Cite as Det. No. 14-0298, 36 WTD 271 (2017)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 14-0298
. . .	)	Registration No. . . .

[1] 49 U.S.C. § 40117; 14 C.F.R. § 158.7: B&O TAX – FEDERAL PREEMPTION – AIRLINE – PASSENGER FACILITY CHARGES. The language of 49 U.S.C. § 40177(j), a state cannot tax the use of passenger facility revenue by air carriers.

[2] RULE 102, RULE 170; RCW 82.04.050, RCW 82.04.051: DEFERRED SALES TAX – FACILITY UPGRADES – SERVICES RENDERED IN RESPECT TO CONSTRUCTION ACTIVITIES – DIRECTLY RELATE TO CONSTRUCTING – RESPONSIBLE FOR PERFORMANCE OF CONSTRUCTING. A contractor that identifies and hires subcontractors, has control over the work of the subcontractors, and reviews and monitors the work of the subcontractors is engaged in retail-taxable construction services as a prime contractor.

[3] RULE 175; RCW 82.12.020: USE TAX – AIRLINE – COMPLIMENTARY NON-ALCOHOLIC BEVERAGES – USED AS MIXER FOR A PURCHASED ALCOHOLIC BEVERAGE. An airline does not purchase non-alcoholic beverages for resale, as they are given to passengers free of charge. The fact that the airline may give a non-alcoholic beverage to a passenger to accompany a purchased alcoholic beverage does not constitute the resale of the accompanying non-alcoholic beverage. The alcoholic beverages sold on flights was a fixed $5.00 per bottle regardless of whether the passenger requested a non-alcoholic mixer. Because the airline does not purchase the non-alcoholic beverages for resale, the airline's purchase of those beverages is subject to use tax.

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.

Pardee, A.L.J. – An airline appeals the Department of Revenue's (Department's) assessment of service and other activities business and occupation (B&O) tax on compensation for collecting passenger facility charges, . . .deferred sales tax on upgrades to its boarding facilities at two airports in Washington, and [use tax on] complimentary non-alcoholic beverages provided to customers in

Washington. We grant the petition as to [passenger facility charges], concluding federal law preempts the taxation of such revenues, but deny the remainder of the petition.[1]

ISSUES

1. Does federal law (49 U.S.C. §40117) preempt the Department's imposition of B&O tax on amounts received by an airline for collecting, handling, and remitting [passenger facility charges]?

2. Per RCW 82.04.050(2)(b), RCW 82.04.051, WAC 458-20-170, and WAC 458-20-102(12), does Taxpayer owe deferred sales tax on amounts it paid a contractor to upgrade its boarding gates at airports in Washington?

3. Under RCW 82.12.020 and WAC 458-20-175, does Taxpayer owe use tax on complimentary non-alcoholic beverages it served to customers in Washington when the customer also purchased spirits to make a mixed drink?

FINDINGS OF FACT

[Taxpayer] business activities in Washington State include providing air transportation both in intrastate and interstate commerce.

The Department's Audit Division (Audit) examined Taxpayer's books and records for the period January 1, 2006, through December 31, 2010 (audit period). On July 25, 2013, the Department issued Taxpayer an assessment (Document No. . . . – "Assessment") for the audit period totaling $ . . . , comprised of $ . . . of service and other activities B&O tax, $ . . . of use tax and/or deferred sales tax, a credit for litter tax of $ . . . , $ . . . of petroleum tax, $ . . . of hazardous substance tax, $ . . . of royalties B&O tax, and interest of $ . . . .

