

1 THE NEVADA TAX COMMISSION

2
3 In re:

4 BOYD GAMING CORPORATION GROUP,)

5)
6 Taxpayer.)

Use Tax Refund Requests/
Sales Tax Deficiencies on
Complimentary Meals

7
8 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION**

9
10 **PROCEDURAL BACKGROUND**

11 Beginning in January 2004, the following casinos, which are part of the Boyd Gaming
12 Corporation or are subsidiaries thereof, filed requests for the refund of use taxes paid to the
13 Department: Barbary Coast, California Hotel & Casino, Eldorado, Inc., Fremont Hotel & Casino,
14 Gold Coast Hotel & Casino, Joker's Wild, Main Street Station, Orleans Hotel & Casino, Sam's
15 Town Hotel & Casino, Stardust Hotel & Casino, Suncoast Hotel & Casino, South Coast Hotel &
16 Casino. Cumulatively, the properties filed eighty (80) refund claims. The use taxes in question
17 were paid to the Department during the period January 1, 2000 through June 30, 2008. The
18 use taxes were remitted on food purchased for use in complimentary meals served to patrons
19 and meals served to employees.

20 The Department held the Taxpayers' refund requests in abeyance while the Nevada
21 Supreme Court considered a similar issue in Sparks Nugget, Inc. v. State of Nevada ex rel.
22 Dept. of Taxation, 179 P.3d 570 (2008). Following the Court's decision in March 2008, the
23 Department denied the Taxpayers' requests for refund and, on January 29, 2010, issued
24 Deficiency Notices to the Taxpayers for sales tax on the prepared meals served to employees
25 and as complimentary meals to patrons.

26 Boyd Gaming Corporation Group ("Taxpayers") filed Petitions for Redetermination
27 ("Petitions") contesting 1) the Department of Taxation's ("Department's") denials of Taxpayers'
28 use tax refund requests and 2) the Department's sales tax Deficiency Notices dated January 29,

1 2010. Taxpayers maintained that they were due a refund of the use taxes paid pursuant to the
2 Sparks Nugget decision. Further, they argued that the sales tax deficiencies could not stand
3 because: 1) the transactions in question did not meet the definition of taxable sale; 2) the sales
4 tax deficiencies were barred by the statute of limitations; 3) the sales tax deficiencies violated
5 Taxpayers' due process rights; and 4) the Department was estopped from assessing sales tax
6 on the transactions because the Department advised the Taxpayers that use tax, rather than
7 sales tax, was due on the transactions.

8 This matter was originally heard by the Department's Administrative Law Judge on
9 September 9, 2010. The parties submitted Pre-hearing statements, a Joint Production
10 consisting of 1995 pages, and Post-hearing Briefs which were accepted into the record. A
11 decision was rendered by the Administrative Law Judge on April 22, 2011. That decision was
12 appealed by the parties to the Nevada Tax Commission ("NTC"). On August 8, 2011, the NTC
13 remanded the matter back to the Administrative Law Judge, to hold a second hearing, receive
14 any supplemental evidence presented by the parties and reconsider the matter.

15 The supplemental hearing was held on September 26, 2011 in Henderson, Nevada.
16 Additional testimony was provided and an additional exhibit was made part of the record at
17 page 1996. The parties submitted Post-hearing Briefs.

18 Pursuant to that hearing, a decision was entered on November 8, 2011 by the
19 Administrative Law Judge which incorporated and superseded the decision issued on April 22,
20 2011.

21 The Taxpayer appealed that decision to this body and the matter came on for hearing on
22 January 23, 2012.

23 Pursuant to NRS 360.390(2), an appeal to this Commission of an Administrative Law
24 Judge's decision must be based on one of the grounds enumerated in NRS 233B.135(3).
25 NRS 233B.135(3) provides the following grounds for overturning a final decision as follows:

- 26 (a) In violation of constitutional or statutory provisions;
27 (b) In excess of the statutory authority of the agency;
28 (c) Made upon unlawful procedure;
(d) Affected by other error of law;

- 1 (e) Clearly erroneous in view of the reliable, probative and
2 substantial evidence on the whole record; or
3 (f) Arbitrary and capricious or characterized by abuse of
4 discretion.

