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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

October 17, 2003

The Honorable John M. Knotts, Jr.
Senator, District No. 23
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Knotts:

You have requested an opinion "concerning the charging of the hospitality tax or 'restaurant tax' on the consumer." By way of background, you provide the following information:

> I have received a number of complaints referencing an additional 2% tax being charged on the number of items purchased. These complaints are being registered because of the interpretation of this tax on the number of items purchased. These complaints are being registered because of the interpretation of this tax is that an additional 2% tax is charged on all prepared food. Such as, slicing ham, pork chops from a loin, spiraling of a whole ham, the splitting of a watermelon, to ordering a birthday cake, etc. I do not feel that this was the intent of the law and it should be only used for food purchased in a restaurant environment.
>
> I again request that you render a decision on what the hospitality tax that has recently been passed to achieve additional revenue for the state, is to be used. Also please include in your response an explanation of what the funds that are collected by the municipalities [are] used for. In an effort to settle this complaint in a timely and efficient manner, I respectfully request your immediate attention and response.

Law / Analysis

The "Local Hospitality Tax Act" was enacted by the General Assembly in 1997 as part of Act No. 138 of 1997 and is codified at S.C. Code Ann. Sec. 6-1-700 et seq. Section 6-1-710 (2) defines a "local hospitality tax" as a "tax on the sales of prepared meals and beverages sold in establishments or sales of prepared meals and beverages sold in establishments for on-premises consumption of alcoholic beverages, beer or wine." (emphasis added).

Section 6-1-720 further provides as follows:

(A) A local governing body may impose, by ordinance, a local hospitality tax not to exceed two percent of the charges for food and beverages. However, an ordinance imposing the local hospitality tax must be adopted by a positive majority vote. The governing body of a county may not impose a local hospitality tax in excess of one percent within the boundaries of a municipality without the consent, by resolution, of the appropriate municipal governing body.

(B) All proceeds from a local hospitality tax must be kept in a separate fund segregated from the imposing entity's general fund. All interest generated by the local hospitality tax fund must be credited to the local hospitality tax fund.

Pursuant to Section 6-1-730, the General Assembly has specified the purposes for which the local hospitality tax may be used. Such provision states:

(A) the revenue generated by the hospitality tax must be used exclusively for the following purposes:

(1) tourism-related buildings including, but not limited to, civic centers, coliseums, and aquariums;

(2) tourism-related cultural, recreational, or historic facilities;

(3) beach access and renourishment;

(4) highways, roads, streets, and bridges providing access to tourist destinations;

(5) advertisements and promotions related to tourism development; or

(6) water and sewer infrastructure to serve tourism-related demand.

(B) In a county in which at least nine hundred thousand dollars in accommodations taxes is collected annually pursuant to Section 12-36-920, the revenues of the hospitality tax authorized in this article may be used for the operation and maintenance of those items provided in (A)(1) through (6) including police, fire protection, emergency medical services, and emergency-preparedness operations directly attendant to those facilities.

The issue you have presented is to determine the meaning which a court would apply to the term "prepared meals and beverages" as used in § 6-1-710(2). Several principles of statutory

interpretation are relevant to your inquiry. First and foremost, is the fundamental principle of construction which is to ascertain and give effect to the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can reasonably be discovered in the language used. Clearly, the legislative wording must be construed in light of the General Assembly's intended purpose. State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964). In essence, the statute as a whole must receive a reasonable, practical and fair interpretation consistent with the purpose, design and policy of the lawmakers. Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948).

Moreover, the legislation's words must be given their plain and ordinary meaning without resort to a forced or subtle construction which would work to limit or to expand the operation of the statute. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). The plain meaning of the statute cannot be contravened. State v. Leopard, 349 S.C. 467, 563 S.E.2d 342 (2002).

Furthermore, a statute must be construed with common sense to avoid unreasonable consequences. U.S. v. Rippetoe, 178 F.2d 735 (4th Cir. 1950). A sensible construction, rather than one which leads to irrational results, is always warranted. State ex rel. McLeod v. Montgomery, supra. Finally, any doubts must be resolved against the taxing authority and in favor of the taxpayer. Op. S.C. Atty. Gen., December 5, 2002; Op. S.C. Atty. Gen., Op. No. 3529 (May 23, 1973).

