during the period when the sales are made except for national and state parks and monuments.

(2) DEFINITIONS.

(A) "Place" means an area the exterior boundaries of which are defined by walls, fences or otherwise in such a manner that the area readily can be recognized and distinguished from adjoining or surrounding property. Examples include buildings, fenced enclosures and areas delimited by post signs.

(B) "Within a place" means inside the door, gate, turnstile, or other point at which the customer must pay an admission charge or present evidence, such as a ticket, that an admission charge has been paid. Adjacent to, or in close proximity to, a place is not within a place.

(C) "Admission charge" means any consideration required to be paid in money or otherwise for admittance to a place.

"Admission charge" does not include:

New 1. Membership dues in a club or other organization entitling the member to, among other things, entrance to a place maintained by the club or

The records acceptable in support of such a deduction are:

(a) A sales ticket prepared for each transaction claimed as being tax exempt showing:

- (1) Date of the sale,
- (2) The kind of merchandise sold,
- (3) The quantity of each kind of merchandise sold,
- (4) The price of each kind of merchandise sold,
- (5) The total price of merchandise sold,
- (6) A statement to the effect that the merchandise purchased is not to be consumed on or near the location at which parking facilities are provided by the retailer, and
- (b) A daily sales record kept in sufficient detail to permit verification by audit that all gross receipts from sales have been accounted for and that all sales claimed as being tax exempt are included therein.

organization, such as a fenced area containing a club house, tennis courts, and a swimming pool. Where a guest is admitted to such a place only when accompanied by or vouched for by a member of the club or organization, any charge made to the guest for use of facilities in the place is not an admission charge.

2. A charge for a student body card entitling the student to, among other things, entrance to a place, such as entrance to a school auditorium at which a dance is held.

3. A charge for the use of facilities within a place to which no entrance charge is made to spectators. For example, green fees paid for the privilege of playing a golf course, a charge made to swimmers for the use of a pool within a place, or a charge made for the use of lanes in a public bowling place.

(D) "National and state parks and monuments" means those which are part of the National Park System or the State Park System. The phrase does not include parks and monuments not within either of those systems, such as city, county, regional, district or private parks.

(3) PRESUMPTION THAT FOOD IS SOLD FOR CONSUMPTION WITHIN A PLACE. When food products are sold within a place the entrance to which is subject to an admission charge, it will be presumed, in the absence of evidence to the contrary, that the food products are sold for consumption within the place. Obtaining and retaining evidence in support of the claimed tax exemption is the responsibility of the retailer. Such evidence may consist, for example, of proof that the sales were of canned jams, cake mixes, spices, cooking chocolate, or other items in a form in which it is unlikely that such items would be consumed within the place where sold.

(4) FOOD SOLD TO STUDENTS. The exemption otherwise granted by Section 6383 does not apply to sales of food products to students when sold within, and for consumption within, a place the entrance to which is subject to an admission charge, and such sales are subject to tax. For example, when food products are sold by a student organization to students or to both students and nonstudents within a place the entrance to which is subject to an admission charge, such as a place where school athletic events are held, the sales to both students and nonstudents are taxable.

(d) HOT PREPARED FOOD PRODUCTS

(1) GENERAL. 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. When

single price has been established for a combination of hot and cold food items, such as a meal or dinner which includes cold components or side items, tax applies to the entire established price regardless of itemization on the sales check. The inclusion of any hot food product in an otherwise cold combination of food products sold for a single established price, results in the tax applying to the entire established price, e.g., hot coffee served with a meal consisting of cold food products, when the coffee is included in the established price of the meal. If a single price for the combination of hot and cold food items is listed on a menu, wall sign or is otherwise advertised, a single price has been established. Except as otherwise provided in (b), (c), or (e) of this regulation, or in regulation 1574, tax does not apply to the sale for a separate price of bakery goods, beverages classed as food products, or cold or frozen food products. Hot bakery goods and hot beverages such as coffee are hot prepared food products but their sale for a separate price is exempt unless taxable as provided in (b), (c), or (e) of this regulation. Tax does apply if a hot beverage and a bakery product or cold food product are sold as a combination for a single price. Hot soup, bouillon, or consommé is considered a hot prepared food product, not a beverage.

