



BOARD OF EQUALIZATION

BUSINESS TAXES COMMITTEE MEETING MINUTES

HONORABLE JOHN CHIANG, COMMITTEE CHAIR

450 N STREET, SACRAMENTO

MEETING DATE: NOVEMBER 20, 2006, TIME: 9:30 A.M.

ACTION ITEMS & STATUS REPORT ITEMS**Agenda Item No: 1**

Title: Proposed revisions to Regulation 1603, *Taxable Sales of Food Products*, regarding the application of tax to charges for mandatory and optional gratuities. (Continued from the September 27, 2006 Committee meeting.)

Issue/Topic:

Should Regulation 1603, *Taxable Sales of Food Products*, be amended to clarify the application of tax to charges for mandatory and optional gratuities?

Committee Discussion:

Representatives from the California Restaurant Association (CRA), the California Hotel and Lodging Association, and the Law Offices of Winston and Strawn LLP, (interested parties) addressed the Committee and expressed concerns with staff's proposed language and examples. The CRA provided a written submission describing its concerns and expressing support for interested parties' proposal. Staff explained that its proposed language, as directed by the Committee at its September 27, 2006, meeting, provides examples that clarify the application of tax to charges for mandatory tips and optional gratuities. Staff and interested parties answered various questions raised by Committee members regarding the proposed revisions.

Committee Action/Recommendation/Direction:Action 1 – Approval and Authorization to Publish Proposed Regulatory Amendments

Upon motion by Ms. Yee, seconded by Mr. Parrish, the Committee approved and authorized for publication staff's proposed regulatory amendments while directing staff and interested parties to meet and clarify the meaning of the word "automatically" in subdivision (g)(2)(B), and to consider adding an example, if appropriate. The Committee directed staff to present the revised amendments at the Public Hearing. A copy of the proposed amendments to Regulation 1603 is attached. The vote was as follows:

MEMBER	Chiang	Parrish	Yee	Mandel	Leonard
VOTE	Yes	Yes	Yes	Yes	Yes

Regulation 1603. TAXABLE SALES OF FOOD PRODUCTS.

References: Sections 6006, 6012, 6359, 6359.1, 6359.45, 6361, 6363, 6363.5, 6363.6, 6370, 6373, 6374 and 6376.5, 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 camps, see Regulation 1506 (e).
 Parent-Teacher associations as consumers, see Regulation 1597.

(a) RESTAURANTS, HOTELS, BOARDING HOUSES, SODA FOUNTAINS, AND SIMILAR ESTABLISHMENTS.**(1) DEFINITIONS.**

(A) Boarding House. 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.

(B) American Plan Hotel. The term "American Plan Hotel" as used in this regulation means a hotel which charges guests a fixed sum by the day, week, or other period for room and meals combined.

(C) Complimentary Food and Beverages. As used in this subdivision (a), the term "complimentary food and beverages" means food and beverages (including alcoholic and non-alcoholic beverages) which are provided to transient guests on a complimentary basis and:

1. There is no segregation between the charges for rooms and the charges for the food and beverages on the guests' bills, and
2. The guests are not given an option to refuse the food and beverages in return for a discounted room rental.

(D) Average Retail Value of Complimentary Food and Beverages. The term "average retail value of complimentary food and beverages" (ARV) as used in this regulation means the total amount of the costs of the complimentary food and beverages for the preceding calendar year marked-up one hundred percent (100%) and divided by the number of rooms rented for that year. Costs of complimentary food and beverages include charges for delivery to the lodging establishment but exclude discounts taken and sales tax reimbursement paid to vendors. The 100% markup factor includes the cost of food preparation labor by hotel employees, the fair rental value of hotel facilities used to prepare or serve the food and beverages, and profit.

(E) Average Daily Rate. The term "average daily rate" (ADR) as used in this regulation means the gross room revenue for the preceding calendar year divided by the number of rooms rented for that year. "Gross room revenue" means and includes the full charge to the hotel customers but excludes separately stated occupancy taxes, revenue from contract and group rentals which do not qualify for complimentary food and beverages, and revenue from special packages (e.g., New Year's Eve packages which include food and beverages as well as guest room accommodations), unless it can be documented that the retail value of the food and beverages provided as a part of the special package is 10% or less of the total package charge as provided in subdivision (a)(2)(B). "Number of rooms rented for that year" means the total number of times all rooms have been rented on a nightly basis provided the revenue for those rooms is included in the "gross room revenue". For example, if a room is rented out for three consecutive nights by one guest, that room will be counted as rented three times when computing the ADR.

(2) APPLICATION OF TAX.

(A) In General. Tax applies to sales of meals or hot prepared food products (see (e) 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, special packages offered by hotels, e.g., a New Year's Eve package as described in subdivision (a)(1)(E), and boarding houses, a reasonable segregation must be made

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between the charges for rooms and the charges for the meals, hot prepared food products, and beverages. 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 (h) below.) Sales of meals or hot prepared food products by restaurants, concessionaires, hotels, boarding houses, soda fountains, and similar establishments to persons such as event planners, party coordinators, or fundraisers, which buy and sell on their own account, are sales for resale for which a resale certificate may be accepted (see subdivision (h)(3)(C)2.).

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) Complimentary Food and Beverages. Lodging establishments which furnish, prepare, or serve complimentary food and beverages to guests in connection with the rental of rooms are consumers and not retailers of such food and beverages when the retail value of the complimentary food and beverages is “incidental” to the room rental service regardless of where within the hotel premises the complimentary food and beverages are served. For complimentary food and beverages to qualify as “incidental” for the current calendar year, the average retail value of the complimentary food and beverages (ARV) furnished for the preceding calendar year must be equal to or less than 10% of the average daily rate (ADR) for that year.