4 In Ranieri v. Catholic Comty. Servs., et al., 111 Nev. 1057, 1061 (1995), the Nevada
5 Supreme Court stated that the inquiry on appeal is whether "the evidence on the whole record
6 supports the appeal's officer's decision." *Id.* The Nevada Supreme Court has defined
7 substantial evidence as "that quantity and quality of evidence which a reasonable man could
8 accept as adequate to support a conclusion." Dubray v. Coer Rochester Inc., et al., 112 Nev.
9 332 (1996) (quoting Maxwell v. State Indus. Ins. Sys., 109 Nev. 327, 331 (1993), citing State,
10 Emp. Sec. Dep't v. Hilton Hotels, 102 Nev. 606, 608 (1986).

11 We do not find that the decision of the Administrative Law Judge is:

- 12 (a) In violation of constitutional or statutory provisions;
13 (b) In excess of the statutory authority of the agency;
14 (c) Made upon unlawful procedure;
15 (d) Affected by other error of law;
16 (e) Clearly erroneous in view of the reliable, probative and
substantial evidence on the whole record; or
17 (f) Arbitrary and capricious or characterized by abuse of
18 discretion.

17 We find that the reliable, probative and substantial evidence on the whole record
18 supports the Administrative Law Judge's decision. Accordingly, we affirm and adopt the
19 Administrative Law Judge's Findings of Fact and Conclusions of Law as follows:

20 FINDINGS OF FACT

21 1. The Procedural History, as set out above, is hereby incorporated into the Findings
22 of Fact.

23 2. During the period in question, Taxpayers offered gambling including slot machines
24 and table games in Clark County, Nevada. Taxpayers also made retail sales of prepared
25 meals and other tangible personal property.

26 3. Taxpayer purchased unprepared food from vendors on which sales tax was not
27 paid. Taxpayer subsequently prepared and served that food in its restaurants and employee
28 dining rooms. Taxpayer collected and remitted sales tax on the meals which were sold in its
restaurants. Taxpayer also accrued and paid use tax on the food which was prepared and

1 then served in the employee dining room or served as complimentary meals to its patrons.

2 The use tax was based on the purchase price of the food used in those meals.

3 **Complimentary Meals for Patrons**

4 4. Taxpayers established exchange systems which they called player's clubs. The
5 player's clubs, named Club Denaro, Club Coast, Player's Gold, and Prime Rewards, were
6 used by various casino properties during the period in question.¹ The programs were
7 systems which exchanged information and gaming from patrons for points in the player's club.
8 The patrons could then exchange the points for rewards, called complimentaries or "comps",
9 from Taxpayers.² The process was much like a currency conversion system and the player's
10 clubs established the rules and the valuation system for trading patrons' information and
11 gaming activity for comps from the Taxpayers. Members of the player's clubs were rewarded
12 by Taxpayers for providing personal information, information about their gaming activity and
13 engaging in certain amounts and types of gaming activity. Over time, these programs evolved
14 and became more specific regarding the valuation of gaming activity.³

15 5. Taxpayers did not charge their patrons for membership in the player's clubs. To
16 establish membership in the player's clubs, the patron provided his or her personal
17 identification information to Taxpayers' employees. The patron then received a player's card
18 which represented the patron's membership in that player's club. The patron agreed to allow
19 Taxpayers to track the patron's gaming activity through the use of the player's card. The
20 patron received the best hotel room rates and reduced prices at the buffet for merely
21 providing the personal information necessary to join the player's clubs.

22 6. Under the player's program, the patrons were required to engage in slot machine
23 gaming in order to earn "reward points" in their player's club accounts. Patrons could get
24 additional points by participating in designated gaming activities at specified times, such as

25 ¹ 'B Connected' is the current name for the player's club, which is used at all of Taxpayers' properties.

26 ² Taxpayers offered patrons various benefits for which rewards points could be exchanged including
cash, merchandise and meals. Only meals are at issue in this matter.

27 ³ Over time, Taxpayers developed mathematical algorithms and amassed information about gaming
28 behavior from many player's club members. Taxpayers used that information to calculate their theoretical win
from each patron. Theoretical win is the amount Taxpayers estimated they would win from a certain amount of
gaming by each patron. Taxpayers used those calculations to determine the valuation for the points and rewards
in the player's club programs.

