

Cite as 3 WTD 21 (1987)

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 of Refund of)
) No. 87-110
)
 . . .) Registration No. . . .
)
)

- [1] **RULE 114, RCW 82.04.4282:** B&O TAX -- RETAILING -- EXEMPTION -- VOLUNTARY DONATIONS -- MEALS PROVIDED TO HOMEBOUND PERSONS. Voluntary donations which do not entitle the donor to receive any significant goods or services in return for the donation are not subject to the B&O tax. Where the homebound persons were provided meals regardless of the amount donated or even if no donation was made established that the donations were voluntary and bona fide. Held, the donations are exempt from Retailing B&O tax.
- [2] **RCW 82.08.020, RCW 82.04.040, RCW 82.04.050:** RETAIL SALES TAX -- SALE -- CONSIDERATION -- VOLUNTARY DONATION -- ETB 516. The term "sale" means any transfer of ownership of, title to, or possession of property for a valuable consideration, and includes the furnishing of food, drink or meals for compensation whether consumed upon the premises or not. Consideration is the inducement, cause, motive, price, or impelling influence which induces a party to enter into a contract to sell. The bona fide voluntary donations were neither consideration nor compensation for the meals because the meals were available without charge. ETB 516.
- [3] **RULE 244, RCW 82.08.0292, RCW 82.08.0293:** RETAIL SALES TAX -- EXEMPTION -- FOOD BANKS -- NONPROFIT ORGANIZATION -- PURCHASE OF MEALS TO FEED THE POOR AND INFIRM -- ETB 525. Prior to May 1, 1982, sales tax applied to the purchase of prepared meals by a nonprofit organization to feed the poor and infirm. RCW 82.08.0292, effective May 1, 1982 until June 30, 1983, and RCW 82.08.0293, effective July 1, 1983 and thereafter, exempt such purchases from sales tax. See ETB 525 as to how a nonprofit organization qualifies as a "food bank" for the sales tax exemption.

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: September 23, 1986

NATURE OF ACTION:

Petition for refund of excise taxes paid involving Retailing business and occupation (B&O) tax and retail sales tax where the petitioner provides meals to homebound persons which activity is supported by solicited voluntary donations.

FACTS AND ISSUES:

Krebs, A.L.J.-- . . . [The] (taxpayer) is a nonprofit corporation incorporated in Washington The taxpayer delivers hot meals to over 100 homebound elderly and handicapped persons. The taxpayer purchases the meals from [a hospital] (supplier) in . . . without payment of sales tax. Volunteers for the taxpayer pick up the hot meals at the hospital and deliver them to the homes. This is done five days per week from Monday to Friday.

About 50 percent of the homebound recipients of the meals delivered by the taxpayer receive such meals under a state-administered nutrition program for the aged as provided for in the Older American Act, Public Law 95-478, Title III and RCW 74.38.040(6). The . . . County Health District furnishes the taxpayer with the names of eligible recipients. This nutrition program is subsidized by the federal and state government who pay for the cost of the program. The recipients are not charged for the meals. If the recipient makes a donation, the taxpayer pays it over to [the] County.

The other 50 percent of the homebound recipients of the meals are persons who have been referred to the taxpayer by service organizations, hospitals, relatives and friends. The taxpayer depends on donations to pay for the cost of this activity. During the initial screening of these recipients, the taxpayer informs them or their sponsors (friends, relatives, etc.) that because the program is not subsidized it would like to receive a voluntary donation to help pay for the cost of the program. The taxpayer delivers meals to these recipients even if no donation is made. Where donations are made, they vary from \$1 to \$50 per month. Donations are given to the volunteer at the time of delivering the meal. The volunteer turns over the donation to the taxpayer. The taxpayer also receives donations directly from the relatives and friends of the recipient.

By letter dated October 11, 1982, . . . , the taxpayer requested from the Department of Revenue a written ruling (on the facts presented) that it was exempt from paying sales tax to its supplier of the meals. The taxpayer referred to ETB 525/.08.12/114.244 (ETB 525),

The Department responded by letter dated October 21, 1982, . . . , which advised the taxpayer that it was exempt from sales tax on its purchase of meals and it should provide its supplier with an exemption certificate and resale certificate. The letter further stated:

However, you must collect retail sales tax from the purchasers of these meals. This is because when you make a charge for the meals, the organization [taxpayer] falls outside the scope of the "food bank" exemption.

