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Airene Haze
Nevada Law Journal

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Sparks Nugget v. State Dept. of Taxation, 124 Nev. Adv. Op. No. 15 (March 27, 2008)¹

**STATE TAX LAW- APPLICABILITY OF NEVADA'S
SALES AND USE TAX EXEMPTION**

Summary

Appeal of a district court summary judgment in favor of Tax Department, holding that the food the appellant removed from its inventory and served as complimentary meals to its patrons and employees was not exempt from taxation.

Disposition/ Outcome

Reversed and remanded. The Nugget argued that the food it purchased and used for complimentary meals was not subject to either sales or use tax. The Supreme Court agreed with this argument and held that the Nevada's food exemption applies to the Nugget's use of the food in question to prepare and serve complimentary meals to patrons and employees. Therefore, the Nugget is entitled to a refund of the use taxes already paid on the meals, and the district court erred in granting summary judgment in favor of the Tax Department.

Factual and Procedural History

Appellant Sparks Nugget, Inc., owns and operates John Ascuaga Nugget, a hotel-casino resort in Sparks, Nevada. Similar to other hotel-casino resorts, the Nugget operates a number of restaurants in its premises. The Nugget also supplies food for these restaurants by purchasing large quantities of unprepared foods from vendors. The Nugget does not pay sales or use tax, under Nevada law, on these initial food purchases.

Subsequently, the Nugget places these unprepared foods in its inventory. The Nugget then later removes the food from its inventory and prepares the food for patron and employee consumption. The Nugget distributes the prepared food in one of two ways: the Nugget either sells the prepared food as meals in its restaurants, or gives it away as complementary meals to its patrons and employees. When the Nugget sells the food, it collects sales tax from the purchasers, which it then remits to the Nevada Department of Taxation (Tax Department). In contrast, the Nugget does not collect any sales tax from the food it gives away as complimentary, but instead, the Tax Department charges the Nugget with use tax on the food used to prepare the meal.

From April 1999 to February 2002, the Nugget paid use tax on the food it used to prepare complimentary meals for employees and patrons. In May 2002, The Nugget filed a claim to the Tax Department, seeking refund of these payments. In its claim, the Nugget argues that the food it used to prepare complimentary meals was not subject to either sales or use tax.

In its argument, the Nugget cited three provisions of the Nevada law: (1) Article 10, Section 3(A) of the Nevada Constitution; (2) NRS 372.284; (3) NRS 374.289.² These provisions exempt "food for human consumption" from sales and use taxation, subject to exceptions. The

¹ By Airene Haze.

² The Supreme Court only discussed NRS Chapter 374. Its conclusion, however, applies to all relevant portions of NRS Chapter 374.

Tax Department denied the Nuggets refund claim by citing one of the provisions exceptions. The exception states that the food exemption does not apply to “prepared food for immediate consumption.”

The Nugget administratively appealed the Tax Department’s decision to the tax commission, which proved unsuccessful. After exhausting all administrative remedies, the Nugget sued the Tax Department in district court, again seeking refund for its paid use tax on complimentary meals.

In the district court, the parties filed cross-motions for summary judgment. The district court granted summary judgment in favor of the Tax Department.³ It held that the food removed by the Nugget from its inventory and served as complimentary meals to patrons and employees were not exempted from taxation. This appeal followed.

Discussion

In this appeal, the Nugget argued that the food it purchased and used for complimentary meals was not subject to either sales or use tax. The Supreme Court agreed with this argument and held that the way in which Nugget uses it tax exempt “food for human consumption” is irrelevant, thereby, no taxable event occurred under the facts.

Furthermore, the Nevada constitution’s plain language clearly and broadly exempts *all* food for human consumption unless that food is “prepared food intended for immediate consumption.” Therefore, Nevada’s food exemption applies to Nuggets’ use of the food to prepare and serve complimentary meals to its patrons and employees.

