

## Memorandum

To: Petition Unit (RNZ)

Date: June 21, 1967

From: Tax Counsel (GLR)

Subject: REDACTED TEXT

This is in reply to your inquiry of May 23, 1967 regarding the taxability of the sale of food to students through vending machines located on the premises of "S" high school. The time period involved is from 9/17/65 to 3/31/67.

It is our understanding that taxpayer contends that such sales are exempt from tax based upon sections (g) and (i) of Ruling 53.

Section (g) in essence provides that the sale of meals to students by private schools is exempt from tax. It goes on to provide, however, that if such sales are made by concessionaires or other retailers, it is subject to tax.

It is the taxpayer's contention that it is an employee of "S" and not an independent contractor-retailer. After reviewing the arguments put forth by the taxpayer and the agreement entered into by the parties, we find that we are unable to agree with the taxpayer. It is our opinion that an employee-employer relationship does not exist where a contractor by contract agrees to furnish and sell all food necessary during the regular school day to the students, is paid on a profit-sharing basis with respect to profits, assumes the risk of loss, is engaged in a distinct occupation, is a separate organization and cannot be immediately discharged (without cause), agrees to comply with all laws in connection with serving of food to students through the vending machines, and agrees to maintain products and public liability insurance covering its operations. Quite to the contrary, it is clear that under such facts the taxpayer-contractor is an independent contractor-retailer. Accordingly, the sales by it are not exempt from tax under section (g).

Section (i) provides in part that the sales of meals by religious organizations at gatherings under its auspices for the purpose of raising revenue and for carrying on its religious activities are exempt from tax.

Since it is provided under paragraph 1 of the agreement between the taxpayer and "S" that the taxpayer is to "furnish and sell all food," we are of the opinion that this is a clear indication that the taxpayer is selling the food and not "S". Accordingly, it is our opinion such sales are not exempt from tax under section (i) of Ruling 53.

GLR:dse [lb]