Cite as Det. No. 95-038E, 15 WTD 123 (1996).

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

In the Matter of the Petition for Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 95-038E
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . .

[1] RULE 119; RCW 82.04.070; AND ETB 409.04.080: TIPS -- GRATUITIES -- CATERER. A caterer who agrees with a customer on gratuity amount prior to performing service, and then invoices the customer for that amount must include the amount received in its tax measure.

[2] 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 and also puts it to intervening use, must pay sales or use tax.

[3] 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 dominion and control over the property. When a caterer supplies plates, glasses, silverware, cooking equipment, linens and tents to his customers as part of his services, there is no change in actual or potential dominion and control over such items.

[4] RULE 211; RCW 82.04.050 AND 82.12.020: INTERVENING USE -- DEFERRED SALES OR USE TAX -- CATERERS. When a caterer supplies plates, silverware, glasses, cooking equipment, linens and tents as part of his services, he is using such items in his 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.

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:

A caterer protests assessment of deferred sales/use tax on dishes, glasses, silverware, cooking equipment, linens and tents rented to serve customers. In addition, the caterer protests business and occupation (B&O) tax and retail sales tax on amounts billed as gratuities.[1]

FACTS:

Pree, A.L.J. -- The taxpayer operated a catering business in Washington. The taxpayer allowed customers to select the food that he served. For an additional charge, he rented dishes, glasses, silverware, cooking equipment, linens and tents to his customers which he obtained from a third-party vendor. That vendor did not charge him sales tax.

The taxpayer was audited for the period January 1, 1990 through September 30, 1993. On June 1, 1994, the Audit Division issued a tax assessment assessing the taxpayer tax and interest. Schedule III of that assessment includes unreported amounts invoiced as gratuities upon which the Audit Division assessed retailing business and occupation (B&O) tax and retail sales tax. Schedule V assesses use and/or deferred sales tax on plates, silverware, glasses, cooking equipment, linens and tents which the taxpayer rented and used to cater the meals, but did not pay retail sales tax to the vendor.

The taxpayer protests the tax assessed on those two schedules. First, he contends that the gratuities were voluntary and not subject to tax as a gift. Second, he contends that since he charged his customers retail sales tax on the items rented which he used to cater the meals, the Audit Division is subjecting him to double taxation. In addition the taxpayer argues that the retail sales tax on these items was the responsibility of the vendor who failed to charge him the tax.

Regarding the gratuities, the taxpayer states that these were paid to him for distribution to the employees. The taxpayer discussed the amount of the gratuity with the customer at their first meeting. They agreed on an amount. After the caterering event, the taxpayer separately itemized the agreed gratuity amount on the invoice to the customer. The taxpayer retained a portion of the "gratuity" paid, but did not include the amount

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

designated as a gratuity in the measure of tax reported to the state. If the gratuities were not paid, the taxpayer states that it did not seek to collect it from the customer. Therefore, the taxpayer contends that the gratuities were "freely given."
Regarding the rental items on Schedule V, the taxpayer catered food at the customer's location. Often special items such as plates, glasses, silverware, cooking equipment, linens or tents would be requested by the customer. The taxpayer rented these items from a third-party vendor. The taxpayer provided the vendor a resale certificate and was not charged retail sales tax. The taxpayer charged his customers retail sales tax on the items rented and remitted the tax collected to the state.

The taxpayer doesn't understand why the Audit Division found him liable for deferred sales/use on the rent he paid the vendors. He states that unlike a restaurant that pays retail sales tax when it acquires plates, silverware, tables, etc., he rents these items and separately invoices the customers. Further, the taxpayer contends that it is the responsibility of the vendor to collect the tax from him when he rents from the third party vendors. He reasons that he should not later be responsible for the retail sales tax that those vendors failed to collect from him.

ISSUES:

1. Whether amounts invoiced as gratuities and collected by the taxpayer were subject to retailing B&O and sales taxes.

2. Whether plates, glasses, silverware, cooking equipment, linens and tents rented by a catering company at the customer's request were subject to use/deferred sales tax.

