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Memorandum

To: Headquarters – Principal Tax Auditor

Date: August 30, 1966

From: Tax Counsel (GAT) - Headquarters

The question has been raised as to whether California Tax Service annotation 1569.45, 5-5-50, contains a complete statement of the law.

The annotation states,

“Employer engaging outside caterer to prepare and furnish employee meals for which employer charges employees is purchasing meals for resale, can give resale certificate to caterer.”

At all times the board has scrutinized transaction designated in contracts by the parties as sales for resale, and has asserted the tax when it determined that the transactions were, in fact, retail sales.

The California District Court of Appeal followed this procedure in reaching its decision in Automatic Canteen Company of America v. State Board of Equalization, 238 A.C.A. 434. In analyzing certain contracts between a caterer and employers and the caterer’s performance under the contracts, the court found that attempts to characterize the transactions as sales for resale to the employers were merely matters of form and not of substance.

In view of the foregoing, annotation 1569.45 should be qualified with the caveat that, although a transaction between a caterer and an employer is designated in a contract between the parties as a sale of meals by the caterer for resale by the employer to his employees, the board may look through the form of the transaction to determine whether, in fact, the sale by the caterer is a sale for resale.

If the substance of the transaction is found by the board to be a retail sale by the caterer, the gross receipts therefrom are subject to sales tax.

GAT:hm