A. Assessment of Tax on Passenger Facility Fees Taxpayer Collected from Customers

Included in Schedule 2 of the Assessment was Audit's assessment of service and other activities B&O tax on a portion of [passenger facility charges] Taxpayer kept to cover administrative overhead costs due to collecting, handling, and remitting [passenger facility charges] to eligible agencies. The Secretary of Transportation may authorize an eligible agency to impose a [passenger facility charge] of [up to] $ . . . on each paying passenger of an air carrier or foreign air carrier boarding an aircraft at an airport the agency controls to finance an eligible airport-related project. 49 U.S.C. 40117(b)(1), (4). 49 U.S.C. 40117(g)(4) explains [passenger facility charges] are trust funds held by the air carrier for the benefit of the eligible agency:

> Passenger facility revenues that are held by an air carrier or an agency of the carrier after collection of a passenger facility fee constitute a trust fund that is held by the air carrier or agent for the beneficial interest of the eligible agency imposing the fee. Such carrier or agent holds neither legal nor equitable interest in the passenger facility revenues except for

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

> any handling fee or retention of interest collected on unremitted proceeds as may be allowed by the Secretary.

([Emphasis] added). *See also* 14 C.F.R § 158.49(b) (2014). 14 C.F.R § 158.53 (2014) explains [that] air carriers may retain a portion of [passenger facility charges] collected as compensation for collecting, handling, and remitting the [passenger facility charge] revenue.[2]

Taxpayer collects [passenger facility charges] on behalf of . . . Airport, but retains a portion as compensation. Audit concluded this portion of the fees was not related to direct passenger flights, but rather was income to Taxpayer to administer and handle the [passenger facility charges] and, therefore, taxable.

Taxpayer argues [that amounts it retains from passenger facility charges] are directly associated with the passenger travel and, therefore, they are not subject to tax. As to this issue, Taxpayer states the amount in dispute is . . . .

B. Taxpayer's Upgrade of its Boarding Gates

Taxpayer contracted with [Contractor] to handle the upgrade of its boarding gates at various airports across the country (Project), including . . . Airport and . . . Airport.[3] The Consulting Services Agreement between Taxpayer and Contractor (Agreement), dated August 28, 2007, states in part:

- Contractor must identify subcontractors in advance;
- Contractor shall have control of and be responsible for any subcontractor's construction means, methods, techniques, sequences or procedures, and be responsible for the subcontractor's progress schedules or failure to carry out work under the Project in accordance with the Agreement; and
- With Taxpayer's prior written consent, Contractor shall require additional testing or inspection of the work completed.

Articles 1.4, 5.5(d)(14)-(15).

Attachment 1 to the Agreement, entitled "Scope of Work for [Contractor's] Services," for Taxpayer's Project, explains Contractor's duties include:

- Site surveys;
- Development of airport submittal documents;

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[2] 14 C.F.R. § 158.53 (2014) states in part:

> **(a)** As compensation for collecting, handling, and remitting the PFC revenue, the collecting air carrier is entitled to:
>
> **(1)** $0.11 of each PFC collected.
>
> **(2)** Any interest or other investment return earned on PFC revenue between the time of collection and remittance to the public agency.
>
> **. . .**

[3] All total, this included four gates at . . . and five gates at . . . .

- Coordination of airport authority approvals;
- Contracting for the installation of the enhanced boarding components; and
- Project closeout.

Under the heading "Construction Agreement," Attachment 1 states Contractor is charged with contracting for the construction of the enhanced boarding project, and permits Contractor to charge a 15% markup on third party construction contracts with subcontractors:

> [Contractor] will contract for the general construction and electrical scope of work associated with the [Project]. [Contractor] shall execute agreements between [Contractor] and its construction Subcontractors in a form containing terms and conditions substantially similar to [Taxpayer's] General Construction Master Services Agreement, [Taxpayer] reserves the right to review any agreements executed between [Contractor] and any Subcontractor. [Contractor] is allowed a fifteen percent (15%) markup on third party construction contracts.

(Brackets added).

Contractor billed . . . Taxpayer cost plus 15% markup . . . to upgrade the gates.

