

TAXATION: Sales of food and drinks at cafeteria owned by  
SALES TAX: manufacturing company to employees of such man-  
ufacturing company are subject to the sales tax.

November 17, 1948



Mr. G. H. Bates  
Collector of Revenue  
Department of Revenue  
Capitol Building  
Jefferson City, Missouri

Dear Mr. Bates:

This is in reply to yours of recent date wherein you submit the question of whether or not the sales tax should be imposed and collected on the sales of food and drinks to employees only of a manufacturing concern at a cafeteria owned and operated by such manufacturing concern and in which it is claimed no profits are derived from the sales of such articles. The provisions of the Sales Tax Act applicable here are found in Laws Missouri 1945, page 1866, subsection (g) of Section 11407 of the Act which defines the term "sale at retail" as follows:

"(g) 'Sale at retail' means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. Where necessary to conform to the context of this article and the tax imposed thereby, it shall be construed to embrace:"

Subsection (5) of said subsection (g) reads as follows:

"(5) Sales or charges for all rooms, meals and drinks furnished at any hotel, tavern, inn, restaurant, eating house, drug store, dining car, tourist camp, tourist cabin, or other place in which rooms, meals or drinks are regularly served to the public."

Section 11408 provides, in part, as follows:

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"From and after the effective date of this Act, there shall be and is hereby levied and imposed and shall be collected and paid:

"(a) Upon every retail sale in this State of tangible personal property a tax equivalent to two (2%) per cent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to two (2%) per cent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange."

Section 11413, of said Act provides, in part, as follows:

"For the purpose of more efficiently securing the payment of an accounting for the tax imposed by this article, the Director of Revenue shall make, promulgate and enforce reasonable rules and regulations for the administration and enforcement of the provisions of this article. \* \* \*"

The Sales Tax Act was originally administered by the State Auditor. Pursuant to the authority conferred on him by Section 11413, supra, the State Auditor promulgated the following rule which relates to sales of food and drinks sold at a cafeteria owned by employers and sold to employees only. We refer to Rule 43 of the Rules and Regulations relating to the Missouri Sales Tax Act, effective August 1, 1941, which provides:

"When private corporations operate cafeterias, lunch rooms or dining rooms for the exclusive use of their employees, they should collect and remit the Missouri Sales Tax on all sales made to their employees even though said place of business is not open to the general public."

This rule has been in effect since 1941 and the provisions of the Missouri Sales Tax Act relating to "business" "retail sales" and sales of food and drinks have not been changed by the various general assemblies which have convened since 1941.

While a regulation or rule, which has been promulgated by an administrative official, may not have the force and effect of law, yet such regulation is persuasive on the courts as to their interpretation of the law, especially where the lawmakers have met a number of times after the rule is promulgated and do not change the acts to which the regulations may apply.

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In 139 A.L.R., at page 381, the annotator, in discussing this principle said, at l.c. 381:

"It has been held that where an administrative officer has adopted a regulation defining a certain transaction as coming within the scope of the taxing statute, and the legislature subsequently re-enacted the statute without amendment in this regard, the reenactment 'amounted to a legislative confirmation of the prior existing rules of interpretation.' Bedford v. Colorado Fuel & Iron Corp. (1938) 102 Colo 538, 81 P(2d) 752. And see Typekrafters, Inc. v. Philadelphia (1938) 34 Pa D & C 82, infra, II d."

Also in 47 Am. Jur. 318, Section 14, we find the principle stated as follows:

"\* \* \*While it has been held that where an administrative officer has adopted a regulation defining a certain transaction as coming within the scope of a sales tax statute, and the legislature subsequently re-enacts the statute without amendment in this regard, the re-enactment amounts to a 'legislative confirmation of the prior existing rules of interpretation,' the view has been taken that under the circumstances named, the legislative confirmation is merely presumed and may be overcome by a consideration of all the circumstances. \* \* \*"

Following these principles, the regulation promulgated by the State Auditor should be persuasive as to the interpretation which we should place on the Sales Tax Act insofar as it applies to sales of food and drinks at the cafeteria which is owned by the manufacturing company and at which only sales are made to employees of the manufacturing company.

The Missouri Sales Tax Act was originally taken from the Illinois Occupation Tax Act and the definitions of many terms in the Missouri Act are the same as those in the Illinois Act especially the definition of the term "sale at retail." The interpretation of the Act by the Illinois courts should also have some weight in the Missouri authorities interpretation of the Missouri Act.

In the case of the Continental Bank Supply Company vs. International, 201 S.W.(2d) 531, the court in construing a Missouri

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statute, which was taken from a New York statute applied the foregoing principle and said, l.c. 534, subsection 5:

"\* \* \*It was ruled in *Bridgman v. Bridgman*, 23 Mo. 272, loc. cit. 273, that the Legislature of 1835 adopted, substantially, the New York revised act regulating the arbitration of controversies. The court indicated that the construction placed on the New York act, by the courts of New York, should be given great weight by the courts of Missouri in construing the Missouri Statute."

