

Cite as Det No. 09-0280, 29 WTD 80 (2010)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition For Tax Ruling of:	)	<u>D E T E R M I N A T I O N</u>
	)	
	)	No. 09-0280
	)	
...	)	Registration No. . . .
	)	TI&E Letter Ruling
	)	Docket No. . . .
	)	

Rule 244; RCW 82.08.0293: RETAIL SALES TAX EXEMPTION FOR FOOD AND FOOD INGREDIENTS - EXCEPTION FOR PREPARED FOOD - BAKERY ITEMS. Piroshkies filled with meat, cheese, and/or vegetables sold by a restaurant are not “bakery items” as defined in RCW 82.08.0293(2)(b)(ii)(C) and Rule 244 because they are sold as meals and do not fall within the ordinary plain meaning of “pastries” as sweet baked goods. Therefore, a restaurant, deli, or bakery that sells meat, cheese, and/or vegetable piroshkies must charge retail sales 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.

Klohe, A.L.J. – A [commercial establishment that sells food, including] piroshkies and other pastries, protests a Taxpayer Information and Education (TI&E) letter ruling that it is required to charge retail sales tax on the sale of all piroshkies. The Taxpayer argues that its meat and vegetarian piroshkies are bakery items exempt from retail sales tax. We deny Taxpayer’s petition.

ISSUES

1. Whether the sale of piroshkies filled with meat, cheese, and/or vegetables qualifies for the exemption from retail sales tax for “bakery items” under RCW 82.08.0293 and WAC 458-20-244.<sup>1</sup>

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

2. Whether the Department's requirement that taxpayer charge retail sales tax on the sale of piroshkies filled with meat, cheese, and/or vegetables violates the Equal Protection Clause of the Federal Constitution and the privileges and immunities clause of the state constitution.

#### FINDINGS OF FACT

[Taxpayer] makes and sells piroshkies, which Taxpayer describes as “a Russian pastry filled with meat and/or vegetables,” and other sweet pastries, [among other items].<sup>2</sup>

By letter dated May 21, 2009, Taxpayer requested a written opinion and ruling from the Taxpayer Information and Education (TI&E) Section of the Department of Revenue (Department) on its Washington excise tax liability pursuant to WAC 458-20-100(2)(b). Taxpayer's letter requested that the Department rule as follows:

- (1) The sales of piroshkies are exempt from retail sales collection.
- (2) The sales of pastries are exempt from retail sales collection. . . .

Taxpayer asserted in its request for a letter ruling that its piroshkies fit the classic definition of “bakery items” as defined in RCW 82.08.0293(2)(b)(iii) and WAC 458-20-244(4)(a) and therefore should be exempt from retail sales tax. Taxpayer's letter depicted the piroshkies as “enclosed meat, vegetable and vegetarian pies.” . . . .

On June 10, 2009, the Department issued a Letter Ruling that provided instructions on individual sales items . . . . The Department concluded that piroshkies are considered “prepared food” because Taxpayer combines two or more ingredients to make the piroshkies. The Department further concluded that it does not consider piroshkies to be “bakery items” because piroshkies cannot be exposed to room temperature for extended periods because of the ingredients, reasoning that “[b]akery items typically can sit out at room temperature for 24 hours or longer without risk of food-borne illness.” Therefore, the Department advised Taxpayer that it is required to collect retail sales tax on the sale of all piroshkies.

The Department agreed with Taxpayer that the other pastries it sells . . . are bakery items exempt from retail sales tax unless the item is sold with an eating utensil provided by Taxpayer or the 75% rule applies.<sup>3</sup> The . . . only portion of the Letter Ruling appealed by Taxpayer concerns the Department's decision that Taxpayer must collect retail sales tax on the sale of all piroshkies.

We note that Taxpayer's request for a letter ruling also identified [sweet] piroshkies . . . . Although the TI&E Letter Ruling stated that retail sales tax applied to *all* piroshkies, we find that

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<sup>2</sup> See Declaration of [Taxpayer] dated May 21, 2009 at ¶2.

