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STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

(916) 327-3400

September 28, 1989

Dear REDACTED TEXT,

I am writing in response to your August 24, 1989 request for a legal opinion regarding the application of sales tax to sales of meals by your client, REDACTED TEXT on the REDACTED TEXT University Campus. Specifically, you ask whether REDACTED TEXT's sales of meals to students is entitled to the exemption from sales tax provided by Revenue and Taxation Code Section 6363 (Section 6363 hereafter). The advice contained in this letter confirms the telephone advice previously given by me on May 14, 1989 to REDACTED TEXT and, on another occasion, by attorney REDACTED TEXT to you.

FACTS

Your client has entered into a contract with REDACTED TEXT University REDACTED TEXT granting REDACTED TEXT an exclusive right to operate seven food service facilities on the REDACTED TEXT campus. According to the contract, which you enclosed, its sole purpose is "providing food and beverage services for students, faculty, staff, and guests of REDACTED TEXT University." (Clause A.) Other provisions of the contract are discussed in the analysis which follows.

APPLICABLE LAW

In California, except where sales are specifically exempted by statute, sales tax applies to the gross receipts of retailers from all retail sales of tangible personal property in this state (Rev. & Tax. Code § 6051). The retailer, in turn, may contractually provide for tax reimbursement from the consumer (Civ. Code § 1656.1). Alternatively, a use tax is imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer (Rev. & Tax. Code §§ 6201 and 6401).

I assume, based on the facts you have provided, that meals sold by REDACTED TEXT to students are cash sales paid at the time of purchase. The legal advice contained in this letter is based on this assumption. If students pay for meals in some other manner, e.g., meal tickets or under contract with REDACTED TEXT please advise me as to the facts so that I can amend the instant opinion if needed.

Section 6363 provides a specific exemption from sales and use tax for "meals and food products for human consumption furnished or served to the students of a school by public or private schools, school districts, student organizations, parent-teacher associations, and any blind person...operating a restaurant or vending stand in an educational institution..."

ANALYSIS

Your letter contends that REDACTED TEXT's sales of meals to students are exempt from sales tax under Section 6363. In support of that contention, you cite a 1943 Attorney General's opinion addressing, inter alia, the question of whether tax was applicable to sales of meals to pre-flight students at REDACTED TEXT College by a food service company deemed to be an agent of REDACTED TEXT (1 Cal.Ops.Atty.Gen. 339 (1943).) The contract between the company and REDACTED TEXT explicitly stated that the company "should be deemed to be the agent of and to act for and on behalf of REDACTED TEXT..." (Id., at p. 340.)

Your letter states that "the Attorney General concluded that the sale of meals by a REDACTED TEXT food service contractor were to be treated as sales by REDACTED TEXT College for purposes of excluding from sales taxes the sales of meals to students. Therefore, the existence of a nonschool contractor operating food service on behalf of a school will not cause otherwise exempt sales to be subject to sales tax." This statement is misleading and incorrect in its conclusion.

The Attorney General in the above-cited opinion was not concerned with the question of whether a food service provider could partake of the Section 6363 exemption granted to schools. Rather, the opinion focused on the fact that the pre-flights students were enlisted in the Navy and sales of meals to them were in fact, sales to the federal government and thus not subject to tax. Specifically, the Attorney General concluded that "[i]nsofar as meals served to the pre-flight students are concerned, the sales tax was inapplicable for the Government purchased and paid for the meals and the gross receipts from the sale of any tangible personal property to the United States are expressly made exempt by Section 5.1 of the Retail Sales Tax Act." (1 Cal.Ops.Atty.Gen. 339, supra, at p. 340.) Further, unlike the situation described in the Attorney General's opinion, the contract between REDACTED TEXT and REDACTED TEXT does not state that REDACTED TEXT is deemed to be the agent of REDACTED TEXT but rather that "[c]ontractor shall be and be deemed to be an independent contractor for all purposes of this agreement." (Clause J.)

