Cite as 6 WTD 291 (1988)

BEFORE THE INTERPRETATION AND 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. 88-314
. . .	Registration No. . . .
	Document No. . . .

[1] **RULE 244 AND RCW 82.08.0293:** RETAIL SALES TAX -- EXEMPTION -- SALES OF FOOD. Exemption of "food products" from sales tax does not apply when products are sold adjacent to an area inviting or permitting consumption of the food. Test is whether such area exists, not who provides it.

[2] **RULE 107, 82.08.050 and RCW 82.32.070**: RETAIL SALES TAX -- PAYMENT -- DOCUMENTATION. The law requires that sales tax be separately stated and provides a conclusive presumption that the quoted selling price does not include sales tax. Persons protesting assessment of sales tax must provide documentation establishing that the tax has been separately stated and charged and that such amount has been paid by the buyer to the seller or the buyer will be deemed not to have paid the tax. Lack of such documentation will bar the taxpayer from questioning the assessment.

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.

DATE OF TELEPHONE CONFERENCE: July 19, 1988

TAXPAYER REPRESENTED BY: . . .

NATURE OF ACTION:

Taxpayer petitions for correction of portion of assessment of retail sales tax and use tax.

FACTS AND ISSUES:

Johnson, A.L.J. -- Taxpayer is a corporation, the principal business of which is the operation of franchise food outlets. . . . .

With regard to the contested sales tax portion of the assessment, the outlet in question is located in a large office building. It is one of several shops centered around an atrium containing plants, chairs and tables. Taxpayer's customers purchase items such as plain and filled croissants and beverages, which are carried out of the taxpayer's store. There is no seating provided in the store itself. Some of the customers consume their food in the atrium's seating area. Taxpayer contends that it should not be required to collect sales tax on the food sales, because it provides no seating for food consumption.

Taxpayer's petition states that

> the lease is essentially a 'net' lease that requires the tenant to pick up a proportionate share of expenses related to running the building. As can be seen by a review of this lease, the tenant is not obligated in any way to pay for or provide the tables, chairs or other seating facilities for patrons.

Taxpayer further contends that, under the lease, the landlord has an unrestricted right to change, modify or even close the common areas; conversely, taxpayer states that the landlord must provide the seating area because of zoning concessions received for the building. Taxpayer states that the areas are not provided for the benefit of the tenants.

Taxpayer contends that Engrossed House Bill 1507, which changed certain parts of the application of the sales tax exemption on food, occurred because operations of its type were not taxable previously and the Legislature sought to make such operations taxable with the amendment.

Additionally, taxpayer relies on the rescission of a portion of Excise Tax Bulletin 528.08.244 (ETB 528) and includes a letter from the Department to taxpayer's franchisor, . . . , which was written following an audit of [the franchisor]. Taxpayer finds support for its argument for nontaxability in the fact that, since it believes that its auditor applied the same logic used in [the franchisor]'s audit, the May, 1987, rescission this portion of ETB 528 is evidence that the assessment is incorrect.

Additionally, taxpayer contests the auditor's assessment of use tax on capital assets and other acquisitions which were not made on a routine or recurring basis, stating that sales tax was paid on these items. Included in the petition materials was a second letter from taxpayer's attorney which contained a statement from . . . , the former Vice President in charge of Operations for [Corp.

A], a closely-held corporation. [He] states that the shareholders of [Corp. A] and of [taxpayer] were identical; that both were closely-held corporations; and that [taxpayer] lacked a credit history at its inception, so the business decision was made to use the creditworthiness of [Corp. A] to acquire equipment, supplies and services. Further, he states that the items were ordered by [Corp. A] and delivered directly to [taxpayer]. When [Corp.A] received bills, [he] would prepare an identical bill for [taxpayer], which would pay [Corp. A]; [Corp. A] would then pay the vendor. The statement says that all bills contained sales tax, but taxpayer's attorney says that [Corp. A] destroyed receipts after five years. Also included in taxpayer's petition materials is a similar statement from [the former accountant of taxpayer and Corp. A]; he says that the statements above are accurate. Copies of several invoices were included in the petition materials.

DISCUSSION:

[1] RCW 82.08.0293 grants an exemption from retail sales tax for certain types of food. Specifically excluded from the exemption is food sold in a situation where immediate consumption of the food is invited. Rule 244 is the administrative regulation implementing the statute. It has the same force and effect as the law itself. RCW 82.32.300. That rule states in pertinent part:

> (3) Vendors who are required to collect tax.
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> (a) Sales of food products are subject to tax when sold by . . . businesses which are operated in such a way as to invite or permit consumption of the food at or near the premises where the food is sold. This circumstance is presumed to occur where customers are provided facilities for immediate consumption of food sold, such as tables, chairs or counters . . . It is the intent of the law that tax be charged by retailers who sell food products ready for consumption at or near the premises of the vendor by furnishing cups, spoons, straws, or the like to facilitate immediate consumption. If such facilities are provided the tax applies even though the food is sold, packaged or wrapped "to go" and even if the food is in fact removed from the premises of the retailer and is consumed elsewhere. The test is not where the food is in fact consumed but whether the customer is provided any of the described facilities for consumption of the food. (Emphasis supplied.)