If a hotel provides guests with coupons or similar documents which may be exchanged for complimentary food and beverages in an area of the hotel where food and beverages are sold on a regular basis to the general public (e.g., a restaurant), the hotel will be considered the consumer and not the retailer of such food and beverages if the coupons or similar documents are non-transferable and the guest is specifically identified by name. If the coupons or similar documents are transferable or the guest is not specifically identified, food and beverages provided will be considered sold to the guest at the fair retail value of similar food and beverages sold to the general public. In the case of coupons redeemed by guests at restaurants not operated by the lodging establishment, the hotel will be considered the consumer of food and beverages provided to the hotel’s guests and tax will apply to the charge by the restaurant to the hotel.

Lodging establishments are retailers of food and beverages which do not qualify as “incidental” and tax applies as provided in subdivision (a)(2)(A) above. Amounts paid by guests for food and beverages in excess of a complimentary allowance are gross receipts subject to the tax. Lodging establishments are retailers of otherwise complimentary food and beverages sold to non-guests.

In the case of hotels with concierge floor, club level or similar programs, the formula set forth above shall be applied separately with respect to the complimentary food and beverages furnished to guests who participate in the concierge, club or similar program. That is, the concierge, club or similar program will be deemed to be an independent hotel separate and apart from the hotel in which it is operated. The ADR and the retail value of complimentary food and beverages per occupied room will be computed separately with respect to the guest room accommodations entitled to the privileges and amenities involved in the concierge, club or similar program.

The following example illustrates the steps in determining whether the food and beverages are complimentary:

FORMULA: $ARV \div ADR \leq 10\%$

Average Daily Rate (ADR):

Room Revenue	\$9,108,000
Rooms Rented	74,607
ADR (\$9,108,000 ÷ 74,607)	\$122.08

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Average Retail Value of Complimentary

Food and Beverages (ARV):

Complimentary Food Cost	\$169,057
Complimentary Beverage Cost	52,513
Total	\$221,570
Add 100% Markup	221,570
Average Retail Value	\$443,140
ARV per occupied room (\$443,140 ÷ 74,607)	\$5.94

Application of Formula: $\$5.94 \div \$122.08 = 4.87\%$

In the above example, the average retail value of the complimentary food and beverages per occupied room for the preceding calendar year is equal to or less than 10% of the average daily rate. Therefore, under the provisions of this subdivision (a)(2)(B), the complimentary food and beverages provided to guests for the current calendar year qualify as "incidental". The lodging establishment is the consumer and not the retailer of such food and beverages. This computation must be made annually.

When a lodging establishment consists of more than one location, the operations of each location will be considered separately in determining if that location's complimentary food and beverages qualify as incidental.

(b) "DRIVE-INS." Tax applies to sales of food products 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 sales of hot prepared food products (see (e) below) and sales of cold food under the 80-80 rule (see (c) below), sales of ice cream, doughnuts, and other individual food items in quantities obviously not intended for consumption on the retailer's premises, 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) COLD FOOD SOLD ON A "TAKE-OUT" ORDER.

(1) GENERAL.

(A) Seller Meeting Criteria of 80-80 Rule. When a seller meets both criteria of the 80-80 rule as explained in subdivision (c)(3) below, tax applies to sales of cold food products (including sales for a separate price of hot bakery goods and hot beverages such as coffee) in a form suitable for consumption on the seller's premises even though such food products are sold on a "take-out" or "to go" order. Sales of cold food products which are suitable for consumption on the seller's premises are subject to the tax no matter how great the quantity purchased, e.g., 40 one-half pint containers of milk. Except as provided elsewhere in this regulation, tax does not apply to sales of food products which are furnished in a form not suitable for consumption on the seller's premises.

¹The 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.

Operative April 1, 1996, although a seller may meet both criteria of the 80-80 rule, he or she may elect to separately account for the sale of "take-out" or "to go" orders of cold food products which are in a form suitable for consumption on the seller's premises. The gross receipts from the sale of those food products shall be exempt from the tax provided the seller keeps a separate accounting of these transactions in his or her records. Tax will remain applicable to the sale of food products as provided in subdivisions (a), (b), (e), or (f) of this regulation. Failure to maintain the required separate accounting and documentation claimed as exempt under this subdivision will revoke the seller's election under this subdivision.

(B) Seller Not Meeting Criteria of 80-80 Rule. When a seller does not meet both criteria of the 80-80 rule as explained in subdivision (c)(3) below, tax does not apply to sales of cold food products (including sales for a separate price of hot bakery goods and hot beverages such as coffee) when sold on a "take-out" or "to go" order.

(2) DEFINITIONS.

(A) For purposes of this subdivision (c), the term "suitable for consumption on the seller's premises" means food products furnished:

1. In a form which requires no further processing by the purchaser, including but not limited to cooking, heating, thawing, or slicing, and

2. In a size which ordinarily may be immediately consumed by one person such as a large milk shake, a pint of ice cream, a pint of milk, or a slice of pie. Cold food products (excluding milk shakes and similar milk products) furnished in containers larger in size than a pint are considered to be in a form not suitable for immediate consumption.

Pieces of candy sold in bulk quantities of one pound or greater are deemed to be sold in a form not suitable for consumption on the seller's premises.

The term does not include cold food products which obviously would not be consumed on the premises of the seller, e.g., a cold party tray or a whole cold chicken.

(B) For purposes of this subdivision (c), the term "seller's premises" means the individual location at which a sale takes place rather than the aggregate of all locations of the seller. For example, if a seller operates several drive-in and fast food restaurants, the operations of each location stand alone and are considered separately in determining if the sales of food products at each location meet the criteria of the 80-80 rule.

