

Cite as Det No. 12-0136, 32 WTD 65 (2013)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For)	<u>D E T E R M I N A T I O N</u>
Correction of Assessment)	
)	No. 12-0136
...)	
)	Registration No. . . .
)	Document No. . . . /Audit No. . . .
)	Docket No. . . .
)	

RULE 254; RCW 82.32.100; RETAIL SALES TAX – RETAILING B&O TAX – RECORDKEEPING – REASONABLE ESTIMATES. An industry study on customer payment practices is a reasonable and acceptable source of facts and information to establish an estimated percentage of cash sales under RCW 82.32.100(1), particularly where the Taxpayer has not provided any sales records or substantiating documentation to establish a different percentage of cash sales.

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.

Kreger, A.L.J. – A Washington corporation that owns and operates a restaurant protests assessment of retail sales tax and retailing business and occupation tax estimating cash sales, because the taxpayer failed to keep and preserve business records detailing their cash sales transactions. We affirm the assessment because the taxpayer did not maintain records of its cash sales during the audit period.¹

ISSUE

Pursuant to RCW 82.32.070 and .100, did the Department of Revenue properly estimate cash sales when a taxpayer failed to maintain records of its cash sales?

FINDINGS OF FACT

[Taxpayer] is a Washington corporation engaged in the business of operating a restaurant The Audit Division of the Department of Revenue (Department) audited the Taxpayer's business

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

activities for the period of January 1, 2007, through March 31, 2011, and issued an assessment, Document No. . . . , on June 10, 2011 for \$. . . in additional tax due. . . .

The tax assessment was attributable to the underreporting of cash sales during the audit period resulting in the assessment of additional retail sales tax and retailing business and occupation (B&O) tax. Due to the lack of business records substantiating cash sales the Audit Division estimated cash sales as 35% of total sales.

The Taxpayer timely appealed the assessment and provided additional records with the appeal, detailing a lower average tip percentage and identifying some specific errors in the audit work-papers. After reviewing this additional information, the Audit Division agreed that the records supported an adjustment to the assessment and on October 5, 2011, issued a Post Audit Adjustment (PAA) which reduced the assessment to \$

The Taxpayer acknowledges that cash sales were underreported during the audit period and that their business records were lacking. However, the Taxpayer estimates that its cash sales only constituted 5.8% of 2009 sales and 6.9% of sales in 2010 and therefore challenges the estimated percentage used in the assessment. The Taxpayer has provided bank statements detailing bankcard deposits for credit/debit sales and terminal receipt tapes from credit card processing machines that detail sales and tip information. In addition to these records the information provided includes handwritten notations that list a summary figure for cash sales for a particular period. No records or supporting documentation were produced to detail how these handwritten, cash sales figures were computed. No register tapes or other business records were produced that detail the source data for these cash sales figures.

ANALYSIS

RCW 82.32.070 provides:

1) Every person liable for any fee or tax imposed by chapters 82.04 through 82.27 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.

See also WAC 458-20-254 (Rule 254); Det. No. 99-341, 20 WTD 343 (2001).

If a person fails to keep and preserve suitable records, then RCW 82.32.100 provides:

(1) If any person fails or refuses to make any return or to make available for examination the records required by this chapter, the department shall proceed, in such manner as it may deem best, to obtain facts and information on which to base its estimate of the tax; and to this end the department may examine the records of any such person as provided in RCW [82.32.110](#).

In this case the Taxpayer admits that there were unreported cash sales during the audit period and does not dispute that it maintained insufficient records to establish its cash sales. The sole point of dispute after the adjustments made to the assessment in the PAA is that the Taxpayer believes that the estimated cash sales percentage used by the Audit Division is too high.

The Taxpayer does not maintain a point of sale system that records all sales. Neither were cash register tapes or other sales detail from sales tickets or receipts made available. The Audit Division reviewed the Taxpayer's bank deposits, credit card reports, and bank settlement statements. The records made available by the Taxpayer indicated underreporting of cash sales. In selecting an estimated cash sale percentage, the Audit Division relied upon a 2008 industry study, prepared by First Data.²

This industry study details that electronic payments are growing across all surveyed retail locations, but also notes that payment methods vary between retailers. Restaurants' cash sales average between 30% to 66% of their total sales, with fast food type restaurants at the high end of that range. Thus fast food restaurants with their comparatively lower per sale average cost average 66% cash sales, and consumers' tendency to use electronic payments methods increases in correlation with the average total meal cost as one moves along the spectrum to full service restaurants. The Taxpayer's restaurant is not a fast food establishment, but rather a moderately priced full service restaurant, with an average entrée price ranging between \$10 and \$15.³ We note that the Audit Division selected an estimated cash sales percentage of 35%, which is on the lower end of cash sale spectrum for restaurants. It is also noteworthy that the Taxpayer's estimate of cash sales at 5.8% for 2009 sales and 6.9% for 2010 is appreciably lower than the cash sale average of any of the retail establishments addressed in the First Data survey. Retailers with the lowest cash sales percentages are Department Stores, and even that type of retailer still had a 15% average for cash sales.⁴ Such a low cash sales percentage for a moderately priced restaurant like the Taxpayer's is not credible. More significantly, the Taxpayer has offered no supporting source detail or payment records to substantiate its estimates.

In this case the Taxpayer did not maintain complete sales records and has not provided any sales records or substantiating documentation to support the cash sales that it acknowledges making. The Department is directed to estimate the assessment in such a manner it deems best when taxpayers do not keep and preserve suitable records. RCW 82.32.100(1), *supra*. We find no error in the Audit Division's method of estimating cash sales and affirm the assessment as adjusted in the PAA.

² First Data Corporation – 2008 Market Brief study on Consumer Payment Preferences for In-Store Purchases. First Data is a credit card processing company and conducted this nationwide study in 2008.

³ [Two internet sites] categorize the Taxpayer's restaurant as moderately priced restaurant, placing the restaurant in the \$\$ out of a possible \$\$\$\$, indicating an average total per person meal cost of \$11-\$30 and an average entrée price of \$10-\$15 respectively.

⁴ The types of retail locations addressed in the survey included: Department Store, Discount Store, Grocery Store, Gas/Convenience Store, Drug Store, Restaurant, Cinema/Theatre, Transit, and Fast Food.

Finally, the Taxpayer notes that the assessment presents a significant financial hardship to the business. Financial hardship does not independently provide a basis to waiving, canceling, or refunding tax or penalties. Det. No. 94-16, 14 WTD 184 (1994); Det. No. 90-340, 11 WTD 81 (1990).

DECISION AND DISPOSITION

The Taxpayer's petition is denied

Dated this 24th day of May 2012.