

Cite as 9 WTD 286-29

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

In the Matter of the Petition)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u>
<u>N</u>		
For Ruling on Tax Liability of)	
)	No. 90-154
)	
. . .)	Unregistered
)	
)	

[1] RULE 190: B&O TAX -- FOOD SALES TO U.S. GOVERNMENT. Gross proceeds received from sales of food products to military and from related food preparation at military delicatessens and bakeries is taxable under the state Business and Occupation Tax.

[2] RULE 191, RCW 82.04.200: State has jurisdiction and authority to levy and collect taxes upon persons, other than the federal government, with respect to business transactions conducted upon federal reservations.

[3] RCW 82.04.260(7), RCW 82.04.270: WHOLESALING. Sale of food products to military and further preparation of such food by taxpayer for resale by military is classified as wholesaling rather than service activity due to interrelationship of two activities and primary nature of wholesaling aspect of contract.

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, a foreign corporation, has requested a written opinion on its tax liability pursuant to WAC 458-20-100, section 18 (Rule 100).

FACTS

De Luca, A.L.J. (successor to Johnson, A.L.J.) -- Taxpayer is not registered with the Department of Revenue although it sells . . . food products directly to U.S. military bases located in the State of Washington. Its contract with the military provides for a "base price" for the food products as well as a "special pricing factor." What these categories mean is that food which is sold directly to the military has a base price. Taxpayer then charges the special pricing factor for staffing military delicatessens and bakeries with taxpayer's employees, who process and prepare the food products for ultimate sale by the military to its personnel.

By letter to the taxpayer, the Department's Audit Division found such activities to be taxable under the Wholesaling classification of the state business and occupation (B&O) tax.

ISSUE

Whether taxpayer's conduct of business with the federal government upon U.S. Military bases within the State of Washington subjects it to the B&O tax.

TAXPAYER'S EXCEPTIONS

Taxpayer asserts that because it is selling directly to the military, and not to individual military personnel, that portion of its revenue which is attributable to its base price is exempt from taxation pursuant to WAC 458-20-190 and WAC 458-20-191, (Rules 190 and 191, respectively). As for the revenue attributable to the special pricing factor, taxpayer acknowledges that it may be subject to B&O tax liability pursuant to Rule 191 under the Service and Other Business Activities classification.

DISCUSSION

Without question, taxpayer is engaged in business within the State of Washington and is not registered with the Department of Revenue (Department). It is selling food products in this state to the military as well as preparing the food for resale by the military at bases located here." `Business' includes all activities engaged in with the object of gain, benefit, or

advantage to the taxpayer." RCW 82.04.140. See also RCW 82.04.150, defining "engaging in business." Such activity is taxable pursuant to RCW 82.04.220, which imposes the business and occupation tax:

There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

Under law, a corporation is a person, RCW 82.04.030. Furthermore, under WAC 458-20-101 (Rule 101), there is a requirement to register with the Department:

(1) Persons required to obtain certificates. Every person who ... shall engage in any business for which a tax is imposed under the Revenue Act, shall, whether taxable or not, apply for and obtain a certificate of registration from the department of revenue upon the payment of \$15.00.

We disagree with taxpayer's reliance upon Rules 190 and 191 for its contention that it is not subject to the B&O tax or that, at least, part of its activities are not covered by the tax. Taxpayer quotes portions of Rule 190 which provide that "[t]he retail sales tax does not apply to sales to the United States...." Taxpayer is correct when it asserts that its sales to the federal government are exempt from the sales tax. However, that matter is not the issue before us because the Department is not claiming any right to collect sales taxes from the subject transactions.

[1] Rather, the issue is the imposition of the B&O tax upon the taxpayer and not upon the federal government. The part of Rule 190 which pertains to the B&O tax likewise exempts the U.S. government from its reaches, but it states:

"[i]n computing business tax liability of others, no deduction from value of products, gross sales, or gross income is allowed in respect to business transacted with the United States, its departments, institutions or instrumentalities." (emphasis ours).

