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BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 14-0216
. . .)	
)	Registration No. . . .
)	

[1] RULE 119; RCW 82.04.050(1); RCW 82.04.040(1); RCW 82.04.290 – B&O TAX – SALES BY FOOD SERVICE CONTRACTORS. When the taxpayer is compensated to manage the kitchen and to provide meals for the members of the fraternity, the taxpayer’s customer is the fraternity and not the students of the fraternity. The taxpayer is engaged in managing the food service operations for an institution, and is not engaged in selling meals under RCW 82.04.050(1) and .040(1) or improving tangible personal property for consumers under RCW 82.04.050(2)(a). Therefore, the taxpayer’s income is subject to the Service & Other Activities B&O tax classification.

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 Taxpayer, who prepares meals for a fraternity organization at a Washington [educational institution], appeals her retail sales tax refund request denial. Taxpayer argues that income from the services she provides is subject to the service and other activities business and occupation (“B&O”) tax classification and she remitted the retail sales tax in error. We grant the petition and remand the case back to the Taxpayer Account Administration (TAA) for refund of uncollected retail sales tax and an adjustment regarding Taxpayer’s service and other activities B&O tax.¹

ISSUE

Under RCW 82.04.050, are charges for the preparation of meals for a fraternity subject to retail sales tax?

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

FINDINGS OF FACT

[Taxpayer's] sole customer is . . . a non-profit fraternity organization. Taxpayer plans their menus, and then prepares meals in the fraternity's house at the university. Taxpayer will clean up the dishes and workspace afterwards. She does not bring the food on her own when she prepares the meals. The fraternity has accounts with food vendors . . . to supply food ingredients. Taxpayer orders food on behalf of the fraternity from these vendors. The food vendors bill the fraternity directly for the food purchased. The fraternity charges the students fees per school year, which cover the rooms and meals. Taxpayer charges a flat rate of \$. . . a month for this food purchasing and meal planning service, and for paying the bills on behalf of the fraternity for the kitchen operation. Taxpayer labeled those services as kitchen management in her invoice to the fraternity. Taxpayer separately charges the meal preparation service for a unit price of \$1.15 per person, per meal, in her invoice.² Taxpayer did not charge retail sales tax on the invoice for the period of January 2009 through December 2009.

Taxpayer filed excise tax returns with the Department of Revenue ("Department") reporting her income under retailing B&O tax classification. Taxpayer paid the retailing B&O tax and the retail sales tax.

On November 26, 2012, Taxpayer's accountant sent a letter ruling request to the Department's Taxpayer Information & Education ("TI&E") Section inquiring about Taxpayer's retail sales tax collection for the services [Taxpayer] provides to the fraternity. TI&E's first response was, as follows:

Question

I would like to request an official ruling regarding the collection of sales tax. My client, [Taxpayer], prepares food for a campus house on [a Washington state educational institution campus]. [Taxpayer] is responsible for cooking the food that is provided by the campus house and cleaning up the dishes and workspace afterwards. [Taxpayer] does not purchase any food or any supplies to produce the food - the campus house provides all the necessary ingredients, as well as, all cookware and utensils. Therefore, we believe that [Taxpayer] should not be charging sales tax to [the] client, or any future client to whom she would provide the exact same service. This opinion is based on the Special Notice for Personal Chefs that was issued by the Department on January 31, 2006 which states that retail sales tax applies when the chef provides the meal ingredients. Since my client does not provide any of the ingredients we believe that this is a service oriented business and should therefore be reported under the Services & Other Activities Category.

Ruling

After reviewing our Special Notice on Personal Chefs, it is apparent that it needs updating. We will update that notice in the near future. In the meantime, have your client continue to report as they have been reporting in the recent past. When the notice is updated, we will let you know.

² For example, the cost for preparing meals for 55 persons will be \$. . . . A monthly charge will be \$. . . if Taxpayer prepares 40 meals for that month

TI&E sent a follow-up email to Taxpayer upon the Department's issuance of the updated Special Notice on Personal Chefs in January 2013. TI&E's second response was, as follows:

This email is a follow-up to our original secure message dated December 12, 2012, regarding the tax reporting responsibilities of [Taxpayer]. We apologize for the delay in our response.

When you originally wrote to us regarding the taxation of personal chefs, the Department was in the process of reviewing and updating our special notice. We posted an updated special notice in January 2013. The notice clarifies our position that charges by personal chefs are subject to sales tax. In addition, the gross income received by the chef is subject to the Retailing classification of the business and occupation (B&O) tax.

Returns for January through March 2013 were correctly filed under Retailing and Retail sales tax per our special notice.

