Cite as 10 WTD 296 (1990)

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

In the Matter of the Petition For Refund of	)	D E T E R M I N A T I O N
	)	No. 89-453
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .

[1] RULE 119 and RULE 244: RETAIL SALES TAX -- NURSING HOMES -- MEALS FOR PATIENTS PURCHASED FROM CATERER. Where nursing home chooses to purchase prepared meals for its patients, the caterer is engaging in a retail activity and its sales of meals to the nursing home are subject to retail sales tax.

[2] RULE 187 and RCW 82.08.050: VENDING MACHINES -- SALES TAX. Sales of food items through vending machines are subject to sales tax. Use tax is not due on purchases for vending machines where taxpayer shows that sales tax has been paid at the time of purchase or collected at the time of sale and remitted to the Department.

[3] RULE 178: USE TAX -- RADIATION BADGES. Use of radiation detection service by nursing home where charge is measured by amount of film used is not subject to sales tax because the purchaser is buying the detection service, not tangible personal property in the form of the film.

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 nursing home, petitions for correction of assessment of use tax on meals purchased for its patients, on carbonated beverages purchased for its vending machines and on radiation badges.

FACTS AND ISSUES:

Johnson, A.L.J. -- Taxpayer is engaged in the business of operating a nursing home. Taxpayer protests the auditor's assertion of sales tax on meals purchased for patients. It argues that, under WAC 458-20-119 (Rule 119), meals furnished by nursing homes to patients as a part of the homes' services are not subject to retail sales tax and that Rule 119 has not been amended to reflect the 1983 repeal of sales tax on food.

Taxpayer also protests assessment of use tax on purchases of carbonated beverages. It acknowledges that the tax is due where the beverages are served to patients but states that where the beverages were resold in vending machines, no use tax is due.

Additionally, taxpayer argues that it should not be liable for use tax on the cost of radiation badges used by hospital staff. The badges themselves are loaned to the hospital for the duration of its association with the seller. The hospital then purchases film which is attached to the badges. After a month, the user removes the film from the badge. The film is sent to the seller for analysis, and replacement film is installed. No charge is made for the film analysis or for the badges. The film is simply replaced on an as-needed basis, and the customer is billed for the amount of film used. The auditor reviewed invoices which stated simply that they were for "badges," found that this was a purchase of tangible personal property, and assessed use tax on the invoice prices.

DISCUSSION:

[1] Rules 244 and 119 state that nursing homes providing meals to patients are not required to collect retail sales tax on the value thereof where the meals are included in the overall charge for services received. These rules were interpreted by the auditor to mean that, where the nursing home itself was not preparing the meals, the preparer was engaged in a retailing activity and was required to charge retail sales tax to the nursing home on the sales of the meals.

Taxpayer contends that food for patients is exempt from retail sales tax. This statement is technically correct, but it does not apply to taxpayer's situation. We disagree with taxpayer's interpretation of the taxing scheme of this state, because it erroneously attempts to apply two true facts, that food purchased for human consumption is exempt from sales tax and that meals served to patients are not subject to retail sales tax in certain cases, to its situation.

Taxpayer's opinion, contained in its petition, is as follows:

> The major item of concern is the assessment of use tax on food for patients. The auditor states:
>
> "The serving of meals by hospitals, rest homes, sanitariums and similar institutions is not subject to Retail Sales Tax."
>
> This is obvious, there is no charge made for food given to patients. He then states:
>
> "Where any facility caters meals to the hospital, it is considered to be making retail sales."
>
> We would not argue this. The nursing home is making a retail sale of food. However, the food is exempt from retail sales tax. WAC 458-20-119 (Rule 119) is in error when it states that
>
> "sales of food and beverage products to such institutions for use in preparing such meals are sales for consumption and are subject to tax."
>
> ...the rule ignores the exemptions for food for human consumption under RCW 82.08.0293 and RCW 82.12.0293.
>
> It is a well established practice in all hospitals that the food they buy for patients is exempt.

First, taxpayer's statements are incorrectly applied to its fact situation. We note, in passing, that meals are not provided without charge to patients; the cost of providing all meals is recovered when it is included as a part of the total amount billed to the patient for the nursing home's service. Where the charge for such meals is included in the flat charge, sales tax is not collected on the value of the meals. Rule 168.

Taxpayer correctly notes that food purchased for human consumption is exempt from sales tax and was exempt during the audit period. However, no exemption exists for purchases of prepared meals, and this is the type of item against which the use tax was assessed. The hospital chose not to prepare the meals against which the tax was assessed; when it does so, it gives up the option of purchasing sales-tax exempt food and preparing it on premises for service to patients. The hospital chose to use a third party preparer to provide meal service. The food purchased by the caterer is not subject to sales tax, but the selling of prepared meals to the hospital is a retail activity and sales tax applies to the full purchase price paid by the hospital. Because the hospital did not pay sales tax at the time of purchase, it was liable for use tax on the purchase price.

Additionally, the rule's language stating that meals are not subject to retail sales tax clearly refers to the transaction between the nursing home and the patient, not the one between the nursing home and its caterer. The version of Rule 244 in effect from 1983 through May of 1988 was in effect through most of the audit period. It provided that

> (13) Certain persons, groups or institutions purchase food products for purposes of serving meals to individuals and historically have been required to pay sales tax as consumers on such purchases because of a unique relationship between the food purchases and the nature of the service rendered by such groups. Food sales taxed in this way were the following:
>
> (a) Furnishing of meals by hospitals, rest homes, sanitariums and similar institutions to patients as a part of the service rendered in the conduct of such institutions. (Emphasis supplied.)