When two or more food-selling activities are conducted by the same person at the same location, the operations of all food related activities will be considered in determining if the sales of food products meet the criteria of the 80-80 rule. For example, if a seller operates a grocery store and a restaurant with no physical separation other than separate cash registers, the grocery store operations will be included in determining if the sales of food products meet the criteria of the 80-80 rule. When there is a physical separation where customers of one operation may not pass freely into the other operation, e.g., separate rooms with separate entrances but a common kitchen, each operation will be considered separately for purposes of this subdivision (c).

(3) 80-80 Rule. Tax applies under this subdivision (c) only if the seller meets *both* of the following criteria:

(A) more than 80 percent of the seller's gross receipts are from the sale of food products, and

(B) more than 80 percent of the seller's retail sales of food products are taxable as provided in subdivisions (a), (b), (e), and (f) of this regulation.

Sales of alcoholic beverages, carbonated beverages, or cold food to go not suitable for immediate consumption should not be included in this computation. Any seller meeting both of these criteria and claiming a deduction for the sale of cold food products in a form not suitable for consumption on the seller's premises must support the deduction by complete and detailed records of such sales made.

(d) 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, and marinas, campgrounds, and recreational vehicle parks.

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(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 posted 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:

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 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 6363 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 except as provided in (p) of this regulation. 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.

(e) HOT PREPARED FOOD PRODUCTS.

(1) GENERAL. 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

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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. 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), (d) or (f) of this regulation, or in Regulation 1574. 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 a hot prepared food product, which is not a beverage.

(2) AIR CARRIERS ENGAGED IN INTERSTATE OR FOREIGN COMMERCE. 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.

(f) 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.

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, glasses, dishes, or other tableware provided by the retailer."

(g) TIPS, GRATUITIES, AND SERVICE CHARGES.

This subdivision applies to restaurants, hotels, caterers, boarding houses, soda fountains, drive-ins and similar establishments.

An optional payment designated as a tip, gratuity, or service charge is not subject to tax. A mandatory payment designated as a tip, gratuity, or service charge is included in taxable gross receipts, even if the amount is subsequently paid by the retailer to employees.

(1) OPTIONAL PAYMENT.

(A) A payment of a tip, gratuity, or service charge is optional if the customer adds the amount to the bill presented by the retailer, or otherwise leaves a separate amount in payment over and above the actual amount due the retailer for the sale of meals, food, and drinks that include services. The following examples illustrate transactions where a payment of a tip, gratuity or service charge is optional and not included in taxable gross receipts. This is true regardless of printed statements on menus, brochures, advertisements or other materials notifying customers that tips, gratuities, or service charges will or may be added by the retailer to the prices of meals, food, or drinks:

Example 1. The restaurant check is presented to the customer with the "tip" area blank so the customer may voluntarily write in an amount, or

Example 2. The restaurant check is presented to the customer with three or more options computed by the retailer and presented to the customer as tip suggestions. The "tip" area is blank so the customer may voluntarily write in an amount:

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<i>Guest Check</i>	
Food Item A	\$ 9.95
Beverage Item B	3.75
Subtotal	\$13.70
8% sales tax	1.10
Subtotal	\$14.80
Tip*	
Total	

*Suggested tips:
 15%=\$2.06; 18%=\$2.47; 20%=\$2.74; other or none.

If an employer misappropriates these payments for these charges, as discussed in subdivision (g)(1)(B) below, such payments are included in the retailer’s taxable gross receipts.

(B) 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 351.) If this prohibition is violated, any amount of such gratuities received by the employer will be considered a part of the gross receipts of the employer and subject to the tax.

(2) MANDATORY PAYMENT.

(A) An amount negotiated between the retailer and the customer in advance of a meal, food, or drinks, or an event that includes a meal, food, or drinks is mandatory.

(B) When the menu, brochures, advertisements or other materials notify customers that tips, gratuities, or service charges will or may be added, an amount automatically added by the retailer to the bill or invoice presented to and paid by the customer is a mandatory charge and subject to tax. These amounts are considered negotiated in advance as specified in subdivision (g)(2)(A). Examples of printed statements include:

“An 18% gratuity [or service charge] will be added to parties of 8 or more.”

“Suggested gratuity 15%,” itemized on the invoice or bill by the restaurant, hotel, caterer, boarding house, soda fountain, drive-in or similar establishment.

“A 15% voluntary gratuity will be added for parties of 8 or more.”

(C) It is presumed that an amount added as a tip by the retailer to the bill or invoice presented to the customer is mandatory. A statement on the bill or invoice that the amount added by the retailer is a “suggested tip,” “optional gratuity,” or that “the amount may be increased, decreased, or removed” by the customer does not change the mandatory nature of the charge.

This presumption may be controverted by documentary evidence showing that the customer specifically requested and authorized the gratuity be added to the amount billed. An example of such documentary evidence includes:

A guest check that is presented to the customer showing sales tax reimbursement and the amount upon which it was computed, without tip or with the “tip” area blank and a separate document, such as a credit card receipt, to which the retailer adds or prints the requested tip.

The retailer must retain the guest checks and any additional separate documents to show that the payment is optional. The retailer is also required to maintain other records in accordance with the requirements of Regulation 1698, *Records*.

~~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 if such service charges are made in lieu of tips and are paid over by the retailer to employees.~~

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(h) CATERERS.

(1) DEFINITION

The term “caterer” as used in this regulation means a person engaged in the business of serving meals, food, or drinks on the premises of the customer, or on premises supplied by the customer, including premises leased by the customer from a person other than the caterer, but does not include employees hired by the customer by the hour or day.

(2) SALES TO CATERERS.