In Schedule 5 of the Assessment, Audit assessed . . . deferred sales tax on amounts Contractor billed Taxpayer for construction [and] installation of the gates at Washington airports under the Agreement. Audit concluded the predominant activity Contractor conducted for Taxpayer under the Agreement was retail construction [and] installation activity. Audit notes Contractor did not bill, collect, or charge Taxpayer retail sales tax on any invoices it issued to Taxpayer under the Agreement. All invoices Taxpayer provided to the Department do not show payment of retail sales tax to the Contractor. Audit found that personnel for Taxpayer allocated charges under the Agreement for improvements to gates at various airport locations around the country by simply dividing total charges under the Agreement by total number of airports, to arrive at a cost per airport. Upon reviewing the purchase invoices, Audit was able to calculate the gross amounts owed under the Agreement on construction earmarked for Washington airports.

Taxpayer asserts it does not owe retail sales tax to Contractor for services under the Agreement because the services were exempt administrative services, and not retail construction services. Taxpayer also argues a detailed review of the invoices shows some of the work was not related to airports in Washington. Taxpayer also alleges [that] Contractor charged Taxpayer retail sales tax; however, [Taxpayer] has provided no invoices to the Department confirming this. Taxpayer states the amount at issue is . . . $ . . . .

C. Complimentary Non-Alcoholic Beverages Taxpayer Provides its Customers

Under Schedule 7, Audit assessed use tax . . . on complimentary items served to passengers onboard flights. Audit explains, during the audit period, Taxpayer purchased at . . . Airport beverages and serving supplies on which it did not pay retail sales tax. This inventory of beverages and consumable supplies was boarded and consumed in Washington on flight departures from . . .

Airport and . . . Airport, and on turnaround flights between . . . , since no items were boarded [out-of-state].

Audit reviewed purchase invoices to determine the total purchases in Washington and eventually boarded on flights in Washington. However, Audit did not review specific documentation showing the actual amount of complimentary beverages that were *boarded and consumed* on flights in this state. Therefore, Audit performed a projection of taxable items, and the percentage of complimentary items boarded and consumed in this state was then applied to the total amount of purchases to determine the total amount subject to use tax . . . .

Taxpayer's "Inflight Offerings Menu" emphasizes complimentary non-alcoholic beverages, such as Coke, Sprite, bloody mary mix, and orange juice, are "completely free." The same menu also states beer, wine, and spirits cost $ . . . . The available spirits are specifically listed.

Taxpayer argues it resells roughly 50% of non-alcoholic beverages it purchases as part of mixed alcoholic drinks, and that percentage of non-alcoholic beverages is not subject to use tax.[4] Taxpayer states the amount at issue here is $ . . . .

ANALYSIS

1. Whether the Department's assessment of service and other activities B&O tax on [passenger facility charges] Taxpayer [retains as compensation] is preempted by federal law.

Every person engaging within this state in any business activity, other than or in addition to an activity taxed explicitly under RCW 82.04.290(3) or another section of RCW Ch. 82.04, shall be subject to service and other activities B&O tax on account of such activities at the rate specified therein multiplied by the gross income of the business. RCW 82.04.290(2). However, in computing tax, there may be deducted from the measure of B&O tax amounts derived from business, which the state is prohibited from taxing under the Constitution of this state or Constitution or laws of the United States. RCW 82.04.4286. Specifically, 49 U.S.C. 40117(j) prohibits states from taxing the collection or use of revenue from a [passenger facility charge] and states:

> A State, political subdivision of a State, or authority of a State or political subdivision that is not the eligible agency may not tax, regulate, or prohibit or otherwise attempt to control in any manner, the imposition or collection of a passenger facility fee or the use of the revenue from the passenger facility fee.

(Emphasis added). *See also* 14 C.F.R. § 158.7(a) (2014).[5]

The language of 49 U.S.C. 40117(j) clearly states a State . . . may not tax the use of [passenger facility charge] revenue by air carriers. Under 49 U.S.C. 40117(g)(4), air carriers, such as Taxpayer, are allowed to retain a portion of the [passenger facility charges] it collects from its

[4] After Taxpayer's calculation, Taxpayer argues that after applying the system complimentary percentage (62.34%), only 81.17% of its complimentary non-alcoholic beverages should be subject to . . . use tax.

