

Cite as 3 WTD 181 (1987)

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

In the Matter of the Petition)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u> <u>N</u>
for Correction of Assessment of)	
)	No. 87-178
)	
. . .)	Registration No. . . .
)	Tax Assessment No. . . .
)	

[1] **RULE 107 and RCW 82.08.050:** RETAIL SALES TAX - MEALS - PRICE INCLUSIVE OF TAX. Statute mandates conclusive presumption that the selling price on guest checks and cash register tapes does not include retail sales tax. Where sales tax is not separately accounted for, the Department has no alternative but to conclude that the sales tax has not been accounted for on the full gross selling price as required by law.

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: February 3, 1987

NATURE OF ACTION

As a result of an audit covering the period from January 1, 1981, to June 30, 1985, the taxpayer was assessed retail sales tax on its sale of food since such tax was not separately stated on either the guest check or cash register tape.

FACTS:

Burroughs, ALJ--The Department of Revenue examined the business records of the taxpayer (. . .), which operates a restaurant and lounge, for the period of January 1, 1981 through June 6, 1985. As a result of this and a supplemental

audit, the Department issued a final tax assessment on December 19, 1985

The auditor assessed underreported sales of food. The adjustment was made because the taxpayer did not separately identify retail sales tax on its guest checks or cash register tapes. The auditor explained that RCW 82.08.050, as in effect during the audit period, required that the retail sales tax be separately stated. Although recently enacted law allows a taxpayer to advertise its prices inclusive of the retail sales tax, that tax still must be separately stated on the guest check or on the cash register tape.

The auditor explained that the taxpayer's procedure, for example, had been to advertise on the menu that the charge for an item was \$1.00 including retail sales tax. The item was identified on the guest check at \$1.00 and rung up on the cash register at \$1.00. The customer paid \$1.00. Sales of food were then totaled by the taxpayer, and that total divided by one plus the current retail sales tax rate to arrive at reported sales of food.

The auditor assessed only the difference between the amount of taxes owed on the selling price as indicated on the guest checks and cash register tapes, and the taxes which had been paid.

TAXPAYER'S EXCEPTIONS:

The taxpayer has objected to its tax assessment, explaining that it began using a new menu on April 1, 1985 in which the retail sales tax was included in the prices. The guest checks from that time recorded only the menu price, and did not break that price down into tax and meal price. The taxpayer's cash register, which is about thirty years old, does not have a tax key on it, so the full price has always been rung. The cash register tapes, then, have always shown only the totals, and not the tax.

The taxpayer's representative testified that prior to April 1, 1985 the menu prices had not included sales tax, and the sales tax had been recorded separately on the guest checks. The taxpayer claims that, at the time of the audit, all guest checks that predated the April 1, 1985 menu change had already been thrown away.¹ Although the taxpayer apparently had cash

¹The auditor, however, disputes this assertion, claiming that he saw and reviewed both guest checks and register tapes for 1982,

register tapes covering the audit period, these did not separately state the sales tax charged.

The taxpayer's representative was of the opinion that the law was being selectively enforced selectively on his business and not on other businesses similarly situated, and that the rules pertinent to the transactions here at issue are not generally known.

ISSUE:

The sole issue for our consideration is whether, in the absence of other records, tax was correctly assessed on the full price of meals as recorded on the taxpayer's cash register tapes which did not separately state retail sales taxes, which the taxpayer alleges were collected and paid.

DISCUSSION:

The Department of Revenue's position, relative to this particular issue, has been uniform and consistent over many years of tax administration, as the Revenue Act is succinct and concise upon the point. The law in effect for the audit period required that sellers collect retail sales tax in addition to and as a separate item over and above the selling price. The auditor asserted tax under authority of RCW 82.08.050 which stated:

. . . 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.

The word "conclusively" was added immediately preceding the word "presumed" by an amendment to the statute effective July 1, 1971 and was expressly designed to dispel any doubts of whether the prior law would allow sales tax included prices. The statute is not permissive, and where the transaction between the buyer and the seller is such that prices include sales tax, the Department has no alternative but to conclude

1984, and 1985, and that on none of these was sales tax separately recorded.

the sales tax has not been accounted for on the full gross selling price (RCW 82.08.010(1)) as required by law.