A caterer generally is considered to be the consumer of tangible personal property normally used in the furnishing and serving of meals, food or drinks, except for separately stated charges by the caterer for the lease of tangible personal property or tangible personal property regarded as being sold with meals, food or drinks such as disposable plates, napkins, utensils, glasses, cups, stemware, place mats, trays, covers and toothpicks.

(3) SALES BY CATERERS.

(A) Caterer as Retailer. Tax applies to the entire charge 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 the caterer, the caterer's 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 (e) above whether or not served by the caterers. A caterer who separately states or itemizes charges for the lease of tangible personal property regardless of the use of the property will be deemed to be the lessor of such property. Tax applies in accordance with Regulation 1660 Leases of Tangible Personal Property – In General. 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.

(B) Caterers as Lessors of Property Unrelated to the Serving or Furnishing of Meals, Food, or Drinks by a Caterer.

1. When a caterer who is furnishing or serving meals, food, or drinks also rents or leases from a third party tangible personal property which the caterer does not use himself or herself and the property is not customarily provided or used within the catering industry in connection with the furnishing and serving of food or drinks, such as decorative props related solely to optional entertainment, special lighting for guest speakers, sound or video systems, dance floors, stages, etc., he or she is a lessor of such property. In such instance, tax applies to the lease in accordance with Regulation 1660.

2. When a person who in other instances is a caterer does not furnish or serve any meals, food, or drinks to a customer, but rents or leases from a third party tangible personal property such as dishes, linen, silverware and glasses, etc., for purposes of providing it to his or her customer, he or she is not acting as a caterer within the meaning of this regulation, but solely as a lessor of tangible personal property. In such instances tax applies to the lease in accordance with Regulation 1660.

(C) Caterers Planning, Designing and Coordinating Events.

1. Tax applies to charges by a caterer for event planning, design, coordination, and/or supervision if they are made in connection with the furnishing of meals, food, or drinks for the event. Tax does not apply to separately stated charges for services unrelated to the furnishing and serving of meals, food, or drinks, such as optional entertainment or any staff who do not directly participate in the preparation, furnishing, or serving of meals, food, or drinks, e.g., coat-check clerks, parking attendants, security guards, etc.

2. When a caterer sells meals, food, or drinks, and the serving of them, to other persons such as event planners, party coordinators, or fundraisers, who buy and sell the same on their own account or for their own sake, it is a sale for resale for which the caterer may accept a resale certificate. However, a caterer may only claim the sale as a resale if the caterer obtains a resale certificate in compliance with Regulation 1668. A person is buying or selling for his or her own account, or own sake, when such person has his or her own contract with a customer to sell the meals, food, or drinks to the customer, and is not merely acting on behalf of the caterer.

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3. When a caterer sells meals, food or drinks and the serving of them to other persons who charge a fee for their service unrelated to the taxable sale, the separately stated fee is not subject to tax.

(D) Sales of Meals by Caterers to Social Clubs, Fraternal Organizations. Sales of meals to social clubs and fraternal organizations, as those terms are defined in subdivision (i) below, by caterers are sales for resale if such social clubs and fraternal organizations are the retailers of the meals subject to tax under subdivision (i) and give valid resale certificates therefor.

(E) Tips, Gratuities, or Service Charges.

~~An optional tip or gratuity is not subject to tax. A mandatory tip, gratuity, or service charge is included in taxable gross receipts. A tip, gratuity, or service charge negotiated in advance of an event between the caterer and the customer is mandatory even though the amount or percentage is negotiated. A tip, gratuity, or service charge itemized on an invoice or billing by a caterer is not optional even if the invoice or billing itemizes with a notation such as "optional gratuity." A gratuity is optional only if it is voluntarily added by the customer.~~

~~Examples of mandatory tips, gratuities, or service charges include:~~

~~"A 15% gratuity [or service charge] will be added to parties of 8 or more."~~

~~"Suggested gratuity 15%," itemized on the invoice or bill by the caterer.~~

Tips, gratuities, and service charges are ~~further~~ discussed in subdivision (g).

(4) PREMISES.

GENERAL. Separately stated charges for the lease of premises on which meals, food, or drinks are served, are nontaxable leases of real property. Where a charge for leased premises is a guarantee against a minimum purchase of meals, food or drinks, the charge for the guarantee is gross receipts subject to tax. Where a person contracts to provide both premises and meals, food or drinks, the charge for the meals, food or drinks must be reasonable in order for the charge for the premises to be non taxable.

(5) PRIVATE CHEFS.

A private chef is generally not an employee of the customer, but an independent contractor who pays his or her own social security, federal and state income taxes. Such a private chef, who prepares and serves meals, food and drinks in the home of his or her customer is a caterer under this regulation.

(i) 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.

(j) STUDENT MEALS.

(1) DEFINITIONS.

(A) "FOOD PRODUCTS". As used herein, the term "food products" as defined in Regulation 1602 (18 CCR 1602) 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.

(B) "MEALS". As used herein, the term "meals" includes both food and nonfood products, which are sold to students for an established single price at a time set aside for meals. If a single price for the combination of a nonfood product and a food product is listed on a menu or on a sign, a single price has been established. The term "meals" does not include nonfood products which are sold to students for a separate price and tax applies to the sales of such products. Examples of nonfood products are: carbonated beverages and beer. For the purpose of this

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regulation, products sold at a time designated as a “nutrition break”, “recess”, or similar break, will not be considered “meals”.

(2) APPLICATION OF TAX.

(A) Sales by Schools, School Districts and Student Organizations. Sales of meals or food products for human consumption to students of a school by public or private schools, school districts, and student organizations, are exempt from tax, except as otherwise provided in (d)(4) above.

(B) Sales by Parent-Teacher Associations. 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 the students of a school by parent-teacher associations. Parent-teacher associations qualifying under Regulation 1597 as consumers are not retailers of tangible personal property, which they sell. Accordingly, tax does apply to the sale to such associations of nonfood items such as carbonated beverages, containers, straws and napkins.

