BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Claim for Refund under the Sales and Use Tax Law of
Century Theatres, Inc.

Appearances:

For Claimant:	Andrew McCullough Senior V.P. for Business Affairs
	Mike Dittman Chief Financial Officer
For Sales and Use Tax Department:	Jeffrey Graybill Supervising Tax Counsel
For Appeals Division:	David H. Levine Tax Counsel IV

MEMORANDUM OPINION

This opinion considers the merits of the claim for refund in the amount of $590,984.62 for the period April 1, 1998 to March 31, 2001. The Board heard this matter on October 19, 2004.

Claimant operated approximately 35 movie theaters in California during the audit period. From October 2000 through the end of the audit period, in all but one location, claimant changed its operations regarding admissions into its theatre buildings. Rather than requiring customers to first purchase tickets to enter into the theatre building lobby in which all food and drinks are sold, claimant opened each lobby to the general public without requiring tickets. According to the parties, claimant only required tickets for the customers to enter further into the inside movie viewing areas of the theatre, and no popcorn was sold inside the viewing areas.

Claimant's process for making popcorn starts with a popper. Kernels are placed in a suspended kettle where the kernels are heated until they pop. Under the kettle is a bin that holds the popcorn once it has popped. Next to the popper machine is a machine called a "cornditioner." The cornditioner includes a storage bin that stores popped popcorn until claimant's employee scoops the popcorn into a bag. Under the storage bin, the cornditioner also includes a heating element and motor that blows air over the heating element causing heated air to be blown up through the popcorn while it sits in the cornditioner.

The Sales and Use Tax Department (Department) determined that a portion of the popcorn claimant sold was a hot prepared food product, sales of which are subject to tax

under Revenue and Taxation Code section 6359, subdivision (d)(7). (Cal. Code Regs., title 18, § 1603, subd. (e)(1).) The Department contended that in its process to produce and sell fresh popcorn, claimant intended to prepare, and actually prepared, all the popcorn for sale in a heated condition.

Claimant contends its cooking and storage process does not create a hot prepared food product, it had no intent to provide a hot food product, and the popcorn was not sold above room temperature. Claimant presented evidence that the effect of the cornditioner was to dehumidify the popcorn, not to heat it. Claimant indicated that it sold a dry, dehumidified product and had no intent to sell a hot food product. Claimant further contends that California Code of Regulations, title 18, section (Regulation) 1603, subdivision (e)(1), requires intent to provide a hot food product for the sale of the product to be taxable. Claimant indicated further evidence of its lack of intent was the packaging used, which had little insulating value. Claimant also presented evidence supporting its contention that the popcorn temperature range was within the temperature range of the ambient air temperatures near the serving areas.

OPINION

Regulation 1603 states as follows, in relevant part:

> "(e)(1) 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 that 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 a 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), (d) or (f) 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…."
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> "….
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> "(f) 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 as otherwise provided in (c), (d), and (e) 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, glassed, dishes, or other tableware provided by the retailer.'"

We conclude that claimant's cooking process has not resulted in the sale of a hot prepared food product within the meaning of the regulation. Claimant had no intention of serving a hot product as evidenced by the cornditioner's openness to the ambient air, the lack of insulating properties of the packaging used and the product's temperature being within the range of ambient air temperatures in the serving areas. The incidental warming of the surrounding ambient air in the effort to produce a dry product does not constitute "heating" within the meaning of the regulation. Accordingly, we grant the claim of refund.

Adopted at Sacramento, California on November 4, 2004.

Carol Migden, Chairwoman

Bill Leonard, Member

Claude Parrish, Member

Marcy Jo Mandel, Member*
*For Steve Westley, pursuant to Government Code section 7.9.