

Cite as 9 WTD 009 (1989)

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. 89-389
)
 . . .) Registration No. . . .
) Notices of Balance Due
)
)
)

[1] RULE 244: RETAIL SALES TAX -- FOOD PRODUCTS --
EXEMPTIONS -- BAKERIES -- PIZZA. The retail sales
tax exemption for bakery items sold in bakeries does
not extend to pizzas sold on a carry-out basis.

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 protests the assessment of sales tax on pizzas sold
for the periods November and December of 1988, and January
1989.

FACTS AND ISSUES:

Hesselholt, A.L.J. -- Taxpayer operates a carry-out pizza
business. Taxpayer prepares and bakes whole pizzas on the
premises, which are sold to customers on a carry-out basis.
There are no eating facilities provided at or near taxpayer's
place of business.

Taxpayer states that in "March of 1988, the Department
reviewed Taxpayer's returns and procedures, and agreed that
Taxpayer had no obligation to collect retail sales tax on any

sales of the pizza business. The Department advised Taxpayer that if any change in procedure was required, Taxpayer would be so advised." Taxpayer claims that he received no information from the Department regarding the taxability of his products until December 15, 1988, when he received a notice from the Department stating that his deductions from sales tax were being disallowed. Taxpayer contacted the Department and was told of the "amended WAC 458-20-244 and told that new rules imposing sales tax on his sales became effective June 1, 1988." Taxpayer alleges that this was his first notice of the change in the rules, whereupon he immediately began collecting sales tax on all pizza sales.

Taxpayer argues that his sales of pizza are

exempt from the retail sales tax under the "bakery" exception of Rule 244(5)(a)(iii). Taxpayer's activities more closely fit the definition of a bakery activity, exempt from sales tax under Rule 244 (5)(a)(iii), than "home delivery" pizza sales which are taxable under Rule 244(4)(a).

More importantly, Taxpayer's activities fit within the statutory language of RCW 82.08.0293, which exempts sales of food products for human consumption from the retail sales tax, except when the food products are (a) served for consumption on the premises of the seller; (b) sold on a "takeout" basis for consumption on or near seller's premises on parking facilities provided for such purposes; or (c) sold for consumption within a place subject to an admission charge. Taxpayer's activities do not come within any of these exceptions, therefore the sales tax does not apply, notwithstanding (sic) the possibly conflicting language of Rule 244, since the statute will always control over an administrative rule.

Taxpayer further argues that since he was audited in early 1988 and told that he would be notified of any changes in the rules, and he was not notified of any change,

it is unfair and improper for the Department to change its position without prior notice to Taxpayer and retroactively to assess over \$8,000.00 of sales tax . . . on sales which Taxpayer could easily have collected the sales tax from the

customers if the Department had simply advised Taxpayer to do so.

DISCUSSION:

Taxpayer's representative seems unaware that the revision to WAC 458-20-244 (Rule 244) was prompted by an amendment to RCW 82.08.0293, effective June 1, 1988. The amended statute reads as follows:

(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, oleomargarine, meat and meat products including livestock sold for personal consumption, fish and fish products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, spices and salt, sugar and sugar products, coffee and coffee substitutes, tea, cocoa and cocoa products.

"Food products" include milk and milk products, milk shakes, malted milks, and any other similar type beverages which are composed at least in part of milk or a milk product and which require the use of milk or a milk product in their preparation.

"Food products" include all fruit juices, vegetable juices, and other beverages except bottled water, spirituous, malt or vinous liquors or carbonated beverages, whether liquid or frozen.

"Food products" do not include medicines and preparations in liquid, powdered, granular, tablet, capsule, lozenge, and pill form sold as dietary supplements or adjuncts.

