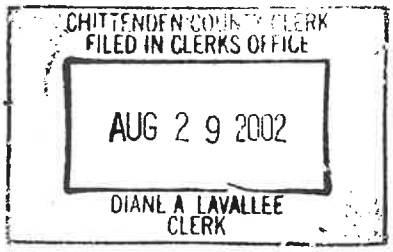
STATE OF VERMONT
CHITTENDEN COUNTY, SS.



FLETCHER ALLEN HEALTH CARE, INC., }
}
v. }
}
VERMONT DEPARTMENT OF TAXES }

CHITTENDEN SUPERIOR COURT

Docket No. S984-01 CnC

OPINION and ORDER

This is an appeal from a decision of the Commissioner of Taxes dated July 13, 2001 denying Appellant's request for a refund and ruling that certain meals sold by Appellant at one of its facilities are not exempt from the Vermont meals tax. Kevin Moriarity, Esq., of Downs Rachlin and Martin PLLC represents the Appellant Fletcher Allen Health Care, Inc. (hereinafter "FAHC"). Judith Henkin, Esq., Special Assistant Attorney General, represents the Vermont Department of Taxes (hereinafter "Department"). The court has reviewed the record of the proceedings before the Commissioner and the briefs filed by both attorneys, and heard oral argument on May 17, 2002.

Certain facts were established by stipulation of the parties at the hearing before the Department, and other facts were found by the hearing officer based on the testimony of witnesses. FAHC is a non-profit charitable organization that provides healthcare services to northwestern Vermont and adjacent communities. It operates facilities at various locations including at a facility it leases in Burlington known as the University Health Center Campus (the "UHC Campus"). It maintains a cafeteria on the UHC Campus in which snacks, meals, and beverages are sold to employees, patients, visitors, family members, and the general public. It is operated for the convenience of those persons whose ability to leave the UHC Campus may be limited. The meals are furnished on the premises of FAHC in furtherance of its charitable purposes, and meal prices are low.

From January 1995 to December 23, 1999, FAHC contracted with a separate business, Eurest Dining Services, to prepare and serve meals at the UHC Campus cafeteria. Under the contract, which was in effect throughout the period at issue in this appeal, Eurest had exclusive rights to operate the UHC Campus cafeteria. Responsibilities were allocated between FAHC and Eurest by the terms of the contract. Eurest paid all costs of business. Eurest received from FAHC reimbursement for its costs of business, a fixed management fee, and a percentage for administrative expenses. Eurest kept the cafeteria adequately serviced and supplied, hired its own employees, and was responsible for paying all federal, state, and local taxes. All costs for

taxes, licenses, and permits were paid by Eurest and treated as a cost of business for which it was reimbursed under the contract terms.

Eurest charged and collected meals tax from cafeteria patrons and remitted payments to the Department under a Vermont taxpayer account in its own name. Prices of many core items sold at the UHC Campus were set so that even with the meals tax included, the overall cost to the patron was the same as if the same items had been purchased at one of the other FAHC cafeterias, which FAHC operated itself. From September 30, 1997 through 1999, the cafeteria operated at a net loss, which was borne by FAHC. The contract ended on December 23, 1999 and FAHC subsequently began operating the cafeteria itself.

The period involved in this appeal is from September 1996 through December 1999. On October 6, 1999, FAHC requested a ruling from the Department that the meals served at all three of its cafeterias, including the one at the UHC Campus, were exempt from the meals tax, and also requested a refund of over $72,000 in meals taxes paid by Eurest beginning in September 1996. On November 9, 1999, the Department denied the request for a refund on the grounds that FAHC had no standing to request a refund on behalf of Eurest because the tax had been collected from customers and remitted to the Department by Eurest as the operator of the facility. On December 6, 1999, the Department issued a ruling that the meals served at the UHC Campus cafeteria were not exempt from the meals tax, whereas the meals served at FAHC's other two cafeterias, which were operated directly by FAHC and not by Eurest or another contractor, were exempt from the meals tax. FAHC appealed the two rulings, and the appeals were consolidated. A hearing was held on September 20, 2000, and the Department hearing officer issued a ruling on July 13, 2001 which was approved by the Commissioner on the same day. This appeal ensued, in which FAHC appeals the denial of a refund. It seeks a refund of $72,793.44 plus interest.

Standard of Review

This is an appeal from a decision of the Commissioner of the Department of Taxes pursuant to 32 V.S.A. § 9817, governed by V.R.C.P. 74 ("Appeals from Decisions of Governmental Agencies"). As such, this court does not make de novo findings of fact and conclusions of law, but reviews of the record of the administrative proceeding below.