The issue raised by your letter was addressed and answered by the First District Court of Appeal in Automatic Canteen Co. v. State Board of Equalization (1965) 238 Cal.App.2d 372. Automatic Canteen Co. (Automatic) contended that its sales of meals were exempt from sales tax under Section 6363 which, at that time, provided an exemption for meals served by employers to their employees. Automatic was a food service provider under contract with several corporate employers to provide meals to their employees. The term of the contracts discussed by the court were similar to the contract between REDACTED TEXT and REDACTED TEXT. The employers, like REDACTED TEXT, owned, furnished and maintained the cafeteria premises as well as bearing many of the costs associated with the food service operation. Further, the employers, like REDACTED TEXT established and enforced the standards by which the cafeterias would be run. Under the contracts, Automatic, like REDACTED TEXT was deemed to be an independent contractor and paid on a percentage of the gross receipts from the sales of meals.

Automatic argued that it was entitled to the Section 6363 exemption as an agent of the employers. You have argued, on behalf of your client, that REDACTED TEXT is entitled to the Section 6363 exemption as an agent of REDACTED TEXT. (There is not question that sales of meals by REDACTED TEXT to its students would be entitled to the Section 6363 exemption). The Automatic Canteen court discussed the agency issues as follows. (Automatic Canteen Co. was a successor to Nationwide Food Services, Inc. which the court refers to as "Nationwide.")

“...we are satisfied that as a matter of law it can be held that Nationwide performed its operations at the various employee cafeterias as an independent contractor since it is clear that in performing its services of preparing and serving meals to the Employer’s employees Nationwide followed the Employer’s desires only as to the results of the services and not as to the means whereby they were accomplished. While the Employers did, it is true, exercise a relatively broad degree of control over Nationwide’s activities, this control was concerned with the results of Nationwide’s work rather than the manner and means by which it was to be accomplished.

“Further support for the conclusion that the relationship between Nationwide and the various Employers was that of independent contract and owner rather than that of employee and employer is found in various secondary tests often used by the courts in distinguishing an independent contractor from an employee. These tests are enumerated in Section 220(2) of the Restatement Second of the Law of Agency, and have been adopted by the California Supreme Court in Empire Star Mines Co. v. California Emp. Com., 28 Cal.2d 33, 43-44 [168 P.2d 686], as follows: ‘(a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, which reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervisions; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.’

“The application of these tests to the facts of the present case is as follows: As to tests (a), (b) and (c) it is obvious that the restaurant and food service business comprises a distinct category of business enterprise. Feeding establishments are traditionally operated as separate businesses rather than as a minor adjunct of some other business. Nationwide itself, whose sold business was operating food establishments, is a typical example of such a business. In addition, it is clear that the operation of restaurants requires a large degree of skill and is usually performed by persons we specialize in this field. In fact, it is obvious that the primary reasons that Nationwide acquired the right to operate the employee cafeterias involved in this action was because Nationwide had this specialized skill.

“As to test (d), while the Employers furnished the cafeteria premises and facilities to Nationwide, this factor is not significant since there was no real alternative because by their very nature, the employee cafeterias operated by Nationwide were required to be located on the Employers’ premises. Concerning factor (e), the Restatement comments that ‘If the time of employment is short, the worker is less apt to subject himself to control as to details and the job is more likely to be considered his job than the job of the one employing him.’ (P. 490.) However, since in the instant case the serving of meals to their employees was a service which the Employers had chosen to provide on a permanent basis, we are of the opinion that the fact that Nationwide performed its operations at the various cafeterias for an extended period of time

should not be determinative of the nature of its relationship with the various Employers. With respect to test (f), the fact that Nationwide was paid on a ‘cost-plus-guaranteed-profit’ basis again tends to show that Nationwide was an independent contractor rather than an employee. Whereas employees are typically paid on a time piece bases, ‘cost-plus’ is a typical method of paying an independent contractor. As regards test (g), it is clear that the operating of cafeterias is in no way a part of the regular business of the Employers involved in this action.

