

Cite as Det No. 13-0048, 32 WTD 276 (2013)

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. 13-0048
...)	Registration No. . . .
)	Document No. . . .
)	Audit No. . . .
)	Docket No. . . .

[1] RCW 82.08.0293(2)(b)(ii)(C): RETAIL SALES TAX – BAKERY ITEMS. A bakery item is “sold without eating utensils” even if customers independently use saucers served with coffee as plates onto which bakery items are placed.

[2] WAC 458-20-244(4)(c)(iii)(B): GOOD FAITH ESTIMATE OF SALES – PREPARED FOOD. A restaurant is entitled to make a good faith estimate of its first annual prepared food sales when it acquires a new cash register that is able to track taxable and non-taxable sales.

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.

Sohng, A.L.J. – Restaurant protests imposition of retail sales tax on sales of bakery goods on the grounds that such food is “sold without eating utensils provided by the seller” under RCW 82.08.0293. The petition is granted.¹

ISSUES

1. Is a bakery item “sold without eating utensils provided by the seller” under RCW 82.08.0293(2)(b)(ii)(C) when some customers independently use saucers served with coffee as plates onto which bakery items are placed?
2. May a restaurant make a “good faith estimate of its first annual prepared food sales” under WAC 458-20-244(4)(c)(iii)(B) when it acquires a new cash register that is able to track taxable and non-taxable sales?

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

FINDINGS OF FACT

[Taxpayer] operates a café in Washington that prepares and sells baked goods, including muffins, bagels, pastries, scones, croissants, brownies, cookies, lemon bars, maple bars, pies, and other similar items (the “Baked Goods”). Taxpayer also prepares and sells soups, salads, sandwiches, quiches, and beverages. Customers order at the counter and wait there while Taxpayer assembles the order. Taxpayer offers seating on the premises. Customers have the option to dine in or take their food to go. Regardless of whether the customer dines in or takes out, Taxpayer places all Baked Goods in a paper bag or a disposable box. Sales of four or more Baked Goods are always placed in disposable boxes. Items such as sandwiches, soups, and salads are served on plates or bowls for customers who dine on the premises or in to-go containers for customers who order take-out. Coffee and tea consumed on the premises are served in ceramic cups accompanied by a saucer. Taxpayer does not physically deliver napkins or silverware directly to the customers. Rather, customers must obtain such items by visiting the self-service station located in another part of the restaurant.

Taxpayer acquired the business in . . . 2006. The cash register that was included with the business at that time was not able to distinguish between taxable and non-taxable sales. On March . . . , 2009, this old cash register broke down and Taxpayer acquired a new cash register that was capable of tracking taxable and non-taxable sales. Until March . . . , 2009, Taxpayer had been charging retail sales tax on 100% of its sales, including all Baked Goods. On March . . . , 2009, Taxpayer stopped charging sales tax on Baked Goods because it believed they were exempt under RCW 82.08.0293(2)(b)(ii)(C). Taxpayer continued to charge sales tax on all other items. Taxpayer has provided documentation that shows the breakdown between taxable and non-taxable sales, beginning on March . . . , 2009. These figures are corroborated by Taxpayer’s previously filed excise tax returns and show the following percentages of taxable and tax-exempt sales for the years 2009 through 2011:

Year	Tax Exempt	Taxable
2009 ²	25.32%	74.68%
2010	25.37%	74.63%
2011	23.28%	76.72%

The Audit Division examined Taxpayer’s books and records for the period January 1, 2008, through September 30, 2011. On February 6, 2012, the Audit Divisions issued Assessment No. . . . in the amount of \$. . . , including \$. . . in retail sales tax and \$. . . in interest. No penalties were assessed. The auditor visited Taxpayer’s premises and observed that some (but not all) customers who ordered both coffee and a Baked Good removed the cup from underneath the saucer, removed the baked good from the paper bag in which it was originally placed, and then used the saucer as a plate for the baked good. On this basis, the auditor concluded that all Baked Goods were sold with eating utensils provided by the seller and thus were not exempt from retail sales tax under RCW 82.08.0293(2)(b)(ii)(C). Additionally, the Audit Division denied the exempt

² Figures for this year were calculated beginning March 20, 2009.

food deduction for all bakery items sold on the grounds that Taxpayer's sales of prepared food exceeded 75% of gross food sales under WAC 458-20-244(4)(c)(iii).

