

M e m o r a n d u m**395.0270**

To: Covina – Foothills – Auditing (IL)

Date: October 16, 1973

From: Headquarters – Legal – Gary Jugum

(916) 445-5550
ATSS 485-5550

Subject: Sale of Fixtures and Equipment

This is in response to your memorandum of October 11, 1973.

You raise a question as to the proper application of the tax in instances where persons who have operated food and drink concessions at the A Fair sell, sometimes months after the close of the fair, the booths, fixtures and equipment used by them in their selling activities.

We understand that the A Fair is conducted each year for 17 consecutive days -- usually in September.

Each food and drink concessionaire within the fair grounds owns his own “grab stand” and its fixtures and equipment. For the right to operate, the concessionaire pays the Fair Association a predetermined percentage of his sales and is required to buy all merchandise and supplies from the fair’s commissary.

At the conclusion of the fair, the grab stands are cleaned up, the perishable goods removed, and the stands are closed and locked with the fixtures and equipment inside. Most of the stands are left in this condition until the fair reopens the next year. Most of the grab stand operators have no other selling activities. They report their tax liability on either annual returns or under temporary permits.

Each year you find that ownership of a few of the grab stands has changed. Frequently the change has occurred months after the last day of the fair. In assigning close out dates for these accounts, the compliance staff has consistently used the last day on which retail sales were made, which is the last day of the fair.

The question which has arisen is whether the sale of fixtures and equipment is an occasional sale. Although in most cases the sale of fixtures and equipment occurs more than 2 months after the last sale of merchandise in the prior fair period, it seems to you that it can be argued that a concessionaire who has operated on the fair schedule for 2, 3, 4 or more years is continuously in business even while the fair is closed until he sells his stand. You state that it would appear that this conclusion would hold true even though for convenience the board may have issued a temporary permit which closes out automatically by the filing of a return.

We are in agreement with your conclusion that sales of fixtures and equipment of the type described are properly subject to the tax. These sales do not qualify as "occasional" sales merely by virtue of the fact that the taxpayer is engaged in a seasonal selling activity and the sales of the fixtures and equipment takes place during the period of the year when taxpayer's business is closed. If we were to conclude that sales of the type in question were exempt then it seems that we might be compelled to conclude that if a taxpayer closed his business for three months to take a vacation the sale of the business upon the taxpayer's return from vacation would be exempt. It is clear to us that such a transaction would not be so exempt.

We have considered the terms of Revenue and Taxation Code Section 6072, which provides that a permit shall be held only by persons actively engaged in or conducting a business as a seller of tangible personal property, and have concluded that this section does not bar the application of tax in the instance under consideration.

Likewise, we have taken into consideration People v. Gabriel, 57, C.A.2d 788, in reaching our conclusion. That case is distinguishable because the court there found that the clear import of the stipulation of facts between the parties was that taxpayer ". . . had abandoned his business on account of domestic trouble . . ."

Would you make a copy of this memorandum and send it to me for my files?

Thank you.