Cite as Det. No. 93-259, 14 WTD 029 (1994).

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of . . .) FY . . . /Audit No. . . .) D E T E R M I N A T I O N) No. 93-259)) Registration No. . . .

[1] RCW 82.04.050, 82.04.020, AND 82.12.190: SALE AT RETAIL -- LEASE -- INTERVENING USE. A person who purchases or leases an article of tangible personal property for resale or lease in the regular course of business without intervening use need not pay sales or use tax.

[2] RULE 211; RCW 82.04.050 AND 82.04.020: LEASE, RENTAL, OR BAILMENT -- DOMINION AND CONTROL -- CATERERS. In order to find a true lease, rental, or bailment, there must be a change in actual or potential dominion and control over the property. When a caterer supplies linens, tableware, and glassware to its customers as part of its services, there is no change in actual or potential dominion and control over such items.

[3] RULE 211; RCW 82.04.050 and 82.12.020: INTERVENING USE -- DEFERRED SALES OR USE TAX -- CATERERS. When a caterer supplies linens, tableware, and glassware as part of its services, it is using such items in its business and deferred sales or use tax is due. Invoices showing a "rental" of such items only demonstrate a method of calculating the cost of catering a unique event and not a true lease, rental, or bailment of such items.

[4] RULE 119; RCW 82.04.050: PURCHASED FOR RESALE -- DISPOSABLE PRODUCTS -- FLOWERS -- ICE SCULPTURES -- CATERERS. Disposable items, the first use of which renders such articles unfit for further use, purchased by a caterer solely for use by its customers, are considered as having been purchased for resale. Such items include flower arrangements, ice sculptures, and the like ordered by the caterer's customers.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

NATURE OF ACTION:

Caterer protests the assessment of deferred use or sales tax on: 1) plates, glassware, linens, and other items it purchased or rented for rental to its customers; and 2) flowers, ice sculptures, and other arrangements it purchased for resale to its customers.

FACTS:

Mahan, A.L.J. -- The taxpayer is in the business of catering weddings, business meetings, and other events. It provides hors d'oeuvres, buffets, and other meals at a location chosen by the customer, whether it be at a church, a business conference room, or a home. According to the taxpayer, the customer determines nearly every aspect of the catered event. The customer decides in advance on:

> what food is to be served, how much, what rental equipment they want provided and what color, what paper products, what decorations, what flowers, how much service or labor will be provided . . . . These items are separately stated and separately charged for in the invoicing to the customer. Whether the customer rents dishes or buys paper plates is the customer's choice. Whether there are flowers or not is the customer's choice . . . .

The taxpayer further states that the customer can provide tables, linens, tableware, glasses and other durable items for the event. If the customer wishes, the taxpayer will instead rent these items to the customer. If the taxpayer does not own such items, it will either buy the items -- if it determines it will be able to recover the cost through subsequent rentals -- or it will rent them from a rental company. In either event, the taxpayer does not pay retail sales tax. Similarly, when a customer wants flowers, ice sculptures, or other decorations, the taxpayer does not pay retail sales tax when it buys those items.

Invoices provided by the taxpayer show separate line items charges
for labor, rental, decorations, paper products, and food. The customer is charged retail sales tax on the total invoice amount.

The taxpayer was audited for the 1989 through 1992 tax years. An assessment was issued. Under Schedule III of the assessment, the

taxpayer was assessed deferred sales or use tax on capital assets for which no retail sales tax had been paid when the assets were purchased. Under Schedule IV deferred sales or use tax was assessed on the rental of equipment and the purchase of taxable catering supplies. The taxpayer disputes the portion of Schedule III which relates to the purchase of plates and glassware for rental to its customers, but does not dispute the portion of the schedule concerning leasehold improvements and the purchase of kitchen equipment. It disputes all of Schedule IV, which concerns the rental of items to be rented to its customers and the purchase of flowers and other decorative items for resale to its customers.

The taxpayer takes exception to the auditor's conclusion that the taxpayer "uses" the items it rents to its customers and, therefore, must pay sales tax when it purchases or rents such items. It believes its business is distinguishable from a restaurant in that the taxpayer's customers are the ones that decide what, if any, items are required for an event. It believes that the rental portion of its business should be treated the same as a party rental company which purchases such items solely for rental to its customers.

The taxpayer further takes exception with the auditor's conclusion that the taxpayer's purchase of flower arrangements and other decorations is subject to retail sales tax and argues that such purchases are solely for resale. The taxpayer further asserts that the assessments to which it takes exception unfairly result in double taxation because retail sales tax is also charged when it bills its customers.[1]

ISSUES:

1. Whether plates, glassware, linens, and other durable goods purchased or rented by a catering company should be considered to have been used by the catering company in the operation of its business.

2. Whether flower arrangements, ice sculptures and similar decorations are subject to use or deferred sales tax when purchased by a catering company for resale to its customers.

DISCUSSION:

[1] RCW 82.04.050 defines the term "sale at retail" or "retail sale" to include:

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[1]Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

> every sale of tangible personal property . . . other than a sale to a person who (a) purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person, . . .
> (4) The term shall also include the renting or leasing of tangible personal property to consumers.[2]

When retail sales tax has not been paid, RCW 82.12.020 imposes the use tax for:

> the privilege of using within this state as a consumer any article of tangible personal property purchased at retail.

RCW 82.04.190 defines the term "consumer" to include:

> Any person who purchases, acquires, owns, holds, or uses any article of tangible personal property . . . other than for the purpose (a) of resale as tangible personal property in the regular course of business . . . .