During the audit period, under the Department's administrative authority granted by RCW 82.32.300 and in appreciation of particular cash collecting problems encountered by certain beverage and food business operations, it allowed, upon its official approval, merchants to sell at rounded off sales price amounts which included the retail sales tax, but only on the condition that a price list be conspicuously posted which stated the item selling price exclusive of tax, the sales tax, and the total purchase price. The posting of a price list was not merely a technical requirement of the Department but was required by law. The Revenue Act in RCW 32.08.120 made it a crime for any person to absorb the tax or make

. . . in any form of advertising, verbal or otherwise, any statements which might infer that he is absorbing the tax or paying the tax for the buyer by an adjustment of prices, or at a price including the tax, or in any other manner whatsoever . . .
(Emphasis supplied.)

The taxpayer had no such official approval. Thus, for the audit period in question, it must be conclusively presumed that retail sales tax was not collected and paid.

As to the taxpayer's contention that the law is being imposed on it when it is not being enforced on others, and that people don't know the rules pertaining to this area of taxation, we must disagree. The Department strives to apply the provisions of the Revenue Act equally to all taxpayers through various methods, including taxpayer audits, public hearings on rule changes, the publication of rules, bulletins, key determinations and newsletters. In addition to information available at district offices, the Department maintains a Taxpayer Information section which stands ready to answer both telephonic and written tax inquiries. Although we are sympathetic to the taxpayer's contention that it was unaware of the requirements, it must be recognized that Washington excise taxes are necessarily of a self-assessing nature, and that taxpayers must avail themselves of information which has been made readily available to the taxpaying public.

For the taxpayer's future reference, the legislature in 1986 enacted statutory language regarding "tax included" advertising which reads as follows:

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, but if the seller advertises the price as including the tax or that the seller is paying the tax, the advertised price shall not be considered the selling price. (Emphasis added.)

WAC 458-20-107, recently amended to reflect this legislative change, provides the following;

RCW 82.08.050 specifically requires that the retail sales tax must be stated separately from the selling price or any sales invoice or other instrument of sale, i.e., contracts, sales slips, and customer billing receipts. (For an exception covering restaurant receipts of Class H liquor licensees, see WAC 458-20-119.) 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 seller and buyer. However, selling prices may be advertised as including the tax or that the seller is paying the tax and, in such cases, the advertised price shall not be considered to be the taxable selling price under certain prescribed conditions explained in this rule. Even when prices are advertised as including the sales tax, the actual sales invoices, receipts, contracts, or billing documents must list the retail sales tax as a separate charge. Failure to comply with this requirement may result in the retail sales tax due and payable to the state being computed on the gross amount charged even if it is claimed to already include all taxes due.

ADVERTISING PRICES INCLUDING TAX

The law provides that a seller may advertise prices as including the sales tax or that the seller is paying the sales tax under the following conditions:

(1) The words "tax included" are stated immediately following the advertised price in print size at least half as large as the advertised price print size, unless the advertised price is one in a listed series;

(2) When advertised prices are listed in series, the words "tax included in all prices" are placed conspicuously at the head of the list in the same print size as the list;

(3) If the price is advertised as including tax, the price listed on any price tag shall be shown in the same way; and

(4) All advertised prices and the words "tax included" are stated in the same medium, whether oral or visual, and if oral, in substantially the same inflection and volume.

If these conditions are satisfied, as applicable, then price lists, reader boards, menus, and other price information mediums need not reflect the item price and separately show the actual amount of sales tax being collected on any or all items.

The scope and intent of the foregoing is that buyers have the right to know whether retail sales tax is being included in advertised prices or not and that the tax is not to be used for the competitive advantage or disadvantage of retail sellers. (Emphasis added.)

Thus, even if menu prices are advertised to include sales tax in accordance with all WAC 458-20-107 requirements, that rule still requires that "actual sales invoices, receipts, contracts, or billing documents" reflect both the actual selling price and the sales tax charged and collected. Accordingly, either the taxpayer's guest checks or cash receipts, both of which should be retained for a period of five years in accordance with RCW 82.32.070, must separately reflect both the actual selling price and the retail sales tax calculated on that selling price.

DISPOSITION:

The taxpayer's petition for correction of assessment is denied
and the assessment sustained.

DATED this 28th day of May 1987.