In Op. S.C. Atty. Gen., July 27, 2001, we addressed the meaning of the term "prepared meals" as used in the Local Hospitality Tax Act. It was brought to our attention there that local governing bodies which had instituted the tax were "charging the hospitality tax on goods prepared in grocery stores such as breads, pies and the like." In that opinion, we stated that

> ... a plain and ordinary reading of the terms "prepared meals" would not apply to foods such as pies and breads sold in a grocery store. The term "meal" in particular connotes a more diverse combination of foods. For example, ENCARTA WORLD ENGLISH DICTIONARY defines "meal" as "food eaten at one time: a substantial amount of food, often more than one course, that is provided and eaten at one time." By contrast, an item such as bread or pie typically serves only as one component of a meal. Construing "prepared meals" to apply to all components of meals such as breads and pies would lead to an absurd result, as most food items sold in a grocery store could be used as components of a meal. Furthermore, had the General Assembly intended to include these kinds of items, it could have used the more likely choice of words "prepared food and beverages" in the definition of the tax. We think a practical reading of Section 6-1-710 requires our conclusion that foods such as breads and pies, which typically serve as only components of a meal are not contemplated by the Act.

Courts in various jurisdictions have similarly interpreted the word "meal" in a number of differing contexts. For example in Thiel v. West Goshen Township Zoning Hearing Board, 1 Pa.D. & C.3d 555, 1976 WL 482 (Pa. Com. Pl. 1976), it was held that the term "meals" normally is considered to encompass a wider selection than doughnuts and a beverage. Likewise, in Montella v. City of Ottertail, 633 N.W.2d 86 (Ct. App. Minn. 1986), in the context of denial of a liquor license application, the Court noted that in common usage, "the word meal refers to a group of food items that includes a main course, and frequently includes a beverage, dessert and other food items." Thus, in the view of the Minnesota Court of Appeals, "[c]offee and dessert are commonly parts of a meal, but they are not commonly considered to be a meal by themselves." 633 N.W.2d at 90.

And in Tougher v. Commissioner of Internal Revenue, 51 T.C. 737 (1969), the Tax Court of the United States commented at some length as to what constitutes a "meal" for purposes of exclusion from wages:

> [t]he word 'meals' connotes to us food that is prepared for consumption at such recognized occasions as breakfast, lunch, dinner, or supper, or the equivalent thereof. It does not ordinarily mean a bag of potatoes, a tin of coffee, a box of salt, a can of peas, 10 pounds of flour, a package of rice, a bottle of ketchup, a jar of mayonnaise, or an uncooked chicken. To be sure, these items, or portions of some of them, can be processed and combined with other items so as to produce 'meals,' but in their raw form they are not ordinarily regarded as meals, and in the absence of persuasive evidence pointing in the other direction, it is our judgment that Congress did not use the term 'meals' in that sense.

51 T.C. at 745.

Cagan's, Inc. v. New Hampshire Dept. of Revenue Adm., 126 N.H. 239, 490 A.2d 1354 (1985), is also instructive. There, the New Hampshire Supreme Court, in concluding that the sale of prepackaged food from a vending machine could constitute a "taxable meal," commented as to the sale of food from a supermarket generally. The Court cautioned that there is a substantial distinction between individual items of food and a prepared "meal." In the Court's view, the argument that any sale of food by a supermarket is a taxable meal is fallacious:

> [t]his argument assumes that if a supermarket can be treated as a restaurant for purposes of taxing some of its sales as meals, it must be treated as a restaurant as to all of its sales of food, with the result that for tax purposes all such sales will be taxable meals. We must reject this assumption, however, and the argument that rests upon it. The assumption ignores the fact that a supermarket's sales of food do not characteristically involve the element of service associated with a meal in a restaurant. It would therefore violate the definition of "meal" to treat all of a supermarket's food sales as meals, simply because the supermarket contains a restaurant somewhere on its premises. (emphasis added).

490 A.2d at 1358.

Moreover, in People v. Waldbaums, Inc., 87 Misc.2d 543, 386 N.Y.S.2d 526 (1976), the Court interpreted the meaning of the phrase "ready-to-eat meal sold as a unit" as used in an ordinance. There, the Court, while concluding that herring in sauce in which it had been marinating fit such definition because of its unique qualities, many of the foods sold in a delicatessen for consumption did not. The Court reasoned that

> [t]here is no doubt that the product is ready-to-eat in that it is eaten as sold and no further processing is required before it is consumed. The problem is that many food items which are regularly sold also fit this description, e.g., cold cuts, potato salad, baked beans, pickles, cheeses of all varieties, and many more. It cannot be seriously argued that all of these products are ["ready-to-eat meals sold as a unit"].

Courts have also held that the term "prepared food" is a separate and distinct concept from that expressed by the word "meal." For example, in Borough of Collingswood v. Boyer, 158 A.2d 227 (N.J. 1960), the Court held that "prepared food" is food "fit for immediate consumption either on or off the premises where the sale is made." 158 A.2d at 231. However, in the Court's opinion, "the words 'meals' and 'prepared food' must have been intended by the Legislature to be different." Thus, the sale of a half dozen doughnuts was deemed to be "prepare food" (although implicitly not a "meal") and the sale thereof exempt for purposes of the Sunday sales law.