The sales tax will be remitted to the Department on excise tax forms. To accomplish this we require that you be registered.

I have enclosed an "Application for Certificate of Registration" which must be completed and returned to the Department along with a \$15 registration fee. (Bracketed word and emphasis supplied.)

Thereafter, on May 2, 1983, the taxpayer filed a completed "Application for Certificate of Registration" which indicated that it commenced business activity on October 11, 1979.

The taxpayer also filed in April 1983 a Combined Excise Tax Return for the annual period of 1979 and remitted sales tax in the amount of \$453.16; for the annual period of 1980 and remitted sales tax in the amount of \$503.02; for the annual period of 1981 and remitted sales tax in the amount of \$622.91; and for the annual period of 1982 and remitted excise taxes (Retailing B&O tax and sales tax) in the amount of \$1,116.15. The taxpayer filed subsequent tax returns with remittances due until February 13, 1985 when the taxpayer advised the Department that, after reviewing ETB 516.08.114.244 (ETB 516), . . . , it had concluded that it "should not be paying retail sales tax for the meals" it delivers, and that "the Department's letter of October 21, 1982 incorrectly required" it to collect sales tax. By its letter of February 13, 1985, . . . , the taxpayer requested a refund of sales taxes paid plus interest. The February 13, 1985 letter states the following pertinent information:

As you will note, our sole purpose is to deliver meals to homebound elderly and handicapped persons. These meals are purchased by our organization from [the] Hospital. About 50% of our meals are subsidized by the state

through the Older Americans Act (Title III). The balance of the meals are subsidized by private fund raising and donations from recipients. Each recipient is requested to donate toward the cost of the meal and most make at least a partial contribution to the cost. We do not establish a "charge" for the meals and no one is denied a meal if they do not make a donation.

. . . the taxpayer's letter of May 29, 1986 which in pertinent part states:

Also included is a letter dated October 21, 1982 from the Department of Revenue advising us that we were not tax exempt. However, the letter inaccurately states that we "sold" meals. None of our meals have ever been sold. We ask for a donation. We have never established a price or charge for the meals and no one has ever been denied a meal because they were unable to make a donation.

The central issue in this case is whether the taxpayer incurred excise tax liability on the "donations" solicited and received to support its meal delivery programs. Also in issue is the question of what tax liability was incurred by the taxpayer and whether the taxpayer is entitled to a refund if it paid more than it was liable for.

DISCUSSION:

Retailing B&O tax.

[1] With respect to the B&O tax, RCW 82.04.4282 provides a deduction (exemption) and in pertinent part provides:

In computing tax there may be deducted from the measure of tax amounts derived from bona fide contributions, donations . . . This paragraph shall not be construed to exempt any person, association, or society from tax liability upon selling tangible personal property . . . (Emphasis supplied.)

WAC 458-20-114 (Rule 114), . . . , implements the statute and in pertinent part provides:

RCW 82.04.4282 provides for a business and occupation tax deduction for amounts derived from activities and charges of essentially a nonbusiness nature. Thus, outright gifts, donations, contributions, endowments, tuition, and initiation fees and dues which do not entitle the payor to receive any significant goods or services in return for the payment are not subject to business and occupation tax. The scope of this statutory deduction is limited to situations where no business or proprietary

activity (including the rendering of goods or services) is engaged in which directly generates the income claimed for deduction.

Many for-profit or nonprofit entities may receive "amounts derived," as defined in this rule, which consist of mixture of tax deductible amounts (bona fide initiation fees and dues) and taxable amounts (payment for significant goods and services rendered). For purposes of distinguishing between these kinds of income, the law requires that tax exemption provisions must be strictly construed against the person claiming exemption.

. . .

CONTRIBUTIONS, DONATIONS, AND ENDOWMENTS.