(C) Sales by 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 19153 of the Welfare and Institutions Code) operating a restaurant or vending stand in an educational institution under article 5 of chapter 6 of part 2 of division 10 of the Welfare and Institutions Code, except as otherwise provided in (d)(4) above.

(D) Sales by Caterers. The application of tax to sales by caterers in general is explained in subdivision (h) above. However, tax does not apply to the sale by caterers of meals or food products for human consumption to students of a school, if all the following criteria are met:

- (1) The premises used by the caterer to serve the lunches to the students are used by the school for other purposes, such as sporting events and other school activities, during the remainder of the day;
- (2) The fixtures and equipment used by the caterer are owned and maintained by the school; and
- (3) The students purchasing the meals cannot distinguish the caterer from the employees of the school.

(k) 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 to employees 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 an employer makes no specific charge for meals consumed by employees, the employer is the consumer of the food products and the non-food products, which are furnished to the employees as a part of the meals.

In the absence of any of the conditions under (k)(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.

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(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 or her 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 \$46.00, and the employee received \$43.90 in cash, and a lunch is received which is credited toward the minimum wage in the maximum allowable amount of \$2.10, the employer has received gross receipts in the amount of \$2.10 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.

(l) 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 subdivision (f) of Section 3 of article XIII of the State Constitution.

(m) 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 or residents of an "institution" as defined in Regulation 1503. Tax, however, does apply to the sale of meals and food products by an institution to persons other than patients or residents of the institution.

(n) MEAL PROGRAMS FOR LOW-INCOME ELDERLY PERSONS. 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.

(o) FOOD PRODUCTS, NONALCOHOLIC BEVERAGES AND OTHER TANGIBLE PERSONAL PROPERTY TRANSFERRED BY NONPROFIT YOUTH ORGANIZATIONS. See Regulation 1597 for application of tax on food products, nonalcoholic beverages and other tangible personal property transferred by nonprofit youth organizations.

(p) NONPROFIT PARENT-TEACHER ASSOCIATIONS. Nonprofit parent-teacher associations and equivalent organizations qualifying under Regulation 1597 are consumers and not retailers of tangible personal property, which they sell.

(q) MEALS AND FOOD PRODUCTS SERVED TO CONDOMINIUM RESIDENTS. 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 to and consumed by persons 62 years of age or older residing in a condominium and who own equal shares in a common kitchen facility; provided, that the meals and food products are served to such persons on a regular basis.

This exemption is applicable only to sales of meals and food products for human consumption prepared and served at the common kitchen facility of the condominium. Tax applies to sales to persons less than 62 years of age.

(r) "FREE" MEALS. When a restaurant agrees to furnish a "free" meal to a customer who purchases another meal and presents a coupon or card, which the customer previously had purchased directly from the restaurant or through a sales promotional agency having a contract with the restaurant to redeem the coupons or cards, the restaurant is regarded as selling two meals for the price of one, plus any additional compensation from the agency or from its own sales of coupons. Any such additional compensation is a part of its taxable gross receipts for the period in which the meals are served.

Tax applies only to the price of the paid meal plus any such additional compensation.

(s) FOOD STAMP COUPONS. Tax does not apply to tangible personal property, which is eligible to be purchased with federal food stamp coupons acquired pursuant to the Food Stamp Act of 1977 and so purchased. When

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payment is made in the form of both food stamps and cash, the amount of the food stamp coupons must be applied first to tangible personal property normally subject to the tax, e.g., nonalcoholic carbonated beverages. Retailers are prohibited from adding any amount designated as sales tax, use tax, or sales tax reimbursement to sales of tangible personal property purchased with food stamp coupons. (See paragraph (c) of Regulation 1602.5 for special reporting provisions by grocers.)

(t) HONOR SYSTEM SNACK SALES. An “honor system snack sale” means a system where customers take snacks from a box or tray and pay by depositing money in a container provided by the seller. Snacks sold through such a system may be subject to tax depending upon where the sale takes place. Sales of such snacks are taxable when sold at or near a lunchroom, break room, or other facility that provides tables and chairs, and it is contemplated that the food sold will normally be consumed at such facilities. Honor system snack sales do not include hotel room mini-bars or snack baskets.

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Appendix A

California Sales Tax Exemption Certificate
Supporting Exemption Under Section 6359.1

The undersigned certifies that it is an air carrier engaged in interstate or foreign commerce and that the hot prepared food products purchased from _____ will be consumed by passengers on its flights.

The undersigned further certifies that it understands and agrees that if the property purchased under this certificate is used by the purchaser for any purpose other than that specified above, the purchaser shall be liable for sales tax as if it were a retailer making a retail sale of the property at the time of such use, and the sales price of the property to it shall be deemed the gross receipts from such sale.

Date Certificate Given _____

Purchasing Air Carrier _____
(company name)

Address _____

Signed By _____
(signature of authorized person)

(print or type name)

Title _____
(owner, partner, purchasing agent, etc.)

Seller's Permit No. (if any) _____

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Proposed Regulation 1671.1. DISCOUNTS, COUPONS, REBATES, AND OTHER INCENTIVES.

