

Cite as Det. No. 13-0234, 33 WTD 409 (2014)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
))	No. 13-0234
))	
))	Registration No. . . .
))	
))	

[1] RULE 166, RULE 124; RCW 82.12.020, RCW 82.08.0293, RCW 82.12.0293: USE TAX – FOOD AND FOOD INGREDIENTS TO PRODUCE COMPLIMENTARY MEALS. A hotel’s purchases of food and food ingredients used in complimentary meals served only to hotel guests are not subject to retail sales tax at purchase because they are purchased for resale, and their subsequent intervening use is not subject to use tax pursuant to the statutory exemption for food and food ingredients.

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.

Anderson, A.L.J. – A hotel disputes use tax assessed on the purchase price of food and beverages used to provide complimentary meals to its guests. We conditionally grant the petition.¹

ISSUE

Where a hotel provides complimentary meals to its guests, is use tax due on the food and beverages it purchases and uses to provide the meals pursuant to RCW 82.12.020?

FINDINGS OF FACT

[Taxpayer] is engaged in the business of providing lodging with meals. Taxpayer owns and operates a [a hotel] in [Washington]. [The hotel] . . . cater[s] to guests staying longer than a week – typically, guests stay anywhere from over a week to six months.

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

Regardless of the length of stay, Taxpayer provides two complimentary meals to its lodging guests: a [breakfast] and a[n evening meal]. Breakfast is provided every morning for three hours, and the evening meal is provided Monday through Thursday for two hours. Both are provided in accordance with the standard operating manual for [the hotel].

At minimum, breakfast consists of the following breakfast items: an egg entrée, one type of breakfast meat, one hot breakfast side (potatoes), a fresh baked item (muffins, pastries, Danishes, or scones), cereal, fruit/juice, and coffee. Taxpayer prepares/bakes the fresh baked item in-house in a quantity equal to at least 50% of the total suites sold, and it may supplement the fresh baked items with pre-made coffee cake, donuts, sweet breads, etc. Taxpayer also offers a waffle station with a waffle iron, batter, syrup, toppings, and whipped cream.

The evening meal is a light meal. At minimum, it consists of an entrée, side item, and finishing touch, for example, fried chicken (entrée), mashed potatoes with brown gravy (side item), and roasted corn (finishing touch). At least three nights a week, a salad bar is offered. In addition, Taxpayer serves at least one national recognized beer, a red wine, a white wine, and two non-alcoholic beverages.

The hotel has a kitchen on premises. Taxpayer prepares the complimentary meals onsite (in the kitchen). The meals are served buffet style on permanent, built-in counters located in a common dining area. The hotel does not maintain a restaurant or a bar. Hotel employees serve as hosts during the hours the meals are served. The hosts prepare the meals and maintain the dining area. Depending on the number of registered guests on any given day, the number of hosts serving the meals can range from one to three hosts at each meal. The meals are only provided to guests, who access the dining area using their room keys.

The Audit Division (“Audit”) of the Department reviewed Taxpayer’s books and records for the period of July 1, 2008 through June 30, 2011 (the “Audit Period”). It determined that Taxpayer had failed to properly pay retail sales tax on purchases of capital assets (furniture, fixtures, chairs, bedding, lighting, etc.) and consumable supplies (lip balm, stress relievers, stickers, chemicals, etc.). Audit also determined that Taxpayer owed use tax on the food and beverage items it used in providing the complimentary meals. The use tax assessed was based on the price Taxpayer paid to purchase the items. Audit issued an assessment against Taxpayer in the amount of \$. . . consisting of \$. . . in assessed use tax and deferred sales tax and \$. . . in interest.

Taxpayer appeals the \$. . . of the use tax that was assessed on the food and beverage items, arguing that it does not owe use tax because the meals are included in its lodging charges and it charges its guests retail sales tax on those charges. In other words, Taxpayer is arguing that it purchases the food and beverages for resale and because items purchased for resale are not subject to retail sales tax, they are likewise not subject to use tax measured by the purchase prices of the items, unless there is intervening use of the items. But, Taxpayer argues that if it is deemed to have put the food and food ingredients and beverages to intervening use in preparing and providing the complimentary meals, then the purchases of these items are nonetheless exempt from sales and use tax as food and food ingredients pursuant to WAC 458-20-124(7).

Audit maintains that use tax is due on Taxpayer's purchase price of food and beverage items because such items are tangible personal property for use in providing lodging and related services and WAC 458-20-166 provides that such purchases are retail sales. Audit states that whether retail sales tax is collected on the full charge for providing lodging and related services has no bearing on whether use tax is due and the purchases are not purchases for resale. In addition, Audit states that such purchases of food and beverages are no different than purchases of soap, linens, toiletries and other items used and/or consumed by the person renting the rooms which are fully taxable under retail sales and use taxes pursuant to *Mayflower Park Hotel, Inc. v. State*, 123 Wn. App. 628, 98 P.3d 534 (2004).

ANALYSIS

Washington imposes a retail sales tax on retail sales of tangible personal property to consumers, unless the tangible personal property is purchased for resale or otherwise exempt. RCW 82.08.020; *see also* RCW 82.04.050. "Sale at retail" or "retail sale" means every sale of tangible personal property to all persons irrespective of the nature of their business"

Tangible personal property purchased for resale in the regular course of business without intervening use by the purchaser is excluded from the definition of "sale at retail" or "retail sale." RCW 82.04.050(1)(a)(i).² "Use" has its ordinary meaning, and with respect to tangible personal property, means "... the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include[s] ... any other act preparatory to subsequent actual use or consumption within this state." RCW 82.12.010(6)(a). RCW 82.04.050(1)(a). "Consumer" is defined in RCW 82.04.190 [in part] to mean "(1) Any person who purchases, acquires, owns, holds, or uses any article of tangible personal property irrespective of the nature of the person's business and including, . . . persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers . . ."