ANALYSIS

The retail sales tax is imposed on every retail sale occurring in the State of Washington. RCW 82.08.020(1). A "sale" 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. Dep't of Revenue*, 88 Wn. App. 632, 946 P.2d 409 (1997).

1. Bakery Items

Some sales of "food and food ingredients" are exempt from retail sales tax. RCW 82.08.0293(1). However, under RCW 82.08.0293(2), sales of "prepared food" are *not* exempt from retail sales tax:

The exemption of "food and food ingredients" provided for in subsection (1) of this section shall not apply to prepared food, soft drinks, or dietary supplements

...

(b)(i) "Prepared food" means:

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

(B) 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

(C) Two or more food ingredients mixed or combined by the seller for sale as a single item, except:

(I) Food that is only cut, repackaged, or pasteurized by the seller; or

(II) Raw eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer

(ii) "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:

...

(C) Bakery items. The term "bakery items" includes bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, Danish, cakes, tortes, pies, tarts, muffins, bars, cookies, or tortillas.

(Emphasis added). Thus, bakery items, as that term is defined by statute, are exempt from retail sales tax if they are “sold without eating utensils provided by the seller.” RCW 82.08.0293(2)(b)(ii). The Baked Goods at issue here consist of muffins, bagels, pastries, scones, croissants, brownies, cookies, pies, and other similar items. Thus, the Baked Goods are “bakery items” as defined in RCW 82.08.0293(2)(b)(ii)(C).

We next address whether the Baked Goods were “sold without eating utensils provided by the seller.” WAC 458-20-244 (“Rule 244”) is the Department’s administrative rule implementing RCW 82.08.0293(2). Rule 244(4) provides in part:

What is "prepared food"? Food or food ingredients are "prepared foods" if any one of the following is true:

...

(b) **Food sold with utensils provided by the seller.** Food or food ingredients are "prepared foods" if sold with utensils provided by the seller. Utensils include plates, knives, forks, spoons, glasses, cups, napkins, and straws. A plate does not include a container or packaging used to transport the food.

(i) **Utensils are customarily provided by the seller.** A food or food ingredient is "sold with utensils provided by the seller" if the seller's customary practice for that item is to physically deliver or hand a utensil to the customer with the food or food ingredient as part of the sales transaction. If the food or food ingredient is prepackaged with a utensil, the seller is considered to have physically delivered a utensil to the customer unless the food and utensil are prepackaged together by a food manufacturer classified under sector 311 of the NAICS. Examples of utensils provided by such manufacturers include juice boxes that are packaged with drinking straws, and yogurt or ice cream cups that are packaged with wooden or plastic spoons.

(Emphasis added). When a customer purchases a Baked Good, Taxpayer places it in a white paper bag or a disposable box and hands it to the customer. Both the bag and the box are containers or packaging used to transport food and do not fall within the definition of “utensil” set forth in Rule 244(b). Because Taxpayer does not physically deliver or hand a utensil to the customer as part of the transaction, the Baked Goods are not “sold with utensils provided by the seller.” The fact that some customers may independently choose to use a saucer, which was originally intended to catch spills from a coffee cup, into a plate by placing a Baked Good onto the saucer does not alter the result. Taxpayer provides the saucer with the *coffee* item, not with the Baked Good. Taxpayer qualifies for the retail sales tax exemption provided for bakery items under RCW 82.08.0293(2)(b)(ii)(C), as long as it does not exceed the 75% threshold provided in Rule 244(4)(c)(iii), discussed below.

