

Cite as Det. No. 02-0062, 23 WTD 233 (2004)

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. 02-0062
)	
...)	Registration No. . . .
)	
)	FY . . . /Audit No. . . .
)	Docket No. . . .

- [1] RULE 119: B&O TAX – SALES TAX – USE TAX -- COLLEGE CAFETERIA – GUEST MEALS -- MEAL TICKETS. Where a college purchases meal tickets that entitle students, faculty, and guests to free meals in its cafeteria, the college is the consumer of the meals and liable for deferred sales or use tax. Concomitantly, a food service contractor, selling those meals to the college, is required to collect that tax.

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:

Food service contractor protests sales tax on meals served at college cafeterias.¹

FACTS:

Dressel, A.L.J. -- . . . (taxpayer) is a food service contractor. Its books and records were examined by the Department of Revenue (Department) for the period January 1, 1995 through June 30, 1999. As a result a tax assessment, identified by the above-captioned numbers, was issued for \$ The taxpayer appeals part of the assessment.

The taxpayer manages the food service operations at a number of Washington colleges. Most of that income was reported, for business and occupation (B&O) tax purposes, under the Service & Other Business Activities category. In the audit much of that income was reclassified to the

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

Selected Business Services category, a classification that only existed between 1993 and 1998.² To this, the taxpayer does not object. In addition, the audit reclassified some income to the Retailing B&O category and subjected it to retail sales tax. To this, the taxpayer does object. The reason the Department reclassified this income is because it thought it was from sales of meals to guests, as opposed to students or faculty.

In protesting these reclassifications, the taxpayer's attack is, essentially, two-pronged. First of all, it has come forth with additional records to establish that some of its income was placed into accounting categories, bearing names that really didn't reflect the source of the income. In particular, it mentions the category "board guest meals," which is numbered . . .³ Contrary to the Department's impression, some or all of the income entered in this account, according to the taxpayer, was not from meals sold to guests. Rather, it was from sales to faculty and students whose meal plans had expired, who had forgotten their meal cards, or who had not purchased meal plans in the first place. These sales were not made to guests, although the taxpayer readily acknowledges the title of the account could, certainly, give one that impression. In support of its position, the taxpayer has submitted numerous accounting exhibits, that, purportedly, help prove its point.

The second area of dispute has to do with color-coded meal *tickets*. According to the taxpayer, these are given by several of its colleges to various persons or groups so that they might eat at the college cafeteria. The holder of a ticket simply presents it at the cafeteria, and (s)he gets a free meal. The taxpayer states that some of these tickets are given to students, some are given to the college's athletic teams, some are given to faculty, and some are given to those with a lesser connection to the college, i.e., guests. The cafeteria attendant collects the tickets and turns them over to the taxpayer. The college and the taxpayer have agreed, in advance, the price of these meals. The taxpayer determines the number of meals consumed and then bills the college at the agreed-upon rate. These billings do not include sales tax. Further, the taxpayer does not know the identity of the ticket users. Somebody presents a ticket, (s)he gets a free meal. The taxpayer stated that the college may keep a record of the ticket recipients, but it did not.

Again, the basis of the Department for the assessment of the retailing taxes⁴ is that these meals were sold to guests, rather than students or faculty members. The taxpayer counters by saying, first, that many of these tickets went to students or faculty. As to those that didn't, the taxpayer avers that they were sold to the college, not to the guests, and that, therefore, those sales were not at retail.

² As it was prior to 1993, income from food service management, after abandonment of the Selected Business Services category in 1998, is B&O taxable under the Service & Other Business Activities classification.

³ At [University] account no. . . . was named " . . . guest/cash."

⁴ Retailing B&O and retail sales tax.

ISSUES:

1. Were certain meals, sold by a college food service contractor, the proceeds from which were placed in a particular income account, actually sold to students and faculty, rather than to guests of the college?
2. Where a college cafeteria management service provides a free meal upon the presentation of a color-coded meal ticket, has a retail sale taken place when such tickets are dispensed to students, faculty, *and* guests?

DISCUSSION:

Some foundation, vis-à-vis the state excise taxation of college food services, is in order. The Department's duly-promulgated rule on sales of meals is WAC 458-20-119 (Rule 119). During the audit period, it read, in part:

(vii) **School, college, or university dining rooms.** Public schools, high schools, colleges, universities or private schools operating lunch rooms, cafeterias, dining rooms, or snack bars for the exclusive purpose of providing students and faculty with meals or prepared foods are not considered to be engaged in the business of making retail sales of meals. However, if guests are permitted to dine with students or faculty in such areas, the sales of meals to the guests are retail sales.