WAC 458-20-166 ("Rule 166") explains the taxation of hotels and provides that all purchases of tangible personal property for use in providing lodging and related services are retail sales. Rule 166 (4)(g). This is consistent with *Mayflower Park Hotel, Inc. v. State*, where the Court of Appeals, ruled on the application of the retail sales tax to furnishings (alarm clocks, sofas, lamps, and tables) and amenities (lotion, coffee, hangers, sheets, shampoo, wash cloths, postcards, and Q-tips) purchased by a hotel and provided for guests' use in individual hotel rooms. The Court determined that "... a hotel 'uses or consumes' such items, in the course of furnishing lodging, when it puts them in its rooms for the comfort of its guests." *Mayflower Park*, 123 Wn. App. at 632. Thus, making "intervening use" of the items it purchases when it puts those items in rooms

² [The definition of "prepared food" requires that the product be sold in order for it to be subject to retail sales tax. See RCW 82.08.0293(b)(i). Because in this case the breakfast and evening meals are included in the price for lodging and not being sold to the hotel guests separately as meals, the providing of the meals to the hotel guests is not subject to retail sales tax. *See also* RCW 82.04.040. The question then becomes whether Taxpayer owes use tax on the ingredients used to produce those meals.]

for use by its guests. *Id.* at 633. “That its guests may also use or consume such items is not material here.” *Id.* at 632-633.

We find no statutory or legal support for distinguishing Taxpayer’s purchases of foods and beverages from the purchases of furnishings and amenities in *Mayflower*. Both here and in *Mayflower*, items were purchased to be provided to hotel guests. In *Mayflower*, the hotel’s placement of the items in the rooms for use by guests was sufficient intervening use to levy the use tax on such items. Here, Taxpayer’s use of food and beverages is more obvious. It purchases foods and beverages and manipulates them, i.e., changes their form through cutting, cooking, mixing, etc., in preparing and serving breakfast and evening meals to its guests. For example, Taxpayer purchases eggs, the eggs may be used by Taxpayer in preparing the egg entrée, a fresh baked item, etc. Taxpayer has acquired the foods and beverages and assumed dominion and control over the items. Thus, Taxpayer is a consumer of the foods and beverages, consuming its purchases of foods and beverages in preparing and serving the breakfasts and evening meals for its guests. RCW 82.04.190. Therefore, in accordance with *Mayflower*, we conclude these purchases are not purchases for resale and there is intervening use by Taxpayer because Taxpayer uses these items to provide the meals it serves to its guests. Absent an exemption, these purchases are subject to retail sales tax. RCW 82.08.020.

As relevant here, purchases of “food and food ingredients” are specifically exempt from retail sales tax. RCW 82.08.0293. “Food and food ingredients’ mean substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value.” RCW 82.08.0293(1).

“Food and food ingredients” do not include alcoholic beverages, prepared food, or soft drinks; all three exclusions are statutorily defined. *Id.* “Alcoholic beverages’ [which] means beverages that are suitable for human consumption and contain one-half of one percent or more of alcohol by volume.” RCW 82.08.0293(1)(a). “Prepared food” means:

- (A) Food sold in a heated state or heated by the seller;
- (B) Food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws, . . . ; or
- (C) Two or more food ingredients mixed or combined by the seller for sale as a single item, . . .

RCW 82.08.0293(2)(b)(i). And, “Soft drinks’ means nonalcoholic beverages that contain natural or artificial sweeteners. Soft drinks do not include beverages that contain: Milk or milk products; soy, rice, or similar milk substitutes; or greater than fifty percent of vegetable or fruit juice by volume.” RCW 82.08.0293(2)(c).

Taxpayer’s purchases of, “food and food ingredients”, as defined in RCW 82.08.0293, are exempt from retail sales tax pursuant to RCW 82.08.0293. Further, although the use tax complements the retail sales tax and is generally equal in amount to the retail sales tax on the use of items where the retail sales tax has not been paid, RCW 82.12.0293 contains a similar exemption from use tax for “food and food ingredients.” RCW 82.12.020; RCW 82.12.0293

(“(1) The provisions of this chapter [82.12] do not apply in respect to the use of food and food ingredients for human consumption. ‘Food and food ingredients’ has the same meaning as in RCW 82.08.0293.”). Therefore, we conclude that Taxpayer’s purchases of “food and food ingredients” as defined in RCW 82.08.0293 and RCW 82.12.0293 are exempt from both retail sales and use taxes.³ RCW 82.08.020; RCW 82.12.0293. Taxpayer is to provide all purchase and sales invoices for “food and food ingredients”, and Audit is to review such invoices for possible adjustment consistent with the holding of this determination.

DECISION AND DISPOSITION

Petition conditionally granted.

Dated this 1st day of August, 2013.

³ This holding is consistent with WAC 458-20-124(7) which provides: “Persons operating restaurants or similar businesses are not required to report use tax on food and food ingredients given away, even if the food or food ingredients are part of prepared meals.”