1 gaming tournaments or promotions at Taxpayers' properties. Occasionally, additional points
2 were awarded as a gesture of good will to compensate a player's club member for an
3 inconvenience. The rewards points could later be exchanged for comps from Taxpayers. In
4 Taxpayers' valuation system, one dollar (\$1) played in a gaming machine equaled one (1)
5 reward point. The reward points awarded for slot machine play were accumulated on a "coin-
6 in" basis, or the amount of money put into the slot machines by the patrons. Patrons could
7 view their total rewards point balance earned from slot machines. Points were transferable
8 from one member of the players' club to another.

9 7. The rewards points could generally be redeemed by a patron at the rate of six
10 hundred (600) points per dollar when patrons used them to purchase complimentary meals.
11 In order to obtain a complimentary meal, a patron would 1) swipe his or her players' club card
12 at the restaurant, or 2) print a voucher for the meal at a self-service kiosk, or 3) obtain a
13 voucher from an authorized employee of Taxpayer. Whatever redemption method the patron
14 used, the point balance in the patron's account would be reduced by the number of points the
15 patron chose to spend on the meal. If the patron elected to use less points than the meal
16 cost, the patron would pay the difference with cash or charge.

17 8. A patron could also earn rewards from Taxpayers by playing table games. Under
18 this aspect of the player's club, the patron was required to show his or her players' club card
19 at the table games and ask Taxpayers' personnel to rate his or her play. To rate the patron's
20 play, the dealer collected information such as the patron's length of play time, speed of play
21 and average bet. That information was later entered into the e-Table computer program
22 owned by Taxpayers which calculated the patron's rating on table games. Then, when a
23 patron asked for a complimentary meal, Taxpayers' employees would review the patron's
24 table games rating and Taxpayers' guidelines for issuing comps in order to determine which
25 rewards could be given to that patron. The patron's rating also increased the patron's status
26 within the player's club by promoting the patron to a higher tier within the player's club. And
27 the higher the patron's tier within the player's club, the greater the benefits available to the
28 patron from Taxpayers. Although the members of the player's club could not see their table

1 games ratings, they could see their tier within the player's club and see changes to the tier.

2 9. In addition to the two ways to earn comps through the player's club discussed
3 above, some select employees of Taxpayers had authority to give "discretionary comps." No
4 points were required to be taken from a patron's account in exchange for the meals if the
5 meals were a discretionary comp. Discretionary comps could be used for new customers, to
6 ensure customer satisfaction, or as a reward for extensive play. There were also
7 administrative comps within the discretionary comps category which were given to vendors or
8 for administrative purposes. Taxpayers' Director of Loyalty Programs believed the
9 discretionary comps accounted for only one percent (1%) of comps awarded by Taxpayers.
10 However, the Vice-President of tax believes that discretionary comps vary from zero to 40%
11 of the comped meals provided to patrons, depending on the property in question.

12 10. The players' club was part of an extensive marketing program. Taxpayers
13 believed the player's clubs encouraged player loyalty. Taxpayers publicized their player's
14 clubs and made their patrons aware that the patrons must gamble at one of Taxpayers'
15 locations in order to earn the rewards in question. The marketing materials explained what
16 the patrons received in return for gaming activity. Taxpayers believed that patrons expected
17 player's clubs in gaming establishments and there was a highly competitive climate with other
18 casinos regarding player's clubs.

19 11. For internal accounting purposes, Taxpayer recorded the retail sales price of the
20 meal as the value of the comped meal. However, Taxpayer accrued and reported use tax to
21 the Department on the cost of the food used in the complimentary meal. If the patron elected
22 to pay for a meal with a combination of points and cash, Taxpayers assessed sales tax on the
23 amount of cash paid by the patron and accrued use tax on the portion paid for with reward
24 points. When a patron elected to use his or her player's points toward a meal at a third-party
25 vendor restaurant, Taxpayers paid sales tax to the third-party vendor when the third-party
26 vendor billed Taxpayers for the meals. The issue of whether sales tax was due on
27 complimentary meals for patrons was litigated in Indiana in Horseshoe Hammond v. Indiana
28 Dep't. of State Revenue, 865 N.E.2d 725 (Ind. T.C. 2007). As a result of the Horseshoe

