

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. 97-098E
)	
...)	Registration No. . . .
)	FY. . . /Audit No. . . .
)	
)	

- [1] RULE 12401; RCW 82.14.360: SPECIAL BASEBALL STADIUM TAX -- RESTAURANTS AND CONCESSION STANDS. Concession stands and counters within motion picture theaters are restaurants as defined in Rule 12401.
- [2] RULE 12401: VALIDITY OF RULES. The Department will not entertain challenges to the provisions of its administrative rules through an administrative appeal under WAC 458-20-100. Citing Det. No. 96-135, 16 WTD 112 (1996).

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:

An association of motion picture theater owners protests a ruling by the Department of Revenue's Taxpayer Information and Education Section that, for the purposes of the baseball stadium tax authorized by RCW 82.14.360, the definition of restaurants includes theater snack counters.¹

FACTS:

Coffman, A.L.J. -- The taxpayer is an association of motion picture theater owners. The taxpayer requested a ruling from the Department of Revenue's (Department) Taxpayer Information & Education Section (TI&E) that sales at snack counters in theaters operated by its members (members) are not subject to the baseball stadium tax authorized by RCW 82.14.360. TI&E issued

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

a letter stating that the tax would apply to sales at the snack counters. The taxpayer filed a timely appeal.

Each of the taxpayer's members operates a snack counter where patrons can purchase soft drinks, popcorn, candy, and other refreshments. The members charge admission to view motion pictures. The taxpayer claims that patrons have access to snack counters without paying for admission to theaters. The members' employees, who work at the snack counters, are required to obtain food handler's permits.

The funding package for the new baseball stadium in King County includes authorization for counties with a population of over 1,000,000 to impose an additional local retail sales tax on sales made "by restaurants, taverns, and bars of food and beverages that are taxable by the state under chapters 82.08 and 82.12 RCW." RCW 82.14.360(1). So far, the only county to impose the baseball stadium tax is King County. The taxpayer agrees that sales made at the snack counters are subject to the tax under chapters 82.08 (retail sales tax) and 82.12 (use tax) RCW. The Department's duties relating to this tax include the adoption of rules. The Department adopted WAC 458-20-12401 (Rule 12401), which explains the application of the baseball stadium tax.

ISSUES:

1. Are the snack counters operated by the members "concessions stands or counters" as used in Rule 12401?
2. If the snack counters are "concession stands or counters," under Rule 12401 may the Department issue a ruling that Rule 12401 is invalid in this respect?

DISCUSSION:

All retail sales taxes (state and local) are imposed on the consumer. They are not imposed on the seller; rather the retail sales taxes are collected by the seller and then remitted to the Department. RCW 82.14.030(1) and RCW 82.08.150. Rule 12401(2)(a) defines restaurant as:

any establishment having special space and accommodation where food and beverages are regularly sold to the public for immediate, but not necessarily on-site, consumption, but excluding grocery stores, mini-markets, and convenience stores. Restaurant includes, but is not limited to, lunch counters, diners, coffee shops, espresso shops or bars, concession stands or counters, delicatessens, and cafeterias. . . .

(Emphasis added.) The theaters are establishments that sell food and beverages. The taxpayer argues that the members do not provide seating areas for customers. We disagree. The lobbies of most movie theaters have benches and areas where customers may sit. Additionally, for the

patrons who view movies, clearly there are seats available. Thus, the snack counters located in the member's theaters meet the general definition of a restaurant stated in Rule 12401.²

[1] The taxpayer argues that the term "concession stand or counter" does not include the snack counters operated by its members, reasoning that a concession "is a privilege or space granted a lessee for particular use within specified premises." Taxpayer's Memorandum of Points and Authorities, page 3. However, the taxpayer misconstrues the inclusion of "concession stand or counter" in the list of types of businesses subject to the tax. The phrase "includes, but is not limited to" means that businesses similar to those specifically listed are also required to collect the baseball stadium tax.

The snack counters at the members' theaters would operate in the same manner whether the member granted a privilege to a concessionaire or the member operated it. Thus, the snack counters are similar to one of the listed businesses. Under these circumstances, the members who operate snack counters in King County are required to collect the baseball stadium tax.

[2] The taxpayer argues that Rule 12401 is incorrect when it included concession stands in the definition of "restaurant". As we stated in Det. No. 96-135, 16 WTD 112 (1996), which was considering the validity of WAC 458-20-226 (Rule 226):

Rule 226 was adopted after the Department completed the processes required by the Administrative Procedures Act (APA), Chapter 34.05 RCW. These processes are designed to seek input from interested parties concerning proposed rules that may affect them. If an interested party is dissatisfied with an adopted rule, the rule may be challenged in court. RCW 34.05.510-.598. We are aware of no court challenges to Rule 226.

RCW 82.32.300 states that the Department's rules "have the same force and effect" as a statute unless found invalid by a court of record. The Department may not repeal a portion of its regulation through any process not sanctioned by the APA. See, RCW 34.05.010(15), (17). An appeal of an individual taxpayer under WAC 458-20-100 is not an APA procedure. RCW 82.32.160 and Det. No. 92-219ER, 13 WTD 119 (1993). Therefore, we can not entertain challenges to regulations that have been properly adopted. Det. No. 87-218, 3 WTD 295 (1987).

We note that the taxpayer's argument is that the term "restaurant" should be interpreted in the same manner as used in RCW 66.24.410(2) and 66.04.010(25). The taxpayer argues that the Department used the definition from this statute to define a tavern. However, these definitions concern the regulation of the sale of alcoholic beverages. Specifically, RCW 66.24.410(2) concerns the requirements for a class H liquor license "to sell spirituous liquor by the individual glass, beer, and wine, at retail, for consumption on the premises..." RCW 66.24.400. Likewise, the definition found in RCW 66.04.010(25) has general application to the sale of alcoholic beverages. There is nothing in RCW 82.14.360 that implies that a license to sell alcoholic beverages is prerequisite for

² We note that the members do not operate grocery stores, mini-markets, or convenience stores.

the application of the stadium tax. If it had been the intent of the legislature to limit the application of the baseball stadium tax to businesses that sold alcoholic beverages, it could easily have done so.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 20th day of May 1997.