

Cite as Det No. 07-0282, 27 WTD 162 (2008)

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. 07-0282
)	
...)	Registration No. . . .
)	Document No. . . .
)	Audit No. . . .
)	Docket No. . . .
)	

Rule 244; RCW 82.08.0293: RETAIL SALES TAX—EXEMPTION FOR SALES OF FOOD – PREPARED FOOD. The retail sales tax exemption for sales of food does not generally apply to food prepared by the seller. Prepared food may qualify for the exemption if it is sold without eating utensils provided by the seller, and is sold in an unheated state by weight or volume. A person who prepares and sells kettle corn in three different size bags at fairs and festivals does not sell by weight or volume.

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.

Chartoff, A.L.J. – A taxpayer who prepares and sells kettle corn in tents at festivals, shows, and sporting events protests an Audit Division (Audit) of the Department of Revenue (Department) assessment of retail sales tax, contending its sales of kettle corn qualify for the retail sales tax exemption for sales of food products for human consumption (RCW 82.08.0293). We deny the petition.¹

ISSUE

Whether the taxpayer's sales of kettle corn qualify for the exemption from retail sales tax for sales of food products for human consumption (RCW 82.08.0293).

FINDINGS OF FACT

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

The taxpayer is a Washington corporation that prepares and sells kettle corn at fairs, shows, and sporting events in Washington, [and other states]. A representative sampling of events during the audit period includes [various shows and events]. Many of these events require payment of an admission charge by attendees.²

The taxpayer prepares and sells kettle corn in mobile kettle corn tents. The tents are staffed primarily by the taxpayer's owner, . . . [Taxpayer's owner] has a food handler's permit. However, the taxpayer represents that a food handler's permit is not necessary to operate the kettle corn stand.³

The taxpayer prepares the kettle corn for sale as follows. Oil and popcorn are heated in a large kettle. When the popcorn is fully popped, it is seasoned with salt and sugar and put into bags for sale. The taxpayer offers popcorn for sale in three size bags: small, medium, and large. . . . Audit found that fresh cooked product is handed to customers without a seal, while the extra popcorn is bagged, sealed, and put on the shelf for later sale. The popcorn is generally at room temperature by the time it is handed to the customer.

The taxpayer registered to do business in the state of Washington in [the 1990s], but did not file tax returns. On . . . , 1999, . . . Revenue Agent, sent a letter to the taxpayer demanding payment of the Annual 1997 and 1998 tax returns. The taxpayer contends he subsequently contacted [Revenue Agent] and provided her with additional information regarding the taxpayer's activities. The taxpayer contends that as a result of their discussions, [Revenue Agent] determined that the taxpayer was eligible for active non-reporting status. On . . . , 1999, the Department issued a letter to the taxpayer stating it qualified for active non-reporting status. The letter listed the criteria that must be satisfied in order to qualify, and explained that it is the taxpayer's responsibility to inform the Department if it no longer meets these requirements.

In early 2000, . . . Revenue Auditor, notified the taxpayer that it was selected for Audit. On July 31, 2000, [Revenue Auditor] sent the taxpayer a letter explaining that the taxpayer did not qualify for active non-reporting status because it was required to collect retail sales tax, and because its gross sales likely exceeded \$28,000 per year. The taxpayer did not start filing tax returns.

In 2004, Audit again contacted the taxpayer, this time for review of taxpayer's records for the period January 1, 2000 through June 30, 2004. During this period, the taxpayer did not file Washington excise tax returns and did not collect retail sales tax. The taxpayer failed to provide the auditor with records sufficient to determine its tax liability. The taxpayer did provide a list of . . . events it worked in 2002, including dates and revenues from each event. The auditor used this list to project the taxpayer's sales for the entire audit period.

² The taxpayer argues that most events did not have an admission charge. The taxpayer also argues that where there was an admission charge, the taxpayer was located in the free area outside the admission charge area. The taxpayer did not provide any evidence to substantiate either allegation.

³ Sellers of popcorn may apply to be exempted from the food handler permit requirements in RCW 69.06.010. *See* WAC 246-215-191(4)(a).

Audit issued an assessment for \$. . . consisting of \$. . . retail sales tax, \$. . . retailing B&O, \$. . . use tax, \$. . . litter tax, \$. . . delinquent penalty, \$. . . evasion penalty, \$. . . assessment penalty and \$. . . interest. After receiving the audit assessment, the taxpayer provided additional records which supported an adjustment of the assessment. Audit issued a post assessment adjustment (PAA) reducing the amount due

The taxpayer filed an Appeals petition protesting the assessment of retail sales tax. The taxpayer contends that it qualifies for the exemption from retail sales tax for sales of food products for human consumption (RCW 82.08.0293). The exemption was substantially amended effective January 1, 2004, and the taxpayer contends it qualifies under both versions of the statute in effect during the audit period.