...

(6) **Food service contractors.** The term "food service contractor" means a person who operates a food service at a kitchen, cafeteria, dining room, or similar facility owned by an institution or business. Food service contractors may manage the food service operation on behalf of the institution or business, or may actually make sales of meals or prepared foods.

...

(b) Food service management. For periods prior to July 1, 1993, the gross proceeds derived from the management of a food service operation are subject to the service and other business activities B&O tax. On and after July 1, 1993, these proceeds are subject to the selected business services classification of the B&O tax.

...

Food service management includes, but is not limited to, the following activities:

...

(ii) Food service contractors managing and/or operating a cafeteria, lunch room, or similar facility for the exclusive use of students or faculty at an educational institution or private school. The educational institution or private school provides these meals to the students and faculty as a part of its educational services. The food service contractor is

managing a food service operation on behalf of the institution, and is not making retail sales of meals to the students, faculty, or institution. Sales of meals or prepared foods to guests in such areas are, however, subject to the retailing B&O and retail sales taxes.

With regard to the additional records produced by the taxpayer for this appeal, the Audit Division (Audit) of the Department has indicated a willingness to examine them and make adjustments in the assessment as appropriate. Accordingly, we remand this appeal to Audit for that purpose. We include in the remand the evidence the taxpayer has put forth vis-à-vis the “board guest meals” and their inclusion in account To the extent the taxpayer can prove that income attributed to this account was from sales of meals to faculty and students, such income will be subtracted from the measure of tax, assuming it was included in that measure in the first place.

Next, we examine the second issue, meal tickets. It is agreed that the taxpayer is engaged in food service management at the colleges, in that Audit has assessed Service B&O tax,⁵ and the taxpayer hasn’t objected. We focus, then, on the last two sentences of the quote from Rule 119, above: “*The food service contractor is managing a food service operation on behalf of the institution, and is not making retail sales of meals to the students, faculty, or institution. Sales of meals or prepared foods to guests in such areas are, however, subject to the retailing B&O and retail sales taxes.*” [Emphasis added.]

[1] . . . Rule 119 reads, in part:

(2) **Business and occupation tax.** The sales of meals and the providing of meals as a part of services rendered are subject to tax as follows:

(a) **Retailing.** The retailing B&O tax applies as follows.

(i) **Restaurants, cafeterias and other eating places.** Sales of meals to consumers by restaurants, cafeterias, clubs, and other eating places are subject to the retailing tax.

The college facilities in question qualify as “cafeterias” or “other eating places”. “Consumer” is defined at RCW 82.04.190 as:

"Consumer" means the following:

(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 . . .

(2)(a) Any person engaged in any business activity taxable under RCW 82.04.290;

In the case of these meal tickets, the purchaser is the college, not the person who actually eats the meal. Therefore, the college is the consumer in that it purchased tangible personal property.

⁵ Service and Other Business Activities or Selected Business Services B&O tax.

Further, the college is a consumer because it is engaged in a business activity taxable under RCW 82.04.290.⁶

Regarding the sales tax, Rule 119 states, in part, “The sales of meals, upon which the retailing tax applies under the provisions above, are generally subject to tax under the retail sales tax classification.” Thus, the colleges should have paid sales tax on their purchases of meal tickets.⁷ The taxpayer should have billed and collected sales tax from the colleges on its sales of meal tickets. It failed to do so, so is liable for that tax.⁸ *See* RCW 82.08.050.

DECISION AND DISPOSITION:

The taxpayer’s petition is denied on the meal ticket issue. It is remanded to the Audit Division on the record-keeping issue. After examination of the new records, Audit will, either, issue an amended assessment or give the taxpayer a new due date for payment of the present assessment.

DATED this 25th day of April 2002.

⁶ The basis of the Service & Other Business Activities B&O category and rate is RCW 82.04.290.

⁷ It should be remembered that the colleges didn’t resell the meals. They gave them away. Thus, they are not eligible for the resale exemption from retail sales tax. *See* RCW 82.04.050 and RCW 82.04.190.

⁸ *See also* Det. No. 87-297, 4 WTD 75 (1987), at 83, where we said: “If the taxpayer does not have an accurate system for differentiating between students and others, all cafeteria sales will be deemed retail. *See* RCW 82.32.070.” Although “free” meals were not at issue in the cited case, it has applicability to the instant case vis-à-vis meal tickets that may have been given to legitimate students and faculty. The taxpayer has no record of the recipients, therefore, there is no basis for apportionment.