

Cite as Det. No. 14-0081, 34 WTD 151 (2015)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of) DETERMINATION
Assessment of)
) No. 14-0081
...)
) Registration No. . . .
)

[1] RULE 124; RCW 82.08.050. RETAIL SALES TAX – SALES OF BEVERAGES – PRICE INCLUSIVE OF TAX – APPROPRIATE NOTIFICATION. Absent evidence that sales slips separately state that retail sales tax is included in beverage prices, and absent evidence that a notice is posted that retail sales tax is included in beverage prices, the selling price of beverages is presumed to not include the retail sales tax.

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.

Weaver, A.L.J. – Taxpayer operates a bar and derives income from the sale of food and beverages. Taxpayer petitions for correction of assessment of additional retail sales tax and retailing business and occupation (“B&O”) tax on beverage sales where sales tax was not separately stated on sales receipts. Taxpayer’s petition is denied.¹

ISSUES

Whether, under RCW 82.08.050 and WAC 458-20-124, Taxpayer met the requirements to sell beverages at prices inclusive of sales tax.

FINDINGS OF FACT

[Taxpayer], operates a restaurant in the [Washington]. The Audit Division of the Department of Revenue (“Department”) examined Taxpayer’s books and records for the period January 1, 2008 through December 31, 2011. Upon examination, the Audit Division discovered that retail sales tax was separately stated on receipts for food sales only. Taxpayer backed out retail sales tax from its z-tape sales totals prior to entering sales amounts into QuickBooks. Taxpayer did not separately state retail sales tax for beverage sales on its receipts.

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

Taxpayer maintains that it had printed menus and had posted a sign stating that tax was included in all beverage purchases. However, there is conflicting evidence on this matter. In the *Auditor's Detail of Differences and Instructions to the Taxpayer*, the Audit Division wrote the following:

During the audit the records showed that retail sales tax was not properly collected on beverage sales. It was stated that retail sales tax is included in the beverage prices and was therefore backed out of the z-tape sales totals prior to entering the amounts into QuickBooks.

In May 2011, a sign was posted stating "all applicable taxes are included in the beverage prices listed." In spring 2012 the menus were updated to also specify this pricing structure. No notice of this pricing structure was communicated to customers prior to May, 2011. Additionally, receipts are provided to the customers which have never, and still do not, separately state the retail sales tax on beverage sales.

Auditor's Detail of Differences and Instructions to the Taxpayer, p.2. The Audit Division's recitation of the facts related to the timing of the sign posting and the menus is based on e-mail correspondence with Taxpayer's accountant. On October 12, 2012, Taxpayer's accountant wrote: "[Taxpayer] had a sign posted at the restaurant once they learned that they had to communicate the pricing policy to their customers. The sign was posted until the menu was next updated." In response to the Audit Division's inquiry as to when the sign was posted, the accountant replied: "Sign was posted May of 2011." The accountant also sent a .pdf e-mail attachment of the new menu to the Audit Division.

On November 7, 2012, the Audit Division issued Taxpayer an assessment totaling \$. . . , which included \$. . . in retail sales tax, \$. . . in retailing business and occupation ("B&O") tax, \$. . . in . . . County Food and Beverage tax, and \$. . . in interest for the period January 1, 2008 through December 31, 2011. Taxpayer filed a timely appeal.

On appeal, Taxpayer maintains that signs stating that tax was included were posted prior to May, 2011, but Taxpayer has not provided any pictorial or documentary evidence of any such signage. Taxpayer also maintains that its menus had always stated that tax was included in beverage prices. As an example, Taxpayer provided a wine list that states "Beverage Prices include all applicable taxes." Taxpayer maintains that that wine list was from 2006 and offers a letter from a vineyard on the wine list that states that the last shipment of a particular wine on the list was in 2007, which pre-dates the audit period. Taxpayer did not provide any exemplar menus stating that tax was included in beverage prices.

At the appeals hearing Taxpayer did present sales receipts from similarly situated taxpayers that did not separately state sales tax on beverage sales. Taxpayer's position is that it is the industry standard to not separately state sales tax on beverage sale receipts.

