

**THIS DETERMINATION HAS BEEN OVERRULED OR MODIFIED IN WHOLE OR PART BY DET. NO. 04-0132, 24 WTD 254 (2005).**

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

In The Matter of the Petition ) D E T E R M I N A T I O N  
For Correction of Assessment )  
of )  
 ) No. 89-241  
 )  
 . . . ) Registration No. . . .  
 ) . . . /Audit No. . . . )  
 )

[1] RULE 244: RETAIL SALES -- CATERING -- PREPARATION OF MEALS FOR OTHERS -- FOOD HANDLER'S PERMITS. The preparation of food for others is a retail sale and subject to the retailing category of the business and occupation tax and the retail sales tax. Prior to June 1, 1988, the rule stated that caterers were subject to the retail sales tax; after the statutory and rule change, persons required to have a food handler's permit under RCW 69.06.010 are making retail sales. RCW 69.06.010 requires every person handling unwrapped or unpackaged food to have a food and beverage worker's permit. The fact that a particular county might not require one does not change the rule.

[2] RULE 105: ENGAGING IN BUSINESS -- EMPLOYEE -- DISTINCTION. A person who is in business of preparing food for others as a caterer is engaging in business and not acting as an employee when she prepares food on a regular basis for a specific couple. The fact that the work is paid at a fixed rate and that taxpayer works for the couple on a regular basis does not alter the result.

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: . . .

NATURE OF ACTION:

Taxpayer petitions for correction of assessment, alleging that some of the income was earned in the capacity of an employee, rather than as a person engaging in business.

FACTS AND ISSUES:

Hesselholt, A.L.J. -- Taxpayer started her business to provide catering services to the general public. According to her petition, she found that her business was not sufficient to support her, and so she accepted a position with a family, working in their kitchen, doing their errands and shopping. All of her income was reported in the service and other category of the business and occupation tax.

In June 1988, taxpayer's accountant wrote to the Department's Taxpayer Information and Education Section, requesting a ruling regarding the taxability of her activities. According to the letter, she engaged in two activities, one of which is relevant here:

Activity #1--She provides cooking services for older aged people who are shut in but do not qualify for state assistance. She buys the groceries they request from the store and is reimbursed for these. She then prepares meals in their home for \$100 a week and is reimbursed at the end of the week for the amount of the groceries plus the \$100 for her services. She brings the food from the grocery store to their house and leaves it. She never prepares food at her house, all preparation is done in the home of the person using their dishes, spices etc.

TI&E wrote back, explaining that "the preparation of food for others by persons who are required to have a food handler's license" was a retail sale under WAC 458-20-244 (Rule 244). Thus, the entire charge by taxpayer would be subject to retail sales tax. If the customer bought the food, and taxpayer only prepared it, only that charge would be subject to the tax. TI&E allowed a retail sales tax deduction for non-taxable food items bought but not prepared by taxpayer, and taxable grocery items purchased by taxpayer.

Taxpayer's accountant then submitted amended returns, but did not include the earnings from the elderly couple. According to that letter, all the services were performed for the one family and not offered to the general public; all services were on the employer's premises and/or under the employer's direction and control; services were personal in nature and could not be subcontracted or substituted by another; the employer provided all the tools and equipment; the services were on a regular, reoccurring basis for eleven months; according to the . . . County Health Department, no food handler's permit was required; and compensation was at a fixed rate per month. For all those reasons, taxpayer contended that she was in fact an employee of the family and not engaging in business, and thus such income was not taxable.

The excise tax examiner handling the returns wrote back to the taxpayer, stating that he required specific legal documentation to show that she was an employee, such as information from the Employment Security Department or that she was considered an employee for Social Security purposes. The examiner also stated that he was bound to abide the letter from the TI&E section, stating that the charges were taxable. Since taxpayer and the examiner could not come to an agreement on this issue, an assessment was issued, from which taxpayer appeals.

Taxpayer argues that she should be considered an employee for the purposes of the income earned from the elderly couple.

#### DISCUSSION:

[1] The business and occupation tax is imposed on "all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly." RCW 82.04.140. An exemption is allowed "in respect to his employment in the capacity of an employee or servant as distinguished from that of an independent contractor." RCW 82.04.360. Persons who prepare food for others are engaged in making sales at retail. RCW 82.04.050. The retail sales tax is imposed on all sales at retail, with certain exemptions. RCW 82.08.020.