(2) The exemption of "food products" provided for in subsection (1) of this section shall not apply: (a) When the food products are ordinarily sold for immediate consumption on or near a location at which parking facilities are provided primarily for the use of patrons in consuming the products purchased at the location, even though such products are sold on a "takeout" or "to go" order and are actually packaged or wrapped and taken from the premises of the retailer, or (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, including but not be limited to sandwiches prepared or chicken cooked on the premises, deli trays, home-delivered pizzas or meals, and salad bars but excluding:

(i) Raw meat prepared by persons who slaughter animals, including fish and fowl, or dress or wrap slaughtered raw meat such as fish mongers, butchers, or meat wrappers;

(ii) Meat and cheese sliced and/or wrapped, in any quantity determined by the buyer, sold by vendors such as meat markets, delicatessens, and grocery stores;

(iii) Bakeries which only sell baked goods;

(iv) Combination bakery businesses, as prescribed by rule of the department, to the extent that sales of baked goods are separately accounted for and the baked goods claimed for exemption are not sold as part of meals or with beverages in unsealed containers; or

(v) Bulk food products sold from bins or barrels, including but not limited to flour, fruits, vegetables, sugar, salt, candy, chips, and cocoa.

(3) Notwithstanding anything in this section to the contrary, the exemption of "food products" provided in this section shall apply to food products which are furnished, prepared, or served as meals:

(a) Under a state administered nutrition program for the aged as provided for in the Older Americans Act (P.L. 95-478 Title III) and RCW 74.38.040(6); or

(b) Which are provided to senior citizens, disabled persons, or low-income persons by a not-for-profit organization organized under chapter 24.03 or 24.12 RCW.

(4) Subsection (1) of this section notwithstanding, the retail sale of food products is subject to sales tax under RCW 82.08.020 if the food products are sold through a vending machine, and in this case the selling price for purposes of RCW 82.08.020 is fifty-seven percent of the gross receipts.

This subsection does not apply to hot prepared food products, other than food products which are heated after they have been dispensed from the vending machine.

For tax collected under this subsection, the requirements that the tax be collected from the buyer and that the amount of tax be stated as a separate item are waived.

As a result of the amendments to the statute, Rule 244 was changed. In June 1988, the Taxpayer Information and Education sent a notice titled "Taxpayer Information and Local Sales and Use Tax Changes" to all registered taxpayers filing on a quarterly or monthly basis. This notice explained the changes in the law and rule regarding the changes to the retail sales tax exemption for food products. . . . Taxpayer was filing his returns on a monthly basis. He would, therefore, have been among the taxpayers receiving this document. We find that the sending of this document meets any duty that the Department may have had to notify taxpayer of the change of the law regarding his business.

[1] Rule 244 provides, in relevant part, as follows:

(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. . . .

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. Thus, unless there is a specific exemption relating to taxpayer, his sales of pizza are taxable under this section of the rule, and RCW 82.08.0293(2)(c).

Taxpayer has argued that his sales of pizza should be exempt of tax under the bakery exemption. That exemption provides that "bakeries which only sell baked goods" are not required to collect the retail sales tax. Taxpayer argues that his product is baked, and should therefore be considered a bakery item.

Exemptions from tax are to be strictly construed. "Taxation is the rule and exemption is the exception." O'Leary v. Department of Rev., 105 Wn.2d 679 (1986), Budget Rent-A-Car of Washington-Oregon, Inc. v. Department of Rev. 81 Wn.2d 171 (1972). The American Heritage Dictionary, 1981, defines "bakery" as "1. A place where products such as bread, cake, and pastries are baked." Where a statute does not define certain words, they must be given their common and everyday meaning. Herring Magic v. U.S., 258 F.2d 197 (C.A. Wash., 1958). Resort may be made to dictionaries to ascertain the common meaning of statutory language. Garrison v. Washington State Nursing Board, 87 Wn.2d 803 (1976). We do not believe that a pizza is ordinarily considered a bakery item; nor do we believe that such a construction was contemplated by the legislature when the statute was amended. Accordingly, we decline to adopt taxpayer's argument.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 27th day of July 1989.