Only amounts which are received as outright gifts are entitled to deduction. Any amounts, however designated, which are received in return for any goods, services, or business benefits are subject to business and occupation tax under the appropriate classification depending upon the nature of the goods, services, or benefits provided. Thus, for example, so-called "grants" which are received in return for the preparation of studies, white papers, reports, and the like do not constitute deductible contributions, donations, or endowments.

. . .

Also, the statute does not distinguish between the kinds of clubs, organizations, associations, or other entities which may be eligible for this deduction. They may be operated for profit or nonprofit. They may be owned by the members, incorporated, or operating as a partnership, joint venture, sole proprietorship, or cooperative group. They may be of a charitable, fraternal, social, political, benevolent, commercial, or other nature. However, none of these characteristics determines the entitlement to tax deduction. The availability of the deduction is determined solely by the nature of the activity or charge which generates the "amounts derived" as defined in this rule.

The deduction is limited to business and occupation tax. There is no provision under the law for any deduction from retail sales tax or use tax of amounts . . .

. . .

The right to deduct bona fide initiation fees, dues, contributions, donations, tuition fees and endowment

funds does not exempt any person, association or society from tax liability upon selling tangible personal property or upon providing facilities or services for which a special charge is made to members or others . . .
(Emphasis supplied.)

In this case, the taxpayer has depended on donations to pay for the cost of providing meals to homebound elderly and handicapped persons. The taxpayer has solicited voluntary donations from the recipients of the meals and other persons. Even if no donation is received from the recipient, a meal is not denied to that person which we believe establishes the voluntary nature of the donation and its being bona fide. Certainly, the taxpayer cannot be considered to have made a special charge for the meal when it routinely provided the meal even though it received no donation from the recipient. In short, there was no charge nor consideration paid for the meal. The taxpayer was not "selling" meals. We conclude that the deduction in RCW 82.04.4282 is available to the taxpayer. Accordingly, a refund of the Retailing B&O taxes paid by the taxpayer shall be made.

It is noted that the taxpayer paid Retailing B&O tax for periods commencing in 1982. The taxpayer first petitioned for a refund on February 13, 1985. RCW 82.32.060 provides:

No refund or credit shall be made for taxes paid more than four years prior to the beginning of the calendar year in which the refund application is made . . .

Accordingly, the taxpayer is entitled to a refund of all Retailing B&O taxes paid since January 1, 1981. All payments of taxes to the Department commenced in 1983.

Retail sales tax.

As discussed above, RCW 82.32.060 limits the refund, if any, in this case to sales taxes paid since January 1, 1981. All payments of taxes to the Department commenced in 1983.

The taxpayer, except for the last two quarterly periods of 1983, absorbed the sales tax, that is, the taxpayer did not collect sales tax from the person making the donation. Accordingly, we can only authorize a refund for the sales taxes paid for the two last quarterly periods of 1983 if the person who paid the tax to the taxpayer first receives a refund from the taxpayer who must so establish that such refund was actually made.

RCW 82.08.020 imposes the retail sales tax on each retail sale in this state measured by the "selling price" which is defined in RCW 82.08.010 as

. . . the consideration . . . expressed in the terms of money paid or delivered by a buyer to a seller . . .

[2] RCW 82.04.040 defines the term "sale" in pertinent part to mean:

. . . any transfer of the ownership of, title to, or possession of property for a valuable consideration . . . It also includes the furnishing of food, drink or meals for compensation whether consumed upon the premises or not.

RCW 82.04.050 defines the term "retail sale" in pertinent part to mean:

. . . every sale of tangible personal property . . . other than a sale to a person who (a) purchases for the purpose of resale . . .

The October 11, 1982 letter, . . . , from the taxpayer indicated the following:

1. On July 1, 1982, the supplier requested the taxpayer to pay sales tax on meals provided to the taxpayer who then served them to the homebound elderly.
2. The taxpayer sought in writing a ruling that it was exempt from paying sales tax to its supplier.
3. Half of the recipients were under the Federal Title IIIc program and the other half paid the costs of providing their meals.
4. The taxpayer was supported by donations from church and civic organizations.