2. Calculation of 75% Threshold

Rule 244(4)(c)(iii) limits the sales tax exemption for foods sold without utensils as follows:

(iii) **More than seventy-five percent prepared food sales with utensils available.** All food and food ingredients sold at an establishment . . . are "sold with utensils provided by the seller" if the seller makes utensils available to its customers and the seller's gross sales of prepared food under (a), (b), and (c)(ii) of this subsection equal more than seventy-five percent of the seller's gross sales of all food and food ingredients, including prepared food, soft drinks, and dietary supplements.

(Emphasis added).³

Thus, even if items are not actually "sold with utensils provided by the seller," they will be deemed to have been if the seller makes utensils available to customers *and* the gross sales of prepared food is more than 75% of sales of all food sold. Here, Taxpayer makes utensils available to customers by providing a self-service station that contains napkins and silverware. Thus, it is subject to the 75% threshold for its sales of bakery items to be exempt from sales tax. To calculate this threshold, Rule 244(c)(iii) continues as follows:

(B) **Determining total sales of prepared foods.** The seller must determine a single prepared food sales percentage annually for all the seller's establishments in the state based on the prior year of sales. The seller may elect to determine its prepared food sales percentage based either on the prior calendar year or on the prior fiscal year. A seller may not change its elected method for determining its prepared food percentage without the written consent of the department of revenue. The seller must determine its annual prepared food sales percentage as soon as possible after accounting records are available, but in no event later than ninety days after the beginning of the seller's calendar or fiscal year. A seller may make a good faith estimate of its first annual prepared food sales percentage if the seller's records for the prior year are not sufficient to allow the seller to calculate the prepared food sales percentage. The seller must adjust its good faith estimate prospectively if its relative sales of prepared foods in the first ninety days of operation materially depart from the seller's estimate.

(Emphasis added). Here, Taxpayer could not begin to calculate its prepared food sales percentage until March . . . , 2009, when it installed the new cash register that allowed tracking of taxable and non-taxable sales. None of Taxpayer's records prior to this date were sufficient to calculate a prepared food percentage. Rule 244(c)(iii) also provides that sellers may "make a good faith estimate of its first annual prepared food sales percentage." (Emphasis added). Because Taxpayer had never made a prepared food sales percentage prior to acquiring the new cash register, it was permitted to make its first good faith estimate of prepared food sales

³ [The Streamlined Sales and Use Tax Agreement (SSUTA) Governing Board, in an interpretative opinion, clarified that for purposes of the SSUTA, the definition of "prepared food" includes the 75% threshold test applicable in the context of the phrase "provided by the seller" with respect to utensils. The interpretative opinion is numbered as Interpretation 2006-04 (2006) available at <http://www.streamlinedsalestax.org>. It is the "intent of the legislature that the provisions of this [Title 82 RCW] relating to the administration and collection of state and local sales and use taxes be interpreted and applied consistently with the agreement." RCW 82.02.210; *See also North Central Washington Respiratory Care Services, Inc. v. Dep't of Revenue*, 165 Wn. App. 616, 641-644, 268 P.3d 972 (2011).]

beginning March . . . , 2009 under Rule 244(c)(iii)(B). In this case, Taxpayer's good faith estimate was based on its actual sales data as determined through its new cash register that was able to segregate taxable food sales from tax-exempt food sales. As the records indicate, Taxpayer's actual prepared food sales percentages were 74.68%, 74.63%, and 76.72% for 2009, 2010, and 2011 respectively.⁴ For 2009, Taxpayer's good faith estimate was appropriate. For 2010 and 2011, Taxpayer used the prior years' breakdown of taxable and non-taxable food sales, as required under Rule 244. Thus, Taxpayer was entitled to the exemption for bakery items sold without utensils provided during the Audit Period, as provided by RCW 82.08.0293(2)(b)(ii)(C). Taxpayer's petition is granted.

DECISION AND DISPOSITION

We grant the petition.

Dated this 22nd day of February 2013.

⁴ Beginning on January 1, 2012, Taxpayer began collecting and remitting sales tax on 100% of its sales.