There is no language in the rule requiring that the facilities be provided or maintained by this taxpayer. The incident triggering taxability is the existence of an area inviting or permitting immediate consumption of food.

This issue has been presented to the Department of Revenue on numerous occasions, and our conclusion that the sales tax has been properly levied is not one of first impression. The Department has issued and released for public information Excise Tax Bulletin 512 (ETB 512), which is an abstract of several Departmental Determinations and interpretive opinions issued to other taxpayers. The bulletin is in accord with both RCW 82.08.0293 and Rule 244. ETB 512 states:

> FOOD PRODUCTS SOLD THROUGH CONVENIENCE FOOD SALES LOCATIONS
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> Convenience food sales locations, for the purposes of this excise tax bulletin, are those locations where food products are sold through vending machines or tended sales booths located for the convenience of persons using premises where the marketing of food is not the principal business. This includes food vending machines or sales booths located in office buildings, factories, motels, hotels, service stations, transportation depots, and similar business locations.
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> Food products of the kind packaged in the same way as they are sold at regular grocery outlets for "take home" purposes and which are tax exempt under Rule 244 are exempt when sold through convenience food sales locations, unless the food products are liquids dispensed in open containers; or consist of salads, pies, soups, sandwiches, and similar items sold in individual service trays or containers or with cutlery, or with heating facilities or supplemental condiments available at the vending location. However, all food items sold at convenience food sales locations are taxable, even though sold in sealed cans, bottles, or sealed packages such as those usually used for candy and snack foods at regular grocery outlets, when the convenience food sales location is operated so as to provide a nearby area under the control of the retailer or a person with whom the retailer contracts where consumption of such food is invited or permitted at tables, chairs, counters, or a designated parking area. The availability of such an area in which consumption of food is invited or permitted includes an area substantially used by the vendor's food purchasers as a place to consume such purchases even though such area is also used as a waiting, resting, or conference location. (Emphasis supplied.)

Taxpayer's franchise bakery and beverage operation is located on one of the office building's three levels devoted to retail shops and restaurants. In this atrium area, the landlord has placed chairs and tables for use by the public. It is the Department of Revenue's position that a nearby area containing tables and chairs is a facility that invites or permits consumption of the food at or

near the premises where the food is sold. Rule 244 makes no reference to ownership, and it makes no limitation as to who must be the provider of the consumption area; consequently, taxpayer's contention that the landlord controls whether the seating area exists is without merit. ETB 512 clearly includes an area used for food consumption which, additionally, is used for other purposes. Such is the case with the atrium seating near taxpayer's operation. The test, under the rule, is whether the facilities exist; it is undisputed in this case that they do.

Further, under the Adjustments section of the lease, at page 4, the taxpayer's lessor, in addition to regular rent, charges the taxpayer an additional monthly fee, proportioned by lessee's square footage in relation to total leasable arcade floor area, to cover the cost of maintenance and upkeep of the common areas of the office building's arcade. We find that the taxpayer's claim that it has in no way provided seating space is without merit. Taxpayer has, in fact, contracted with the lessor to provide seating space by being constructively involved in maintaining the atrium seating space through its proportionate payment of costs. The lessor's additional motivation for providing the seating space is immaterial. This arrangement would clearly be sufficient to constitute control of the seating area as mentioned in ETB 512.

The Department of Revenue's letter dated May 5, 1987, to [taxpayer's franchiser] Corporation clearly states, in the paragraph following the one referring to the rescinded portion of ETB 528, that

> [w]e are advised, however, that in some instance, an entire mall area may be dedicated to restaurant businesses and/or various food preparers, where there are tables, chairs, and other facilities for the immediate consumption of the prepared foods. In these cases the sale of prepared foods will be subject to retail sales tax.

This paragraph is consistent with the statute, Rule 244, ETB 512, and the Department's administration of the law. There is no dividing line of taxability between shopping malls and office buildings. The test is, and consistently has been, whether the facilities inviting or permitting immediate consumption of food exist. Existence of such facilities has always caused sales of food to be taxable, and Engrossed House Bill 1507 represents no change in this portion of the law.

RCW 82.08.0293, Rule 244 and ETB 512 require that taxpayer collect sales tax on food sales in this case, because the sales are made under circumstances where seating areas inviting or permitting immediate consumption of the food are provided. This portion of the law is unchanged by the recent amendment to the statute, effective June 1, 1988. A claim that the amendment changed the law

and showed that taxpayer's type of operation was previously not required to collect and remit retail sales tax is incorrect.

