Cite as 2 WTD 385 (1987)

BEFORE THE INTERPRETATION AND APPEALS SECTION
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. 87-75
. . .)	Registration No. . . .
)	Tax Assessment No. . . .
)	
)	

[1] **RULE 119:** EMPLOYEE MEALS -- RETAIL SALES TAX. Retail sales tax is due, based on the cost of food supplied by an employer to its employees, where no specific charge is made for the food. A 1% charge will not be considered a "specific charge" under Rule 119.

[2] **RULE 211, RCW 82.04.040, .050, RCW 82.08.020, .050:** LEASE OF TANGIBLE PERSONAL PROPERTY -- SUCCESSIVE SALES. A lessee of personal property is liable for retail sales tax when it does not pay the tax to its lessor.

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.

TAXPAYER REPRESENTED BY: . . .
. . .

DATE OF HEARING: November 8, 1985

NATURE OF ACTION:

The taxpayer, a restaurant operator, was audited by the Department of Revenue for the period from January 1, 1981 through Decemberá31, 1984. The taxpayer appeals from assessments involving employee meals and leased equipment.

FACTS:

Normoyle, A.L.J. (successor to M. Clark Chandler, A.L.J.) -- The first issue in this appeal concerns meals supplied by the taxpayer to its restaurant employees. The Department assessed business and occupation tax and retail sales tax on the value of these meals, based on the average cost of the food served. The taxpayer stated that it did not furnish the meals to its employees free of charge. It maintains that for sales under $3.75, certain employees were charged one percent of the menu price, with retail sales tax being charged and paid on that discounted price. Thus, for example, a $3.50 meal could be purchased, with tax, for five cents. The taxpayer stated that the money received on these one percent sales was reported under business and occupation Retailing, and that the collected retail sales tax was paid to the state. In short, the taxpayer claims that it made a "specific charge" for the meals, i.e., 1 percent; and that the tax has to be measured by that 1 percent charge.

The auditor's position is that the one percent sale price does not represent a "specific charge" for the meals, as that phrase is used in WAC 458-20-119 (Rule 119). During the audit, the auditor was told that the employee meals were handled one of two ways, depending on the length of employment. Employees with less than one year of employment paid 50ápercent of the menu price. It was intended by the taxpayer that those with more than one year of employment were to get free meals, up to a $3.75 menu price. However, the auditor was informed, the cash registers used by the taxpayer were not capable of subtracting the full sales price once it was rung up. The registers were programmed to take out all but one percent of the price. The auditor then concluded that the taxpayer was not actually making a specific charge and computed the retail sales, for both business and occupation and retail sales tax purposes, on the cost of the food, pursuant to Rule 119.

The second area of dispute involves the leasing, by the taxpayer, of certain restaurant furniture, fixtures and equipment (collectively referred to as "the equipment"). From information supplied by the taxpayer and the original lessor of the equipment, we understand the following to be the history of the lease transaction:

1. In 1976, the original lessor, which will be referred to as the "Credit Corporation," based in Connecticut, leased the equipment to what will be referred to as the "Equipment Company," based in Colorado. The equipment was to be used in

Washington. The Credit Corporation was registered to do business in Washington. The Equipment Company was not.

2. The original lease contained an option to buy, which was exercised by the Equipment Company on November 9, 1981.

3. Prior to exercising the option to buy, the Equipment Company had re-leased the equipment to the taxpayer. The invoices to the taxpayer from the Equipment Company included the following: "Tax as charged by financing company." The amount of this "tax," when put into a percentage, did not correspond with the Washington retail sales tax rate in effect at the time of the invoice. For example, the invoice dated Julyá1, 1982 showed a lease payment of $1,168.36 plus "tax" of $56.98. This last figure equals 4.877ápercent of the lease payment. The Washington retail sales tax rate then in effect, however, was 6.1ápercent. In fact, none of the "taxes" on the invoices supplied by the taxpayer to the Department, when put into a percentage, correspond with the Washington retail sales tax rate.

4. It is not known what the "tax as charged by financing company" was based on, or what the Equipment Company did with the amount collected. It is known that the Equipment Company had not registered to do business in Washington and did not collect or remit the Washington retail sales tax on the lease to the taxpayer.[1]

5. The lease between the taxpayer and the Equipment Company terminated on Marchá8, 1983 when the taxpayer bought the equipment.

ISSUES:

1. Was the one percent meal price a "specific charge," within the meaning and intent of Rule 119?

2. Is the taxpayer liable for retail sales tax on the lease payments made by it to the Equipment Company?

DISCUSSION:

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[1]The Credit Corporation did apparently collect retail sales tax from the Equipment Company on the first lease. That is not the issue here, though. Instead, the question is whether the taxpayer paid Washington retail sales tax on its lease from the Equipment Company.