ANALYSIS

The retail sales tax is imposed on every retail sale occurring in the State of Washington. RCW 82.08.020(1). A "sale" for purposes of the retail sales tax includes "the furnishing of food, drink, or meals for compensation whether consumed upon the premises or not." RCW 82.04.040. A "retail sale" is "every sale of tangible personal property . . . to all persons irrespective of the nature of their business" RCW 82.04.050(1). The sale of food is a sale of tangible personal property. *See Sacred Heart Medical Center v. Dept. of Revenue*, 88 Wn. App. 623, 946 P.2d 409 (1997).

RCW 82.08.0293 provides a retail sales tax exemption for certain sales of food and food ingredients. This exemption statute was amended by SB 6515-S, Chapter 153, Laws of Washington 2004, effective January 1, 2004, which was during the audit period. The legislature amended the statute to comply with the national Streamlined Sales and Use Tax Agreement.⁴

The version of RCW 82.08.0293 in effect from 1988 through December 31, 2003 stated, in relevant part:

(1) The tax levied by RCW 82.08.020 shall not apply to sales of food products for human consumption.

"Food products" include cereals and cereal products . . .

(2) The exemption of "food products" provided for in subsection (1) of this section shall not apply . . . (b) when the food products are sold for consumption within a place, the entrance to which is subject to an admission charge, except for national and state parks and monuments, or (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 . . . excluding . . . bulk food products sold from bins or barrels, including, but not limited to flour, fruits, vegetables, sugar, salt, candy, chips, and cocoa.

⁴ See Wa. State Senate, Substitute Bill Digest, SB 6515-S (2004); Wa. State Senate, Final Bill Report, SB 6515 (2004).

The version of WAC 458-20-244 (Rule 244) in effect from 1988 through 2003 explains the general intent of the statute:

Generally, it is the intent of the law, as amended, to provide the exemption for groceries and other unprepared food products with some specific exclusions. 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.

With respect to the two exceptions to the exemption, cited above, Rule 244 further provided:

(4) 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 beverages service worker's permit under RCW 69.06.010 (handling unwrapped or unpackaged food) are subject to sales tax. . . .

(b) Food products sold for consumption within a place, the entrance to which is subject to an admission charge, except for national or state parks or monuments, are subject to sales tax.

Kettle corn is a cereal product and therefore a food product under the exemption statute. Rule 244 describes two exceptions to this exemption. To the extent either of the exceptions applies to sales of kettle corn, the taxpayer's sales are subject to sales tax. If neither exception applies, then the taxpayer's sales are exempt sales of food products.

Sales of food products are not exempt from retail sales tax when sold by a 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. The taxpayer states that although he has a food handler's permit, the permit is not required for the sale of kettle corn. WAC 246-215-191(4)(a). WAC 246-215-191 explains that the applicable regulatory authority may allow a food vendor to operate without food handler's permits if it sells certain low risk foods, such as popcorn. However, the exemption from the food and beverage handler's permit is not automatic. The vendor must submit a written application for the exemption from the food handler's permit requirements. WAC 246-215-191(2). Since the taxpayer bears the burden of proving it qualifies for a tax exemption, and the taxpayer has not produced evidence that he was granted an exemption from the food and beverage handlers' permit requirements, we conclude the taxpayer has failed to prove that it is entitled to the food and beverage retail sales tax exemption.

Sales of food products are not exempt from retail sales tax when they are sold for consumption within a place, the entrance to which is subject to an admission charge. The taxpayer sells kettle corn for consumption at festivals, shows, and sporting events, the entrance to which is often subject to an admission charge. The taxpayer claims, however, that the vast majority of events have no admission charge. The taxpayer further contends that even where there is an admission charge for an event, the taxpayer is often located just outside the entrance to the event. The auditor found no evidence upon its review of the taxpayer's records to substantiate these claims.

Since, the taxpayer bears the burden of proving it qualifies for a tax exemption, we conclude the taxpayer has failed to meet its evidentiary burden in this regard.⁵

In conclusion, with respect to the version of RCW 82.08.020 in effect through 2003, the taxpayer has failed to establish the exemption for food products applies to its sales of kettle corn. The taxpayer bears the burden of establishing the exemption. *Deaconess Med. Ctr., Department of Revenue*, 58 Wn. App. 783, 788, 795 P.2d 146 (1990).

