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Texas Comptroller of Public Accounts STAR System

202101004L

January 28, 2021

RE: Private Letter Ruling No. 20190402101009

Dear *****,

We issue this private letter ruling in accordance with Rule 3.1, Private Letter Rulings and General Information Letters.¹ We are responding to your request dated March 19, 2019, as well as supplemental information received on May 2, 2019. Detrimental reliance relief is provided in accordance with Rule 3.10, Taxpayer Bill of Rights.

You requested guidance on the taxability of subsidies received from a client for operating a cafeteria for use by its employees and guests.

Facts Presented

Taxpayer is a third-party food service provider that operates cafeterias or similar facilities to offer meal and beverage services on clients' premises. Under its agreements with clients, Taxpayer receives subsidies associated with the costs of operating the cafeterias. Taxpayer currently collects tax on sales of food and drink sold through the cafeterias as well as on the subsidies received from its clients.

The client provides the equipment, including fixtures, tables, chairs, equipment, silverware, chinaware, glassware, linens, kitchen utensils, and all other equipment and facilities necessary to operate the facility.

Taxpayer and its clients work together to determine personnel wages, food and drink prices, portion sizes, food quality, recipes, and menus. Taxpayer hires and supervises staff, prepares and serves food, and provides

administrative services.

Taxpayer receives, as payment, an administrative fee plus reimbursement for the cost of conducting business minus the receipts from sales. The cost of conducting business includes all costs incurred by Taxpayer in operating the facility, including the cost of all food, paper and beverages, wages, supplies, taxes, and administrative expenses. Should the cost of conducting business exceed the receipts, the clients will pay the difference to Taxpayer.

Question, Ruling, and Analysis

Your question is shown below, followed by our response and analysis.

Question: Are the subsidies that employers pay to the Taxpayer as part of a contractual arrangement to maintain and operate the employer's cafeteria subject to sales or use tax in Texas?

Ruling: Subsidies paid to Taxpayer to maintain and operate an employer's cafeteria are subject to sales or use tax in Texas.

Analysis: Texas imposes a sales tax on the sale of each taxable item in this state. Section 151.051 (Sales Tax Imposed). The term "sale" includes the furnishing, preparation, or service of food, meals, or drinks. Section 151.005(6) ("Sale" or "Purchase"). The term "taxable item" includes tangible personal property and taxable services. Section 151.010 (Taxable Item).

Taxpayer is compensated in the form of an administrative fee plus a reimbursement for any operating loss incurred during any operating period.

Prior to Sept. 15, 2006, there existed an exclusion from the sales price in Rule 3.293(e)(2) (Food; Food Products; Meals; Food Service) for subsidies paid to food service operators which stated:

An employer is not liable for tax on the amount of any subsidy paid to a food service operator unless the subsidy is specifically contingent on, or included in, the sales price for meals served to employees or guests, or is the total consideration paid for the meals.

This exclusion for subsidies was removed from the rule by the Comptroller without public comment in a repeal and replacement of the rule on Sept. 15, 2006.

Tax Code Section 151.007(a) defines in relevant part the "sales price" or "receipts" of a taxable item to mean, "the total amount for which a taxable item is sold, leased, or rented, valued in money, without a deduction for the cost of:

- (1) the taxable item sold, leased, or rented;
- (2) the materials used, labor or service employed, interest, losses, or other expenses.

The administrative fee plus reimbursement for the cost of conducting business (i.e., the subsidy) client pays to Taxpayer becomes part of the total sales price of the meals sold by Taxpayer to clients.

In Comptroller's Decision 41,495 (2003) an insurance company (TP) instituted a program in which TP's customers could purchase a child safety seat from a manufacturer for \$20. The remainder of the cost was born by TP. TP stated that it engaged in this program not only for child safety, but also to reduce claims, which was

a benefit to TP. TP sought a refund for tax paid on the portion of the purchase it paid to the manufacturer. TP argued those amounts were not taxable because TP never took possession of the child safety seats and thus there was never a taxable sale. The court determined that there was conflicting evidence regarding possession, but that possession was not determinative. The court found that TP paid a portion of the purchase price and that the total amount of the purchase was taxable.

The economic reality is that the subsidies and administrative fees paid to the Taxpayer to maintain and operate an employer's cafeteria are paid to offset the cost of the meals. *Cantu Enterprises, LLC v. Hegar*, 03-15-00516-CV, 2017 WL 2927567, at *5 (Tex. App.—Austin July 7, 2017, no pet.) (holding that the comptroller can consider the economic reality or substance of a transaction.) There is no statutory exemption for the subsidy in Chapter 151, Tax Code. Those fees help to pay for the meals and therefore, are part of the purchase price and subject to sales and use tax in Texas.

The Texas Tax Code, Texas Administrative Code, and the STAR system are accessible at www.comptroller.texas.gov/taxes/.

If you have questions about this private letter ruling, please email us through our website at <https://comptroller.texas.gov/web-forms/tax-help/> and reference Private Letter Ruling No. 20190402101009.

Sincerely,

Tax Policy Division – Indirect Taxes
Texas Comptroller of Public Accounts

ENDNOTE

1. Unless otherwise indicated, all references to “Section” are to the Texas Tax Code, and all references to “Rule” are to Title 34 of the Texas Administrative Code.

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