ANALYSIS

RCW 82.08.020 imposes a retail sales tax on each retail sale in this state. The sale of meals or prepared foods, generally, is a retail sale. RCW 82.04.050; WAC 458-20-119. RCW 82.08.050(9) sets forth the following requirements for proving that sales tax has been paid:

[T]he 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 . . . Except as otherwise provided in this subsection, for purposes of determining the tax due from the buyer to the seller and from the seller to the department it must 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 may not be considered the selling price.

RCW 82.08.050(9) (2010). On the matter of the taxability of an advertised tax-included selling price, the Court of Appeals, in *Dep't of Revenue v. Bi-Mor, Inc.*, 171 Wn. App. 197, 286 P.3d 417 (2012) held:

[T]he plain language of former RCW 82.08.050² mandates that when the seller advertises that the price includes the tax, the Department may not consider the advertised price to be the selling price.

Bi-Mor, Inc., 171 Wn. App. at 207, 286 P.3d at 422. RCW 82.08.050 creates a conclusive presumption 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. . . .” However, the statute allows taxpayers to rebut the presumption with proof that they advertise that the price includes sales tax. WAC 458-20-107(3); *see also Bi-Mor, Inc.*, 171 Wn. App. at 207, 286 P.3d at 422. Therefore, the issue in this matter is whether the Taxpayer indeed advertised that its selling price for beverages included sales tax.

WAC 458-20-124 currently reads as follows:

(9) **Sales of meals, beverages and food at prices including retail sales tax.** Persons may advertise and/or sell meals, beverages, or any kind of food product at prices including sales tax. Any person electing to advertise and/or make sales in this manner must clearly indicate this pricing method on the menus and other price information.

(10) **Spirits, beer, and wine restaurant licensees.** Restaurants operating under the authority of a license from the liquor control board to sell spirits, beer, and wine by the glass for on-premises consumption generally have both dining and cocktail lounge areas.

² The Court of Appeals, in *Bi-Mor*, was interpreting the 2001 version of RCW 82.08.050, which read as follows:

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. On all retail sales through vending machines, the tax need not be stated separately from the selling price or collected separately from the buyer. 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.

RCW 82.08.050 (2001). This version of the statute did not change in any significant respect until January 1, 2010, when the statute was amended to read in the manner quoted in the text above. *See RCW 82.08.050(9).*

Customers purchasing beverages or food in lounge areas are generally not given sales invoices, sales slips, or dinner checks, nor are they generally provided with menus.

(a) Many spirits, beer, and wine restaurant licensees elect to sell beverages or food at prices inclusive of the sales tax in the cocktail lounge area. If this pricing method is used, notification that retail sales tax is included in the price of the beverages or foods must be posted in the lounge area in a manner and location so that customers can see the notice without entering employee work areas. It will be presumed that no retail sales tax has been collected or is included in the gross receipts when a notice is not posted and the customer does not receive a sales slip or sales invoice separately stating the retail sales tax.

(b) The election to include retail sales tax in the selling price in one area of a location does not preclude the restaurant operator from selling beverages or food at a price exclusive of sales tax in another. For example, a spirits, beer, and wine restaurant licensee may elect to include the retail sales tax in the price charged for beverages in the lounge area, while the price charged in the dining area is exclusive of the sales tax.

(c) Spirits, beer, and wine restaurant licensees are not required to post actual drink prices in the cocktail lounge areas. However, if actual prices are posted, the advertising requirements expressed in WAC 458-20-107 must be met.

Rule 124(9), (10) (emphasis added).

In this case, the balance of the evidence tends to show that Taxpayer did not have appropriate signage or notification during the period in question. During the audit, the Audit Division was not made aware of any signage or menu language advertising that tax was included in beverage sales. In fact, Taxpayer's outside accountant sent the Audit Division an e-mail stating that Taxpayer first posted a sign stating that tax was included in drink prices in May of 2011. Taxpayer's outside accountant also stated, by e-mail, that Taxpayer's menus were updated with "tax-included" language in early 2012. On appeal, in an effort to rebut these assertions, Taxpayer was only able to provide a single wine list stating that beverage sales included tax. Taxpayer did not provide any documentary or pictorial evidence of signage [during the audit period, offering only the outside accountant's statement that the sign was posted in May, 2011,] and did not provide any exemplar menus. Based on the evidence presented, we conclude that Taxpayer did not meet the requirement of advertising that its beverage prices included sales tax [during the audit period] and, accordingly, we sustain the assessment.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 6th day of March 2014.