June 24, 1955

To Ernest H. Johnson, State Tax Assessor
Re: Automatic Canteen Co. of Maine

You will recall that this case involves several types of sales:

Vending machine sales prior to August 8. The taxpayer operates 5 or 6 vending machines from which sandwiches are sold at 20¢ apiece. Each sandwich is tightly wrapped in wax paper and the wrapping is sealed in order to keep the sandwich fresh for several days. One of the machines is installed at Mercy Hospital and the others are in industrial plants. In no place does the taxpayer have any designated area under his control. He simply has a spot on the wall where he is permitted to install the machines and has a right of ingress and egress simply to service the machines.

As far as the sales prior to August 8, 1953, are concerned, they are clearly exempt under the Fortin and Cumberland Amusement Corporation cases. We conceded as much in conference, as you will recall.

Vending machine sales after August 8, 1953. These, of course, are taxable only if they are

> "products ordinarily sold for immediate consumption on or near the location of the retailer. . . unless such products are sold on a 'to take out' or 'to go' order, and are actually packaged or wrapped and taken from the premises."

I believe that a court would concede that a made-up individual sandwich, individually wrapped, is a product "ordinarily sold for immediate consumption on or near the location of the retailer." The three remaining questions are: (1) Is the product sold on a "take out" order? (2) Is it actually packaged or wrapped? (3) Is it taken from the premises?

The statute envisions two types of orders: one where the customer tells the vendor to wrap the food up in order that he may carry it away for consumption elsewhere and orders for immediate consumption. When one approaches a coin machine there is, of course, only one possible type of order - the dropping of requisite coins into the machine. The sandwiches are "actually packaged or wrapped" within statutory meaning because they are firmly sealed. The wrapping fulfills every function of packaging: retention of qualities of the contents, prevention of pollution from the outside, enabling of transportation, etc.

Are the sandwiches order "to go"? It would seem very easy to arrive at a conclusion that they are because they are wrapped and there are not eating facilities in the immediate area. The same result, tax wise, could be reached by holding that the language

is inapplicable; e.g., if there is no possible way of ordering food "to go" or not to go, then the words do not apply. Reading the statute without this requirement, the food need only be wrapped and actually taken from the premises in order to be exempt.

The argument contra does not seem to me very strag: that the food is not in fact ordered "to go". The reason I do not think this argument strong is that the customer in fact does not order the food "to go" nor does he expressly order it not to go. There is only one way to order - depositing coins in the machine - whether the customer desires to eat the food there or elsewhere. There being no express direction, we are free to look for implications, inquiring whether the order might not be one "to go" by reason of the circumstances. As stated above, these circumstances include wrapping suitable to transportation and no immediate facilities for eating the food at the place of purchase. Therefore, I think the order is impliedly one "to go".

The taxpayer may have the burden of showing that the food was "taken from the premises". This leads to a consideration of the meaning of "premises".

"Premises" (prae-mittere, L., to send before) is a word which relates to everything in a deed above the habendum, according to Webster.

> "The technical meaning of the word 'premises', in a deed of conveyance, is everything which precedes the habendum."
>
> Berry v. Billings, 1857
> 44 Me. 416, 423.

Thus, because of its place in deeds, premises acquired a secondary meaning as land and buildings. Doherty's Case, 1936, Mass.; 2 N.D. 2d, 186, 105 A.L.R. 76.

In the Doherty case the court held that "premises" had to have boundaries. The case involved a Workmen's Compensation policy covering "premises on which the contractor has undertaken to execute the word of the insured." The court held that a public way was not included in "premises".

The Ohio courts have considered the identical facts that bother us, but their law is a little different. The Ohio Constitution (Art. XII) provides:

> "On and after November 11, 1936, no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold." (Underlining supplied)

Section 5546-2, General Code, exempts from the sales tax the "sale of food for human consumption off the premises where sold."

The above language was considered in connection with sales from booths at a stadium. The booths had 20-foot counters. The spectators were not permitted to enter the booths and there were no tables, chairs or other facilities. The customers purchased at the counter and usually went away consuming their products as they walked to their destination. The taxpayer had no control over any portion of the concourses, seats, runways, ramps, or any part of the stadium outside the booths. The stadium maintained its own police force. The taxpayer did have the exclusive right to sell food at the stadium.