In accordance with the above statutes, a person who purchases or leases an article of tangible personal property for resale or lease in the regular course of business without intervening use need not pay sales or use tax. However, no such exemption exists for a purchaser or lessor who uses the item. Use by a lessor/owner of tangible personal property ordinarily subjects the lessor/owner to liability for use tax measured by the full purchase or rental price of the property. ETB 481.12.178; See, e.g., Det. No. 90-397, 10 WTD 341 (1990). Accordingly, the taxpayer here would be entitled to the exemption only if it leased or rented the property to its customers and did not subject the property to any intervening use.

[2] In general, a lease, rental, or bailment of tangible property requires the relinquishment of possession and control over the item by one party and the acceptance of such possession and control by the other party. Duncan Crane v. Department of Rev., 44 Wn. App. 684, 689 (1986); Collins v. Boeing Co., 4 Wn. App. 705, 711 (1971). Whether possession and control has in fact been transferred is a question of fact. As stated in Collins:

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[2]Recently RCW 82.04.050(4) was amended to read:

> The term shall also include the renting or leasing of tangible personal property to consumers and the rental of equipment with an operator.

> Whether there is a change or acceptance of possession depends on whether there is a change or acceptance of actual or potential control in fact over the subject matter . . . . In determining whether control exists, it is relevant to consider the subject matter's amenability to control, steps taken to effect control, the existence of power over the subject matter, the existence of power to exclude others from control, and the intention with which the acts in relation to the subject matter are performed.

More specific to the exception from retail tax for the lease, rental, or bailment of personal property, WAC 458-20-211 (Rule 211), subsection (3), provides:

> A true lease, rental, or bailment of personal property does not arise unless the lessee or bailee, or employees or independent operators hired by the lessee or bailee actually takes possession of the property and exercises dominion and control over it. Where the owner of the equipment or the owner's employees or agents maintain dominion and control over the personal property and actually operate it, the owner has not generally relinquished sufficient control over the property to give rise to a true lease, rental, or bailment of the property.

In considering the taxpayer's actual or potential dominion and control over the property during all phases of its use, coupled with the lack of any evidence that the taxpayer's customers in fact asserted dominion and control over the property once "rented," we cannot find a true lease, rental, or bailment here. To the contrary, the possession and control over linens, tableware, and glassware in this case is similar to the possession and control exercised by a restaurant. As in a restaurant, such items are provided by the taxpayer to the guests, the taxpayer's employees are usually present when the items are used, and the taxpayer's employees clean and remove the items when the event is finished. Although the taxpayer's clients may have more say over the type of service items being used, it does not appear that the actual possession and control over the items once selected is any different from what occurs in a restaurant.

Under WAC 458-20-124 (Rule 124) a restaurant must pay retail sales tax on the purchase of "dishes, kitchen utensils, linens, furniture and fixtures, and the like, . . ." For the reasons stated above, a caterer who buys or rents such items should be treated the same.[3]

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[3]We note that amendments have been proposed for WAC 458-20-119 (Rule 119), which concerns the "Sales of Meals." [Both Rule 119

[3] It further appears that the provision of linens and tableware is part and parcel of a caterer's business. The ability to provide such items allows the taxpayer to perform its services, that is, to prepare and serve meals to its customers and their guests. The plates and other items are thus used by the taxpayer, when necessary, to provide service to its customers. Again, in this sense, the taxpayer's operation is similar to that of a restaurant.

Although characterized as a rental of property in the billing, such itemization appears more in the nature of a method of calculating the cost of putting on a unique event rather than evidence of a true lease, rental, or bailment. As discussed above, we cannot find that the taxpayer's customers actually take possession and control over the items as those terms are commonly understood. Because we do not find a true lease, rental, or bailment, and because we find that the items were used by the taxpayer in the operation of its business, deferred use or sales tax is due.

With respect to the taxpayer's double taxation argument, we note that there is no constitutional prohibition against double taxation as applied to excise taxes. Klickitat County v. Jenner, 15 Wn.2d 373 (1942). The scenario before us, however, is not one of double taxation. This matter involves two transactions, each of which was taxed once. First, there was the rental or purchase of the tableware and linens by the taxpayer. Second, there was the catering of the events by the taxpayer. Each of these events resulted in retail sales, and retail sales tax must be collected on each such transaction. RCW 82.08.020.

[4] With respect to flower arrangements and ice sculptures, the taxpayer states that such items have no use or utility beyond the event being catered. The taxpayer further contends that it does not put such items to personal use and such items are used exclusively by the taxpayer's customers.

Under Rule 119, sales to caterers of "food and beverage products for use in preparing meals are sales for resale . . . ." Similarly, under Rule 124, concerning sales by restaurants, the retail sales tax does not apply to the sale of "paper plates, paper cups, paper napkins, toothpicks, or any other articles which are furnished to customers, the first use of which renders such articles unfit for further use." (Emphasis added.)

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and Rule 124 were amended following the issuance of this determination.]

Like paper plates and other disposable items used exclusively by the taxpayer's customers, flower arrangements and ice sculptures which have been ordered by the caterer's customers are unfit for further use after the first use in the catered event. The auditor's conclusion that such items are taxable as "durable goods" cannot be sustained. Such items are purchased for resale.

DECISION AND DISPOSITION:

The petition is denied in part and granted in part. This matter is remanded to the Audit Division for amendment of Schedule IV, to delete deferred use or sales tax on flower arrangements, ice sculptures, and the like.

DATED this 27th day of September, 1993.