

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

In the Matter of the Petition) D E T E R M I N A T I O N
For Correction of Assessment of) No. 87-158
)
)
) Registration No. . . .
) Tax Assessment No. . . .
)

[1] **RULE 178:** RCW 82.12.010(5) -- USE TAX -- CONSUMER -
- PROMOTIONAL MEALS -- MEASURE OF TAX. A restaurant
business which gives away meals to promote its
business is the consumer of such meals; use tax
applies on the value of the meals which is the
retail selling price.

[2] ESTOPPEL -- USE TAX -- CHANGE IN POSITION -- PROSPECTIVE
APPLICATION.

Where taxpayer had been told by two different
auditors in recent audits of affiliates that its
method of reporting promotional meals was correct,
and where the Department's position was unclear,
taxpayer's method of reporting accepted for current
audit period. Change in position applied
prospectively only.

[3] **RULES 178 AND 119:** USE TAX -- PARTNERSHIP --
OWNER/MANAGER MEALS -- BUSINESS PURPOSE -- MEASURE
OF TAX -- COST BASIS. Meals provided by restaurant
operated as a partnership to owner/manager found
subject to use tax where cost of providing meals
considered a business expense by the taxpayer.
Measure of tax is the cost of the food.

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: . . .
 . . .

DATE OF HEARING: November 13, 1986

NATURE OF ACTION:

The taxpayer seeks a correction of an assessment of use tax on promotional meals and a ruling that the proper measure of tax on owner/manager meals is the cost of the food.

FACTS AND ISSUES:

Frankel, A.L.J.--The taxpayer, a partnership, operates a restaurant and does catering at the restaurant. The taxpayer's records were examined for the period October 1, 1982 through September 30, 1985. The audit disclosed taxes and interest owing in the amount of \$ Tax Assessment No. . . . in that amount was issued on June 12, 1986.

The taxpayer had been reporting forty percent of the retail selling price of promotional meals, owner meals, and house discounts as retail sales. Forty percent represents the average cost of the food. The auditor found the owner meals and promotional meals were subject to use tax only, and that the house discounts¹ are not taxable. At issue in this appeal is the measure of the tax on promotional and owner/manager meals.

The auditor first told the taxpayer that the measure of the tax on owner and promotional meals was the retail selling price. During a conference with the auditor and his supervisor, the taxpayer was informed that the cost basis was the correct measure of the tax on owner/manager meals. The taxpayer stated that some time later the auditor called and stated audit review in Olympia disagreed with the cost basis of owner meals and that he had to recalculate the assessment at retail value. In May, the taxpayer stated the auditor again called and stated audit review in Olympia now agreed that the tax on owner meals should be based on the cost of the food.

The taxpayer changed its method of reporting and is now paying tax on owner meals on the cost basis and on promotional meals on the retail value. It protests the assessment of taxes and interest on the prior periods, however, contending it was

¹ House discounts include refunds or meals served to dissatisfied customers where the taxpayer did not charge for the meal.

reporting as it had been instructed to report in audits in 1983 and 1985 of other restaurants it operates. It stated those restaurants used the same bookkeeping and reporting methods and that two different auditors examined those books and approved the taxpayer's method of paying tax on owner and promotional meals.

[1] Promotional meals -- RCW 82.12.020 states that the use tax is levied upon a "consumer" measured by the "value of the article used." In this situation, the taxpayer is the "consumer" of the food items given away because RCW 82.12.010(5) includes within the meaning of that word

. . . any person who distributes . . . any article
of tangible personal property, . . . the primary
purpose of which is to promote the sale of products
. . .

See also WAC 458-20-178.

The measure of the use tax is the "value of the article used" which is the "retail selling price." RCW 82.12.010(1). Thus, because the taxpayer is statutorily defined as the consumer of the food items, it is liable for use tax on the retail selling price of the same. The use tax applies in this case because the meals are "promotional," i.e., promote the taxpayer's business.

[2] The taxpayer is now reporting promotional meals on the retail value, but contends it should not be assessed back taxes and interest for the previous periods because it used the cost basis for reporting these meals. The taxpayer was told in two different recent audits of affiliates that its method of reporting promotional meals on a cost basis was correct. Furthermore, it notes that even in the assessment at issue, the Department changed its position several times as to the measure of the tax. Because the taxpayer relied upon statements by responsible Department employees, acting within the scope of their authority, we believe the taxpayer should be granted the benefit of any doubts which might be raised under the doctrine of Harbor Air Service, Inc. v. Board of Tax Appeals, 88 Wn.2d 359 (1977).

[3] Manager/owner meals. The auditor also assessed use tax on the manager/owner meals on the retailing price. We agree with the subsequent decision that the measure of tax on these meals is the cost basis. Although we do not find that the manager/owner is an "employee" of the partnership, we find the

value of the product in this case is similar to that where an employer furnishes meals to an employee.²

WAC 458-20-119 (Rule 119) is the administrative rule which governs the tax liability of persons making sales of meals. Where meals are furnished to employees, Rule 119 provides that sales of meals by businesses to employees are sales at retail and subject to the retail sales tax. As the rule states:

This is true whether individual meals are sold, whether a flat charge is made, or whether meals are furnished as a part of the compensation for services rendered. Where no specific charge is made for each meal, the measure of the tax will be average cost per meal served to each employee, based upon the actual cost of the food. (Emphasis added.)

In this case, the taxpayer contends that the cost of providing meals to manager/owners is an ordinary and necessary business expense,³ and is not done for the owner's personal convenience and benefit. It believes the manager has no way of knowing how meals are being prepared and served if the manager does not sample meals. Because we find the manager/owner is acting in the nature of an employee of the partnership when sampling meals for a business purpose, the measure of the tax on the manager/owner meals is the actual cost of the food.

DECISION AND DISPOSITION:

The taxpayer's petition is granted. An amended assessment shall be issued based on the revised schedule of taxes due submitted by the taxpayer (. . .). The amount remaining

² Because we find the partnership is the consumer of the owner/manager meals and the promotional meals, we agree with the auditor that no B&O tax is due. Where an employer provides meals to an employee, Rule 119 provides the retail sales tax and retailing B&O tax apply.

³For federal tax purposes, the taxpayer treats the meals provided to the manager/owner as a necessary business expense under I.R.C. + 119.

owing, plus extension interest through January 1, 1987,⁴ shall be due on the date provided on the adjusted assessment.

DATED this 15th day of May 1987.

⁴Interest is waived after January 1, 1987, as the delay in issuing this Determination was for the convenience of the Department and not because of any action by the taxpayer.