In enacting the "Local Hospitality Tax Act," the General Assembly did not define the term "prepared meals." We have been able to locate no guiding definition which has been enacted into law in South Carolina. Thus, a court would most likely apply the common and ordinary definition of that term. As we noted in the July 27, 2001 opinion, such term means "food eaten at one time: a substantial amount of food, often more than one course, that is provided and eaten at one time." In other words, components of prepared meals typically do not constitute prepared meals. Furthermore, as the earlier opinion recognized, it would have been a simple matter for the Legislature to have used a much broader term such as "prepared foods and beverages" rather than the more narrow phrase "prepared meals" if the intent had been to include within the tax the kinds of items mentioned in your letter. As you indicate, the tax is commonly known as a "restaurant tax" indicating that the Legislature's intent was to tax "prepared meals" offered in a restaurant type of environment.[1]

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[1] We would note that at least one decision has recognized that certain individual foods such as pizzas, sandwiches and the like have become commonly recognized as "meals" in and of themselves. In Dept. of Revenue v. To Your Door Pizza, Inc., 670 S.W.2d 482 (Ky.Ct. App. 1984) the Court noted that "[t]oday's customs would allow many single items to be considered a 'meal.' In today's world, a hot dog or hamburger and a soft drink frequently make a meal .... Furthermore,

(continued...)

Conclusion

Application of the Local Hospitality Tax obviously is dependent upon the specific fact situation, and an opinion of this Office cannot possibly address each and every factual circumstance which might arise. However, it is our opinion that component parts of a meal, such as you described in your letter, are not intended to constitute "prepared meals" for purposes the 2% Local Hospitality Tax Act. In short, items such as "slicing ham, pork chops from a loin, spiraling of a whole ham, the splitting of a watermelon, birthday cake" would not, in our opinion, constitute a "prepared meal." Nor typically would individual food items such as breads, cakes, pies, doughnuts or similar items be subject to the Local Hospitality Tax.

In our opinion, a court would likely resolve all doubts in individual instances in favor of the taxpayer and against the taxing entity. Here, with respect to whether or not a particular item constitutes a "prepared meal," all doubt should be resolved against individual food products – particularly those which commonly are considered component parts of meals, rather than "meals" themselves. These include the items you mentioned in your letter – none of which are commonly considered a "meal" in itself. As the Supreme Court recently emphasized in City of Hardeeville v. Jasper County, 340 S.C. 39, 530 S.E.2d 374 (2000), the Local Hospitality Tax Act must be construed consistent with its plain and ordinary meaning so as not to expand the scope of the Act as passed by the General Assembly. Thus, the common and ordinary definition of "prepared meals" cannot be expanded to include taxation of citizens for items that are not "prepared meals" in the common and ordinary sense of those words.

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[1](...continued)
it is common knowledge that millions of Americans consider pizza a meal." 670 S.W.2d at 484. Again, each individual food component would have to be examined on a case-by-case to determine if it is a "prepared meal" for purposes of the Local Hospitality Tax. Our conclusion herein is simply that, typically speaking, components of a meal do not constitute a "meal" for purposes of the Act.

We further note that many localities which are imposing the Local Hospitality Tax are defining "prepared meals and beverages" as products sold for immediate consumption either on or off premises in businesses classified as eating and drinking places under the Standard Industrial Code Classification Manual. See e.g. www.georgetowncounty.org. ("General Accommodation/Hospitality Tax Information and Instructions). This manual lists as "eating places" such things as the following: lunch counters; drinking places operated as a subordinate service facility by other establishments; bars and restaurants operated for members of civic, social and fraternal associations. Many localities are interpreting the Local Hospitality Tax Act as including the sales of all deli and bakery department items by a grocery store. www.georgetowncounty.org, supra. In our view, however, a court will attribute the common and ordinary meaning to the phrase "prepared meals and beverages." We see no indication in the Local Hospitality Tax Act that the SIC Manual is to be used as a guide.

Accordingly, in our opinion, a court would likely conclude that component parts of a meal are not a "prepared meal" for purposes of the 2% Local Hospitality Tax and thus are not subject to taxation as such. As to your questions regarding the use of the Hospitality Tax funds collected by municipalities, such authorized purposes are set forth in § 6-1-730(A) and (B), as discussed above. These express purposes include: tourism related buildings; tourism-related cultural, recreational, or historic facilities; beach access and renourishment; highways, roads, streets and bridges providing access to tourist destinations; advertisements and promotions related to tourism development; and voter and sewer infrastructure to serve tourism-related demand. The fact that the General Assembly limited use for the Tax to the express purposes specified in § 6-1-730 strongly indicates these funds cannot be used for purposes other than those enumerated.

Yours very truly,

Henry McMaster

HM/an