



STATE BOARD OF EQUALIZATION

February 15, 1967

Dear Mr. --- ---:

This refers to the petition for redetermination filed on behalf of "R".

We have considered all the facts relating to the use of outside help in serving food prepared by your client, and we have checked the case of Anders v. State Board of Equalization, 82 Cal. App. 2d 88, to see if it is analogous to the "R" matter.

To the extent that the case involved the question of whether so-called tips were the seller's gross receipts, there is a similarity. In "R" we are to determine whether the wages paid to outside help are considered your client's gross receipts.

We all agree that the outside help is temporary. They are only occasionally employed.

There are no doubt several circumstances giving rise to the hiring of outside help. Your client, in figuring the food costs per person, might recommend what help is needed to make the affair a success. It was stated that he offered to make arrangements to obtain the needed or recommended help if the customer wanted him to do so.

All of these facts do not dictate a finding that the wages paid to the outside help are not gross receipts from serving the meals.

Gross receipts, as defined in Section 6011.5 of the Sales and Use Tax Law, mean the total amount of the sale valued in money. The total amount of the receipts from a sale includes "any" services that are a part of the sale, and "all" receipts of any kind.

Clearly, part of the charges for serving the food includes a charge for the services. Your client's billings to the customer show that "service charges" are billed separately. This does not necessarily preclude them from being gross receipts to your client.

The fact that your client does not withhold any sum for payroll tax, etc., purposes does not dictate a finding that the wages are not a charge for serving the food or are not his gross receipts.

If your client, for whatever reason, solicits, engages, or hires outside help, even as an accommodation for the customer, he becomes sufficiently involved with the independent contractor so obtained that the wages paid are a part of the charge for selling the food and a part of your client's gross receipts.

We give considerable weight to the incident where one of the outside help was injured and the customer's insurance company prevailed in an action to determine whether the customer's insurance company or your client's insurance company should be liable for payments resulting from the injury. We think if the court had found that the injured party had been an employee of the customer, your client's insurance company would not have been liable.

The Anders case involved tips, and whether tips given by customers are gross receipts from the sale.

One question regarding tips and gross receipts turns on whether the tip is an exaction or a gratuity. The Board has held that in cases involving private country clubs which add a certain percent to the members' food charge and label it tip or service charge, the added sum is gross receipts from the sale of the food even if the club management turns the added sum over to the employee performing the service.

This is because the added sum is automatic and the member does not have any choice in whether it should be added. In other words, it is an exaction.

In the "R" matter, we are not confronted with the question of whether any of the wages are a gratuity or an exaction. The sum we are concerned with is an obligation of the customer fixed by the wage scale and the hours worked. To this extent the Anders case is not analogous.

Summarily, it is our opinion that the wages paid to outside help that served food, tended bar, washed dishes, etc., and which was arranged for by your client, are gross receipts from the sale of food regardless of how the payments were made or the reason why your client made the arrangements for the help.

We are, therefore, recommending that there be no adjustment.

If, after considering our recommendation and the reasons therefore, your client wishes to have the matter heard by the Board, please notify us in writing within three weeks.

Very truly yours,

Robert H. Anderson
Associate Tax Counsel

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