(2) AIR CARRIERS ENGAGED IN INTERSTATE OR FOREIGN COMMERCE. Effective as of January 1, 1972, tax does not apply to the sale, storage, use, or other consumption of hot prepared food products sold by caterers or other vendors to air carriers engaged in interstate or foreign commerce for consumption by passengers on such air carriers, nor to the sale, storage, use, or other consumption of hot prepared food products sold or served to passengers by air carriers engaged in interstate or foreign commerce for consumption by passengers on such air carriers. "Air carriers" are persons or firms in the business of transporting persons or property for hire or compensation, and include both common and contract carriers. "Passengers" do not include crew members. Any caterer or other vendor claiming the exemption must support it with an exemption certificate from the air carrier substantially in the form prescribed in Appendix A of this regulation.

(e) FOOD FOR CONSUMPTION AT FACILITIES PROVIDED BY THE RETAILER. Tax applies to sales of sandwiches, ice cream, and other foods sold in a form for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware provided by the retailer or by a person with whom the retailer contracts to furnish, prepare, or serve food products to others.

With the exception food as provided in (b), (c), and above, tax does not apply to sales of food in boxes, cartons or otherwise in a form for consumption other than at tables, chairs, or counters or from trays, glasses, dishes or other tableware provided by the retailer or by a person with whom the retailer contracts to furnish, prepare, or serve food products.

If a retailer of cold sandwiches, ice cream, or other foods sold for immediate consumption, claims exemption from tax of any sales of food products on the grounds that they were sold for consumption other than at facilities of this kind, either he must show that no such facilities were provided or he must keep a careful segregation of his receipts from such sales on separate cash register listings, on copies of sales slips, or in some similar record which can be verified by audit. This paragraph does not apply to sales of hot prepared food products or sales which are taxable under (b), (c), or (d) above.

A passenger's seat aboard a train, or a spectator's seat at a game, show, or similar event is not a "chair" within the meaning of this regulation. Accordingly, except for hot prepared food products and as otherwise provided in (c) above, tax does not apply to the sale of cold sandwiches, ice cream, or other food products sold by vendors passing among the passengers or spectators where the food products are not "for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware provided by the retailer."

(f) **TIPS AND SERVICE CHARGES.** Effective January 1, 1976, no employer shall collect, take, or receive any gratuity or a part thereof, paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of such gratuity, or require an employee to credit the amount, or any part thereof, of such gratuity against and as a part of the wages due the employee from the employer. (Labor Code Section 331.) If this prohibition is violated, tax applies according to the provisions of this regulation in effect prior to January 1, 1976. (See Appendix B.)

Amounts designated as service charges, added to the price of meals are a part of the selling price of the meals and, accordingly, must be included in the retailer's gross receipts subject to tax even though such service charges are made in lieu of tips and are paid over by the retailer to his employees.

(g) **CATERERS.** The term "caterer" as used in this regulation means a person engaged in the business of serving meals, food and drinks on the premises of his customers but does not include employees hired by the hour or day.

Tax applies to the entire charges made by caterers for serving meals, food, and drinks, inclusive of charges for food, the use of dishes, silverware, glasses, chairs, tables, etc., used in connection with serving meals, and for the labor of serving the meals, whether performed by himself or by his employees or subcontractors. Tax applies to charges made by caterers for preparing and serving meals and drinks even though the food is not provided by the caterers. Tax applies to charges made by caterers for hot prepared food products as in (d) above whether or not served by the caterers. Tax does not apply to charges made by caterers for the rental of dishes, silverware, glasses, etc., purchased by the caterer with tax paid on the purchase price if no food is provided or served by the caterers in connection with such rental.

Sales of meals by caterers to social clubs, fraternal organizations or other persons are sales for resale if such social clubs, fraternal organizations or other persons are the retailers of the meals subject to tax under (h) below and give valid resale certificates therefor.

(h) **SOCIAL CLUBS AND FRATERNAL ORGANIZATIONS.** "Social Clubs and Fraternal Organizations" as used herein include any corporation, partnership, association or group or combination acting as a unit, such as service clubs, lodges, and community, country, and athletic clubs.