1 Hammond case, Taxpayers received a refund on the use tax paid on complimentary patron
2 meals to the state of Indiana.

3 12. The evidence on the record indicates that the overwhelming majority of
4 complimentary meals were awarded within the parameters of the player's club or subject to
5 Taxpayers' guidelines for discretionary comps.⁴ Players' program requirements and the
6 internal directives of Taxpayers stated that all rewards points and comped meals, including
7 discretionary comps, were based on gaming activity or "play." Joint Production at 982-1033,
8 2071-2072. Although the term "complimentary" implies that an item was given away, the
9 complimentary meals were not simply given to any patron as a gesture of good will for which
10 Taxpayers expected nothing in return. The complimentary meals were directly in exchange
11 for information and a certain amount of gambling, as tracked within the player's club, the table
12 games rating which was tied to the player's club, or through discretionary comp tracking.
13 Taxpayers kept detailed and accurate records of the patrons in the Player's club, the points
14 redeemed by each patron, the comps awarded and the retail value of each complimentary
15 meal. This extensive system was intended to ensure that Taxpayers did not award
16 complimentary meals when they had not received something of value in return.

17 13. The Department advised Taxpayers in many publications and through audit
18 reports that use tax, as measured by the cost of food to Taxpayers, was the appropriate tax to
19 be paid on the complimentary patron meals. Additionally, the Department's philosophy
20 regarding complimentary meals was recorded in regulation NAC 372.350(3). Based on the
21 Nevada Supreme Court's decision in Sparks Nugget, the Department changed its position
22 and began assessing sales tax on the retail price of the complimentary patron meals.

23 **Meals for Employees**

24 14. Taxpayers provided one meal in their Employee Dining Rooms for each employee
25 during the employee's shift. Employees did not receive meals on days they do not work. The
26 meals were provided to employees for the benefit of Taxpayers. Feeding the employees and

27 ⁴ At the supplemental hearing held in this matter, Taxpayers presented an exhibit separating discretionary comps
28 from comps using points. Joint Production at 1996. That distinction is meaningless for sales tax purposes
because the transactions were all based on the exchanges of meals for gaming. However, it illustrates how
carefully Taxpayers track the information surrounding comps.

1 keeping them on-site reinforced Taxpayers' security and increased the reliability of the
2 employees. Some employees, who were subject to collective bargaining agreements,
3 received the meal as part of their negotiated employment contract and Taxpayers were
4 obligated to pay the employees a minimal amount (\$1.50 - \$1.75) if the meal was not
5 provided.

6 15. Taxpayers reported the employee meals as fringe benefits for the employees on
7 its federal income tax returns. Taxpayers were allowed by the Internal Revenue Service to
8 deduct 100% of the cost of providing those meals.

9 16. Any Finding of Fact hereinafter construed to constitute a Conclusion of Law is
10 hereby adopted as such to the same extent as if originally so denominated.

11 APPLICABLE LAW

12 17. Nevada imposes a sales tax upon retailers for the privilege of selling tangible
13 personal property at retail. NRS 372.105.⁵ A sale at retail is a "... sale for any purpose other
14 than resale in the regular course of business." NRS 372.050. A sale is defined as the
15 transfer of tangible personal property for a consideration. NRS 372.060.

16 18. Consideration is defined as "[s]omething of value (such as an act, a forbearance,
17 or a return promise) received by a promisor from a promisee." BLACK'S LAW DICTIONARY, 7th
18 Ed. (1999). "[C]onsideration in the form of money is not essential to a binding contract. A
19 mere promise is sufficient as consideration if it is the result of a bargained for exchange.
20 Moreover, a benefit to the promisor or a detriment to the promisee is sufficient as
21 consideration." Horseshoe Hammond, 865 N.E.2d at 729. In Nevada, "[t]o constitute
22 consideration, a performance or return promise must be bargained for. A performance or
23 return promise is bargained for if it is sought by the promisor in exchange for his promise and
24 is given by the promisee in exchange for that promise." Pink v. Busch, 100 Nev. 684, 688,
25 691 P.2d 456, 459 (1984), *quoting* Restatement (Second) of Contracts § 71(1), (2) (1982).
26 When evaluating whether consideration has been exchanged, "courts do not generally inquire
27 into the adequacy of consideration" unless an allegation of fraud has been made. Oh v.