“Finally, as to factor (h) and concerning the intent of the parties as to the nature of their relationship, we note that both the Shell Chemical and Standard Oil contracts expressly provided that Nationwide was an independent contractor... While it is true that the form of the contract between the parties and the labels used by them are not necessarily controlling and that a contract should be considered not only in view of the circumstances under which it was made, but also in the light of the conduct of the parties while the work is being performed, the form of the contract and the labels used are of some weight in determining the nature of the relationship since the relation is prima facie that expressed by the terms of the writing. [Citations omitted.] In the present case not only is the relationship of the parties expressed in terms indicating that Nationwide was an independent contractor, but there is nothing in the conduct or acts of the parties inconsistent therewith.” (Automatic Canteen Co. v. State Board of Equalization, *supra*, 238 Cal.App.2d 372, 387-389.)

We find the court’s reasoning and conclusions to be applicable to the contract between REDACTED TEXT and REDACTED TEXT. It is clear from the express language of the contract, at Clause J, that REDACTED TEXT functions as an independent contractor. There is nothing in the relationship between the parties outlined in the body of the contract inconsistent with this conclusion.

The Automatic Canteen court concluded that the Section 6363 exemption was inapplicable to REDACTED TEXT’s sales of meals to REDACTED TEXT Students.

“Nationwide seeks to uphold the trial court’s judgment on the basis that even if Nationwide is deemed to be the retailer of the meals involved, its gross receipts from such operations were exempted from the sales tax under the then language of section 6363. By clear language, this exemption was limited to gross receipts from the sales of meals served (i.e., sold) ‘by employers or employee organizations...’ Nationwide was neither the employer of the persons to whom it sold meals nor an organization representing those persons; rather it was publicly-held corporation engaged in the business of industrial catering, which, for a profit, operating the dining facilities located in the building and plants occupied by the Employers. Any argument that the exemption granted by section 6363 should be extended to concessionaires such as Nationwide as contrary to the plain language of the section. Such a construction must, therefore, be avoided. [Citations omitted.]

“...Since we have concluded that Nationwide operated at the various employee cafeterias as an independent contractor rather than as an employee, we accordingly must reject Nationwide’s argument that it was entitled to the benefit of the section 6363 exemption.” (Automatic Canteen Co. v. State Board of Equalization, *supra*, 238 Cal.App.2d 372, 389-391.)

We find that REDACTED TEXT is no more entitled to claim the Section 6363 exemption than was REDACTED TEXT. The statute clearly states that the exemption is available to “public or private schools, school districts, student organizations, parent-teacher associations, and any blind person...operating a restaurant or vending stand in an educational institution.” REDACTED TEXT falls into none of the above categories. Rather, it is a for-profit corporation operating food service establishments as an independent contractor and is not entitled to the Section 6363 exemption. This conclusion is consistent with the staff’s past practices as annotated in the Business Taxes Law Guide. Annotation 550-0840 is as follows:

“Independent Contractor. Irrespective of the conclusions stated in a written contract as to the relationship between an employer and a caterer, where the caterer purchases food, prepares and serves it (whether with its own employees or through a manager directing those on the payroll of another) and participates in the retail cash sale, the caterer is engaged in a retailing activity. The caterer is an independent contractor making taxable retail cash sales pursuant to a contract with the employer.”

CONCLUSION

We conclude that REDACTED TEXT is not entitled to the Section 6363 exemption and is thus liable for sales tax on the gross receipts of its sales of meals at the seven food service facilities located on the REDACTED TEXT campus.

I hope the above analysis will be useful to you in advising your client. Please feel free to contact us if you have any further questions.

Very truly yours,

Stella C. Levy
Tax Counsel

SCL:cl

cc: San Francisco District Administration