<u>References:</u>	Sections 6011, 6012, Revenue and Taxation Code
	Gifts, Marketing Aids, Premiums and Prizes generally, see Regulation 1670
	Trading Stamps and Related Promotional Plans generally, see Regulation 1671
	Receipts for Tax Paid to Retailers, see Regulation 1686
	Reimbursement for Sales Tax, see Regulation 1700

(a) IN GENERAL. Retailers often engage in marketing and sales programs in which they issue coupons or other indicia to their customers that entitle the customers to a reduction in the amount they are required to pay for products sold by the retailers. Manufacturers, vendors, and other third parties often engage in various programs that result in credits or payments made to retailers with respect to a retailer's taxable sale of products to an end-use customer. These payments and credits include, but are not limited to, purchase and cash discounts, coupon reimbursements, ad or rack allowances, buy-downs, scanbacks, voluntary price reductions and other incentives, promotions, and rebates. Under certain conditions, payments received by the retailer in the form of rebates or other types of payments or credits for products sold at retail are included in the retailer's gross receipts or sales price from the sale of the product.

(b) DISCOUNTS.

(1) CASH DISCOUNTS are offered by a retailer to its customer for prompt payment by that customer. If the customer makes prompt payment and takes the discount, the retailer's gross receipts are reduced by the amount of the discount. Cash discounts allowed and taken on sales are excluded from gross receipts. If, however, the customer does not make prompt payment, the retailer's gross receipts are the amount billed. Generally, discounts provided to customers utilizing a grocery store discount club card are regarded as cash discounts or retailer coupons.

(2) PURCHASE DISCOUNTS are given by a manufacturer and/or wholesaler to a vendor (i.e., a retailer) based upon the amount of prior or future purchases by that vendor. These discounts are regarded as trade discounts and are excluded from gross receipts as they are based on the number of products the retailer purchased from the manufacturer and/or wholesaler and not the number of products sold by the vendor at retail. Agreements wherein the retailer agrees to sell the products at a target price for a period of time are also "purchase discounts" and excluded from gross receipts when the discount is based on the number of products purchased by the vendor. The rebates received either directly from the manufacturer or from the wholesaler are not subject to tax since they are tied to the retailer's wholesale purchases of the products, not to the number of retail sales made at the target price.

(3) AD OR RACK ALLOWANCES are contractual agreements usually between a manufacturer and the retailer to advertise a product, or to give that product preferential shelf space. Ad or rack allowances are also known as "Local Pay," "Display Shelf Payments," or something similar. Such allowances are not related to the retail sale of the underlying product and are excluded from gross receipts. Generally, payments to a grocery store retailer pursuant to discounts offered through a grocery store discount club card are regarded as ad or rack allowances.

(4) RETAILER COUPONS are issued by a retailer in paper or paperless form. When presented to the retailer by the customer, they entitle the customer to buy tangible personal property at a certain amount or percentage off the advertised selling price. Although the coupons are presented to the retailer to receive a reduction in the selling price, retailer coupons do not result in compensation from a third party. If the customer has not paid any consideration for the coupon, e.g., a coupon clipped from a magazine or newspaper, the coupon represents a true price reduction resulting in a corresponding reduction in the retailer's gross receipts from the sale. If, however, the customer has previously given compensation to the retailer for the coupon, e.g., the coupon was purchased as part of a coupon booklet sold by the retailer to the customer, the pro rata share of the cost of the booklet represented by the purchase for which the coupon was given must be included in gross receipts.

(5) MANUFACTURER COUPONS are paper or paperless coupons funded by the manufacturer that customers can utilize at the time of purchasing the manufacturer's product, thus entitling customers to a certain amount or percentage off the advertised selling price. These coupons are generally identified as "manufacturer coupons" and include retailer reimbursement terms that must be followed by retailers in order to redeem the coupons. Amounts paid by a manufacturer to a retailer to reimburse the retailer for the value of the manufacturer coupon are included in the retailer's gross receipts. The retailer may, by contract, charge the customer sales tax reimbursement on the amount paid by the manufacturer. When a retailer charges such reimbursement, the amount on which the reimbursement is charged is fully disclosed to the customer through the customer's utilization of the manufacturer coupon.

(c) REBATES AND INCENTIVES.

(1) DEFINITIONS. For purposes of this subdivision only, the following definitions shall apply:

(A) "Discount" means a reduction in the amount of consideration the customer is required to provide in order to purchase the tangible personal property from a retailer as a result of third-party consideration promised to or received by the retailer.

(B) "Retailer's vendor" means a person who sells tangible personal property for resale directly to the retailer.

(C) Operative October 1, 2007, "third party" means a person other than the retailer or the retailer's customer, such as a manufacturer or retailer's vendor.

(2) REBATES ISSUED DIRECTLY TO CUSTOMERS. Manufacturers engage in promotional programs in which they offer product rebates directly to the retailer's customers following their purchase of the manufacturer's products. To receive the product rebate, customers are generally required to submit a rebate application form along with any required documentation (e.g., sales receipt) to the manufacturer or manufacturer's representative directly or through the retailer. Once the rebate form and required documents are processed and accepted, the manufacturer or the manufacturer's representative will issue the customer a rebate check. Rebates checks issued by manufacturers directly to the retailer's customers are not part of the retailer's gross receipts. In this situation, the customer pays the retailer the full selling price and receives a subsequent rebate directly from the manufacturer.

(3) REBATES AND INCENTIVES ISSUED TO RETAILERS. Retailers engage in rebate and incentive programs with manufacturers or other third parties that result in additional revenue for the retailer when certain conditions are satisfied. These are transactions involving buy-down programs, markdowns, discounts, coupons, rebates, and other price reductions. These rebate and incentive programs are also known as "Buy-Down Rebates," "Voluntary Price Reductions" "Promotions," "Flex" (Flex Extensions), "Coupon Redemptions," "Scanbacks," "Instant Rebates," or by a similar name.