[5] . . .

customers as a handling fee. As explained in *Analytical Methods, Inc. v. Dep't of Revenue*, 84 Wn. App. 236, 243-44, 928 P.2d 1123 (1996),[6] preemption may occur by statute. This is also known as express preemption. *Pacific Gas & Electric Co. v. State Energy Resources Conversation & Dev. Comm'n*, 461 U.S. 190, 203, 103 S.Ct. 1713 (1983).

Analytical Methods, Inc., 84 Wn. App. at 243, explains [that] there is a strong presumption against preemption,[7] especially where local taxation is involved.[8] [U]nder the doctrine of express preemption, [however,] we conclude the Department's assessment of service and other activities [B&O] tax against Taxpayer, under Schedule 2 of the Assessment, for its use of revenues from [passenger facility charges] (i.e., handling fees), is not allowed by federal law and is accordingly cancelled. Accordingly, under RCW 82.04.4286, Taxpayer may deduct from the measure of its B&O tax revenue from [passenger facility charges].

2. Whether Taxpayer owes deferred sales tax on amounts it paid to Contractor for upgrading the gates at the . . . Airport and . . . Airport.

The term "sale at retail" or "retail sale" includes the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the constructing, repairing, decorating, or improving of new or existing buildings on real property of or for consumers. RCW 82.04.050(2)(b).

RCW 82.04.051 provides a definition for determining when a construction service is considered a retail service. This clarifying statute provides:

> (1) As used in RCW 82.04.050, the term "services rendered in respect to" means those services that are directly related to the constructing, building, repairing, improving, and decorating of buildings or other structures and that are performed by a person who is responsible for the performance of the constructing, building, repairing, improving, or decorating activity. The term does not include services such as engineering, architectural, surveying, flagging, accounting, legal, consulting, or administrative services provided to the consumer of, or person responsible for performing, the constructing, building, repairing, improving, or decorating services.
>
> (2) A contract or agreement under which a person is responsible for both services that would otherwise be subject to tax as a service under RCW 82.04.290(2) and also constructing, building, repairing, improving, or decorating activities that would otherwise

[6] Citing *Stevedoring Svcs. of America Inc. v. Eggert*, 129 Wn.2d 17, 23, 914 P.2d 737 (1996); *see also* Det. No. 99-070, 22 WTD 144 (2003); Det. No. 98-151E, 18 WTD 74 (1999).

[7] Citing *Stevedoring Svcs. of America, Inc.*, 129 Wn.2d at 24; *see also* 22 WTD 144 (2003); Det. No. 98-151E, 18 WTD 74 (1999)

[8] "Th[e] 'presumption against federal preemption' applies with special force where 'a matter of primary state responsibility,' like local taxation, is at stake." *Tri-State Coach Lines, Inc. v. Metropolitan Pier and Exposition Authority*, 732 N.E.2d 1137, 1149 (Ill. 2000) ("Thus, no federal preemption exists concerning a state or local tax unless Congress made its intent to preempt 'unmistakably clear in the language of the statute.'"). [*See De Buono v. NYSA-ILA Medical & Clinical Services Fund*, 520 U.S. 806, 117 S. Ct. 1747 (1997) (no ERISA preemption of state's gross receipts tax on medical centers where no indication Congress intended to supplant this type of state law of general applicability).]

> be subject to tax under another section of this chapter is subject to the tax that applies to the predominant activity under the contract or agreement.

(Emphasis added).[9] The term "responsible for the performance" is defined as:

> As used in this section "responsible for the performance" means that the person is obligated to perform the activities, either personally or through a third party. A person who reviews work for a consumer, retailer, or wholesaler but does not supervise or direct the work is not responsible for the performance of the work. A person who is financially obligated for the work, such as a bank, but who does not have control over the work itself is not responsible for the performance of the work.

