

TAXPAYER EXHIBIT
B2
December 14, 2011
Leprino Foods Co.
481272

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Appeal of Leprino Foods Co.

Appeal Case ID No. 481272
December 14, 2011

STATE BOARD OF EQUALIZATION



Appeal Name: Leprino Foods, Inc.

Case ID: 481272 ITEM #: B2

Date: December 14, 2011 Exhibit No: 12.5

FTB DEPT PUBLIC COMMENT

Liberal Construction

“[T]he MIC is . . . interpreted liberally in favor of taxpayers.”

Appeal of California Steel Industries, Inc.,
2003-SBE-001.

Brick and Tile Coverings

Issue:

Are the brick and tile coverings “tangible personal property” or “structural components”?

Brick and Tile Coverings

Key Facts:

- Sanitary function, not structural
- Provide a sanitizable surface that can be sterilized with harsh chemicals
- Bricks and tiles used because removable one-by-one if chipped or cracked

Brick and Tile Coverings

“Tangible personal property” defined by
Whiteco Industries.

Every factor in Whiteco test is satisfied.

Whiteco requires that the Brick and Tile Coverings be deemed tangible personal property.

Application of *Whiteco* Test to Brick and Tile Coverings

<i>Whiteco</i> Factor	Application	Explanation
(1) Is the property capable of being moved, and has it in fact been moved?	Yes	Bricks and tiles expected to be moved and <i>designed</i> to be moved, and chipped or cracked ones must be removed immediately. Savage Declaration ¶¶ 8-9.
(2) Is the property designed or constructed to remain permanently in place?	No	Bricks and tiles specifically designed to be removable in order to preserve sanitizable conditions without replacing the whole floor. Savage Declaration ¶ 9.
(3) Are there circumstances that tend to show the expected or intended length of affixation, <i>i.e.</i> , are there circumstances which show that the property may or will have to be moved?	Yes	Bricks and tiles expected to be removed and <i>designed</i> to be removed, and chipped or cracked ones must be removed immediately. Savage Declaration ¶ 8-9.
(4) How substantial a job is removal of the property and how time-consuming is it? Is it “readily removable”?	Easy to remove	Brick and tile coverings for the floor and walls specifically chosen because they “can easily be removed.” Savage Declaration ¶ 8.
(5) How much damage would the property sustain upon its removal?	Can be removed without damage	Bricks and tiles could be removed and re-used in another location if necessary. Savage Declaration ¶ 10.
(6) What is the manner of affixation of the property to the land?	Affixed by mortar	Bricks and tiles are “installed so as to be removable with appropriate equipment and replaceable.” Savage Declaration at ¶ 9.

Brick and Tile Coverings

There is binding federal authority confirming this result.

The California regulatory definition of “tangible personal property” cross references federal statutes, and “necessarily” incorporates federal law, including case law, to apply the California definition.

Appeal of Bronco Wine, at 8.

Brick and Tile Coverings

Sanitary floor tiles discarded on removal are tangible personal property.

Hospital Corp., 109 T.C. 21, 33 (1997)

Transformer Assets

Issue:

Are the Transformer Assets “used in the manufacturing process”?

Transformer Assets

The “manufacturing process” is the period beginning at the point raw materials are introduced into the manufacturing, processing, refining, fabricating, or recycling activity, and ending at the point the product reaches its completed form.

Rev. & Tax. Code § 23649(e)(6)

Transformer Assets

Key Facts:

- The Transformer Assets power every step of the process.
- Without them, no manufacturing.
- ✓ So the Transformer Assets are used in the manufacturing process.

Transformer Assets

- No legal basis for a “touching” requirement.
- The definition of “processing” does require touching.
- But the “manufacturing process” can consist of manufacturing, processing, refining, fabricating, or recycling.
 - “Processing” is just one of five possible options.

Transformer Assets

The SBE has allowed the MIC for assets that do not “touch” what is being manufactured many, many times, *e.g.*:

- *Appeal of Granite Rock*
- *Appeal of Foster Poultry Farms*
- *Appeal of Sierra Pacific Industries*

In this very appeal, FTB has conceded that the Brick and Tile Coverings are used in the manufacturing process without “touching.”

Emergency Generators

Issue:

Are the Emergency Generators used to “maintain” Appellant’s cheese-making machinery?

Emergency Generators

Key Facts:

- Emergency Generators only ever used to clear partially processed cheese from Appellant's cheese-making machinery to avoid serious damage to that machinery.

Emergency Generators

The parties agree that “maintain” means

“to hold or keep in any particular state or condition.”

- *Webster’s Dictionary*

Emergency Generators

- ✓ The Emergency Generators' sole use is to keep the cheese-making machinery in working order and, thus, to maintain the machinery.