Rule 244, as amended in 1988, refers the reader to Rule 119 for an interpretation of the taxability of patient meals. Rule 119 states that

> [t]he serving of meals by nursing homes. . .as a part of the service rendered. . .is not subject to retail sales tax. (Emphasis and brackets supplied.)

WAC 458-20-168 (Rule 168) states that the gross income of nursing homes is subject to Service B&O tax, and that charges

for meals which are billed separately to the patient are taxable under the Retailing B&O tax category and are subject to retail sales tax.

The policy was that, where meals were served as a part of a service and the charge therefor was included in the overall service charge, the service provider was not required to separate out the meal charges and add the applicable sales tax to the patient's bill. This method of taxation is consistent with the taxation of all service providers, many of whom perform various activities as a part of their overall service. The taxation method enacted by the legislature does not and is not intended to reflect a policy of tax exemption; it is intended to reflect accommodation for the manner in which a service provider engages in business.

Where a service provider is a consumer, the value of items consumed is included in the service charge billed to its customer, as is the case when nursing homes provide meals to patients. What would normally be a retailing activity becomes taxable at the higher Service B&O rate when engaged in by a nursing home by virtue of its inclusion in an overall billing charge, not by virtue of any legislative policy on the sales taxability of the meals served to patients. This fact is borne out by the rules cited.

There is no language anywhere in Rule 244 prior to or following its amendment or in Rule 119 indicating any intent to exempt taxpayer's purchase of prepared meals from taxation.

The decision on the part of the nursing home to purchase prepared meals from the third party was a voluntary one. Where the nursing home chooses not to be the preparer of the meals, it chooses to engage an outside caterer to conduct those activities. That caterer is making retail sales of prepared meals to the nursing home and the nursing home is liable for sales tax on the full value of the meals or use tax where sales tax is not paid at the time of purchase.

Taxpayer's petition is denied with regard to this issue.

[2] Taxpayer protests the assertion of use tax on its purchases of soft drinks. It acknowledges that purchases of carbonated beverages are subject to sales tax when served to patients; however, it contends that "to the extent the pop is sold in the cafeteria it is purchased for resale and use tax does not apply."

RCW 82.08.0293 provides that

> [s]ubsection (1) of this section notwithstanding, the retail sale of food products is subject to sales tax under RCW 82.08.020 if the food products are sold through a vending machine, and in this case the selling price for purposes of RCW 82.08.020 is fifty-seven percent of the gross receipts.

WAC 458-20-187 states that use tax applies to all purchases for vending machines upon which sales tax has not been paid. Again, taxpayer's position is to use a technically-correct statement of the law incorrectly to cover two transactions. That the purchases for resale to stock the vending machines are not subject to sales tax is technically correct, because the purchases are for resale. However, the vending machine sales themselves are subject to sales tax, and the seller is required to collect the sales tax from the purchaser and remit it to the Department. Upon a failure to collect and remit the tax, the vendor is liable for deferred sales tax.

Taxpayer states that it is "examining" the breakdown of the soft-drink account to determine the percentage of the purchases used to stock the machine. Taxpayer is responsible for collecting and remitting sales tax on taxable sales. RCW 82.08.050. Further, it bears the responsibility of maintaining records which justify the tax treatment it seeks. RCW 82.32.070. Upon a showing that the sales tax on the vending machine sales and use tax on the value of the beverages served to patients was remitted to the Department, taxpayer may petition for a refund. Taxpayer's petition is denied on this issue.

[3] Taxpayer additionally protests the assertion of use tax against its purchases of radiation badges for use in the nursing home. The badges are worn by personnel to detect exposure to radiation from x-ray and other equipment. Taxpayer's petition contends that "the hospital is not buying badges; it is buying a service for measuring radiation exposure." We agree. One problem is that the invoices indicated a charge for badges. However, what occurs is that the badges which hold the film are loaned to the purchaser for the duration of its use of the service. Film is attached to the badge and replaced monthly. The taxpayer sends the film to the seller for analysis of radiation levels. The seller bills the taxpayer based on the amount of film used. The film charge includes any costs associated with the monitoring, which is not separately billed.

The Department has previously stated that, where the purchaser is interested in purchasing the time or expertise of another, it is purchasing a service. Conversely, where the purchaser seeks to buy items such as film strips, it is purchasing tangible personal property. Here, although taxpayer uses or exposes the film during the performance of its service-taxable activity, it is not consuming tangible personal property. It is employing another service provider to supply it with analytical services. As such, the film purchases are not of tangible personal property and are not subject to use tax under Rules 224 and 178. This finding is consistent with Rule 224, which includes chemists, laboratory operators, and others who perform technical and scientific testing services as service-taxable persons. Additionally, the fact that written test results may be sent to the taxpayer does not alter this conclusion. Rule 138 states that

> The retail sales tax does not apply to the amount charged or received for the rendition of personal services to others, even though some tangible personal property in the form of materials and supplies is furnished or used in connection with such services.

Taxpayer's petition is granted with regard to this issue.

DECISION AND DISPOSITION:

Taxpayer's petition is denied except with regard to the radiation badges. The file will be remanded to the audit section for the appropriate adjustment.

DATED this 13th day of September 1989.