Findings of Fact. The findings of the Commissioner will not be set aside unless they are clearly erroneous. See *Morton Bldgs., Inc. v. Vermont Dep't of Taxes*, 167 Vt. 371, 374 (1997). In this case, many facts were established by stipulation of the parties. Clearly those will not be disturbed on appeal. The hearing officer also made additional findings of fact based on the testimony at the hearing, and these were adopted by the Commissioner. These facts are amply supported by evidence in the record below, and there is no basis to disturb them. Appellant FAHC argues that the hearing officer and Commissioner failed to make additional findings of fact requested by Appellant. The court has reviewed these. While also supported by the evidence, they are not necessary to the analysis called for by the issues of the case, and therefore it was not error to fail to make those findings of fact.

Conclusions of Law. The court grants deference to the expertise and informed judgment of the Commissioner with respect to the subject matter of the Department. An administrative agency's interpretation of a statute it is responsible for executing will be upheld "absent compelling indication of error" in the interpretation. *Burlington Elec. Dep't v. Vermont Dep't of Taxes*, 154 Vt. 332, 337 (1990). *See also Tarrant v. Vermont Tax Dep't*, 169 Vt.189, 195 (1999).

Discussion

FAHC urges the court to conclude that it qualifies as an "operator" under the statute authorizing refunds to be paid to operators, because Eurest was acting only as its agent when it collected the tax, and that FAHC effectively paid the tax itself and the court should apply an equitable analysis and conclude that FAHC is entitled to a refund.

The Department argues that there is no basis for a refund at all since FAHC does not qualify as an operator who collected taxes and is therefor not entitled to seek a refund, and that there was no overcollection of taxes because Eurest actually collected meals taxes from customers who purchased meals and beverages at the UHC Campus cafeteria based on stated meal prices and remitted them to the Department.

FAHC has not shown that the Department and Commissioner erred in its application of the law to the facts presented by this case. FAHC essentially asks the court to rewrite the contract that it had with Eurest, retroactively, to include terms that it would have used if it had realized that it could structure the contract to qualify for an exemption of the meals tax. The court cannot change the terms of the contract that FAHC and Eurest established at the time, and those facts support the Commissioner's decision. The controlling facts are found in the contract itself, as described more fully below.

The refund statute upon which FAHC relies is in 32 V.S.A. §9245:

> Upon application by an operator, if the commissioner determines that any tax, interest or penalty has been paid more than once, or has been erroneously or illegally collected or computed, the same shall be credited by the commissioner on any taxes then due from the operator under this chapter, and the balance shall be refunded to the operator. . .with interest at the rate per annum established from time to time by the commissioner pursuant to section 3108 of this title.

The first question is whether FAHC can qualify under the refund statute as an "operator." The term "operator" is defined in 32 V.S.A. §9202(4) as "any person, or his agent, charging for a taxable meal." It further provides that if an operator "is a corporation or other entity, the term 'operator' shall include any officer or agent of such corporation or other entity who, as an officer or agent of the corporation, is under a duty to pay the gross receipts tax to the commissioner as required by this chapter."

In 1995, FAHC had the opportunity to make an agreement with Eurest under which FAHC would retain the obligations making it an "operator" under the statute, and Eurest would act only as its agent. This could have been done, but that is not what the parties did. Instead, FAHC agreed to a contract in which Eurest, and not itself, had full independent responsibility to the Department for all operations, including tax liability, on its own behalf and not simply as an agent acting for FAHC as principal. FAHC argues that Eurest was acting only as FAHC's agent becuase FAHC had the right to exercise pervasive and regular control over operations at the UHC Campus. The terms of contract do not support that argument.

Under the contract, there was an allocation of rights and responsibilities between the parties. While FAHC retained a certain amount of control, its ability to control was defined and limited. Furthermore, Eurest had exclusive responsibility for the majority of cafeteria operations. Thus Eurest, in collecting and remitting taxes, was not acting in the name of FAHC, but was acting for itself. It had the primary responsibility for all tax liabilities and payments. While it also had the contractual right to seek reimbursement for taxes as an operating expense, it could not pass tax liability through directly to FAHC, but rather had to assume the obligation to pay the taxes and subsequently collect them from FAHC as a business cost. Under the circumstances of the contract the parties signed, it was Eurest and not FAHC that actually was the operator, even though either of them perhaps could have been made to qualify as an "operator" depending on how they chose to allocate responsibilities between them. They probably could have set the contract up so that FAHC was the operator, but they did not.