<sup>3</sup> . . . .

it did not include the [sweet] piroshkies . . . . For the reasons discussed in this determination, we conclude that the sweet piroshkies should receive the same tax treatment as the pastries.

### ANALYSIS

The retail sales tax is imposed on every sale at retail occurring in the State of Washington. RCW 82.08.020(1). A “sale” for purposes of the retail sales tax includes “the furnishing of food, drink, or meals for compensation whether consumed upon the premises or not.” RCW 82.04.040(1). A “retail sale” is “every sale of tangible personal property.” RCW 82.04.050(1). Generally, the sale of food prepared by a restaurant is a sale of tangible personal property. *See Sacred Heart Medical Center v. Dep’t of Revenue*, 88 Wn. App. 623, 635, 946 P.2d 409 (1997).

RCW 82.08.0293 provides a retail sales tax exemption for food and food ingredients. RCW 82.08.0293 also provides an exception to the exemption for non-necessary food items such as soft drinks, dietary supplements, and prepared foods. The “prepared food” exception has existed in one form or another since 1988 to tax the sale of meals and food prepared by the seller. Det No. 07-0282, 27 WTD 162 (2008).<sup>4</sup> In order to comply with the Streamlined Sales and Use Tax Agreement (SSUTA),<sup>5</sup> the Legislature amended this exemption statute by Senate Bill 5783 (SB 5783), Laws of 2003, Ch. 168, Sec. 301, effective July 1, 2004.<sup>6</sup>

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<sup>4</sup> The actual language of the statute in effect prior to the 2004 amendment stated in relevant part:

(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 . . .

(2) The exemption of "food products" provided for in subsection (1) of this section shall not apply . . .

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

<sup>5</sup> The Streamlined Sales Tax Project (SSTP) was organized in March of 2000 with a wide range of participation from state and local tax administrators, state and local government representatives, and private industry groups. Kentucky Sales Tax Facts, Vol. 6 No. 3, June 1, 2004. The SSUTA is a multi-state project intended to simplify the administration of sales and use taxes in order to substantially reduce the burden of tax compliance. *Indiana Dep’t of Revenue v. Kitchin Hospitality, LLC*, 907 N.E.2d 997, 1000, n.2 (Ind. 2009). The SSUTA seeks to accomplish this goal by, among other things, providing uniform definitions within tax laws. *Id.* For states to participate, the state must enact laws, rules, and regulations that conform to its provisions. Kentucky Sales Tax Facts, Vol. 6 No. 3. On November 12, 2002, Washington, along with 30 other states and the District of Columbia approved the Streamlined Sales Use Tax Agreement. Hallie Hostetter & Carl Gipson, *The Streamlines Sales and Use Tax Agreement, A Primer on the New Law*, 2007-03, available on the Washington Policy Center Website at [http://www.washingtonpolicy.org/Centers/smallbusiness/policynote/07\\_hostetter\\_streamlinedtax.html](http://www.washingtonpolicy.org/Centers/smallbusiness/policynote/07_hostetter_streamlinedtax.html) (last visited September 21, 2009.) There are now at least 42 states participating in this effort. Kentucky Sales Tax Facts, Vol. 6 No. 3.

<sup>6</sup> During the 2003 legislative session, the Washington State Legislature began its effort to conform Washington laws to SSUTA. As a result, it passed the Streamlined Sales Tax Act, Chapter 168, Laws of 2003. In 27 WTD 162, we erroneously noted that RCW 82.08.0293 was amended by SB 6515-S, Chapter 153, Laws of Washington 2004 to comply with SSUTA. The Legislature passed SB 6515-S only to correct errors and omissions from the legislation passed the prior year.

SSUTA Member states must adopt the definitions in the SSUTA Library of Definitions without qualifications, except those allowed by SSUTA.<sup>7</sup> Consequently, the retail sales tax exemption for the sales of certain food and food ingredients contained in RCW 82.08.0293 now mirrors the SSUTA and provides that the exemption does not apply to “prepared foods,” which means:

- (i) Food sold in a heated state or heated by the seller;
- (ii) 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
- (iii) Two or more food ingredients mixed or combined by the seller for sale as a single item.

