STATE OF VERMONT

SUPERIOR COURT **CIVIL DIVISION**
Washington Unit **Docket No. 32-1-16 Wncv**

EUROWEST CINEMAS, LLC
Taxpayer–Appellant

v.

VERMONT DEPARTMENT OF TAXES
Appellee

DECISION ON APPEAL

Taxpayer Eurowest Cinemas, LLC, operator of a movie theater, Essex Cinemas in Essex Junction, Vermont, appeals from an assessment of rooms and meals tax by the Vermont Department of Taxes following an audit. Before the Commissioner, the parties stipulated to the facts and there is no dispute about the findings on appeal. The Commissioner interpreted the relevant statutory expression—"taxable meal"—to encompass concession stand sales of prepackaged candy and bottled water to theater patrons and assessed previously uncollected rooms and meals tax accordingly. The sole legal issue on appeal is whether the Commissioner's interpretation of the statute is correct.

The parties agree on the following facts. Eurowest operates a large movie theater. Among the items it sells from its concession stand to moviegoers are prepackaged candy and bottles of water. Those are the only items and sales at issue in this case. The only controversy is whether those sales are subject to the rooms and meals tax.

Standard

The court reviews this case "on the basis of the record established before the Commissioner." *Piche v. Dep't of Taxes*, 152 Vt. 229, 233 (1989) (citing *State Dep't of Taxes v. Tri-State Indus. Laundries, Inc.*, 138 Vt. 292, 294 (1980)). The Commissioner's decision is presumed "correct, valid and reasonable, absent a clear and convincing showing to the contrary." *Tri-State Indus. Laundries*, 138 Vt. at 294.

"In construing a taxing statute, like all statutes, our primary goal is to implement the intent and purpose of the Legislature. If a statute's meaning is plain on its face, we enforce it according to its terms." *Ran-Mar, Inc. v. Town of Berlin*, 2006 VT 117, ¶ 5, 181 Vt. 26 (citation omitted). "[I]n construing tax exemptions, the burden is on the person claiming the benefit of the exemption and the exemption statute must be strictly construed against that person." *Our Lady of Ephesus House v. Town of Jamaica*, 2005 VT 16, ¶ 14, 178 Vt. 35. "Any remaining ambiguities are resolved against the taxing power and in favor of the taxpayer." *Ran-Mar*, 2006 VT 117, ¶ 5.

Analysis

The dispute between the parties can be boiled down easily. Vermont's rooms and meals tax applies to "the sale of each *taxable meal*." 32 V.S.A. § 9241(b) (emphasis added).[1] A "taxable meal," in relevant part, means: "Any food or beverage furnished within the State by a *restaurant* for which a charge is made, including admission and minimum charges, whether furnished for consumption on or off the premises." *Id.* § 9202(10)(A) (emphasis added). A "restaurant," in relevant part, means, "[a]n establishment from which food or beverage *of the type for immediate consumption* is sold or for which a charge is made, including a cafe, cafeteria, dining room, diner, lunch counter, snack bar, private or social club, bar, tavern, street vendor, or person engaged in the business of catering. *Id.* § 9202(15)(A) (emphasis added).

In the Department's view, the theater's concession stand is selling food and beverages—the candy and bottled water at issue in this case—"for immediate consumption." These sales are not exempt from the tax and thus the concession stand is a "restaurant" and these sales are subject to the tax. In Eurowest's view, § 9202(15)(A) limits "restaurant" to those establishments that people patronize for the primary purpose of the immediate consumption of food. It argues that the list of examples in the subsection makes this clear. The primary purpose of going to the movie theater is to watch the movie, not to dine, it argues. Therefore, concludes Eurowest, these sales are not subject to the tax.

The court concludes that the plain meaning of these statutes is clear in this context and the tax extends to the sales at issue. Though the larger statutory context and the applicable regulations are confusing, nothing in those provisions renders these provisions ambiguous as applied in this case or otherwise supports a different outcome here.

The prepackaged candy and bottled water sold at Eurowest's concession stand are for immediate consumption. This makes the concession stand a § 9202(15)(A) restaurant and subjects all of its food and beverage sales to the rooms and meals tax. Nothing about the term "establishment" or the statutory list of examples of restaurants suggests any different outcome.

In common usage, "establishment" merely means "place of business." Black's Law Dictionary 566 (7th ed. 1999); Merriam-Webster Online Dictionary, available at https://www.merriam-webster.com/dictionary/establishment (last visited Dec. 16, 2016). Nothing about the word limits its meaning to the *primary* business conducted at that place of business.

The same is so regarding the statutory list of examples. The exemplars are not all necessarily places, or parts of places, that patrons would visit for the primary purpose of dining. For example, one may go to a sporting event and visit the "snack bar," shop at a bookstore and get coffee at its internal "cafe," or attend an institution and eat at its "cafeteria." The statutory list of examples simply does not demonstrate that the term "restaurant" is intended to describe only places where the patron's primary reason for visiting was to dine. It is broader than that—it

[1] The sales tax generally does not apply to retail sales "meals" or "food." For sales tax purposes, "meals" refers to those "meals" subject to the rooms and meals tax. 32 V.S.A. § 9741(10). "Food" refers to food "sold for human consumption off the premises where sold." *Id.* § 9741(13).

attempts to describe discrete places that serve food and beverages "of the type for immediate consumption."

The statutory scheme is confusing as the scope of "taxable meal" expands and contracts variously based on the qualities of the food and beverage at issue, how it is served or expected to be consumed, and by whom. All food and beverage sales, subject to exceptions not at issue in this case, by a restaurant are subject the rooms and meals tax even if only some of that food and beverage is of the type for immediate consumption. Taken to its logical extreme, a restaurant would include *any* place that sells *any* food for immediate consumption. However, the correct legal interpretation of a statute does not need to extend to the extremes of logic, and the statutory list of examples shows that "restaurant," while not intended to apply only to businesses with an exclusive or primary intention of selling food for immediate consumption, is intended to extend to sales locations exhibiting some principal purpose of selling food for immediate consumption, such as the concession stand at issue in this case.

This is consistent with the Department's regulations, which state: "A restaurant is 'an establishment from which food or beverage of the type for immediate consumption is sold or for which a charge is made.' The term includes eating establishments whether stationary or mobile, temporary or permanent."[2] Reg. § 1.9202(15)-1(A) (citation omitted); see also Reg. § 1.9202(15)-2 ("The term 'restaurant' is broadly defined.").

Regulation § 1.9202(15)-2 explains the Department's 80% rule, which is not at issue in this case. See 32 V.S.A. § 9202(15)(B). As the statute states, and as the regulations explain, the 80% rule helps determine taxability when one place of business carries on both taxable (meals) and nontaxable (food, such as ordinary groceries) sales. It can have the effect of making certain items subject to the rooms and meals tax even though the place of business as a whole is not a restaurant. The rule is not used to compare sales attributable to meals with sales attributable to nonfood items or services. In other words, it does not reflect any intention to treat a place of business with multiple uses only according to its primary use.

ORDER

For the foregoing reasons, the Determination of the Commissioner is *affirmed*.

Dated at Montpelier, Vermont this 21st day of December 2016.

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Mary Miles Teachout
Superior Judge

[2] The court finds the State's focus on *Eurowest Cinemas, LLC v. Vermont Dep't of Taxes*, 2009 VT 2, 185 Vt. 599, unhelpful. The dispute in that case was limited to a specific regulatory provision that no longer exists.