1978 S.C. Op. Atty. Gen. 191 (S.C.A.G.), 1978 S.C. Op. Atty. Gen. No. 78-161, 1978 WL 22629

Office of the Attorney General

State of South Carolina
Opinion No. 78-161
September 28, 1978

***1 SUBJECT: What is the meaning of the term 'separate charge' as used in Section 12–35–110 of the Code as amended by Act 623, Acts and Joint Resolutions of 1978.**

The term 'separate charge' as used in Section 12–35–110 of the Code refers to a designated price for a particular meal and not to a lump sum semester or annual charge for board. An educational institution furnishing meals and beverages under a board plan is deemed under Act 623 of 1978 to be the user or consumer of those meals and beverages.

TO: Mr. Cyril C. McCrary
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QUESTION:

What is the meaning of the term 'separate charge' as used in Section 12–35–110 of the Code as amended by Act 623, Acts and Joint Resolutions of 1978.

STATUTE:

Section 12–35–110 of the 1976 Code; Act 623, Acts and Joint Resolutions, 1978.

DISCUSSION:

The question asked pertains to the definition of 'retail sale' as the term is defined in Section 12–35–110 of the Code. The Section was recently amended by Act 623 of 1978 which became law on July 23. The pertinent portion of the Act reads as follows:

'Where meals and beverages are furnished by * * * educational institutions * * * without a separate charge being made, the * * * educational institutions * * * are deemed to be the users or consumers of the prepared meal * * *.'

In order to determine the meaning of the term 'separate charge' as used in the Act, it is helpful to examine the circumstances in existence at the time that the bill was enacted. See 73 Am. Jur. 2d, Statutes, § 151, citing Penn. Human Relations Co. v. Chester School District, 427 Pa., 157, 233 A. 2d 290.

The legislation in question was enacted in response to the decision of Slater Corporation v. South Carolina Tax Commission, 242 S.E. 2d 439 (filed March 16, 1978). That case held that Slater Corporation was making non-taxable wholesale sales at four colleges and a university in this State. The Tax Commission had argued that Slater and not the schools was making taxable retail sales to the students but the Court disagreed. It found that Slater had sold the meals to the schools in a non-taxable wholesale sale and that the schools had in turn resold the meals to their students.

The Court dismissed the Commission's alternative argument that the schools had purchased the meals from Slater for consumption and not for resale. The Court relied instead on the case of Mitchell v. Sherry Corine Corporation, 264 F. 2d 831 (4 Cir. 1959) which had found that a caterer making sales to an airline was making wholesale sales or sales to the airline for resale to its passengers. The sales were not viewed as sales to the airline for consumption by it in performing its principal service. The Sherry Corine decision held that sales of meals by a caterer to an airline were exempt wholesale sales and that the meals were sold to the airline for resale to its passengers, 'although no separate charge is made' for the food.

***2** In addition to the Sherry Corine case the South Carolina Supreme Court also cited Undercofler v. Eastern Air Lines, Inc., 147 S.E. 2d 436 (Ga. 1966). In Eastern the Georgia Supreme Court rejected the argument that the absence of a separate charge prevented a retail sale of flight meals. The Court said:
'The fact that the price of the meal is included in the cost of the ticket does not prohibit a tax on the meal. We must conclude from the allegations that 'the price of the meal' is a known amount and hence separable from the charge made for transportation.' (Emphasis added).

In the decisions relied on by the South Carolina Supreme Court in Slater Corporation the term 'separate charge' referred to a separately designated price for an individual item, more specifically a finished meal. There is no other reference in the opinion to the term 'separate charge'.

In the facts of the opinion the Court stated: 'The basic and most substantial service was the board plan under which Clemson charged a student a certain fee and then purchased the meals from Slater for a lesser amount'. The possibility has been raised that the term 'separate charge' used in the curative legislation refers to the 'certain fee' charged by Clemson to its students for a semester's board and not to a specific price per individual meal. This possibility has been investigated. By way of legislative history, the bill in question was drafted by the South Carolina Tax Commission and presented before the House Ways and Means Committee on May 23, 1978.

The recorded Committee discussion of the bill reveals that the term 'separate charge' referred to a particular price 'i.e., $2.00 per meal', and not to a semester or annual charge. From a review of the legislative history of the bill, it appears that the term 'separate charge' as used in the bill refers to a specific price per meal to the consumer. This conclusion is buttressed by an examination of the facts present in the Slater decision. Three of the five schools is question did not separately identify the semester fee for board. At these schools, the cost of meals served to the students was included as an unidentified portion of either a combination room and board charge or a more comprehensive fee. No reason is apparent for classification of schools based on how they present their board charge to students. On the other hand, all of the schools in question had both 'board plan' sales for which a certain fee was charged per semester and 'cash sales' for which specific prices were charged for individual meals.

CONCLUSION:

The term 'separate charge' as used in Section 12–35–110 of the Code refers to a designated price for a particular meal and not to a lump sum semester or annual charge for board. An educational institution furnishing meals and beverages under a board plan is deemed under Act 623 of 1978 to be the user or consumer of those meals and beverages.

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