RCW 82.08.0293(2)(a). The 2004 Amendments based on the SSUTA definitions also added a subsection, which provided that “prepared foods” do not include bakery items sold without eating utensils provided by the seller:

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

RCW 82.08.0293(2)(b)(iii) (emphasis added).<sup>8</sup> The Department’s administrative rule WAC 458-20-244 (Rule 244) generally tracks the statute for all relevant sections cited above.

Taxpayer argues that a piroshky is a “bakery item” within the meaning of the exemption statute and rule because Webster’s Third New International Dictionary 1723 (1993) defines piroshky (or piroshki) as “a small pocket of *pastry*” or “small *pastry* turnovers stuffed with a savory filling.” (Emphasis added). Because the list of exempt bakery items in RCW 82.08.0293(2)(b)(iii) includes “pastries,” Taxpayer reasons that piroshkies should not be subject to retail sales tax. Taxpayer’s argument is based solely on the dictionary definition of piroshky as a “pastry” and ignores the dictionary definition of “pastries,” which is the actual word used in the statute. While Taxpayer’s argument might appear to be a reasonable construction at first blush, it is ultimately not persuasive because it ignores the statute as a whole and the context in which the word is used.

The fundamental objective in statutory interpretation is to ascertain and carry out the legislature’s intent. If the statute’s meaning is plain on its face, then the court must give effect to

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<sup>7</sup> Streamlined Sales Tax Government Board Section 328 Taxability Matrix Library of Definitions (Revised May 7, 2008). Washington became a full member state on July 1, 2008. A full member state is a state that is in compliance with the SSUTA through its laws, rules, regulations, and policies. See Streamlined Sales Tax Governing Board, Inc. website at <http://streamlinedsalestax.org/govbrdstates.htm> (last visited September 18, 2009).

<sup>8</sup> This definition is identical to the definition of “bakery goods” in the SSUTA, as adopted November 12, 2002. Other SSUTA Member states that have adopted this definition include Kentucky, Minnesota, New Jersey, Rhode Island and West Virginia. Non-member states have adopted this definition include North Carolina, Ohio, and Texas. According to the SSUTA, the defined terms are “for use within the Agreement and for application in the sales and use tax laws of the member states. The definition of a term is not intended to influence the interpretation or application of that term with respect to other tax types.” SSUTA Sec. 104 (Adopted November 12, 2002).

that plain meaning as an expression of legislative intent. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720, 724 (2001). Plain meaning is discerned from all that the legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. *Dep't of Ecology v. Campbell & Gwinn L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4, 10 (2002). Each provision of a statute must be read in relation to the entire statute, and the statute should be construed as a whole. *Port of Seattle v. Dep't of Revenue*, 101 Wn.App. 106, 112, 1 P.3d 607, 610 (2000). In ascertaining the meaning of a particular word used in a statute, the court must consider “both the statute’s subject matter and the context in which the word is used.” *Id.*

The legislature did not define the term “pastries” used in RCW 82.08.0293(2)(b)(iii). Rule 244 also does not define “pastries” or “pastry.” When statutory terms are not defined, the Department may look to the dictionary meaning for guidance. Det. No. 04-0147, 23 WTD 369 (2004). The term at issue in this case is not ambiguous. Webster’s Third New International Dictionary, 1653 (1993) defines pastry as “sweet baked goods made of dough or having a crust made of enriched dough.”<sup>9</sup> Meat, cheese, and/or vegetable filled piroshkies do not fit the ordinary meaning of “pastry” based on the dictionary definition because they are not “sweet baked goods.”<sup>10</sup>

In addition, in relation to the context in which the word is used and the entire statute, it is clear that the Legislature did not intend to exempt pastries, pies, or any other baked goods that are meals and not simply baked goods that are consumed as part of a meal or as a dessert. To aid in determining the context in which the word is used, we are guided by the doctrine of *noscitur a sociis*, which means literally “known from its associates.” Norman J. Singer and J.D. Shambie Singer, 2A Sutherland Statutory Construction § 47:16 (5th ed. 1992). In practical application, the maxim *noscitur a sociis* means that:

a word may be defined by an accompanying word, and ordinarily the coupling of words denotes an intention that they should be understood in the same general sense. The Hawaii Supreme Court has said that *noscitur a sociis* requires that the more general and the more specific words of a statute must be considered together in determining the meaning of a statute, and that the general words are restricted to a meaning that should not be inconsistent with, or alien to, the narrower meanings of the more specific words of the statute. This is so only if the result is consistent with the legislative intent, for the maxim *noscitur a sociis* is a mere guide to legislative intent.