The tax applies to receipts from the furnishing of meals, food, and drink by social clubs and fraternal organizations unless furnished: (1) exclusively to members; and also, (2) less frequently than once a week. Both these requirements must be met. If the club or organization furnishes meals, food or drink to nonmembers, all receipts from the furnishing of meals, food or drink are subject to tax whether furnished to members or nonmembers, including receipts on occasions when furnished exclusively to members. Meals, food or drink paid for by members are considered furnished to them even though consumed by guests who are not members.

(i) **STUDENTS' MEALS—BLIND VENDORS.**

(1) **DEFINITION.** As used herein, the term "food products" includes food furnished, prepared, or served for consumption at tables, chairs, or counters, or from trays, glasses, dishes, or other tableware provided by the retailer or by a person with whom the retailer contracts to furnish, prepare or serve food to others.

(2) **STUDENTS' MEALS.** Sales of meals or food products for human consumption to students of a school by public or private schools, school districts, student organizations, and parent-teacher associations are exempt from tax, except for 33 percent of the gross receipts from the sale of cold food products through a vending machine for more than 15 cents and except as otherwise provided in (c) (4) above.

(3) **BLIND VENDORS.** Tax does not apply to the sale of meals or food products for human consumption to students of a school by any blind person (as defined in Section 19133 of the Welfare and Institutions Code) operating a restaurant or vending stand in an educational institution under Article 3 of Chapter 6 of Part 2 of Division 10 of the Welfare and Institutions Code, except for 33 percent of the gross receipts from the sale of cold food products through a vending machine for more than 15 cents and except as otherwise provided in (c) (4) above.

(j) **EMPLOYEES' MEALS.**

(1) **IN GENERAL.** Any employer or employee organization that is in the business of selling meals, e.g., a restaurant, hotel, club, or association, must include its receipts from the sales of meals to employees, along with its receipts from sales to other purchasers of meals, in the amount upon which it computes its sales tax liability. An employer or an employee organization selling meals only to employees becomes a retailer of meals and liable for sales tax upon its receipts from sales of meals if it sells meals to an average number of five or more employees during the calendar quarter.

(2) **SPECIFIC CHARGE.** The tax applies only if a specific charge is made for the meals. Tax does not apply to cash paid an employee in lieu of meals. A specific charge is made for meals if:

- (A) Employee pays cash for meals consumed.
- (B) Value of meals is deducted from employee's wages.
- (C) Employee receives meals in lieu of cash to bring compensation up to legal minimum wage.
- (D) Employee has the option to receive cash for meals not consumed.

(3) **NO SPECIFIC CHARGE.** If no specific charge is made for meals, the employer is the consumer of the food products purchased and the sale of food products to him is not subject to the tax. If he furnishes nonfood items with the

meals, such as cigarettes and soft drinks, the tax applies to the sale of such products to him

In the absence of any of the conditions under (j) (2) a specific charge is not made if:

(A) A value is assigned to meals as a means of reporting the fair market value of employees' meals pursuant to state and federal laws or regulations or union contracts.

(B) Employees who do not consume available meals have no recourse on their employer for additional cash wages.

(C) Meals are generally available to employees, but the duties of certain employees exclude them from receiving the meals and are paid cash in lieu thereof.

(4) MEALS CREDITED TOWARD MINIMUM WAGE. If an employee receives meals in lieu of cash to bring his compensation up to the legal minimum wage, the amount by which the minimum wage exceeds the amount otherwise paid to the employee is includable in the employer's taxable gross receipts up to the value of the meals credited toward the minimum wage.

For example, if the minimum rate for an eight-hour day is \$13.20, and the employee received \$12.20 in cash, and he receives a lunch which is credited toward his minimum wage in the maximum allowable amount of \$1.00, the employer has received gross receipts in the amount of \$1.00 for the lunch.

(5) TAX REIMBURSEMENT. If a separately stated amount for tax reimbursement is not added to the price of meals sold to employees for which a specific charge is made, the specific charge will be regarded as being a tax-included charge for the meals.