(A) Operative October 1, 2007, when a retailer enters into an oral or written contract with a manufacturer or other third party that requires, on a transaction-by-transaction basis, a specific reduction in the retailer's selling price of specified products in exchange for a certain payment of a like amount from the contracting party (e.g., a payment that is not contingent upon selling a particular amount of the specified products), such payments received by the retailer are part of the taxable gross receipts or sales price of the sales. For purposes of this subdivision, it is rebuttably presumed that any consideration received by retailers from third parties related to promotions for sales of specified products is subject to tax until the contrary is established. The types of documentation that will generally rebut this presumption include, but are not limited to, the following:

1. A copy of an agreement or contract between the retailer and a third party that requires the retailer to give specified products preferential shelf space or to display the products in specific areas of the retailer's establishment in exchange for the payment received.

2. A copy of an agreement or contract between the retailer and a third party that provides the retailer with an advertising allowance, equal to or in excess of the payment received, when the retailer advertises the third-party's products.

3. A copy of an agreement or contract between the retailer and a third party that provides that the retailer will only receive the payment if the retailer sells a certain quantity of the products within a specified price range during a particular period, or if the retailer purchases a certain quantity of the products during a particular period.

4. In the absence of a written agreement or contract, the retailer may use any verifiable method of establishing that the consideration received from the third party was not subject to tax, such as a signed and dated letter or other type of documentation provided by the third party, subsequent to the contract or agreement, verifying that the payment received was not paid pursuant to a contract requiring a reduction in the selling price of specified products on a transaction-by-transaction basis.

(B) Operative October 1, 2007, for purposes of this subdivision, when a retailer contracts with its customer for the addition of sales tax reimbursement to the gross receipts of tangible personal property sold at retail, or when a retailer is obligated to collect use tax measured by the sales price, the retailer is required to disclose to the customer the amount upon which sales tax reimbursement or use tax is collected, including the amount of any taxable discounts, rebates, or incentives offered or paid to the retailer by third parties. The retailer may show the amount upon which sales tax reimbursement or use tax is collected on the customer's sales receipt, sales invoice, or other proof of sale. When applicable, the retailer may also post on its premises in a location visible to the customer, or in an advertisement or other printed material directed to customers, a notice to the effect that "tax" will be added to the selling price of all items, including the amount of any taxable discounts, rebates, or incentives offered or paid to the retailer by third parties.

A retailer that does not disclose the amount of any taxable discounts, rebates, or incentives upon which sales tax reimbursement is collected, is in violation of the provisions of Regulation 1700, *Reimbursement for Sales Tax*. A retailer obligated to collect the use tax that does not disclose the amount of any taxable discounts, rebates, or incentives is in violation of the provisions of Regulation 1686, *Receipts for Tax Paid to Retailers*.

(d) EXAMPLES.

(1) The following are examples of transactions where the value of the coupon or discount is part of the retailer's gross receipts (or sales price if subject to use tax) from the sale of the product:

(A) Customer clips a coupon out of a newspaper and presents it to the retailer at the time of sale to receive a discounted price on the product purchased. The coupon indicates "Manufacturer Coupon." Since the manufacturer will compensate the retailer for the amount of the price reduction and the customer presents a manufacturer coupon to the retailer, the value of the coupon is included in the retailer's gross receipts.

(B) Coupon on dog food bag indicates \$2 off at register. The coupon also indicates "payable by Big Bad Dog Food Co. (BBDF Co.)" or "All promotional costs paid by BBDF Co." The store clerk removes the coupon from the dog food bag and enters the amount of the discount into the register. The discount is included in the retailer's gross receipts.

(C) Retailer provides its customers with a coupon discount booklet containing coupons accepted by the retailer during sales periods. The booklet includes coupons identified as "manufacturer coupons" and retailer coupons. Customers remove the coupons from the booklet and present them to the check-out clerk. The value of the coupons identified as "manufacturer coupons" is included in the retailer's gross receipts. The value of the retailer coupons, however, would generally not be included in the retailer's gross receipts.

(2) The following are examples of transactions where rebate or incentive payments are part of the retailer's gross receipts (or sales price if subject to use tax) from the sale of the product:

(A) The retailer purchases dog food from a distributor, a separate legal entity from the manufacturer (BBDF Co.). No coupon is present on the dog food bag. However, a display notice indicates that a \$2 "price reduction is made possible by BBDF Co." Since the retailer agrees to reduce

the selling price of the product in exchange for an offsetting reimbursement from the distributor, the discounted amount is included in the retailer's gross receipts.

(B) The retailer maintains an online sales Web site. The retailer enters into buy-down programs with manufacturers in which the manufacturers require the retailer to offer their products at a reduced price. When the customer purchases a discounted product, the customer's invoice lists the selling price less the amount of the manufacturer's discount. The amount of the discount is subject to tax.

(C) Retailer offers a grocery store discount club card. The customer uses the club card when purchasing various products. The customer also presents manufacturer coupons to the store clerk that are scanned along with the club card. Although the price reductions associated with the club card are not part of the retailer's gross receipts, the value of the manufacturer coupons is included in gross receipts.

(D) Retailer purchases cosmetic products directly from the manufacturer. The manufacturer and retailer enter into a buy-down program in which the retailer is required to reduce the selling price of the manufacturer's products. In turn, the manufacturer agrees to compensate the retailer for the amount of the price reduction. The rebate revenue is included in the retailer's gross receipts.

(E) A cola distributor enters into graduated rebate agreements with retailers that entitle the retailers to reimbursement from the distributor based on the number of 12-packs of cola the retailers sell at a required discounted price during the month of July. The amount of the sales discount is dictated by the distributor as follows. A participating retailer is certain to receive 50 cents for every 12-pack of cola the retailer sells in July at the required discounted price. However, after surpassing a minimum threshold of 12-pack units sold, the retailer will receive an additional 50 cents for each additional 12-pack sold over the threshold minimum. At the end of the promotional period, after verifying the number of 12-pack units sold, the distributor issues a rebate check to the participating retailer. Only the certain payment of 50 cents for every 12-pack of cola the retailer sells in July at the required discounted price is subject to tax. To the extent the retailer receives additional rebates for exceeding the minimum threshold, such contingent rebates are not subject to tax.