28 ⁵ Corresponding provisions of Nevada law enacted in NRS Chapter 374 have the same requirements and
combine to create the total sales and use tax rate.

1 Wilson, 112 Nev. 38, 41, 910 P.2d 276, 279 (1996).

2 19. The sales tax is imposed on the gross receipts from the retail sales of tangible
3 personal property. Gross receipts is defined as the total sales price of the tangible personal
4 property as “valued in money, whether received in money or otherwise.” NRS 372.025(1).
5 Gross receipts do not include cash discounts. NRS 372.025(3)(a).

6 20. The sales tax is customarily collected by the retailer from the purchaser. However,
7 a retailer’s failure to collect the tax from the purchaser does not necessarily extinguish the
8 retailer’s liability for the tax. See NRS 372.105, 372.110, and 372.155.

9 21. In addition to the sales tax, Nevada imposes a use tax upon consumers for the
10 storage, use or other consumption of tangible personal property in Nevada. NRS 372.185.
11 The use tax rate is equivalent to the sales tax rate. NRS 372.185. The use tax is imposed
12 upon the sales price of the property to the purchaser. NRS 372.185. The use tax is
13 complementary to the sales tax and applies to the person’s use or storage of the property
14 unless the person has otherwise paid the sales tax to a Nevada registered vendor.⁶ See NRS
15 372.190. Sales tax and use tax are mutually exclusive taxes, and therefore, only one type of
16 tax may be assessed on a single transaction. See State, Dep’t. Taxation v. Kelly-Ryan, Inc.,
17 110 Nev. 276, 280, 871 P.2d 331, 334 (1994) and NRS 372.345 (use tax does not apply to a
18 transaction if sales tax was already collected on that sale).

19 22. There are various exemptions to the sales and use taxes, including an exemption
20 for food. In 1983, the Nevada Constitution Article 10 Section 3(A) required the legislature to
21 enact a sales and use tax exemption for “food for human consumption.” The Constitution
22 excluded from the exemption “prepared food intended for immediate consumption.” Id. NRS
23 372.284 and 374.289 were amended pursuant to the Constitutional directive. As a result,
24 when food is prepared and then sold, Nevada sales tax is imposed on the purchaser of the
25 “prepared food intended for immediate consumption.” NRS 372.284.

26 23. The Nevada Tax Commission ruled in 1974 that use tax “applies to tangible
27 personal property purchased for resale and given away in the form of complimentary food and

28 ⁶ Use tax is primarily applicable when tangible personal property avoids the imposition of sales tax at a point of purchase outside of Nevada. See Nevada Tax Comm’n v. Nevada Cement Co., 116 Nev. 877, 8 P.3d 147 (2000).

1 beverages as a use of the property other than retention, demonstration, or display while
2 holding it for sale in the regular course of business. The taxable cost of the complimentary
3 food and beverage includes the cost of the food or beverage and other ingredients, including,
4 but not limited to, napkins, straws, and condiments." NAC 372.350(3).

5 24. When calculating the amount of use tax due on meals served to employees by an
6 employer, the Department was required to base the amount of tax due on "the cost of the
7 specific components of those meals if: 1) [t]he meals are furnished on a regular basis on the
8 premises of the employer for the convenience of the employer; and 2) [t]he employer does
9 not charge the employees a specific fixed price per meal. NRS 372.727.

10 25. When the Department finds that a taxpayer has failed to remit sales tax, the
11 Department is required to issue a Deficiency Notice to that taxpayer setting out the amount of
12 sales tax owed by that taxpayer. NRS 360.300. The Department must issue that
13 determination within three years if the taxpayer has filed tax returns and within eight years if
14 the taxpayer has failed to file the requisite returns. NRS 360.355. When a taxpayer files a
15 request for refund, the time requirements of NRS 360.355 are "tolled until the Department
16 makes a determination whether the taxpayer owes any taxes for the period for which the
17 claim for a refund is filed, or issues and personally serves or mails a notice of a deficiency
18 determination to the taxpayer who files the claim for a refund, whichever occurs later." NRS
19 360.357.