The version of RCW 82.08.0293 in effect January 1, 2004 through the present states, in relevant part provides:

(1) The tax levied by RCW [82.08.020](#) shall not apply to sales of food and food ingredients.

(2) The exemption of "food and food ingredients" provided for in subsection (1) of this section shall not apply to prepared food...

(a) "Prepared food" means:

(i) Food sold in a heated state or heated by the seller;

(ii) Food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins or straws. A plate does not include a container or packaging used to transport the food; or

(iii) Two or more food ingredients mixed or combined by the seller for sale as a single item

(b) "Prepared food" does not include the following food or food ingredients, if the food or food ingredients are sold without eating utensils provided by the seller:

(ii) Food sold in an unheated state by weight or volume as a single item;

Like the previous version of the statute, the current exemption for sales of food does not generally apply to food prepared by the seller. "Prepared food" is defined in the current statute to include two or more ingredients mixed or combined by the seller for sale as a single item. In the present case, the taxpayer combines raw popcorn, oil, salt, and sugar to produce kettle corn for sale.

The taxpayer contends that the kettle corn is excluded from the definition of "prepared food" by RCW 82.08.0293(2)(b)(ii), which excludes food that is not sold with eating utensils provided by the seller, and is sold in an unheated state by weight or volume as a single item. The taxpayer

⁵ Audit has stated it would consider adjusting the assessment to the extent the taxpayer can prove certain sales were made at events which do not charge admission. However, the taxpayer bears the burden of producing records sufficient to support the adjustments.

argues that it sells popcorn by volume because it sells the popcorn in three different size bags. We agree that the popcorn is generally sold at room temperature⁶ and without eating utensils.⁷ However, we disagree with the taxpayer's claim that "sold ... by volume" means sold in more than one size.

The sale of food or other commodities "by volume" has a meaning which is governed by State and Federal law. See Chapter 19.94 RCW; *National Institute of Standards and Technology (NIST) Handbook 130*, Uniform Laws and Regulations, 2006 Edition, United States Department of Commerce, National Institute of Standards and Technology, available at <http://ts.nist.gov/WeightsAndMeasures/pubs.cfm>. When food is sold by volume, the price of the food is based on the measured volume of the food sold. Packaged food which is sold by volume must have a declaration of quantity expressed in terms of liquid or dry measure. *Consumer Package Labeling Guide: Selling by Volume*, NIST Special Publication 1020-2, United States Department of Commerce, National Institute of Standards and Technology, available at <http://ts.nist.gov/WeightsAndMeasures/pubs.cfm>. State and Federal laws and regulations specify the recognized units of measure which must be used to sell specific commodities. See Chapter 19.94 RCW⁸; NIST Handbook 130; NIST Special Publication 1020-2. They also prescribe accuracy standards for the measuring equipment. Id.

In the present case, the taxpayer sells at a price that varies by size rather than by unit of measure. The taxpayer's customers do not know the measured volume of popcorn they are purchasing and the price of the popcorn is not expressed as a function of measured volume. Therefore, the exception to the definition of prepared food for food sold in an unheated state by weight or volume does not apply. Accordingly, the taxpayer's sales of prepared food do not qualify for the food exemption and are subject to retail sales tax.

At the hearing, the taxpayer presented three bags of popcorn it purchased without sales tax from a grocery store. The taxpayer argues that the intent of the Streamlined Sale and Use Tax Agreement is for sales of the same type of food to be taxed in a uniform and consistent manner. We disagree. RCW 82.08.020 plainly treats foods prepared by the seller differently from foods resold by a grocery store. The taxpayer's argument that the taxability of food should not depend on identity of the seller is not consistent with a plain reading of the statute, and is without merit.

⁶ WAC 458-20-244(4)(a) states in relevant part: "Food is sold in a heated state or is heated by the seller when the seller provides the food to the customer at a temperature that is higher than the air temperature of the seller's establishment."

⁷ WAC 458-20-244(4)(c) states in relevant part: "A plate does not include a container or packaging used to transport the food." The popcorn is delivered to the customer in a plastic bag, which is packaging used to transport the popcorn, and not an eating utensil.

⁸ RCW 19.94.340 states that commodities not in liquid form may only be sold by weight, measure of length or area, or by count except, *inter alia*, for "commodities that are sold for immediate consumption on the premises where sold...."

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 9th day of October 2007.