Reversing the Board of Tax Appeals, the high court held:

> "The words 'premises where sold,' as used therein, mean the limited portion of a building, structure, enclosure or other area, where sales or purchases of foods for human consumption are made, which is in the actual possession or under the actual control of the vendor."
> 159 Ohio St. at 482.

The above reference was quoted by the court in Cleveland Concession Co. v. Peck, 1953, 159 Ohio St. 480, 112 N.E. 2d, 529.

Castleberry v. Evatt, 1946, 167 A.L.R. 198, 147 Ohio St. 30, 67 N.E. 2d, 861, involves the identical facts we are now considering. It involves the same law, constitutional and statutory, quoted above. The vending machines in question were installed in industrial plants and they dispensed milk. The vendor had no right within the plant except to come in to service the machines and go out.

The State contended that "premises where sold" meant the entire plant building in which the machines were placed. To resolve whether "premises" meant the entire plant or only that part of the plant under the vendor's control, the court inquired as to the purpose of the constitutional amendment. The court concluded that that purpose was to repeal the sales tax on food for home consumption. The court then reasoned that if food were delivered at an ordinary home for home consumption, the sale would take place on the premises of the customer. If "premises where sold" does not mean the premises simply of the vendor, the court reasoned, the State would be taxing food delivered at homes. Also the court reasoned that under the State's theory "

> "sales of food to the tenants of an apartment building wherein the vendor's sotre is located would be subject to the tax, for such sales of food would be for consumption within the boundary of the premises where the sames are made, as would also sales of food at a booth located on land used as a trailer camp to customers then living in the trailers parked within the enclosure."
> 167 A.L.R. at 202.

Zimmerman, J., dissented. Zimmerman stated that in adopting such constitutional provision the voters undoubtedly had in mind that the sale of food bought in grocery stores, meat markets and other like establishments was non-taxable, for removal therefrom for preparation and consumption in homes.

For my part, I do not find the Ohio reasoning entirely acceptable. But I do find the conclusion acceptable. If our legislature meant the area under the control of the vendor bu "premises", it meant an area which we can bound. If we state that a food vendor entering a plant temporarily to sell food to the employees is selling "on the premises" because he is selling somewhere in the plant, we have a very difficult problem of statutory definition. Where do the "premises" begin and end? If there are two vendors at the same time in one plant, shall we say that each of the vendors may regard the entire plant as his "premises"?

In conclusion, it is my view that the statutory direction with respect to this type of sale is such that we should not attempt to tax. We might get by with it but I have serious doubts.

Cafeteria Sales. Taxpayer maintains a plant cafeteria in a shoe factory. The space is about 20-feet x 20-feet. The workers in each department are given 20-minute breaks during which time they may line up and pass through the cafeteria. For example, an employee may buy coffee in a paper cup, pick up a doughnut and perhaps a napkin. He then must proceed to his place of work to make way for those who follow him. When a knife, fort or speen is necessary, disposable ones are supplied. Waste barrels are scattered all over the plant. Sometimes the coffee is lidded, sometimes not. Mr. Chapman, representing the taxpayer, contends that cafeteria sales prior to August 8, 1953, are exempt and admits that those made thereafter are taxable. Nothing is packaged or wrapped. Therefore, the only sales we need to consider are those made prior to August 8, 1953.

It seems to me that we should hold these sales non-taxable under the statutory language:

> "'Food products' also shall not include meals served on or off the premises of the retailer; or drinks or food, furnished, prepared, or served for consumption at tables, chairs or counters, or from trays, glasses, dishes or other tableware provided by the retailer."

Both the facts and the law are squarely within the Treasure Island Catering case. From the acceptance by the court of Maine of other aspects of that case in its recent opinion in the Cumberland Amusement case, I have no question that our court would follow the California holding. This holding was, of course, that the "trays, glasses, dishes or other tableware" had to be of permanent materials.

Since the California court found such sales to be non-taxable, I have no doubt that the Maine Court would here.

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