Cite as Det. No. 94-115, 15 WTD 19 (1995).

BEFORE THE INTERPRETATIONS 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. 94-115
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

RULE 119, RULE 136, RULE 224; RCW 82.04.290, RCW 82.08.0293: B&O TAX -- RETAIL SALES TAX -- SERVICE -- DEMONSTRATION -- CATER -- TRUE OBJECT. The classification of receipts from manufacturers to demonstrate their products and provide samples to potential customers is determined by the true object of the transaction. If the true object is a marketing activity, the receipts are taxable under the catch-all "service and other" business and occupation tax classification.

This headnotes is provided as a convenience for the reader and is 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 company that demonstrates products, prepares them as samples and hands them out to shoppers protests the assessment of retail sales tax on its charges to the product manufacturers.[1]

FACTS:

Pree, A.L.J.-- The taxpayer is engaged in the business of demonstrating manufacturers' products in the stores of a particular retailer (hereafter referred to as the retailer). In addition to setting up displays, answering questions, and

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

submitting reports, it prepares and passes out product samples including food.

The taxpayer's records were examined by the Department of Revenue (Department) for the period August 1, 1989 through June 30, 1993, disclosing taxes and interest owing. A tax assessment was issued.

The taxpayer demonstrated manufacturers' products to customers in the retailer's stores. After entering into an agreement with the manufacturer, the taxpayer purchased the food or other products from the retailers at the retail price plus sales tax on nonexempt items. Sales tax was not paid on food items. The taxpayer billed the manufacturer for its cost of the product plus a flat rate for each six hour demonstration. The taxpayer separately stated each charge (flat rate plus the actual merchandise cost) on a single invoice to the manufacturer who was asked to remit the total balance due to the taxpayer's Washington address.

The taxpayer's product demonstrators would enter a particular store and set up a demonstration table in a designated area. On the table, the demonstrators placed product information, any necessary cooking appliances such as a skillet, and supplies such as a napkins. The manufacturers provided signs, pictures, nutritional information, and literature for the taxpayer to distribute.

The product demonstrators prepared the food products by heating them if necessary, and cutting them in "ample" portions large enough for two bites or sips. Their customer greeting included the full product name, its price, and location in the store followed by a nonaggressive sales pitch stressing the product's benefits. They would then pass the samples out to customers.

The demonstrators were responsible for cleaning the equipment and storing it with the leftover supplies and samples. Finally, the demonstrators prepared a report for the manufacturers. The report included information regarding the number of customers served with the conditions (i.e., weather, crowd, etc.). They also noted any customer comments about the product for the manufacturer.

The job description for the taxpayer's demonstrators emphasized communication and sales skills. The taxpayer also required experience working with and preparing food. The demonstrators were each required to have a food and beverage service worker's permit when preparing food samples. See RCW 69.06.010.

The taxpayer reported its gross receipts from the manufacturer (the demonstration fee plus the amount paid to the retailer for

the product) under service and other business activities classification. Prior to notification of the audit, the taxpayer wrote to the Taxpayer Information and Education Division (TI&E) of the Department requesting a ruling regarding the proper measure of tax. While its request did not specify that food was involved in the demonstration, it did state that consumables were given away during the course of the demonstration.

On the last day of the audit period, TI&E section wrote the taxpayer advising it to report the gross amount billed under the selected business service classification. The letter stated that demonstrating constituted public relations and advertising services (marketing).

The Audit Division assessed the taxpayer for uncollected retail sales tax on its gross receipts from the manufacturers reclassifying the receipts from service to retail. The Auditors Detail of Differences and Instructions to the Taxpayer provided in part:

> The preparation of food for others by persons, who are required to have a food handlers license, is a retail sale and subject to retail sales tax. See Washington Administrative Code (WAC) 458-20-244 [Rule 244], attached. The total charge for the food and the server and preparation is subject to the retailing tax. The amount you pay for food dispensed to others is considered a cost of doing business. If the jobbers or the manufacturer provides the food, the charge for preparing the food would be subject to sales tax. On non-food items which do not require a food handlers permit, your income would be reported under the service classification since there would be no sale of any item. You would be performing a service, but only if the items were supplied to you. If you purchased the non-food items, it would still be considered a retail sale.