Taxpayer also contends in its petition that Excise Tax Bulletins are not circulated to the general public. This, too, is incorrect. It is the obligation of taxpayers in this state to correctly inform themselves of the tax consequences of their activities. This Department maintains a staff of qualified personnel to whom inquiries regarding such matters may be addressed, and information is freely available without charge. Had the taxpayer inquired, it could have been supplied with Excise Tax Bulletins addressing the tax ramifications of its operation's structure.

[2] Taxpayer's second contention is that the assessment of use tax is improper, because sales tax was paid on the items acquired. No evidence of payment was found by the auditor. Copies of various invoices and checks were submitted with the petition.

In cases where sales tax has not been paid and the items acquired were purchased for use in the taxpayer's business as opposed to being acquired for resale, use or deferred sales tax is imposed under RCW 82.12.020.

RCW 82.08.050 sets forth stringent requirements for proving that sales tax has been paid:

> The tax required by this chapter to be collected by the seller shall be stated separately from the selling price in any sales invoice or other instrument of sale. For purposes of determining the tax due from the buyer to the seller and from the seller to the department it shall be conclusively presumed that the selling price quoted in any price list, sales document, contract or other agreement between the parties does not include the tax imposed by this chapter. (Emphasis supplied.)

The statute also provides that the Department may, in its discretion, proceed directly against the buyer for collection of the tax.

WAC 458-20-107 clearly restates these requirements:

> RCW 82.08.050 specifically requires that the retail sales tax must be stated separately from the selling price on any sales invoice or other instrument of sale, i.e., contracts, sales slips, and customer billing receipts....This is required even though the seller and buyer may know and agree that the price quoted is to include state and local taxes, including the retail sales tax. The law creates a "conclusive presumption" that, for purposes of collecting the tax and remitting it to

> the state, the selling price quoted does not include the retail sales tax. This presumption is not overcome or rebutted by any written or oral agreement between the seller and buyer. (Emphasis supplied.)

Finally, RCW 82.32.070 provides that

> [e]very person liable for any fee or tax imposed by chapters 82.04 through 82.28 RCW shall keep and preserve, for a period of five years, suitable records as may be necessary to determine the amount of any tax for which he may be liable, which records shall include copies of all federal income tax and state tax returns and reports made by him. All his books, records, and invoices shall be open for examination at any time by the department of revenue.
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> . . .
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> Any person who fails to comply with the requirements of this section shall be forever barred from questioning, in any court action or proceedings, the correctness of any assessment of taxes made by the department of revenue based upon any period for which such books, records, and invoices have not been so kept and preserved. (Emphasis supplied.)

In this case, the auditor assessed use tax in the absence of proof that sales tax had been paid by the taxpayer to the seller of the items acquired. The taxpayer contends in its petition and in the statements of its former Vice President . . . and of its former accountant . . . that sales tax was paid.

The petition materials also included a copy of a proposal for work by a contractor. The proposal was submitted to [Corp. A] but states that it is for work on [one of taxpayer's outlets]. The proposal separately states sales tax. Accompanying this copy were photocopies of four checks with dates matching the contract period; three of the checks totaled $40,000 and stated that they were for work by the contractor. These payments are among the items on Schedule IX of the audit. No other receipts were shown to the auditor by [taxpayer] or included in the petition materials which match the items on which the auditor assessed use tax. Of the remaining copies, most would be insufficient proof that sales tax was paid by [taxpayer]. They are either invoices showing only [Corp. A] name, or invoices not separately stating sales tax. Further, there were duplicate copies of at least three invoices included in the group of invoices, and several invoices bore the same invoice numbers with different items billed thereon.

During the telephone conference, taxpayer's attorney stated that [Corp. A] records were destroyed after five years. Five years is

the retention period required by the statute; however, the audit period is within the last five years, and the records necessary for examination are those of [taxpayer], not of [Corp. A]. [The former vice president's] statement contends that matching invoices for each expenditure were prepared for [taxpayer], but no adequate receipts other than the contractor's receipts with matching checks were produced by [taxpayer].

We believe that the contract proposal and the checks totaling $40,000, which match the items against which use tax was assessed, show that the taxpayer did pay the amounts and that sales tax was paid on the contract. As to the remainder of the items in the assessment, because no proof of payment of the sales tax has been produced, we find that the assessment of use tax is proper.

DECISION AND DISPOSITION:

Taxpayer's petition is granted in part and denied in part. With regard to its liability for collection of retail sales tax in the [office building] location, taxpayer's petition is denied. As to the assessment of use tax, the audit is remanded for examination of the records supplied and such adjustments as are consistent with the findings of this Determination. An amended assessment will be issued to be due on the date indicated thereon.

DATED this 10th day of August 1988.