(3) The following are examples of transactions where the value of the coupon or discount is not included in the retailer's gross receipts (or sales price if subject to use tax) from the sale of the product:

(A) Retailer has store discount coupons printed in newspaper advertisements. The customers present the coupons when purchasing the advertised products. The retailer's coupon is not a third-party coupon, nor is the retailer reimbursed for the amount of the discount. Although the customers may present a coupon to the retailer, the amount of the discount is not included in the retailer's gross receipts.

(B) Retailer advertises a special promotional sale to a specific customer base. Qualifying customers are mailed a 25% discount coupon they may use on the last Tuesday of the month. The customers are required to bring the coupon to the store during the promotional period in order to receive a discount on their purchases. The retailer is not reimbursed by a third party for the discounted amount. The discounts provided to the retailer's customers qualify as nontaxable discounts.

(C) Retailer offers a "double discount" for certain manufacturer coupons used by customers. The customers present a manufacturer coupon offering \$1 off the purchase of a specific healthcare product. In turn, the retailer also allows an additional \$1 off the selling price of the healthcare product. Although the value of the reimbursable manufacturer coupon is included in the amount subject to tax, the retailer's additional \$1 discount qualifies as a nontaxable discount.

(4) The following are examples of transactions where rebate and incentive payments are not included in the retailer's gross receipts (or sales price if subject to use tax) from the sale of the product:

(A) A cola distributor enters into written agreements with retailers that entitle the retailers to compensation from the distributor based on the number of 12-packs of cola the retailers sell during the month of July. The retailers retain copies of the agreements. The retailers may or may not reduce the selling price of the 12-packs. At the end of the promotional period, the distributor issues rebate checks to the participating retailers. Given the retailers can document there was no requirement to reduce the selling price of the product, the additional revenue is not included in the retailers' gross receipts.

(B) A manufacturer enters into written agreements with retailers to advertise the manufacturer's products and to provide the products preferential shelf space. Retailers that agree to the manufacturer's terms receive compensation from the manufacturer at the end of the promotional period. Assuming the retailers can document that the agreements were not based on a selling price reduction, the payments from the manufacturer are not included in the retailers' gross receipts.

(C) A retailer's vendor agrees to discount the retailer's November purchases of Christmas products by 20% if the retailer's total sales for October exceed a specific amount. The retailer increases its purchases during October, gives the products preferential shelf space and advertises the products at 10% off. Although the retailer reduced the selling price of the products, a price reduction was not a condition of the agreement. The retailer retains documentation to support this fact. The discount is a reduction to the retailer's cost of good sold, not additional gross receipts.

(D) A manufacturer's representative enters into an agreement with a retailer that entitles the retailer to compensation from the manufacturer if the retailer's sales of the manufacturer's hair and skin care products exceed a specific amount during the month of June. The retailer offers the products at a reduced price and provides the hair care products with preferential shelf space. The retailer's sales for June exceed the specified amount and the manufacturer issues a check to the retailer, as agreed. The rebate payment is not subject to tax.

(E) A retailer buys products from either a wholesaler or the manufacturer of products. Retail sales of these products are generally subject to tax. The product manufacturer and/or the wholesaler enters into an agreement with the retailer for a rebate, based upon the number of products the retailer purchases from either the manufacturer or the wholesaler, if the retailer agrees to sell the products at a "target" price for a specified period. Typically, a target price is used to establish a general price range for a particular geographic area or demographic market. The rebates received either directly from the manufacturer or from the wholesaler are not subject to tax since they are tied to the retailer's wholesale purchases of the products, not to the number of retail sales made at the target price.

(F) During a routine audit of the retailer's books and records, the retailer is asked to provide documentation to support its nontaxable treatment of the revenue received; however, the retailer does not have sufficient documentation to support its reporting of the transactions in question. To verify that the revenue received from the manufacturer was not part of gross receipts, the retailer sends a letter to the manufacturer requesting that the manufacturer verify that the payment received under their promotional agreement was not paid pursuant to a contract requiring the retailer to reduce the selling price of their products. The manufacturer signs and dates the letter verifying this fact and returns it to the retailer. No concerns regarding the authenticity of the letter exist. Since the subsequent verification establishes that the rebate revenue was not paid in exchange for a required reduction to the retailer's selling price of the manufacturer's products, the revenue is not part of the retailer's gross receipts.

(5) The following are examples of transactions involving payments by automobile manufacturers to automobile dealers or end-use customers with respect to the sale or lease of automobiles.

(A) An automobile manufacturer provides a customer with a \$1,000 rebate upon the purchase of a specific automobile. Rather than receive payment from the manufacturer, the customer assigns the rebate to the dealer, who in turn applies the amount of that rebate toward the customer's payment for the vehicle. The \$1,000 payment by the manufacturer is part of the dealer's gross receipts, since the rebate is provided to the customer who uses the rebate amount to partially satisfy that customer's total payment obligation to the dealer. The \$1,000 rebate does not constitute a reduction in the retailer's gross receipts as a retailer's coupon, cash discount, purchase discount, or otherwise.

(B) An automobile dealer receives a \$500 incentive from the automobile manufacturer for every vehicle sold of a specific model in a given period. The manufacturer does not have an oral or written contract requiring the dealer to sell the specific model at a reduced price. The selling price is based solely on the dealer's discretion. Under these facts, the \$500 payment by the manufacturer is not part of the dealer's gross receipts since the manufacturer does not require a reduction in the retail selling price of the vehicle. The \$500 incentive instead constitutes a reduction in the dealer's cost of goods sold.