The auditor likens the taxpayer's activities to that of a caterer under WAC 458-20-119 (Rule 119). Subsection (2)(ii) of Rule 119 provides a special rule for "Caterers:

> Sales of meals and prepared food by caterers are subject to the retailing tax when sold to consumers. "Caterer" means a person who provides, prepares and serves meals for immediate consumption at a location selected by the customer. The tax liability is the same whether the meals are prepared at the customer's site or the caterer's site. The retailing tax also applies when caterers prepare and serve meals using ingredients provided by the customer. Persons providing a food service for others should refer to the subsection below entitled "Food service contractors".

The taxpayer contends that it does not fall within the definition of "caterer" since it only provides bite size samples, not meals. It argues that it was not selling meals, but a service. Regarding the audit instructions, the taxpayer sees no justification for
distinguishing between food and non-food items as a basis for determining whether or not the service classification applies.

The taxpayer contends that it provided manufacturers with a marketing service, taxable under the service classification rather than retailing. The demonstrators were hired primarily for their marketing as opposed to culinary skills. The taxpayer states that the food preparation activities of its demonstrators were de minimis, seldom going beyond reheating products prepared by the manufacturer and cutting or serving them in sample sizes. Their primary activity was demonstrating the products. Therefore, the taxpayer reasons, the receipts should be taxable under the selected business service classification.

Also the taxpayer argues that it is a consumer under RCW 82.12.010(5) which provides in part:

> . . . "Consumer," in addition to the meaning ascribed to it in chapters 82.04 and 82.08 RCW insofar as applicable, shall also mean any person who distributes or displays, or causes to be distributed or displayed, any article of tangible personal property, except newspapers, the primary purpose of which is to promote the sale of products or services.

The taxpayer reasons that it provides manufacturers with the marketing service of promoting the sale of their products. As such it is the consumer of those products, subject to the applicable retail sales tax. As food products, those purchases were exempt. See RCW 82.08.0293.

Finally, the taxpayer points out that the state of California ruled the true object of its services was to provide advertising services for the manufacturers' products. All samples demonstrated, including exempt food products, were found to be consumed as part of the demonstration, and not sold by the taxpayer.[2]

---

[2] This is provided as persuasive authority only. We note that the California Statutes are not identical, but similar. California Sales and Use Tax Section 6007 provides in part:

> A "retail sale" or "Sale at Retail" means a sale for any purpose other than resale in the regular course of business in the form of tangible personal property."

ISSUE:

The issue is, whether the taxpayer is selling a food product as a retail vendor (i.e. as a food caterer) or is providing a demonstration service (marketing). While some of each of these activities are obviously involved, we must determine if one activity controls the classification of all receipts, and if not, determine the taxpayer's predominate activity. The Audit Division agrees that if the taxpayer's receipts are taxable under the retailing classification, the taxpayer is entitled to a credit for any retail sales taxes paid to the retailer upon verification.

DISCUSSION:

RCW 82.08.020 imposes the retail sales tax on retail sales. RCW 82.04.050 includes in the definition of "retail sale" every sale of tangible personal property such as food as well as charges for altering or improving (i.e., cooking) it for consumers. While a specific exemption applies to sales of food under RCW 82.08.0293, food products sold by the retail vendor, which by law must be handled on the vendor's premises by a person with a food and beverage service worker's permit, are excepted from the exemption.

The application of "Caterer" in Rule 119 specifies "meals" which the taxpayer highlights to distinguish its situation from that of the retail activity of caterers. We do not believe the term

---

Food products for human consumption are exempted under Section 6359. But among the exceptions to this exemption are food furnished for consumption from trays provided by the retailer under subsection (d)(2) and hot prepared food products under subsection (d)(7). Cal. Admin. Code Sales and Use Tax Regulation 1501 provides in part:

> The basic distinction in determining whether a particular transaction involves a sale of tangible personal property or the transfer of tangible personal property incidental to the performance of a service is one of the true object of the contract; that is, is the real object sought by the buyer the service per se or the property produced by the service. If the true object of the contract is the service per se, the transaction is not subject to tax even though some tangible personal property transferred.