Furthermore, since only Eurest remitted taxes to the Department, and did so in its own name and not in the name of FAHC as its principal, it is only Eurest that is an operator entitled to pursue a refund under 32 V.S.A. §9245. The taxpayer account number at the Vermont Department of Taxes was only in the name of Eurest, and not in the name of Eurest as agent for FAHC, or in the name of FAHC. Eurest has not participated with FAHC in seeking a refund.

Even if it did, there is no evidence that the amount of tax charged to patrons, collected, and remitted to the department was an overcollection in relation to the prices for meals paid by the patrons. As far as UHC Campus patrons knew at the time, they were charged a tax when they purchased meals. FAHC seeks to have the court convert the taxes paid by patrons into a cost increase paid by FAHC, to be paid back to FAHC by the Department of Taxes, with interest. Since Eurest collected the meals taxes from patrons and remitted them to the Department, whether as agent or independent contractor, they were required to be paid to the commissioner under 32 V.S.A. §9242(c), and there is no statutory basis on which FAHC can now claim a right to a refund for purposes of keeping the money.

Since FAHC does not qualify to seek a refund under 32 V.S.A. §9245, its argument that it could have treated Eurest as its agent is to no avail. FAHC relies on the analysis in *Moore v. Chesapeake and Ohio Railway Co,* 493 F. Supp. 1252 (S.D.W.Va. 1980), *aff'd*, 649 F. 2d 1004 (4th Cir. 1981). The issue in that case was whether the food service provider was the agent or independent contractor of the railroad for purposes of personal injury liability to an injured

patron. The purpose of the analysis is unrelated to the issue presented in this case, which turns on a contract under which Eurest was required to, and did, sign up with the tax department as the operator of the cafeteria and the entity responsible for collecting and remitting meals taxes, and on a specific statute defining eligibility for refunds.

FAHC argues that it effectively bore the cost of the tax that it was otherwise exempt from paying, since meal and beverage prices were reduced for the customers at the UHC Campus in an amount so that the prices customers paid were as low as the prices in the other cafeterias. It argues that to the extent that a portion of that price represented meals tax, FAHC as a non-profit organization should not have to bear that additional cost and should be able to claim it in the form of a refund. This occurred, however, not because there was an overcollection of tax, but as the consequence of the business structure that FAHC selected and embodied in its contract with Eurest. It could have operated the UHC Campus directly (as it did with the other cafeterias) or under a contract that reserved for itself more responsibility and established an agency relationship with Eurest, but it did not do so. Having chosen for whatever reason not to do so, it cannot now ask the court to rewrite for it a contract that with hindsight it would prefer to have signed. FAHC agreed to a business structure under which only Eurest had tax liability and could pass it along to FAHC only in the form of a business cost. It cannot ask the court to change its contract retroactively.

For the court to do so would have the effect of telling the commissioner of the Department of Taxes that she is required, when someone seeks a refund of taxes, to look behind the contract and business structure used by the parties to another one that might have been used, and apply an equitable analysis to change the structure to one more favorable to the entity seeking a refund. The court will not require the commissioner to do this. This would increase the costs and complications of the department's work, thereby increasing the costs of operating the department. It is not the taxpayers who should bear the cost consequences of the choice of contractual structure selected by FAHC when it made its agreement with Eurest, or other similarly situated entities in the future.

FAHC seeks a refund on equitable grounds so that the portion of its revenues from the UHC cafeteria that Eurest paid in meals taxes, plus interest, can be used for its charitable purposes rather than for public tax purposes, but the overall effect of a ruling permitting the type of equitable analysis it seeks would be to require the government to pay to FAHC, with interest, taxes properly collected at the time. Such a practice would not be equitable to other taxpayers and would promote a practice that would increase the cost of state government. The situation was avoidable by FAHC through administrative planning, as it could have operated the UHC Campus cafeteria itself, as it did with its other cafeterias, or structured its contract and operations with Eurest differently in order to avoid having its patrons charged with a meals tax which they paid, and which was properly remitted by Eurest to the Department of Taxes.

The court concludes that FAHC is not qualified under its contract with Eurest to seek a refund, with interest, of those taxes.

Because the foregoing analysis is dispositive of the appeal, it is unnecessary for the court to address Appellant's argument that the tax was collected in error because the net proceeds from the sale of meals were to be used exclusively for the charitable purposes of the organization.

ORDER

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

Dated this 7th of August, 2002.

Mary Miles Teachout

Hon. Mary Miles Teachout
Superior Judge, presiding