The Department's response letter of October 21, 1982, . . . , ruled that while the recipients under the Federal Title IIIc program were exempt, the other half of the recipients were not exempt because they purchase the meals. The Department further ruled:

The meals purchased and resold to nonqualifying individuals may also be purchased from the hospital [supplier] exempt of sales tax. In this case, you should give the hospital a resale certificate like that outlined in [Rule 102] . . .

However, you must collect retail sales tax from the purchasers of these meals. This is because when you make a charge for the meals, the organization [taxpayer] falls outside the scope of the "food bank" exemption. (Bracketed words and emphasis supplied.)

The taxpayer's letter of October 11, 1982 reported that half of the recipients paid the costs of their meals and that the taxpayer was also supported by donations. The Department's response letter of October 21, 1982 misconstrued, we believe, that the taxpayer was buying meals and reselling them to the recipients. The taxpayer's actual activity was not to resell the meals but to provide the meals with the cost being supported by bona fide donations from the recipients and other persons.

RCW 82.08.020 and RCW 82.04.040, supra, clearly provide that in order for a sale to take place there must be "consideration."

Consideration is the inducement to a contract; the cause, motive, price, or impelling influence which induces a contracting party to enter into a contract. Consideration is an act or forbearance, or the promise thereof, which is offered by one party to an agreement and accepted by the other as an inducement to that other's act or promise. Black's Law Dictionary, Third Edition.

Whatever amounts paid by the recipients to the taxpayer were not "consideration" paid to the taxpayer. They were voluntary donations. They did not induce the taxpayer to provide meals to the recipients. The taxpayer provided the meals whether or not a donation was made. We conclude that the taxpayer was neither selling nor reselling the meals.

However, this does not mean that the situation in question did not give rise to tax consequences. When the taxpayer purchased the meals from the hospital-supplier, sales tax should have been paid to the hospital-supplier on the half that was not exempt because the taxpayer was not reselling the meals. This is supported by the following excerpt from ETB 516, . . . :

There are programs, other than exempt Older American Act [Title III] programs, whereby meals are supplied to persons [taxpayer] by commercial food preparers [hospital-supplier] who purchase and prepare food without [where there is no] charge to the meal consumer [recipient], but where payment is made to the food preparer [hospital-supplier] by nonprofit or charitable organizations [taxpayer]. In such cases the payment [by the taxpayer] is subject to sales tax irrespective of any bona fide donations which may be received by the organizations [taxpayer]. (Bracketed words supplied.)

[3] The taxpayer, having not paid sales tax on its purchase of the meals from the hospital-supplier, became liable to the Department for the sales tax. RCW 82.08.050. But such requirement to pay sales tax to the hospital-supplier existed for the period only prior to May 1, 1982. RCW 82.08.0292, effective May 1, 1982 until June 30, 1983, and RCW 82.08.0293, effective July 1, 1983 and thereafter, exempts "food banks" from sales tax on purchases of

meals for distribution to the poor and infirm. ETB 525, . . . , explains the exemption implications of RCW 82.08.0292 and RCW 82.08.0293. The taxpayer comes within the definition of "food bank." Prepared meals, for the purpose of the statutory exemptions, are included within the terms "food and food products."

SUMMARY:

1. The taxpayer is entitled to a refund of all Retailing B&O taxes paid to the Department.

2. The taxpayer is entitled to a refund of all sales taxes paid for periods commencing May 1, 1982, except for the last two quarterly periods of 1983 during which time the taxpayer actually collected sales tax from the persons making the donations. If the taxpayer establishes that it has made refunds to the latter donors, it will be entitled to a corresponding refund.

3. For periods prior to May 1, 1982, when the taxpayer should have been paying sales tax to its hospital-supplier but did not, the taxpayer is not entitled to a refund of the sales taxes paid to the Department because of the provisions of RCW 82.08.050 of sales tax liability to the Department. We believe it is correct to assume that the sales taxes paid to the Department on donations collected approximated the sales tax which would have been paid to the hospital-supplier.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part in accordance with the Summary part of this Determination. This matter is being referred to the Department's Office Account Audit Section for computation of the refund as indicated by this Determination and issuance of the refund plus applicable statutory interest.

DATED this 13th day of April 1987.