Cite as Det. No. 13-0272, 33 WTD 70 (2014)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	DETERMINATION
	)	No. 13-0272
. . .	)	Registration No. . . .

[1] RULE 254; RCW 82.32.070; RCW 82.32.100: RECORDS TO BE PRESERVED – EXAMINATION. The Department is directed to estimate the assessment in such a manner it deems best when taxpayers do not keep and preserve suitable records.

[2] RULE 107; RCW 82.08.050(9): RETAIL SALES TAX — SELLING PRICE – SEPARATELY STATED. The taxpayer is liable for the retail sales tax because its menu does not advertise that the prices listed include the retail sales tax or the taxpayer is paying 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.

Callahan, A.L.J. – A Washington corporation that owns and operates a cafeteria ("Taxpayer") protests an estimated assessment for retail sales tax and retailing business and occupation (B&O) tax. Taxpayer also contends that the Department of Revenue (the "Department") should not include the retail sales tax it has already remitted in the measure of its tax liability. We affirm the assessment because Taxpayer did not maintain records of its cash sales during the audit period, and because it did not separately state the retail sales tax on its sales receipts to its customers. We deny the petition.[1]

ISSUES

1. Pursuant to RCW 82.32.070 and 82.32.100, did the Department properly estimate cash sales when Taxpayer failed to maintain records of its cash sales?

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

2. Pursuant to RCW 82.08.050 and WAC 458-20-107 (Rule 107), did the Department correctly calculate the measure of tax by including collected retail sales taxes when Taxpayer did not separately state retail sales tax on sales receipts?

FINDINGS OF FACT

Taxpayer owns and operates a cafeteria in Washington. The Department's Audit Division (Audit) audited Taxpayer's books and records for the period of December 1, 2010 through June 30, 2012 (the "audit period"). On September 6, 2012, Audit issued an assessment against Taxpayer for $. . . , which consisted of a small business credit of $. . ., retail sales tax of $. . . , retailing B&O tax of $. . . , use tax/deferred sales tax of $. . . , King County Food and Beverage tax of $. . . , evasion penalty of $. . . , interest of $. . ., and 5% assessment penalty of $. . . . Taxpayer did not pay the assessment and timely petitioned the Department's Appeals Division for a correction of assessment.[2]

The majority of 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 B&O tax. During the audit, Taxpayer maintained that it did not have cash register tapes or a cash receipts journal for its sales during the audit period. Audit examined Taxpayer's bank statements, merchant statements, and excise tax returns. Audit discovered that Taxpayer reported a very insignificant amount of cash sales. Generally, Taxpayer would make no more than one cash deposit per month to its business bank account. Specifically, Taxpayer did not deposit any cash sales to its business account from the period of October 2011 through December 2011.

Due to the lack of business records substantiating the cash sales Taxpayer reported, Audit estimated the cash sales as 40% of total sales. Audit used a June 2008 study by First Data Corporation that calculated cash sales as a percent of total sales for the fast food and restaurant industries. According to that data, cash payments make up approximately 66% of the total payments for a fast food business and cash payments make up approximately 30% of the total payments for a restaurant business. Audit determined that Taxpayer is somewhere in between a fast food business and a restaurant business and the average of those two businesses is 48%. Audit took the average of those businesses but applied a conservative percentage of 40% using Taxpayer's bank statements, merchant statements, and excise tax returns.[3]

Before the auditor finalized his assessment, Taxpayer provided a cash receipt journal for the cash sales during the audit period and the cash sales represented around 17% of the total sales. However, Taxpayer did not provide other records or supporting documentation such as cash register tapes or sales tickets to detail how those cash sales figures were computed. As a result, Audit did not apply the 17% cash sales percentage.

[2] Taxpayer did not provide any argument for the assessment that was attributable to the use tax/deferred sales tax and the King County Food and Beverage tax.

[3] For example, there was a record of total of $ . . . gross sales Taxpayer made from Taxpayer's customers using credit cards for the payments in March 2011. Audit applied a ratio of 40% cash to 60% credit card to the gross sales and projected a cash and credit card total sale of $ . . . ($. . . /60%) for March 2011.

Taxpayer argued in its petition that the cash sales assessment should be based on its cash receipt journal because the 40% cash sales Audit used was above the industry average in its area. Taxpayer did not provide any data to substantiate this argument.