The Illinois court has construed the Occupation Tax Act of that state under its definition of the term "sale at retail" and held that it included sales of food and drinks at cafeterias owned by employers and sold to employees only. In the case of *Continental Can Company vs. Nudelman, et al.*, 34 N.E. (2d) 397, the following set of facts were submitted to the court for determining whether or not the transactions were taxable under the Illinois Act which defined "retail sale" in identical language to the Missouri Act, the facts were, l.c. 397, 398:

"No question is raised on the pleadings and the facts are stipulated. The pertinent portions are: '(1) the plaintiffs are corporations and own, operate and conduct factories, manufacturing and business enterprises in Cook county, Illinois; (2) that for the convenience of plaintiffs and their employees the plaintiffs operate and maintain cafeterias, lunch rooms and restaurants for the feeding of their employees, all of which are situated in the various properties at which plaintiffs conduct their respective businesses; (3) that said restaurants, cafeterias and lunch rooms are not advertised to the general public nor are the public invited thereto, although occasionally some outsiders are permitted to avail of the restaurant facilities; (4) that in the operation of said restaurants, cafeterias and lunch rooms, plaintiffs serve, dispense and transfer to their employees for a valuable consideration, food and nonalcoholic beverages for physical consumption and not for resale from which they have derived no profit.'"

In passing on these facts the court held the transactions were taxable by saying, l.c. 398:

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"Under the stipulated facts, the operation of cafeterias, lunch rooms and restaurants for the purpose of selling food to their employees made appellees vendors engaged in a business which was subject to the tax."

It might be contended that since the food and drinks sold and served at the cafeterias and being only sold and served to employees that the tax was not applicable on account of the provisions of Section 5 of subsection (g) of said Section 11407 and of subsection (f) of said Section 11408. These sections contain the provision that the sales are applicable where they are sold at places in which meals and drinks, etc., are "regularly served to the public."

Referring to the last sentence of subsection (g) of Section 11407, it would be noted that the "subdivisions" of said subsection (g) are embraced within the act only when it is necessary to so embrace them to conform to the context of the Sales Tax Act. As stated above the Illinois courts have held that the term "sale at retail" as defined in the first part of subsection (g) was broad enough to include the sale of food and drinks at cafeterias such as are under consideration here. Therefore, it would not seem to be necessary to look to the subdivisions of said subsection (g) to find authority to impose the tax on the "sale of foods and drinks at cafeterias, etc.," even though they might not be served to the public. We also think that the same reasoning would apply to subsection (a) of Section 11408 because there can be no question but that the sale of food and drinks would be a sale of tangible personal property which are included in said subdivision (a).

The question of the imposition of the tax might also be raised because there is no profit in the transaction. Under the definition of the term "business" in the Sales Tax Act, subsection (c) of Section 11407 we find it to be defined as follows:

"'Business' includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either direct or indirect, and the classification of which business is of such character as to be subject to the terms of this article. \* \* \*"

By this definition it will be found that a transaction to be taxable does not necessarily have to be one in which the seller derived a profit. If the sale is made with the object of "gain, benefit or advantage, either direct or indirect, it is a retail sale and would be subject to the tax regardless of the fact that there is no profit in the transaction.

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In the Annotation, 139 A.L.R., page 391, the annotator in treating the case in which the sales of food at clubs and restaurants by nonprofit organizations were involved, said:

"So too, the furnishing of food and liquor to members of a social and political club and their guests was held to constitute a sale within the meaning of a statute requiring the payment of the tax upon every 'retail sale' or 'sale at retail,' under a statute defining such terms as 'a sale to a consumer or to any person for any purpose other than for sale in the form of tangible personal property,' Union League Club vs. Johnson (1941) 18 Cal(2d) 257, 115 P(2d) 425 (reversing in this regard (1940; Cal App) 108 P(2d) 487). (This case also involves the question whether the club was engaged in the 'business' of making retail sales 'with the object of gain, benefit or advantage, either direct or indirect.' The court commented that, assuming that no profit was intended or realized by the club from the operations of its dining room and bar, it did not follow that there was no 'gain, benefit or advantage' to the club, since few persons would go to a club without these facilities and they undoubtedly contributed largely to the success of such an enterprise.)"

We do not think it can be successfully contended that the employer and manufacturer carry on this business of selling and serving food and drink at the cafeteria without the object of gain, benefit or advantage either direct or indirect.

#### CONCLUSION

Under the foregoing authorities it is the opinion of this department that sales of food and drinks by cafeterias, owned by a corporation, to the employees of such corporations are retail sales under the Missouri Sales Tax Act and are subject to the provisions of that Act.

Respectfully submitted,

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APPROVED:

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