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<sup>9</sup> In the absence of other authority, Washington Courts use Webster’s Third New International Dictionary. *State v. Glas*, 106 Wn. App. 895, 27 P.3d 216 (2001), citing, *In re Personal Restraint of Well*, 133 Wn.2d 433, 438, 946 P.2d 750 (1997); see also Det No. 07-0113, 26 WTD 250 (2007); Det. No. 05-0217E, 26 WTD 91 (2007).

<sup>10</sup> Even if we were to consider that the term “pastries” was open to two or more reasonable interpretations, it would be ambiguous and we would look to other sources of legislative intent. In this case, the Legislative intent does not indicate that the Legislature intended to include pastries, pies, or turnovers that are meals in the same exempt category as bakery items that accompany a meal or are served as a dessert. If there was still an ambiguity, the tax exemption statute “must be strictly, though fairly and in keeping with the ordinary meaning of [its] language, against the Taxpayer, *Port of Seattle*, 101 Wn. App. at 114 (quoting *Sacred Heart Medical Center*, 88 Wn. App. at 637).

*Id.* A variation of the maxim of noscitur a sociis, which is also helpful in this case, is the maxim ejusdem generis, which is a narrower form of noscitur a sociis and means literally, “of the same kind:”

[T]he doctrine, often called Lord Tenterden's Rule, is of ancient vintage, going back to Archbishop of Canterbury's Case, 2 Co Rep 46a, 76 Eng Repr 519 (1596). Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. *Where the opposite sequence is found, i.e., specific words following general ones, the doctrine is equally applicable, and restricts application of the general term to things that are similar to those enumerated. . . .*

*Id.* at 47:17 (emphasis added).

Washington Courts have generally applied the rule of ejusdem generis to general and specific words clearly associated in the same sentence in a pattern, such as “specific, specific, and general or general, including specific and specific.” *Port of Seattle*, 101 Wn.App. at 113; *see also State v. Flores*, 164 Wn.2d 1, 186 P.3d 1038 (2008). For instance, in *Port of Seattle*, the taxpayer argued that the term “mass public transportation terminal” includes airport terminals. The court acknowledged that while the common understanding of the phrase could include the Sea-Tac Airport Terminal, given that the term was sandwiched between phrases denoting infrastructure for ground transportation, the court held that the Legislature intended to include only terminals for ground transportation and not airport terminals. 101 Wn. App. at 114.

Similarly, in this case, foods encompassed within the general term “bakery items” are exempt from retail sales tax, including a number of specific foods, such as bread, donuts, and pastries, among other things. Given that the term “pastries” is listed with these other types of traditional bakery items that are not meals, but are desserts (e.g. cookies, cakes) or bakery items that are typically served as part of a meal (e.g. bread, buns, rolls, tortillas), the context requires a narrower reading of pastry - one that is limited by the dictionary definition of “pastry” as a “sweet baked good” and not a pastry filled with meat, cheese, and/or vegetables that makes a meal. Additional persuasive authority supports this position.<sup>11</sup>

For example, in a California Sales and Use Tax Legal Opinion Letter, the California State Board of Equalization, focusing on the filling of the bakery item, held that a hot croissant filled with fruit or cream is a non-taxable “bakery good” similar to a jelly or cream-filled doughnut, but the same croissant filled with meat and cheese and heated is taxable. Cal. Sales & Use Tax

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<sup>11</sup> In making this statement, we recognize that there is at least one other state advisory opinion that has reached the opposite conclusion. In 2003, the Texas Comptroller of Public Accounts issued an advisory opinion with similar facts. In response to an inquiry from a bakery/coffee shop concerning whether “kolaches” (kolaches or “kolacky” are an Eastern European pastry defined as “a bun made of rich sweet yeast-leavened dough filled with jam or fruit pulp” Webster’s Third New International Dictionary, 1254 (1993)) are subject to retail sales tax, the Comptroller held that kolaches stuffed with meat and cheese prior to baking are considered bakery items and are exempt from sales tax if served without eating utensils. Texas Policy Letter Ruling No. 200608117L, issued August 23, 2006. Kolaches stuffed or filled after baking are considered sandwiches and not bakery items. *Id.* . . .