RCW 82.08.0293 exempts certain food products for human consumption from the retail sales tax, but does not apply

(c) to a food product, when 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 under RCW 69.06.010, including but not be (sic) limited to sandwiches prepared or chicken cooked on the premises, deli trays, home-delivered pizzas or meals, and salad bars . . . .

WAC 458-20-244 (Rule 244) is the Department of Revenue's duly authorized rule regarding the sale of food products. As such, it has the force and effect of law until overturned by a court of record not appealed from. RCW 82.32.300. According to Rule 244,

(1) . . . It is the intent of the law to tax the sales of meals and food prepared by the seller regardless of where it is served or delivered to the buyer. . .

(3) . . . There is no general tax exemption for sales of food or food products for B&O tax purposes. The gross proceeds of sales of food are subject to the wholesaling or retailing classification of B&O tax, as the case may be.

(4) Retail sales tax--Taxable sales. Sales of food products are subject to retail sales tax under any of the following circumstances:

(a) Effective June 1, 1988, sales by any retail vendor of any food handled on the vendor's premises which by law requires the vendor to have a food and beverage service worker's permit under RCW 69.06.010 (handling unwrapped or unpackaged food) are subject to sales tax. . . .

Prior to June 1, 1988, the Rule and statute required that

Sales of food products are subject to [retail sales] tax when sold by cafes, caterers, restaurants, pizza parlors, food drive-ins, and businesses which are operated in such a way as to invite or permit consumption of the food at or near the premises where the food is sold. . .

Former WAC 458-20-244.

RCW 69.06.010 requires that a person "employed in the handling of unwrapped or unpackaged food unless he or she shall furnish . . . a food and beverage service worker's permit. . . . "

Any person who handles unwrapped or unpackaged food is required to have a permit under the statute. The fact that any particular county may not require such a permit does not alter the requirements of the statute. Under Rule 244, taxpayer is required to have a food and beverage service worker's permit, as part of the work done for the couple involves the preparation of meals. Accordingly, unless taxpayer can be considered an employee of the couple, she is subject to retail sales tax on the meals prepared for the couple and business and occupation tax on the amounts received from them, unless she can show that she was an employee.

[2] WAC 458-20-105 (Rule 105) is the Department's rule that lays out the requirements to determine whether a person is an employee or engaging in business. The rule provides as follows:

A person engaging in business is generally one who holds himself out to the public as engaging in business either in respect to dealing in real or personal property or in respect to the rendition of services; one to whom gross income of the business inures; one upon whom liability for losses lies or who bears the expense of conducting a business; one, generally, acting in an independent capacity, whether or not subject to immediate control and supervision by a superior, or one who acts as an employer and has employees subject to his control and supervision.

. . .

An employee or servant is an individual whose entire compensation is fixed at a certain rate per day, week or month, or at a certain percentage of the business obtained by such employee or servant, payable in all events; one who has no direct interest in the income or profits of the business other than a wage or commission; one who has no liability for the expenses of maintaining an office or place of business, for other overhead or for compensation of employees; one who has no liability for losses or indebtedness incurred in conducting the business; one whose conduct with respect to services rendered, obtaining of, or transacting business, is supervised or controlled by the employer. . .

. . .

The fact that a person is construed to be an employee under the provisions of the State Employment Security Act or the Federal Social Security Act, does not conclusively establish such persons as an employee within the provisions of the Revenue Act.

Taxpayer is not an employee of the couple for either purposes of Employment Security or Social Security. She holds herself out to the public to be in the catering business; that is, the business of providing food to persons at a location of their choice. As illustrated by the letter to TI&E, she held herself out to be in the business of providing meal preparation and general errand work to elderly people. She is liable for any losses in her business, and receives all income of her business. She charges the couple a set amount per week for her services, exclusive of the food costs. Her income is not limited to the amount she receives from the couple, as she is free to accept other catering jobs. While she does the errands and fixes the food as requested, we have seen no evidence that she is required to do such errands in a certain way or from only certain locations. Likewise, we have seen no evidence that the couple controls how she prepares the food, but only what is prepared. Taxpayer argues that the services were personal in nature and could not be subcontracted out, but there has been no evidence to that effect, and it seems likely that taxpayer could have directed another to do the things requested. Taxpayer's other contentions do not alter this result.

. . . .

#### DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 27th day of April 1989.