Clearly, under Rule 190, the B&O tax applies to persons, other than the U.S. Government, who are transacting business with the military. Moreover, it applies to both aspects of

taxpayer's contract - the base price and the special pricing factor.

[2] In specifically addressing the tax liability of persons carrying on wholesaling activities with the federal government, taxpayer cites Rule 191 and relies on the rule's reference to the impertinent part of Rule 190 concerning exempt sales to the U.S. Government.

For our purposes, however, other parts of Rule 191 are applicable. The rule begins by defining federal reservations and declares:

The state of Washington has jurisdiction and authority to levy and collect taxes ... with respect to business transactions conducted upon federal reservations: Provided however, That no tax may be levied upon or collected from the United States,....

A concessionaire, operating within a federal area under grant or permit issued by the United States..., is not exempt from state excise taxes,....

The term "federal reservation" ... means any land or premises within the exterior boundaries of the state of Washington which are held or acquired by and for the use of the United States,....

See also RCW 82.04 200, defining "within this state" as including all federal areas lying within the exterior boundaries of the state.

Under the heading of Business and Occupation Tax, a section of Rule 191 concerning retailing and wholesaling continues:

Persons making retail or wholesale sales to persons residing within or conducting business upon federal reservations are taxable upon gross proceeds of sales under the retailing or wholesaling classification.

The rule next provides that persons who perform services within federal reservations are taxable under the service and other business activities classification upon their gross income derived therefrom.

Again, it is clear that persons, other than the federal government, who are transacting business with the military on military bases are subject to the B&O tax. This conclusion includes all of taxpayer's gross proceeds or gross income from the base price as well as the special pricing factor.

[3] The question remains which B&O tax classification applies to the taxpayer, who concedes that its revenue attributable to its special pricing factor is subject to the B&O tax and suggests that the proper classification might be Service and Other. Based on the facts available at this time, we believe the correct classification is Wholesaling pursuant to RCW 82.04.260 (7) and RCW 82.04.270 for both the base price and the special pricing factor income.

Because the military buys the food products from taxpayer for the purpose of resale in the regular course of business without intervening use by the military, the sales at issue are not considered sales at retail, but rather ones at wholesale. RCW 82.04.050 (1)(a) and RCW 82.04.060.

There appear to be at least two wholesaling B&O rates which apply. RCW 82.04.260 (7) imposes one tax rate upon persons who sell perishable meat products at wholesale only and not at retail. This rate would apply only to the perishable meats which taxpayer sells and which are to be resold by the military. The rest of the food products which are sold by taxpayer would be taxed at the higher rate for wholesaling under RCW 82.04.270. The burden is on the taxpayer to identify by sufficient documentation which sales to the military involve perishable meats in order to get the lower rate. Otherwise the higher wholesaling rate applies.

At this time and based on the facts currently available, we do not believe that the special factor pricing income should be taxed at the service and other rate. It appears that the primary purpose of the contract is the providing of food products at wholesale rather than the subsequent preparation of them by the employees for resale. It also appears that without the base price portion of the contract, taxpayer would not have the contractual right to perform the delicatessen/bakery functions for the military. Such interrelationship among the base price and the special pricing factor aspects of the contract probably prevent the setting of different classifications for B&O purposes.

However, if upon subsequent examination, it is determined that a classification under another category, such as other

business or service activities (RCW 82.04.290), is more appropriate due to the nature of the activities, a change in classification will be allowed prospectively. Likewise, if by contract as well as billing and accounting procedures it is deemed that the food preparation service can be provided separately from wholesaling, separate classifications may be permitted for the base price and the special pricing factor. Det. 89-396, ____ WTD ____ (1989)

RULING

Taxpayer is subject to the B&O tax under the wholesaling category for its gross proceeds of sales from both the sale of food products to the military (base price) and its preparation of food at base delicatessens and bakeries (special pricing factor).

DATED this 5th day of April 1990.