RCW 82.04.051(4) (emphasis added).

Under RCW 82.04.051, we must evaluate both the nature of the services provided and the entity providing them in characterizing the services for tax purposes. To be rendered in respect to construction activities the services themselves must "directly relate to the constructing" and the provider of the services must be "responsible for the performance of the constructing." Det. No. 01-140, 22 WTD 26 (2003). Persons that merely review construction work are not responsible for the performance. Det. No. 99-011R, 19 WTD 423 (2000). In contrast, a person who either supervises or directs the work is considered "responsible for the performance." *Id.*

In identifying the scope of what constitutes services "in respect to constructing," Det. No. 99-152, 19 WTD 643 (2000) explains:

> It is first important to note the statute refers to the activity of "constructing", not construction in general. Accordingly, services that are directly related to or in direct reference to the activity of constructing a building are covered. The further removed an activity is from the physical activity of constructing a building, the less likely it is to be considered a service rendered in respect to such activity.
>
> In this regard, when the relationship at issue involves a service that controls or determines how or when the constructing activity takes place, the service is directly related to building activity. For example, in [one case], taxpayer prepared a construction schedule and continuously monitored and updated it, supervised construction on a day-to-day basis, and arranged for and approved the purchase of all materials, all of which concern how and when the constructing takes place. Such services are directly related to the activity of constructing a building or structure. In this regard, the Department has consistently held that construction management services constitute services in respect to constructing activity. See Det. No. 89-63, 7 WTD 163 (1989); Det. No. 93-159, 13 WTD 316 (1994); Det. No. 98-27, 17 WTD 99 (1998). In contrast, most architectural, administration, inspection, or other related services -- which may be related to the general process of construction -- are not directly related to the activity of constructing itself. Accordingly, they would not be covered, except when they are functionally integrated with a building or installation activity.

[9] *See also* WAC 458-20-170(1)(e).

(Emphasis and brackets added).[10]

Under the Agreement, all of Contractor's services are directly related to the construction [and] installation of the enhanced boarding components. For the purposes of the Project, Contractor is "responsible for the performance" of the construction/installation of the boarding gate upgrades for Taxpayer at . . . Airport and . . . Airport. Contractor identifies [and] hires subcontractors, has control over the work of the subcontractors, and reviews and monitors their work. Under RCW 82.04.051, and the standard set forth in 19 WTD 643, services Contractor provides to Taxpayer under the Agreement are more than simply administrative tasks. Even if some of the responsibilities [or] tasks Contractor is charged with under the Agreement could in isolation not be deemed retail activities, the predominant activity Contractor is engaged in under the Agreement with Taxpayer is retail construction [and] installation activity. Under RCW 82.04.050(2)(b), [the Contractor's] activities amount to retail construction services as a prime contractor.

WAC 458-20-170 (Rule 170) is the administrative rule dealing with the taxation of the construction of buildings. Rule 170(1)(a) defines a "prime contractor" as a "person engaged in the business of performing for consumers, the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon or above real property. . . . [P]rime contractors are required to collect from consumers the retail sales tax measured by the full contract price. Rule 170(4)(a). Where no such price is stated, the measure of sales tax is also the total amount of construction costs paid by the builder. *Id.*

Consistent with the Agreement, Contractor billed . . . Taxpayer cost plus 15% markup . . . to upgrade the gates. However, Taxpayer has provided no invoices showing it paid retail sales tax to Contractor on such charges. Therefore, Taxpayer owes deferred sales tax on those amounts and we affirm the Assessment.

3. Whether Taxpayer owes use tax on complimentary non-alcoholic beverages boarded on flights in Washington, and consumed in Washington, even if they are incorporated into mixed alcoholic drinks.

