

Cite as 9 WTD 286-25

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

In the Matter of the Petition )	<u>D E T E R M I N A T I O</u>
<u>N</u>	
For Correction of Assessment)	
of )	No. 90-151
)	
. . . )	Registration No. . . .
)	. . . /Audit No. . . .
)	

**[1] RULE 169:** B&O TAX -- SALES TAX -- EXEMPTION --  
BENEVOLENT ORGANIZATIONS -- CONCESSION SALES. The  
sale of concession food items by a nonprofit theater  
group for 45 minutes per performance exceeds the two  
day limit for excise tax exemption.

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 theater seeks exemption from excise tax on concession  
income.

FACTS AND ISSUES:

Dressel, A.L.J. -- [The Taxpayer] presents plays on stage.  
Its books and records were examined by the Department of  
Revenue (Department) for the period . . . through . . . . As  
a result, a tax assessment, identified by the above-captioned  
numbers, was issued for \$ . . . . The taxpayer appeals a  
portion of the assessment.

During the performances at its theater, the taxpayer sells  
concession items, presumably of the standard variety, candy,  
soda pop, popcorn, etc. It did not report on its state excise

tax return the income from these concessions because it figured it was too trifling to mention. Upon being advised by the Department's auditor that such income is taxable, the taxpayer now relies on a provision of WAC 458-20-169 (Rule 169) which, to a limited extent, exempts concession income realized by benevolent and nonprofit service organizations.

After citing the administrative rule, the taxpayer states that its concession sales are done intermittently and for short periods of time. "They occur for 20-30 minutes before showtime and for 15 minutes of intermission (should there be one) only on those days performances are held in our theaters", says the taxpayer's petition. The Department's auditor states that "The concessions are only held three times a week for a couple of hours at a time".

The issue is whether the concession income of a non-profit, live theater is exempt from excise taxation.

#### DISCUSSION:

Under Rule 169, as it existed during the audit period, religious, charitable, benevolent, and nonprofit service organizations had a limited exemption from excise taxation. The pertinent language from the rule read:

Similarly, when such organizations make retail sales in the course of annual fund raising drives, or make such sales through concessions operated intermittently and for short periods of time for the support of various benevolent, athletic, recreational, or cultural programs, the retail sales tax and business and occupation tax need not be accounted for.

Assuming, arguendo, that the taxpayer is such an organization, we need to determine if the taxpayer's concession activity is short enough or intermittent enough to qualify for exemption.

[1] The Department has, through the years, interpreted the "short periods of time" language in Rule 169 to mean a maximum

of two days duration. This is analogous to the time period permitted for bazaars and rummage sales. To hold otherwise would grant tax relief in excess of those time limits intended by the legislature, an act which would exceed our administrative authority.

Even if we give the taxpayer the benefit of a favorable interpretation of "two days" by construing that to mean two working days or 16 hours, and even if we accept the taxpayer's statement that the concession stand is only open about 45 minutes per night, the taxpayer exceeds the limit. The auditor says the taxpayer stages about three performances per week. Three times 45 minutes is two hours 15 minutes per week. That product times 52 for the number of weeks in a year yields 117 hours which, divided by eight for the number of hours in a conventional work day, is 14.6 days which exceeds the above-referenced maximum of two days. Consequently, the taxpayer's concession sales are not exempt of excise taxation.

As a point of information to the taxpayer, Rule 169 was amended effective November 6, 1988 to say that to be exempt the subject concessions cannot be operated more than twice a year. Clearly, under this new criterion, the taxpayer's sales are not exempt.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this the 30th day of March 1990.