DISCUSSION:

[1] A caterer's tax is measured by its gross proceeds of sales, which is defined under RCW 82.04.070 as:

> "Gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property and/or for services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

Under RCW 82.04.080 gross income means that the value proceeding or accruing by reason of the transaction of the business engaged in. Gross income includes compensation for the rendition of services however designated. Under RCW 82.04.090 the value proceeding or accruing means the consideration actually received or accrued. Whether the amounts received are designated as

"tips" or service charges, if a taxpayer receives compensation for the transaction of business, the receipts are included in the measure of tax.

ETB 409.04.119 (copy attached) discusses service charges added to the price of meals in lieu of voluntary tips. The Department of Revenue ruled that such service charges are subject to both the retail sales and retailing B&O taxes. Both taxes are imposed on the "selling price" of articles sold at retail. The term "selling price" is defined by RCW 82.08.010(1) to mean:

> [T]he consideration, whether money, credits, rights, or other property, expressed in the terms of money paid or delivered by a buyer to a seller, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expenses whatsoever paid or accrued and without any deduction on account of losses.

Thus, "selling price" includes the total consideration "paid or delivered by a buyer to a seller," and includes a service charge as well as any other charge added to the price of meals however designated. Since here the taxpayer was selling meals in its own name, it is immaterial under RCW 82.04.480 that he considers himself an agent.

In Det. No. 87-71, 2 WTD 361 (1987) (copy attached) we found that gratuities paid under circumstances which are not clearly voluntary must be included in the selling price. Charges for gratuities are not voluntary when the amount is agreed upon and the contract document states that they "will be added."

Only in situations where the customer alone determines the amount of the gratuity <u>after</u> the taxpayer provides the service will it be considered voluntary. Amounts negotiated prior to providing the service will be considered consideration for that service.

The taxpayer states the charges were freely given; suggested by the customer yet negotiated into the contract for inclusion on the invoice. Although the tips may be for the staff, the taxpayer retains a portion, estimated by the Audit Division to be 30%. We find under such circumstances that the amounts received were because the taxpayer was engaged in the catering business. The amounts invoiced and received were taxable in full to the taxpayer regardless of their designation and without deduction for the amounts paid to employees.

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

> 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 (copy attached); 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. He would incur use tax if he used the property.

[3] 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 Revenue, 44 Wn. App. 684, 689, 723 P.2d 480 (1986); Collins v. Boeing Co., 4 Wn. App. 705, 711, 483 P.2d 1282 (1971). Whether possession and control has in fact been transferred is a question of fact. As stated in Collins:

> 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. . . .

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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. This change has no affect on this assessment.

> 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, we cannot find a true lease, rental, or bailment here. To the contrary, the possession and control over plates, glasses, silverware, cooking equipment, linens and tents in this case is similar to the possession and control exercised by a cafeteria style 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 remove the food and return 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 significantly 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] For retail sales tax purposes, rental is considered the same as a sale.

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[3]WAC 458-20-119 (Rule 119), concerning the sale of meals, was recently amended, effective December 9, 1993. This change does not affect the assessment.

[4] It further appears that the provision of dishes, glasses, silverware, cooking equipment, linens and tents 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, 130 P.2d 880 (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 plates, glasses, silverware, cooking equipment, linens and tents by the taxpayer from the vendor. 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]

Finally, RCW 82.08.050 clearly provides that the retail sales tax is imposed on the buyer. The seller is only liable in cases where it failed to collect and remit the tax unless it obtained from the buyer a properly executed resale certificate. Here, the taxpayer provided such a certificate to the seller. In any case, under RCW 82.08.050, the Department may proceed directly against the buyer to collect the tax.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 28th day of February, 1995.

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[4] Also note that subsection (3) of RCW 82.08.020 specifically provides: "The taxes imposed under this chapter shall apply to successive retail sales of the same property."