Tangible personal property purchased for resale in the regular course of business without intervening use by the purchaser is excluded from the definition of "sale at retail" or "retail sale." RCW 82.04.050(1)(a)(i). "Consumer" is defined in RCW 82.04.190 as: "(1) Any person who purchases, acquires, owns, holds, or uses any article of tangible personal property irrespective of the nature of the person's business. . . ." This meaning of consumer also applies for purposes of the use tax. RCW 82.12.010(1). There is levied and collected from every person in this state use tax for the privilege of using within this state as a consumer any article of tangible personal property on which retail sales tax has not been previously paid. RCW 82.12.020(1) and (2).

For purposes of the use tax, "use" means "the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and includes installation, storage, withdrawal from storage, distribution, or any other act preparatory to subsequent actual use or consumption within this state." RCW 82.12.010(6)(a)(emphasis

[10] *See also* Det. No. 99-001, 18 WTD 420 (1999); Det. No. 98-215, 19 WTD 26 (2000); Det. No. 99-346, 19 WTD 891 (2000).

added); Rule 178(3). "Intervening use" is not defined, but "occurs when an item . . . is used by the business as a consumer before the item is sold. . . ." Det. No. 06-0232, 26 WTD 125 (2006); *see also* Det. No. 04-0145R, 24 WTD 400 (2005); Excise Tax Advisory 3005.2009 (ETA 3005).

In Det. No. 13-0234, 33 WTD 409 (2014), the Department held that a hotel that acquired food and beverages, assumed dominion and control over them, and used them in preparing meals for its guests was the consumer of such items and owed use tax on them . . . :

> We find no statutory or legal support for distinguishing Taxpayer's purchases of foods and beverages from the purchases of furnishings and amenities in *Mayflower*. Both here and in *Mayflower*, items were purchased to be provided to hotel guests. In *Mayflower*, the hotel's placement of the items in the rooms for use by guests was sufficient intervening use to levy the use tax on such items. Here, Taxpayer's use of food and beverages is more obvious. It purchases foods and beverages and manipulates them, i.e., changes their form through cutting, cooking, mixing, etc., in preparing and serving breakfast and evening meals to its guests. For example, Taxpayer purchases eggs, the eggs may be used by Taxpayer in preparing the egg entrée, a fresh baked item, etc. Taxpayer has acquired the foods and beverages and assumed dominion and control over the items. Thus, Taxpayer is a consumer of the foods and beverages, consuming its purchases of foods and beverages in preparing and serving the breakfasts and evening meals for its guests. RCW 82.04.190. Therefore, in accordance with *Mayflower*, we conclude these purchases are not purchases for resale and there is intervening use by Taxpayer because Taxpayer uses these items to provide the meals it serves to its guests. Absent an exemption, these purchases are subject to retail sales tax. RCW 82.08.020.

[33 WTD at 412 (applying *Mayflower Park Hotel, Inc. v. Dep't of Revenue*, 123 Wn. App. 628, 98 P.3d 534 (2004); emphasis added).]

Like the hotel in 33 WTD 409, Taxpayer is the consumer of the non-alcoholic beverages boarded on flights in Washington and served to customers in Washington. RCW 82.04.190(1).[11] Taxpayer does not purchase these beverages for resale, but rather, Taxpayer makes intervening use of them by giving them on a complimentary basis to customers on flights. Absent an exemption,

[11] For purposes of the use tax, Taxpayer is also arguably a consumer of the non-alcoholic beverages under the language of RCW 82.12.010(1), which states in part:

> [A]ny person who distributes or displays, or causes to be distributed or displayed, any article of tangible personal property, except newspapers, the primary purpose of which is to promote the sale of products or services. With respect to property distributed to persons within this state by a consumer as defined in this subsection (1), the use of the property is deemed to be by such consumer.