20 26. When a "taxpayer has relied to his or her detriment on written advice provided to
21 the taxpayer by an officer, agent or employee of the Department . . . [t]he Department may
22 waive any tax, penalty and interest owed by the taxpayer." NRS 360.294.

23 27. The burden of proof is on the taxpayer to show that it is entitled to a refund of
24 overpaid taxes. See NRS 372.630 through 372.720 and NAC 360.490. The burden is also
25 on the Taxpayer to show that a deficiency determination issued by the Department is
26 incorrect. See NRS 360.360 through 360.365 and NAC 360.130.

27 CONCLUSIONS OF LAW

28 28. When Taxpayers purchased the unprepared food from its vendors, it was a tax

1 exempt purchase. NRS 372.284. When Taxpayer prepared that food and sold it to its
2 customers, Taxpayer engaged in taxable sales of prepared food. NRS 372.105 and 372.284.
3 For many years, the Department instructed Taxpayers that if Taxpayers prepared food for its
4 employees and for complimentary meals for patrons, Taxpayers would be subject to use tax
5 on the food used in those meals. However, the Nevada Supreme Court decided that if
6 Taxpayers prepare the food but give it away, no taxable event has occurred. See Sparks
7 Nugget, 179 P.3d 570. In other words, the taxable event is the retail sale of prepared food
8 rather than the preparation of the food. Consequently, if Taxpayer's complimentary meals for
9 patrons and employee meals are given away to the patrons and employees, no tax is due on
10 those transactions. However, if the complimentary meals for patrons and employee meals
11 are actually retail sales of the prepared food, sales tax is due on the transactions. Sparks
12 Nugget, 179 P.3d at 575.

13 29. The definition of a retail sale in Nevada is broad and simply excludes items sold
14 for resale. NRS 372.050. A retail sale requires consideration. *Id.* However, there are no
15 requirements for the amount or type of consideration specified in the statute. Consideration is
16 merely value received which can be measured and does not depend upon a monetary
17 payment. Consideration is simply an exchange of things of value or which provide a benefit.
18 See NRS 372.025; Horseshoe Hammond, 865 N.E.2d at 729; and Pink v. Busch, 100 Nev. at
19 684.

20 **Complimentary Meals**

21 30. The Taxpayers' benefits in this exchange system were the gaming revenues and
22 the accumulation of information about its patrons. These benefits were recognized and
23 realized through the elaborate player's club program. The information about their patrons
24 was valuable to Taxpayers because the information allowed Taxpayers to track how much
25 they were winning from individual players and to maximize Taxpayers' wins by constantly
26 adjusting the player's program rewards accordingly. Taxpayers also recognized and realized
27 a detriment through this same program: they promised to give up some of their winnings as
28 meals in exchange for the patrons' gaming activity and use of the player's card. The benefits

1 to the patrons were the complimentary meals. The detriment to the players was the
2 requirement to give their personal information to Taxpayers and to wager a sufficient amount
3 of money in Taxpayers' slot machines or table games.

4 31. The patrons knew they had to wager money in a gaming activity and allow that
5 activity to be tracked in order to receive specific rewards under the rules of the player's club.
6 As Taxpayers described it, the players' club took the guess work out of the comp system for
7 the patrons. It was only after gaming activity that the points or the majority of the
8 discretionary comps were awarded. The bargained-for exchange happened when patrons
9 participated in the required gaming activity in order to receive the points or the discretionary
10 comps.⁷ There was clearly value and detriment on both sides of this bargained-for exchange,
11 which establishes legally sufficient consideration. Consequently, the complimentary meals
12 provided to Taxpayers' patrons were sales.