Annotation 550.1712, 2 Bus. Taxes L. Guide 4024 (Cal. State Bd. of Equalization) (1996).<sup>12</sup> Making the comparison to a sandwich that is subject to retail sales tax, the Board also recognized a prior similar opinion with respect to Cornish pastries:

In determining if a filled item is a food product, we look to the nature of the filling. ... Soon after the statute providing for the exclusion of hot bakery items sold for a single price from the definition of hot prepared food products was enacted, we considered whether Cornish pastries would qualify. *We determined at that time that such items were properly “meals” sold wrapped in pastry and not the kind of item the law contemplated.* (See Rev. & Tax. Code § 6359(e).) In the same vein, we conclude that a croissant filled with meat and cheese would be *more like a sandwich than a bakery good, and therefore not within the meaning of the statute.* As a result, the sale for a single price of a hot meat-and cheese-filled croissant would be the sale of a hot prepared food product under Regulation 1602(e)(1) and so subject to tax.

*Id.* at 2 (emphasis added).<sup>13</sup>

Likewise, in this case, the nature of the filling is determinative. Meat, cheese, and/or vegetable filled piroshkies are much more like a sandwich than a bakery good. They are essentially meals

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<sup>12</sup> While California has not yet adopted the SSUTA definition, the relevant provision in California’s Tax code is not dissimilar from our statute:

(e) “Hot prepared food products,” for the purposes of paragraph (7) of subdivision (d), include a combination of hot and cold food items or components where a single price has been established for the combination and the food products are sold in combination, such as a hot meal, a hot specialty dish or serving, a hot sandwich, or a hot pizza, including any cold components or side items. Paragraph (7) of subdivision (d) does not apply to a sale for a separate price of **bakery goods** or beverages (other than bouillon, consommé, or soup), or where the food product is purchased cold or frozen; “hot prepared food products” means those products, items, or components that have been prepared for sale in a heated condition and that are sold at any temperature that is higher than the air temperature of the room or place where they are sold.

Regulation 1602(e)(1) (emphasis added). The 1971 amendment to California’s Revenue and Taxation Code section 6359 retained subparagraph (c) but added (e) which removed “Hot Prepared Food Products” from exemption. *Henry’s Rest. of Pomona, Inc. v. State Bd. of Equalization*, 30 Cal.App.3d 1009 (1973). Although California is not a SSUTA Member state and is not actively participating in the SSTP, it is currently analyzing the SSUTA to determine the impact of adopting it in California. See [http://www.boe.ca.gov/sstp/sb157\\_analysis.htm](http://www.boe.ca.gov/sstp/sb157_analysis.htm) (last visited September 17, 2009).

<sup>13</sup> “A pastry is not a ‘bakery good’ within the meaning of Revenue and Taxation Code 6359(e). It is actually an entire meal, compacted into a form more convenient than the ingredients would be if sold as a conventional meal on a plate or cardboard tray.” California Sales & Use Tax Annotation 550.1775 (1995) (relying on Letter Opinions cited in 550.1712, dated April 5, 1972 and May 9, 1972). Following this same reasoning for bakery items that are not meals – but may be part of meals – with respect to tortillas, the Board held that:

corn or flour tortillas, sold plain, qualify as “bakery products” within the meaning of subdivision (e) of section 6359 of Revenue and Taxation Code, as added by Assembly Bill 2019. They are baked, have essentially the same ingredients as corn bread or white bread, and serve essentially the same purpose as bread.