See also Sprint Spectrum, LP v. Dep't of Revenue, 174 Wn. App. 645, 662, 302 P.3d 1280, 1288 (2013) [("Sprint was a consumer under the plain language of RCW 82.12.010(6) when it gave away fully-discounted phones primarily for the purpose of promoting its wireless services and, accordingly, is liable for use tax on these transactions.")] *rev. denied*, 178 Wn.2d 1024, 312 P.3d 651 (2013) . . .However, in this case, having found that Taxpayer is a consumer under RCW 82.04.190, we need not address the definition of consumer in RCW 82.12.010(1) or apply it to the facts herein.

Taxpayer's purchase of such beverages is subject to use tax.[12]

As Taxpayer's own flight menu emphasizes, the beverages were offered [and] distributed free of charge to customers. Taxpayer's argument that roughly 50% of the non-alcoholic beverages it purchased were resold as part of spirits it sold its customers fails for this same reason. The spirits Taxpayer sold onboard flights for $ . . . were the same price regardless of whether non-alcoholic beverages were added to the spirit. Therefore, Taxpayer did not resell any portion of non-alcoholic beverages to its customers.

In order to correctly tax the portion of tangible personal property bought and consumed in Washington, WAC 458-20-175 (Rule 175) explains air carriers, such as Taxpayer, owe use tax on complimentary items of tangible personal property placed aboard carrier property while within Washington, to the extent consumed in Washington, and states in part:

> The use tax does apply upon the actual use within this state of all other types of tangible personal property purchased at retail and upon which the sales tax has not been paid. Included herein are all consumable goods for use on and placed aboard carrier property while within this state, but only to the extent of that portion consumed herein. . . .
> Due to the difficulty in many cases of determining at the time of purchase whether or not the property purchased or a part thereof will be put to use in this state and due to the resulting accounting problems involved, persons engaged in the business of operating as private or common carriers by air, rail or water in interstate or foreign commerce will be permitted to pay the use tax directly to the department of revenue rather than to the seller, and such sellers are relieved of the liability for the collection of such tax.

As Audit explains in Schedule 7 of the Assessment, during the audit period Taxpayer purchased at . . . Airport beverages and serving supplies on which it did not pay retail sales tax. This inventory of beverages and consumable supplies was boarded and consumed in Washington on flight departures from . . . Airport and . . . Airport, and on turnaround flights between . . . , since no items were boarded [out-of-state].

While Audit was able to review purchase invoices to determine the total purchases, which were made in Washington and eventually boarded on flights in Washington, Taxpayer did not provide Audit with specific documentation showing the actual amount of complimentary beverages that were *boarded and consumed* on flights in this state. Therefore, Audit performed a projection of taxable items, and the percentage of complimentary items boarded and consumed in this state was then applied to the total amount of purchases to determine the total amount subject to use tax and/or deferred sales tax.

[12] Use tax does not apply in respect to the use of food and food ingredients for human consumption. RCW 82.12.0293. For purposes of the use tax, food and food ingredients have the same meaning as that provided in RCW 82.08.0293 [and include non-alcoholic beverages]. *Id.* [However, the use tax exemption for food and food ingredients does not apply to soft drinks and dietary supplements. RCW 82.12.0293(2). Thus, non-alcoholic beverages, other than soft drinks and dietary supplements, boarded and consumed in Washington are exempt from use tax. Examples of non-alcoholic beverages exempt from use tax include bottled water; beverages containing milk or milk products, soy, rice, or similar milk substitutes; and fruit or vegetable juices containing more than 50 percent juice by volume.]

We affirm the Department's assessment of . . . use tax on non-alcoholic beverages purchased and consumed in Washington.

DECISION AND DISPOSITION

Taxpayer's petition as to [passenger facility fees] (Issue 1 above) is granted, and denied as to the remainder of the issues raised and addressed herein. Therefore, this matter is remanded to Audit for adjustment to the Assessment (Document No. . . .) consistent with this Determination.

Dated this 22nd day of September 2014.