13 32. The court in the Horseshoe Hammond case found that there was no consideration
14 exchanged between the casino and the players because the casino was bargaining for
15 continued customer loyalty and the awarding of comps was purely discretionary. Mr.
16 Schultz's testimony at the supplemental hearing attempted to characterize Taxpayer's players
17 club in this same manner by repeatedly stating that the comps were intended to incentivize
18 future playing. However, Mr. Schultz admitted he did not know what criteria Taxpayers used
19 to administer comps. The current matter differs from Horseshoe Hammond because
20 Taxpayers rewarded past gaming activity within a rigorous exchange system which did not
21 allow their employees discretion with regard to comps. Consequently, the court's conclusion
22 in the Horseshoe Hammond matter is not applicable here.

23 33. The sales of complimentary meals to their patrons were made at retail. Taxpayers
24 were in the business of making sales of prepared food and the meals were not for resale by
25 Taxpayers' patrons. NRS 372.050. Consequently, sales tax was due on the gross receipts
26 from the complimentary meals.

27 _____
28 ⁷ It should be noted, however, that it is not necessary to find a contract in order to conclude that a sale
occurred. A sale happens when consideration has been exchanged for tangible personal property. NRS
372.060.

1 34. Taxpayers argued that their rewards points were actually like coupons or cash
2 discounts. NRS 372.060. Accordingly, Taxpayers argued that the amount that the meals
3 were reduced, even if the cost of the meal was reduced to zero, was not subject to sales tax.
4 Taxpayers also likened the reward points to winning a prize rather than a retail sale.⁸
5 However, those arguments are unpersuasive because Taxpayers' player's club points are not
6 like coupons or cash discounts or prizes. They are the currency component of the elaborate
7 exchange system established by Taxpayers for their player's club. The points earned by the
8 players allow the players to make future demands of the Taxpayers, including complimentary
9 meals.

10 **Employee Meals**

11 35. The Nevada Supreme Court held in the Sparks Nugget case that meals given
12 away to employees were not subject to use tax. The Department maintained that the
13 employee meals served by the Taxpayers qualified as retail sales and were, therefore,
14 subject to sales tax. The Taxpayers argued that the meals were merely one of the many
15 benefits provided to employees rather than individual sales of the meals to the employees.

16 36. The employees' meals were an insignificant part of the employees' compensation
17 packages. Nevertheless, the meals were a result of a bargained-for employment contract,
18 whether under a union contract or otherwise. The exchange involved a meal on the part of
19 the Taxpayers and labor on the part of the employees. Although the IRS may utilize a de
20 minimus standard for federal income tax reporting purposes, that standard is inapplicable to
21 Nevada sales tax analysis and does not change the bargained-for nature of the exchange.⁹
22 This court will not inquire into the adequacy of the consideration provided by either party. Oh
23 v. Wilson, 112 Nev. 38, 41, 910 P.2d 276, 279 (1996). The employee meals were retail sales

25 ⁸ To support their argument that the rewards points were prizes, Taxpayers cite to State of Nevada v.
26 GNLV Corp., 108 Nev. 456, 834 P.2d 411 (1992). The Nevada Supreme Court ruled that awards within a player's
27 club were prizes rather than the result of a legitimate wager for purposes of deducting the loss from gaming
28 revenues. The rules regarding deductions from gaming revenues are inapplicable to the instant proceeding. In
light of Taxpayers' argument that the player's clubs did not create any contractual rights on the part of the
members, it is interesting that Taxpayers have relied on a case which found that the terms of a player's club form
a contract.

⁹ The Nevada Legislature seemed to borrow the Internal Revenue Service's idea of de minimus value
when it enacted NRS 372.727. That statute is moot in light of the Sparks Nugget decision.

1 of the meals to the employees.

2 **Estoppel**

3 37. Taxpayers argued that the Department is equitably estopped from assessing sales
4 tax on the transactions in question because the Department previously advised the Taxpayers
5 to remit use tax on the purchase price of the food used in the transactions in question. The
6 doctrine of equitable estoppel bars one party from taking a position or making a claim or
7 allegation which is inconsistent with previous statements or representations made to another
8 party who has relied to his detriment upon those statements or representations. See BLACKS
9 LAW DICTIONARY, 6th Ed. (1990).