Standard of Review

The Supreme Court reviewed the district court’s summary judgment de novo. Because the parties stipulated to the operative facts of the case, the only issue involved was the interpretation of Nevada constitutional and statutory provisions. This case involved an interpretation of a tax provision, so the Court strictly construed the meaning of the language.⁴

Relevant Sales and Use Tax Provisions

Nevada imposes an excise tax, also known as sales tax on the retail sale of tangible personal property in the state.⁵ Nevada also has a corresponding excise tax, known as use tax, “on the storage, use or other consumption” of tangible personal property in Nevada.⁶ The use tax, in effect, guarantees that any nonexempt retail sales of personal property that have escaped sales tax liability is taxed when the property is utilized in the state.⁷

³ The district court relied on *State Tax Comm’n v. Nevada Cement Co.*, 117 Nev. 960, 960-70, 36 P.3d 418, 418-24 (2001), as its basis for rejecting the Nugget’s refund claim.

⁴ *Shetakis Dist. V. State, Dep’t. Taxation*, 108 Nev. 901, 907, 839 P.2d 1315, 1319 (1992); *Sierra Pac. Power v. Dept. Taxation*, 96 Nev. 295, 297, 607 P.2d 1147, 1148 (1980).

⁵ NEV. REV. STAT. § 372.105; *see also* NEV. REV. STAT. § 372.050 (defining retail sale as “a sale for any purpose other than resale in the regular course of business of tangible personal property.”)

⁶ NEV. REV. STAT. § 372.185.

⁷ *State, Dep’t. Taxation v. Kelly-Ryan, Inc.*, 110 Nev. 276, 280, 871 P.2d 331, 334 (1994); *see also* NEV. REV. STAT. § 372.345 (noting that use tax on property does not apply if state tax on that property was already collected.)

The Nevada constitution and several statutory provisions provide an exemption to certain retail sales from sales and use taxation. Art. 10, Section 3(A) of the Nevada Constitution – the primary issue in this case – provides broad sales and use tax exemption with respect to “food for human consumption.” It further states that the “legislature shall provide by law for . . . [t]he exemption of food for human consumption from any tax upon sale, storage, use or consumption of tangible personal property.”⁸ Although Section 3(A) does not specifically define “food for human consumption,” it does specify that “[prepared food intended for immediate consumption” and “alcoholic beverages” are excluded from the exemption.⁹ Under Article 10 Section 3(A) and NRS 372.284, therefore, both the sale and “use” of “food for human consumption” are exempt from taxation in Nevada.

The Tax Department relied on Nevada’s use tax, not sales tax, in collecting the taxes at issue here, thereby making the applicability of use tax the primary issue on appeal. The Tax Department argued that despite Nevada’s food exemption, the use tax applied to the complimentary meals given by Nuggets in this case because Nugget’s use of tax-exempted food to prepare the meals altered the food’s tax exempt status and changed it into a taxable “prepared food intended for immediate consumption.” Nuggets argued that the taxes collected in this case was unconstitutional because Nuggets “use” of its tax-exempt food to prepare and give away complimentary meals to employees and patrons did not constitute a taxable event under Nevada’s food exception.

Nevada Use Tax Does Not Apply to Nugget’s Complimentary Patron and Employee Meals

In Nevada, the use tax is imposed on the act of storing, using, or otherwise consuming tangible personal property in Nevada. The use tax is triggered only after that property escapes Nevada sales tax liability and is used within the state.¹⁰

By contrast, the Supreme Court held that in this instance, the Nugget’s initial purchase of unprepared food did not “escape” sales tax liability since Nevada’s constitution exempts these purchases from sales and use taxation. Here, the food at issue was not “prepared food intended for immediate consumption” at the time it was purchased by Nugget. Therefore, the Nugget’s initial purchase was exempt from sales tax. Furthermore, Nugget’s later “use” of that food to prepare complimentary food was not subject to taxation since Nugget’s “use” did not follow an otherwise taxable purchase that had escaped sales tax liability.¹¹

The Supreme Court relied on *Horseshoe Hammond v. Department of State Revenue*¹², where the Indiana Tax Court concluded that complimentary meals were exempt from sales and use tax.¹³ *Horseshoe Hammond* involved a substantially similar fact pattern, where a casino acquired food in a tax-exempt transaction and later prepared and gave away as complimentary meals.¹⁴ The Indiana statute, at the time of the issue, also exempted “sales of food for human

⁸ NEV. CONST. art. 10, § 3(A); In accordance with Article 10, Sec 3(A), the Legislature enacted NEV. REV. STAT. § 372.284.

