

2347

SALE—MEALS FURNISHED BY EMPLOYER TO EMPLOYEE—
ONLY CHARGE MADE IS RECORDING MEALS AS PART
COMPENSATION FOR SERVICES PERFORMED OR WORK
DONE—NOT “SELLING” WITHIN MEANING OF SECTION
5546-1 G. C.

SYLLABUS:

The furnishing of meals by an employer to an employee, for which the only charge made is the recording of such meals as part compensation for services performed or work done, is not “selling” within the meaning of Section 5546-1, General Code.

Columbus, Ohio, October 28, 1947

Hon. C. Emory Glander, Tax Commissioner, Department of Taxation
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion, which request reads as follows:

“The Amendment to Section 5546-1 of the General Code, passed by the 97th General Assembly with respect to employees’ meals reads as follows:

‘but the furnishing, preparing or serving of meals without charge by an employer to an employee shall not be construed as a sale or selling provided the employer records such meals as part compensation for services performed or work done.’

The Ohio Bureau of Unemployment Compensation and the Internal Revenue Division of the Federal Government require the inclusion of the charge for meals in the taxable wages when an employer serves meals to an employee.

The following is an entry taken from the records of a restaurant owner and is a fair sample of that maintained by such vendors:

Amount Earned	Meals	Total	Sales Tax	Social Security	Income Tax	Meals	Amount Received
32.00	2.10	34.10	.07	.34	4.10	2.10	27.49

In view of the requirements set up by the Governmental Agencies are meals furnished by employers to employees retail sales as same are defined in Section 5546-1 of the General Code?”

Prior to the amendment to which you refer Section 5546-1, General Code, provided in part as follows:

“‘Sale’ and ‘selling’ include all transactions whereby title or possession, or both, of tangible personal property, is or is to be transferred * * * and includes the furnishing, preparing or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing or serving such tangible personal property * * *.”

The rules of the Tax Commissioner interpreting this section in its then form held that meals furnished to employees were taxable. Rule 45 provided as follows:

“Sales or transfers of tangible personal property by an employer to an employee, either in the form of meals, or in the form of articles sold from an employer’s stock of merchandise, whether the transfers are designated as sales or wages, are sales at retail and subject to the tax. It is immaterial that such sales constitute a small fraction of the employer’s total sales, or that sales are not ordinarily made at retail.”

The validity of this rule was upheld by the Board of Tax Appeals in the case of *King’s Grill v. Evatt*, 38 O. L. A. 71, 26 O. O. 386. In the course of its opinion the Board said (38 O. L. A. at page 77):

“Assuming, as we must, that the meals here in question were not donated by the appellant to its employees by way of charity or otherwise, we are led to the conclusion that in each instance the meals furnished to the employee were part of his compensation for services rendered by him, as such employee, to the appellant in connection with the particular work for which he was employed. And in this view such transaction would in each instance be a sale, as that term is defined by Section 5546-1, G. C., above quoted. In this connection it is pertinent to note that under date of August 7, 1939, the tax commissioner acting under the authority conferred upon him to this end by Sections 1464-3 and 1464-4, G. C., adopted and certified to the secretary of state Rule 45, which is as follows: * * *”

With the law being applied in this manner, the 97th General Assembly amended Section 5546-1, General Code, in the language set out in your request. This amendment added to the language of Section 5546-1, set out above, the following provision:

“* * * but the furnishing, preparing or serving of meals without charge by an employer to an employee shall not be con-

strued as a sale or selling provided the employer records such meals as part compensation for services performed or work done.”

It seems clear that the purpose of this amendment was to remove the tax on meals furnished to employees by removing the furnishing of such meals from the definition of “sale.” Did the amendment accomplish its objective when applied in a situation such as the one described in your request?

Applying every word of the new provision literally, it might possibly be argued that the words “without charge” require that the value of the meals cannot even be used for bookkeeping purposes to record an employee’s total compensation and to compute the taxes referred to in your request. However, I feel that this argument is negated by the language immediately following which says that there shall be no sale “provided the employer records such meals as part compensation for services performed or work done.” This is exactly what has been done in the example set out in your request. In my opinion, the words “without charge” refer to a situation in which no cash changes hands between the employer furnishing the meals and the employee consuming them, and to construe them otherwise would do violence to the obvious legislative intent.

The provision in question could have been written to provide that :

“* * * the furnishing, preparing or serving of meals by an employer to an employee shall not be construed as a sale or selling provided the only charge made is the recording of such meals as part compensation for services performed or work done.”

In view of the situation which the General Assembly set out to change I have no difficulty in arriving at the conclusion that the result attained was the same as if the above language had been used.

It is therefore my opinion that the furnishing of meals by an employer to an employee, for which the only charge made is the recording of such meals as part compensation for services performed or work done, is not “selling” within the meaning of Section 5546-1, General Code.

Respectfully,

HUGH S. JENKINS,
Attorney General.