10 38. As a general rule, the doctrine of estoppel has no application to the state or its
11 agencies. See Foley v. Kennedy, 110 Nev. 1295, 885 P.2d 583 (1994). However, the Nevada
12 Supreme Court has recognized that "the modern trend permits the application of equitable
13 estoppel against a government to avoid manifest injustice and hardship to the injured party."
14 Southern Nevada Mem'l Hosp. v. State, Dep't of Human Res., 101 Nev. 387, 390, 705 P.2d
15 139, 141 (1985). NRS 360.294 authorizes an estoppel against the State where "a taxpayer
16 has relied to his detriment on written advice provided to him by an officer, agent or employee
17 of the Department or on an opinion of the Attorney General." In the event that a taxpayer can
18 prove estoppel, then the Department "may waive any tax, penalty or interest owed by the
19 taxpayer." See also NAC 360.702.

20 39. The Department's position that employee meals and complimentary meals for
21 patrons are subject to sales tax is inconsistent with its prior policy that those meals were
22 subject to use tax.¹⁰ However, NRS 360.294 and NAC 360.702 do not provide grounds for
23 refunds, but merely allow the Department to waive tax, penalty and interest which is still
24 outstanding debt, in the interest of equity.

25 40. In this case, Taxpayers were accruing use taxes to be paid to the Department on
26 the employee meals and the complimentary meals for patrons. Taxpayers accrued the use
27

28 ¹⁰ The Department acted on its long-held interpretation that the meals in question were subject to use tax when it issued its guidelines and did not issue guidance contrary to its knowledge and information at the time. Additionally, Taxpayers, rather than challenging those guidelines, followed them until the Sparks Nugget case.

1 tax based on their purchase price of the unprepared food because they were following the
2 guidelines from the Department which had been repeatedly provided to Taxpayers and
3 enforced by the Department through audits. Taxpayers only received notification of the
4 Department's new policy of collecting sales tax years after the taxes in question were due. If
5 Taxpayers had been informed before the taxes were due that the Department was changing
6 its long-standing policy, they would have had an opportunity to accrue or collect an amount
7 measured by the retail price of the food. As such, it would be inequitable and unfair for the
8 Department to now assess an additional amount of tax to the Taxpayers. Consequently, a
9 waiver of the sales tax, penalty and interest which was assessed over and above the use
10 taxes which were remitted by Taxpayers is warranted.¹¹

11 **Statute of Limitations**

12 41. Taxpayer also argued that the sales tax deficiency determinations issued by the
13 Department are barred by the statute of limitations. NRS 360.355 does require that the
14 Department issue deficiency determinations within three (3) years of the date on which the
15 taxes were due.¹² NRS 360.357 tolls that statute of limitations while a refund request is
16 pending. NRS 372.357 was not effective until October 2005. Consequently, there was no
17 tolling statute for twenty-two (22) of the eighty (80) refund requests which were filed prior to
18 that date. As such, the Department is now barred from assessing additional taxes, penalties
19 and interest on the periods represented by those twenty-two (22) refund requests. However,
20 the tolling statute was in place for the remaining fifty-eight (58) refund requests.

21 42. Any Conclusion of Law hereinafter construed to constitute a Finding of Fact is
22 hereby adopted as such to the same extent as if originally so denominated

23 **FINAL DECISION**

24 1. Taxpayer's employee meals and complimentary meals to patrons were retail sales
25 and subject to sales tax.

26 2. The use tax remitted by Taxpayer shall be credited against the sales taxes due.

27 ¹¹ This decision should not be construed in any way to limit the Department's authority to interpret and re-
28 interpret Nevada's tax laws in the future.

¹² The three-year period is applicable in this case because Taxpayers were filing sales and use tax returns and
there is no allegation of fraud on the part of Taxpayers. NRS 360.355.

CERTIFICATE OF SERVICE

1 I HEREBY CERTIFY that on the 14th day of February, 2012, I served the foregoing
2 Findings of Fact, Conclusions of Law and Final Decision by depositing for mailing in the U.S.
3 mail, postage prepaid to:

4
5 Blake A. Doerr
6 Senior Deputy Attorney General
7 Office of the Attorney General
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9 Las Vegas, Nevada 89101
10 Attorneys for Nevada Department of Taxation

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Erin Fierro, Executive Assistant