Taxpayer next argues that the credit card payments that Audit used to project the total cash and credit card sales had already included the retail sales tax that it collected. Taxpayer asserts Audit incorrectly calculated its gross sales tax by including the collected and remitted retail sales tax. The total projected cash and credit card sales during the audit period were $. . . .[4] Taxpayer did not separately state the retail sales tax on its charges to its customers during the audit period. Taxpayer provided sales tickets to its customers when they placed the orders. The sales ticket contained the date, the total amount charged, the number of guests, and the ticket number.[5] [Taxpayer's menu did not advertise the prices listed as including the retail sales tax or state that Taxpayer was paying the retail sales tax.]

ANALYSIS

[1] RCW 82.32.070 provides:

> 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; 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, Taxpayer maintained a cash receipt journal but did not maintain records to substantiate the cash sales recorded in its cash receipt journal. Taxpayer did 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. Audit reviewed the Taxpayer's bank statements, merchant statements, and excise tax returns. The records made available by Taxpayer indicated underreporting of cash sales. In selecting an estimated cash sale percentage, Audit relied upon a

[4] Audit reduced this amount by subtracting the retail sales tax of $18,606 Taxpayer remitted to the Department.
[5] For example, a copy of the sales ticket Audit obtained from Taxpayer contained the information of "date July 6, 2012, Amount $. . . , Guests (1), [ticket number] 253828."

2008 industry study, prepared by First Data Corporation.[6] We recently addressed this issue in Det. No. 12-0136, 32 WTD 65 (2013). The taxpayer in 32 WTD 65 did not maintain business records to record its cash sales but challenged the Department's estimated cash sale percentage relying on the 2008 First Data study. We explained in 32 WTD 65 that:

> 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, ...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 . . . is appreciably lower than the cash sale average of any of the retail establishments addressed in the First Data survey. . . . Such a low cash sales percentage for a moderately priced restaurant like the Taxpayer's is not credible. <u>More significantly, the Taxpayer has offered no supporting source detail or payment records to substantiate its estimates.</u>

(Emphasis added).

Similarly here, the average cash sales percentage of fast food business and restaurant is 48% and Audit selected a conservative percentage of 40%, which was lower than the average cash sales percentage of those two businesses. Taxpayer's 17% cash sales argument was significantly lower than the industry average provided in the First Data survey. Taxpayer did not maintain any records to support its argument. 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). Accordingly, we find no error in Audit's method of estimating cash sales and affirm the assessment.

[2] Taxpayer also asserts that Audit improperly included the retail sales tax it had already remitted to the Department to calculate the total cash and credit card payments sales. The retail sales tax is levied on each retail sale in this state, measured by the selling price. RCW 82.08.020; WAC 458-20-107(1). RCW 82.08.050(9) states that

> [T]he tax required by this chapter to be collected by <u>the seller must be stated separately from the selling price in any sales invoice or other instrument of sale.</u> On all retail sales

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[6] 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.

> through vending machines, the tax need not be stated separately from the selling price or collected separately from the buyer. Except as otherwise provided in this subsection, <u>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</u> quoted in any price list, sales document, contract or other agreement between the parties <u>does not include the tax imposed by this chapter.</u> 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.

(Emphasis added).

Thus under RCW 82.08.050(9), if a seller does not advertise its price as including the retail sales tax or that the seller is paying the retail sales tax, and the seller does not separately state the retail sales tax in its invoices to its customers, there is a conclusive presumption that the selling price quoted in the price list does not include the retail sales tax. Rule 107 is the administrative rule that implements this statute, and mirrors the statute. Here, we found that Taxpayer has not presented any evidence to rebut this presumption. Taxpayer's menu does not advertise that the prices listed include the retail sales tax or Taxpayer is paying the retail sales tax. The sales ticket Taxpayer provided to its customers during the audit period only contained the total price charged. It contained no description of what was sold and for what price. There was no separately stated retail sales tax. Therefore, we conclude that Audit properly assessed the deferred retail sales/use tax and affirm the assessment in its entirety. *Id.; see also* Det. No. 99-222, 19 WTD 363 (1999).

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 28th day of August 2013.