Cal. Sales & Use Tax Annotation 550.2020, 2 Bus. Taxes L. Guide 4024 (Cal. State Bd. of Equalization) (1972).

wrapped in a pastry that are identical to the Cornish pastries discussed in the California Legal Opinion. For the same reasons as those adopted by the California State Board of Equalization as well as the reasons discussed in the remainder of this determination, we find that meat and vegetarian piroshkies are not the kind of item that the Legislature intended to exempt from retail sales tax. On the other hand, we find that [Taxpayer's sweet] piroshkies . . . are exempt from retail sales tax because they fit squarely within the plain meaning of pastries as "sweet baked goods."

Our interpretation of RCW 82.08.0293 based on the plain meaning of "pastries" as "sweet baked goods" and not baked goods that are meals is also consistent with the goals of the SSUTA. When adopting SB 5783 to implement the SSUTA, the Legislature expressly stated that its intent was that the statute would be "interpreted and applied consistently with the [SSUTA] agreement." RCW 82.02.210. Thus, in addition to the plain meaning of "pastries" from the dictionary, as directed by the Legislature, we must also consider the two major policy goals of the SSUTA.

First, the SSUTA drafters wanted to create a set of definitions that would allow states to re-create "existing tax food bases as faithfully as possible" by adopting broad food definitions coupled with various "carve-out" definitions for common sub-classifications. See Hellerstein, State Taxation § 19A.04[2][c][iii].<sup>14</sup> Prior to 2004, if a taxpayer sold baked goods together with a beverage in an unsealed container or with a meal then the retail sales tax applied to both the beverage and the baked goods. RCW 82.08.0293(2)(c)(iv) (amended 2004). As described by the Taxpayer, its piroshkies filled with meat, cheese, and/or vegetables are "a hand held meal." As a meal, we believe meat and vegetarian piroshkies have long been subject to retail sales tax in Washington as they are today.<sup>15</sup>

Second, in addition to taxing the "sins" of tobacco, alcohol, candy, and soft drink consumption, many states wanted to continue to tax the "luxury" of dining out. *Id.* The Minnesota Supreme Court concluded that the general classification of taxing "restaurant-type" but not "grocery type" food sales did not change after the SSUTA amendments. *Minn. Automatic Merch. Council v. Salamone*, 682 N.W.2d 557, 563 (Minn. 2004) ("The distinction is genuine and substantial and serves the legislative purpose of taxing food when sold as a luxury and avoiding a regressive tax on necessities.") This holding illustrates the intent of SSUTA Member states, including Washington, to continue to interpret food classifications in such a way as to distinguish between the luxury of eating out and the purchase of food necessities. Eating a meal out, even one that

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<sup>14</sup> While there are already a number of official interpretations in the "Library of Interpretations" adopted by the Streamlined Sales Tax Governing Board, there are no interpretations on the definition of bakery items or pastries. This has created what at least one commentator has described as taxpayers and states struggling with "thin if not unfathomable distinctions between various kinds of food and food products." See Hellerstein, State Taxation § 19A.04[2][c][iii].

<sup>15</sup> Another SSUTA Member state that adopted the SSUTA definition of "prepared food" and "bakery items" issued a policy statement shortly after the amendment, which explained that bakery items sold as a meal are still taxable. See Kentucky Sales Tax Facts, Vol. 6 No. 3, June 1, 2004 (*citing* KRS 139.485)(3)(h)(2) (emphasis added).

you may be able to eat from a serving bag standing up such as a meat or vegetarian piroshky is still considered a luxury of dining out rather than a food necessity.<sup>16</sup>

Lastly, Taxpayer's Appeal Petition states that "[t]he exclusion of Russian pastries (piroshkies) based upon the Department's definition of baked goods ... is a violation of the equal protection clause of the Federal constitution and the privileges and immunities of the Washington Constitution (Const. Art. 1, § 12). First, we first note an administrative body does not have the authority to declare the statutes it administers to be unconstitutional; only the courts have that power. Det. No. 02-0106, 24 WTD 115 (2005) (*citing Bare v. Gorton*, 84 Wn. 2d 380, 526 P.2d 379 (1975)). However, we will provide reasons below why we conclude RCW 82.08.0293 is valid as applied and not in violation of the Equal Protection Clause or privileges and immunities of the Washington Constitution.