Included was a copy of the taxpayer's request for the California ruling which did state the same relevant facts outlined above including the fact that some of the products demonstrated were food products.

"meal" was intended to limit the application to full, balanced meals. It should apply to hors d'oeuvres or snacks regardless of the quantity or effort expended by the caterer provided that a food and beverage service worker's permit is required. A common definition of "Cater" such as "to provide food" from Webster's New Universal Unabridged Dictionary 285 (2d ed. 1983) should be applied to determine whether a taxpayer is engaged in a catering activity.
The application of "Caterer" is not limited to full meals.

However, WAC 458-20-138 (Rule 138) provides in part:

> The retail sales tax does not apply to the amount charged or received for the rendition of personal services to others, even though some tangible personal property in the form of materials and supplies is furnished or used in connection with such services.

While the taxpayer catered food, it also demonstrated and marketed the products. The manufacturers pay the taxpayer to provide multiple activities. Where a taxpayer agrees to perform an activity taxable primarily under a particular classification, and only incidently engages in other activities in furtherance of that activity, the taxpayer will be taxed according to its primary activity. Det. No. 92-183ER, 13 WTD 93, (1993).

The predominate activity based on the true object of the transaction should control the classification of receipts from the transaction. Before considering the catering issue of whether the food exemption applies, we must determine whether the taxpayer's activity constitutes selling products as a retail vendor, or rendering personal services with some personal property furnished in connection with those services.

In Final Determination No. 89-9A, 12 WTD 1 (1992), we held that where a transaction consists of elements of both a service and a retail sale, the taxability is determined by the "true object" of the transaction, i.e., what the buyer was objectively seeking in exchange for the amount paid to the seller. When the activity does not fall under any specific tax classification, it falls under the catch-all "service and other" classification of the B&O tax.

The inquiry as to the true object of the transactions involved in this matter should focus on the issue of what the buyer is seeking in exchange for the amount paid to the seller. See Hellerstein, Significant Sales and Use Tax Developments During the Past Half Century, 39 Vand. L. Rev. 961, 970 (1986), Det. No. 90-128, 9 WTD 280.1 (1990).

Applying the true object test to these transactions provides a clear result. The manufacturer is not seeking to repurchase its product at retail; rather it is seeking to entice customers to purchase the very products they are sampling. The taxpayer primarily demonstrates the manufacturers' products. The conclusion that the buyer's true object of the transaction was a demonstration service is limited to situations where the following facts are evident:

1. Payments are received only from the manufacturers whose products the taxpayer demonstrates;

2. Neither the retailer nor the customers pay the taxpayer anything;

3. The demonstrator charges the manufacturer its actual product cost (no markup) with the charge for the demonstration service separately stated;

4. Applicable retail sales tax is paid to the retailer by the demonstrator;

5. In the case of food, the sample size is limited to a taste, not a meal;

6. The demonstrations include product information provided by the manufacturers;

7. The demonstrators' job descriptions and instruction emphasize sales and communication skills in relation to culinary skills; and

8. The samples are prepared in full view of the customers from products readily available for the customers to purchase.

TI&E correctly concluded that demonstrating products in this manner constitutes marketing under the public relations and advertising subsection of the definition of selected business services in effect after the end of the audit period beginning July 1, 1993. RCW 82.04.055.

During the audit period, the taxpayer's activity is not covered under any specific tax classification and, therefore, falls under the service and other classification of the B&O tax. RCW 82.04.290. Persons taxable under this classification are defined as consumers (RCW 82.04.190 and 82.08.010(5)) and are subject to the retail sales tax or use tax on purchases of tangible property used in the performance of their business activities.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part. The file will be returned to the audit division to delete the retail sales tax assessed on the receipts from manufacturers as well as to delete the business and occupation tax reclassification of service income to retailing.

DATED this 24th day of June, 1994.