Tax Humor

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SALES TAX ON FOOD DEPENDS ON WHO EATS IT: NEW CALIFORNIA CUISINE?

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We tax lawyers are universally labeled as dry and humorless. Our work is universally labeled as dry and technical. Is our alleged temperament attributable to our chosen work, or is the nature of our work attributable to our supposed temperament? Most observers probably do not care.

Only rarely do tax lawyers have the opportunity to make an argument rivaling the O.J. case for crowd appeal. Such an opportunity came for me in a recent case before the California State Board of Equalization challenging sales taxes assessed against several wholesale produce companies. In California, as in many states, the sales tax is not collected on food. Lines are drawn between what is food and what is not. Pet food, for example, is taxable. Feed for livestock is not taxable.

Out of such line drawing arose a 1943 statute, California Revenue and Taxation Code 6358, stating that feed sold for consumption by animals that in turn are ordinarily suitable for human consumption is not taxable. A 1947 regulation, State Board of Equalization Regulation 1587, interpreted the statute. What little authority there was suggested that the animals do not ultimately have to be eaten by humans for the tax exemption on the feed to apply. For their feed to be exempt from sales tax, the animals must merely be "ordinarily suitable" for human consumption.

Is the Law an Ass?

How could such a point of law be as interesting and exciting (to a tax lawyer, anyway) as the O.J. case? The answer came in the state's zealous enforcement of the sales tax. Enter two wholesale produce companies that sell only USDA first quality fruits and vegetables and only at wholesale. Such entities are not required to hold seller's permits. If you don't hold a seller's permit and make taxable sales, the state can go back eight years rather than the usual three, thus making whopping assessments.

Among the entities to which these produce companies sold their wholesale fruits and vegetables was the city and county of San Francisco. The city operated hospitals, juvenile halls, and other places where the produce sellers' fruits and vegetables were consumed. But, here's the rub. The city also operated the San Francisco Zoo.

Over a period of years, lettuce, broccoli, bananas, carrots, etc., were delivered not only to the hospitals and other facilities operated by the city, but also to the zoo. The zoo animals ate the food. The zoo animals were not ordinarily suitable for human consumption, said the audit staff. Therefore, whopping sales taxes were payable. The produce sellers asked the city to foot the bill, but to no avail. So the produce sellers fought the tax, eventually landing before the full State Board of Equalization.

Most federal tax lawyers know that legislative history, the Joint Committee Blue Book, and a variety of other resources would doubtless yield some interpretive authority about just what the words in the statute mean. State tax legislative history is typically not so replete. The question here was what animals are ordinarily suitable for human consumption.

Viewed with a 1990s ethnic and cultural makeup in as diverse a state as California, who can say what is suitable for human consumption, let alone ordinarily so? Here's where the case had its appeal. To begin with, the zoo had the usual petting zoo complement of sheep, goats, chickens and pigs, whose "suitable" status was beyond question.

The zoo also kept a variety of deer and antelope species that happened to appear on the menus of some of the

finer restaurants in California. Several specialty meat companies in California, of which we introduced price lists into evidence, today sell all manner of exotic meats. Horses are eaten in France. Monkeys and other primates are eaten over much of Africa. Dogs are consumed in many cultures. Snake is a delicacy to many. Bison are harvested commercially (even by Ted Turner). Statistics showed a majority of minorities in the state (another neat oxymoron), so cultural menu items seem today to deserve particular respect.

There was also the argument of discriminatory enforcement. Evidence presented established that supermarkets would not charge sales tax on fruits and vegetables even if the checkout clerk was told that the food would be eaten by a pet. My Scottish terrier eats broccoli, yet I could not convince stores to charge me [P. 114] tax on it. One member of the Board of Equalization used the example of purchasing a fillet for Fido. Yet no tax is ever payable on these items.

Duck Soup

While this may not exactly rise to the level of the Mark Fuhrman tapes, it did get pretty amusing. Probably the highlight for me came when one of the government lawyers (who was arguing the tax was proper) alluded to roadkill rattlesnake as something that no one in his right mind would eat. One of the board members barked back, "You picked the wrong example, Counselor. I'm from Texas, and we eat rattlesnake."

Ultimately, in light of the diverse cultural makeup of California, the substantial evidence of many different food items, and doubtless too the hardship that was being visited upon these produce companies, the Board of Equalization ruled hands down (paws down?) that the tax would not be assessed on these sellers. It was a rare taxpayer victory. One board member quipped, "Is this a new definition for California cuisine?" Alas, if it is , it will be an unpublished one, as the board in its 3-2 decision did rule that this decision was best left out of the published cases.

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