⁹ NEV. CONST. art. 10, § 3(A)(2)(a) and (b); *see also* NEV. REV. STAT. § 372.284 (2)(a) and (d).

¹⁰ NEV. REV. STAT. § 372.185.

¹¹ *Kelly-Ryan, Inc.*, 110 Nev. at 280, 871 P.2d at 334; *see also* NEV. REV. STAT. § 372.345.

¹² 865 N.E.2d 725 (Ind. T.C. 2007)

¹³ *Id.* (The Supreme Court explains that other states have enacted similar food exemptions, but only the Indiana Court, *Horseshoe Hammond*, formally addressed whether the state’s food exemption extends to complimentary meals.)

¹⁴ *Id.* at 730.

consumption” from sales and use tax.¹⁵ Similar to Nevada’s prepared food exception, Indiana statute also excluded certain food prepared for immediate consumption from the exemption.¹⁶

The *Horseshoe Hammond* court concluded that both the casino’s initial “purchase of unprepared food items, and its subsequent use thereof, [were] exempt from tax” under the general food exemption.¹⁷ The court noted that the way in which casino later used the food items was “irrelevant” for the purpose of applying use tax.¹⁸

The Nevada Supreme Court followed *Horseshoe Hammond* and concluded that the Nugget’s complimentary meals are use tax exempt since the way Nugget uses its tax exempt “food for human consumption” is irrelevant for purposed of applying the use tax. In addition, the Nugget merely purchased tax-exempt “food for human consumption,” and that food maintained its tax-exempt status until it was prepared and sold. Once the food is sold, the Nevada sales tax will apply on the purchased of the “prepared food intended for immediate consumption.” The Supreme Court further stated that at “no point in this chain of transaction” was the Nugget itself a purchaser of “prepared food intended for immediate consumption.” Additionally, nothing in the constitution’s language suggest that Article 10, Section 3(A)’s mandate stopped applying when Nugget prepared and distributed its tax-exempt food as complimentary meals. The Supreme Court found that no taxable event occurred in this case.

Moreover, the Nevada Supreme Court also found the constitution’s language to be plain and clear. The constitution broadly exempts *all* food for human consumption unless the food is “prepared food intended for immediate consumption.” The Court further stated that it was not for them to decide whether the exemption was the best approach; they were bound to follow the constitution’s plain language.

Given the unambiguous language of the constitution to maintain the tax-exempt status of “food for human consumption,” the Supreme Court concluded that Nevada’s food exemption applies to the Nugget’s use of the food to prepare and serve complimentary patron and employee meals.

Dissent

Justice Douglas dissented and stated that the majority failed to accurately assess the meaning of Nevada Constitution, NRS 372.284 and NRS 374.289, ignored the need to strictly construe its meaning and concluded that the majority created a loophole within the Nevada’s tax law that is contrary to the plain language of the Nevada Constitution.

Conclusion

The Supreme Court held that no taxable event occurred when Nuggets gave complimentary meals to its patrons and employees. Nuggets, therefore, is owed refund for the use tax it paid for the complimentary meals and the district court’s summary judgment denying the refund claim is reversed. The matter is remanded to the district court for further proceedings with respect to Nugget’s refund claim.

¹⁵ *Id.* at 730-31.

¹⁶ *Id.* at 731; *see also* Ind. Code § 6-2.5-5-20(c)(8) (excluding “food furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant” from the state’s food exemption.). *Id.*

¹⁷ *Id.* at 732.

¹⁸ *Id.*