ISSUE NO. 1. We start with a discussion of the statutes governing sales at retail. The term "sale" includes the furnishing of meals for compensation. RCW 82.04.040. "Retail sale", as it applies to this part of the appeal, generally means every sale of tangible personal property. RCW 82.04.050. "Selling price" means the consideration paid by a buyer to a seller. If the consideration is not paid with money, e.g., a barter or, as in this case, employee services in exchange for free or reduced meals, the consideration must be put into money terms to determine the "selling price." RCW 82.08.010. In the present case, the consideration passing between the taxpayer and its employees was as follows:

A. From the taxpayer: reduced meals, given as part compensation for employees' services;

B. From the employee: his or her services, in part, for reduced meals.

The retail sales tax is payable on sales at retail, based on the "selling price" (the consideration). RCW 82.08.020.

The above leads us to this inquiry: What was the selling price, expressed in terms of money, of the meals supplied to the taxpayer's employees as part compensation for his or her services? The taxpayer says it is the one percent charge. The auditor says it is the cost of the food. Under the facts of this case, we agree with the auditor.

The legislature has directed the Department of Revenue to enact administrative rules designed to implement and make workable the excise tax statutes. Rule 119 sets forth the Department's guidelines for determining taxation of meals supplied to employees. Two different versions of the rule were in effect during the audit period, but the critical paragraph was the same:

> Persons engaged in the business of furnishing meals to the public, generally pay their employees a fixed cash wage and, in addition thereto, furnish one or more meals per day to such employees, as compensation for their services. The furnishing of such meals constitutes a retail sale, irrespective of whether or not a specific charge is made therefor. Where a specific charge is made, the retail sales tax must be collected and accounted for on the selling price.

Both versions of the rule also provided that the measure of tax, when no specific charge is made for each meal, is the "average cost per meal served to each employee, based upon the actual cost of the food." Prior to Mayá1, 1982, the rule also provided that, where there was no specific charge made for each meal, the actual cost of the food could not be reported to be less than 75ácents per meal. After that time, the rule did not contain a minimum cost per meal provision. Regardless of which version of the rule was in effect during the audit period, the auditor correctly based the tax liability on the actual cost of the food.

If the one percent sales price were considered to be a "specific charge," the taxpayer would have complied with its business and occupation and retail sales tax obligations. We find, however, that there was no specific charge within the meaning and intent of Rule 119. The administrative rules are designed to implement the tax statutes, not provide loopholes. The taxpayer intended to charge nothing for the meals. If it had charged nothing, the measure of tax would have been the cost of the food. The fact that the cash registers could not "back out" 100ápercent of the charges is merely a fortuitous circumstance, that is, in itself, insufficient to allow the taxpayer to escape payment of the proper amount. Here, the substance of the transactions was that the taxpayer was furnishing the meals to its employees for much less than the actual cost of the food. That being the case, the proper measure of the tax is the cost of the food, not the fictitious "specific charge." The auditor correctly used that method, and his assessment will be sustained.

ISSUE NO. 2. Under RCW 82.04.040 and .050, the leasing of tangible personal property is a retail sale. RCW 82.08.020 imposes the retail sales tax on "successive retail sales of the same property." The buyer is to pay the tax to the seller, who is to remit it to the state. If the buyer does not pay the tax, the Department may proceed directly against the buyer. RCW 82.08.050 and WAC 458-20-211 (Rule 211).

The taxpayer argues that it paid the retail sales tax to its lessor, the Equipment Company, and, therefore, RCW 82.08.050 and Rule 211 don't apply. We disagree, for reasons stated below.

There were two different leases, one from the Credit Corporation to the Equipment Company, and one from the Equipment Company to the taxpayer. Each of these leases was an individual "retail sale," as defined by RCW 82.04.050.

Each was subject to payment of retail sales tax. Apparently, the tax was collected and remitted by the Credit Corporation for the first lease, but that fact has no bearing on the tax liability concerning the second lease. The question, then, is whether or not the taxpayer paid Washington retail sales tax to its lessor, the Equipment Company.

The taxpayer incorrectly believes that the amount it paid to its lessor, shown on the invoices as "tax as charged by financing company," represented Washington sales tax on its lease. Whatever this "tax" was, or whatever was done with it by the Equipment Company, the fact remains that it was not Washington sales tax and was not paid to this state.[2] The Equipment Company was not registered with the state and remitted no sales tax. Because the tax due was not paid by the taxpayer, the auditor correctly relied upon RCW 82.08.050 and Rule 211.

DECISION AND DISPOSITION:

The taxpayer's petition for correction of assessment is denied in its entirety. Because the delay in the issuance of this Determination was solely for the convenience of the Department, extension interest will be waived from December 9, 1985 to April 7, 1987. Tax Assessment No. . . . in the amount of $ . . . , plus additional unwaived interest of $ . . . , for a total of $ . . . is due by April 7, 1987.

DATED this 18th day of March 1987.

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[2]We note again that the "tax" on the invoices did not correspond with the Washington retail sales tax rates in effect on the dates of the respective invoices. The taxpayer's recourse, if any, is against the Equipment Company.