(k) RELIGIOUS ORGANIZATIONS. Tax does not apply to sales of meals and food products for human consumption furnished or served by any religious organization at a social or other gathering conducted by it or under its auspices, if the purpose in furnishing or serving the meals and food products is to obtain revenue for the functions and activities of the organization and the revenue obtained from furnishing or serving the meals and food products is actually used in carrying on such functions and activities. For the purposes of this regulation, "religious organization" means any organization the property of which is exempt from taxation pursuant to Section 1 1/4 of Article XIII of the State Constitution.

(l) INSTITUTIONS. Tax does not apply to the sale of, nor the storage, use, or other consumption in this state of, meals and food products for human consumption furnished or served to and consumed by patients and inmates of an "institution" as defined in Regulation 1503.

(m) MEAL PROGRAMS FOR LOW-INCOME ELDERLY PERSONS. On and after October 1, 1972, tax does not apply to the sale of, and the storage, use or other consumption in this state of, meals and food products for human consumption furnished or served to low-income elderly persons at or below cost by a nonprofit organization or governmental agency under a program funded by this state or the United States for such purposes.

6359.2. Food products sold through vending machines. Except for the tax treatment of food products selling at retail for fifteen cents (\$0.15) or less under Section 6359.4, 33 percent of the gross receipts of any retailer from the sale at retail of food products (other than hot prepared food products, as defined in Section 6359) shall be subject to the tax imposed by Section 6051, when such food products are actually sold through a vending machine.

The Legislature finds that 33 percent represents the statewide average of cold food products sold through vending machines which are subject to the tax imposed under this part. Therefore, the Legislature establishes this average as the measure of the tax with respect to vending machine sales to simplify tax auditing procedures and to provide for uniformity in the taxation of gross receipts derived from the sale of cold food products through vending machines.

History—Added by Stats. 1971, p. 2712, in effect December 16, 1971, operative January 1, 1972.

6359.4. Vending machine operator. Any vending machine operator is a consumer of, and shall not be considered a retailer of, tangible personal property which sells at retail for fifteen cents (\$0.15) or less and which is actually sold through a vending machine.

History—Added by Stats. 1967, p. 2474, operative August 1, 1967; Stats. 1968, p. 3128, in effect January 1, 1970, substituted "fifteen cents (\$0.15)" for "ten cents (\$0.10)".

6359.5. Ice. As incidental to the exemption provided for in Section 6359, there are exempted from the taxes imposed by this part, the gross receipts from the sale of and the storage, use, or other consumption in this State of ice or dry ice used or employed in packing and shipping or transporting food products for human consumption between a point or points within and a point or points without this State.

History—Added by Stats. 1946, p. 878, in effect May 22, 1946; Stats. 1964, p. 112, in effect April 20, 1964, added "or dry ice."

6358. Animal life; feed; seeds; plants; fertilizer. There are exempted from the taxes imposed by this part the gross receipts from sales of and the storage, use, or other consumption of:

(a) Any form of animal life of a kind the products of which ordinarily constitute food for human consumption.

(b) Feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or are to be sold in the regular course of business.

(c) Seeds and annual plants the products of which ordinarily constitute food for human consumption or are to be sold in the regular course of business.

(d) Fertilizer to be applied to land the products of which are to be used as food for human consumption or sold in the regular course of business.

History—Stats. 1946, p. 2486, operative July 1, 1946, added (b), (c), and (d); Stats. 1947, p. 2028, operative July 1, 1947, substituted "Any form of animal life" for "Livestock and poultry" in (a) and (b).

6359.1. Hot prepared food products sold to air carriers. There are exempted from the taxes imposed by this part, the gross receipts from the sale of, and storage, use, or other consumption in this state, of hot prepared food products sold by caterers, or other vendors, to air carriers engaged in interstate or foreign commerce for consumption by passengers on such air carriers, and the gross receipts from the sale of and the storage, use or other consumption of hot prepared food products sold or served to passengers by air carriers engaged in interstate or foreign commerce for consumption by passengers on such air carriers.

History—Added by Stats. 1974, Ch. 156, effective April 4, 1974.