In *General Motors Corp. v. Tracy*, 519 U.S. 278, 311-312 (1997), the United States Supreme Court held that "state classifications require only a rational basis to satisfy the Equal Protection Clause." The Court emphasized "'in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.' [citation omitted]" *Id.* RCW 82.08.0293 does not violate the Equal Protection Clause or privileges and immunities clause of the Washington Constitution because there is a rational basis for the state to distinguish between bakery items that are meals and those that are not. This applies not just to Russian piroshkies, but would also apply to a variety of other very similar ethnic baked goods, including Polish pierogi,<sup>17</sup> British pasties,<sup>18</sup> Latin American empanadas,<sup>19</sup> East Indian Samosas,<sup>20</sup> and Italian calzones,<sup>21</sup> as well as more American-type fare such croissants or bagels with ham and cheese baked in or quiche.

<sup>16</sup> See *Dep't of Revenue v. To Your Door Pizza*, 670 S.W. 482 (Ky. Ct. App. 1984), in which the court stated:

...the main thing is that one no longer must "dine" to have a "meal." Today's customs would allow many single items to be considered a "meal." In today's world, a hot dog or hamburger and a soft drink frequently make a meal. Also, a sandwich can be a meal whether it is consumed standing up, sitting at a desk, perched on a steel girder, or while lunching at the Ritz. We need not speculate as to what decision the California court might make today. Under the common usage rule, "meal" simply means "the portion of food taken at one time to satisfy appetite." *Webster's New Collegiate Dictionary*, page 712 (1976). Furthermore, it is common knowledge that millions of Americans consider pizza a meal. Most pizzas contain components drawn from the four basic food groups—bread, cheese, vegetables, and meat. This Court herewith takes judicial notice of those facts. R. Lawson, *Kentucky Evidence Law Handbook*, § 1.00 at pp. 1-2 (1976).

670 S.W. at 484; see also *Southland Corp. v. Comm'r of Revenue*, No. 4136, 4137 and 4138, 1985 WL 6212 (Minn. Tax 1985). Kentucky and Minnesota are not the only states that have adopted this reasoning. Relying on the Minnesota court's analysis in *To Your Door Pizza*, a Superior Court in Connecticut found that "[i]f anything, our nation's gastronomic habits have become even less formal in the twelve years since *To Your Door Pizza* was decided." *Jones v. Crystal*, No. 529453, 1996 WL 106765, 16 Conn. L. Rptr. 312 (Conn. Super. Ct. 1996) (holding that an order of fries of a stuffed clam can readily qualify as a meal).

<sup>17</sup> "A small dough envelope filled with mashed potato, meat, cheese, vegetables, crimped to seal the edge and then boiled or fried, typically served with sour cream or onions." *Dictionary.com Unabridged*, based on the Random House Dictionary, Random House, Inc. 2009.

<sup>18</sup> "A pie filled with game, fish, or the like." *Id.*

<sup>19</sup> "A turnover or mod of pastry filled with chopped or ground meat, vegetables, fruit, etc. usually baked or fried." *Id.*

We conclude, based on the ordinary meaning of “pastries” from the dictionary definition as well as the entire statute and the context in which the term was used in RCW 82.08.0293, that meat, cheese, and/or vegetable filled piroshkies are subject to retail sales tax. As discussed above, persuasive authority from other jurisdictions supports this conclusion. Further, we conclude that the [sweet] piroshkies sold by Taxpayer are exempt from retail sales tax unless sold with eating utensils provided by Taxpayer or the 75% rule applies because they are “sweet baked goods” within the ordinary meaning of pastries. Accordingly, we deny Taxpayer’s petition.

#### DECISION AND DISPOSITION

Taxpayer’s petition for correction of the tax ruling is denied.

Dated this 14th day of October 2009.

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<sup>20</sup> “A small fried turnover of Indian origin that is filled with seasoned vegetables or meat.” *Id.*

<sup>21</sup> “A turnover made of pizza dough, usually containing cheese, prosciutto, and herbs or garlic and either baked or fried.” *Id.*