The special notice is located online at:

http://dor.wa.gov/Docs/Pubs/SpecialNotices/2013/sn_13_PersonalChefs.pdf

If you have any further questions, please write again.

This ruling is binding. If you disagree with it, you can appeal. You must appeal within 30 days of the date of this letter.

On June 1, 2013, Taxpayer submitted amended returns for the tax periods of January 1, 2009, to March 31, 2013, requesting to change the income classification from retailing B&O tax to service and other activities B&O tax. Taxpayer requested a refund for the retail sales tax she remitted for the period of January 2009 through December 2009, representing she did not collect retail sales tax for this period from her customer and that she paid the retail sales tax out of her own funds. On June 11, 2013, TAA denied Taxpayer's request based on the TI&E Letter Ruling quoted above TI&E Section issued to Taxpayer concluding that Taxpayer's income for providing the personal chef service is subject to the retailing B&O tax classification.

Taxpayer petitioned the Department's Appeals Division dated July 3, 2013 asking for a refund for the tax period of January 2009 to December 2009. Taxpayer wrote in her petition that "[i]n the year of 2009, I paid retail sales tax for my services as a chef. I did not impose that tax on my customers and should not have had to pay said tax for my service income." Taxpayer argued at the hearing that her income should be classified under the service and other activities B&O tax classification, because she merely provides a professional service to its customer and she did not sell food.

ANALYSIS

Washington imposes a B&O tax "for the act or privilege of engaging in business" in the State of Washington. RCW 82.04.220. The B&O tax measure and rate are determined by the type or nature of the business activity in which a person is engaged. Ch. 82.04.RCW. Washington also levies a retail sales tax on each retail sale in this state. RCW 82.08.020 and 82.04.050.

The sale of tangible personal property and labor and services to alter or improve tangible personal property of or for consumers is a retail sale under the retailing B&O tax classification. RCW 82.04.050(2)(a); RCW 82.08.020; *see also* RCW 82.04.040 (“Sale” . . . includes the furnishing of food, drink, or meals for compensation whether consumed upon the premises or not.) Although the sales of food items are generally exempt from retail sales tax, that exemption does not apply to sales of “prepared” foods. RCW 82.08.0293. Thus, restaurant or catered meals are subject to B&O tax under the retailing classification and retail sales tax. WAC 458-20-119 (Rule 119) (Sales by caterers and food service contractors), WAC 458-20-124 (Restaurants, cocktail bars, taverns and similar businesses).

Rule 119 explains the application of the B&O tax and retail sales tax to sales by caterers and food service contractors. With respect to caterers, Rule 119(2) explains:

Sales by caterers. Sales of meals and prepared food by caterers are subject to the retailing B&O and retail sales taxes when sold to consumers. “Caterer” means a person who provides, prepares, and serves meals for immediate consumption at a location selected by the customer. The tax liability is the same whether the meals are prepared at the customer's site or the caterer's site. The retailing B&O and retail sales taxes also apply when caterers prepare and serve meals using ingredients provided by the customer.

(Emphasis added).

This rule also addresses the income from food service management services provided by a food service contractor. Unlike with caterers, such contractors are not making sales to consumers and the income is subject to the service and other activities B&O tax. Rule 119. Rule 119(3) defines the term “food service management” as:

(b) **Food service management.** The gross proceeds derived from the management of a food service operation are subject to the service and other business activities B&O tax. . . . If the food service contractor merely manages the food service operation on behalf of an institution or business, that institution or business is considered to be selling meals or providing the meals as a part of the services the institution or business renders to its customers. These institutions and businesses should refer to subsections (4) and (5) in this section to determine their B&O tax and retail sales tax liabilities.

Food service management includes, but is not limited to, the following activities:

...

(ii) Food service contractors managing and/or operating a cafeteria, lunch room, or similar facility for the exclusive use of students or faculty at an educational institution or private school. The educational institution or private school provides these meals to the students and faculty as a part of its educational services. The food service contractor is managing a food service operation on behalf of the institution, and is not making retail sales of meals to the students, faculty, or institution. Sales of meals or prepared foods to guests in such areas are, however, subject to the retailing B&O and retail sales taxes.

(iii) Food service contractors managing and/or operating the dietary facilities of a hospital, nursing home, or similar institution, for the purpose

of providing meals or prepared foods to patients or residents thereof. These meals are provided to the patients or residents by the hospital, nursing home, or similar institution as a part of the services rendered by the institution. The food service contractor is managing a food service operation on behalf of the institution, and is not considered to be making retail sales of meals to the patients, residents, or institution. Sales of meals to doctors, nurses, visitors, and other employees through a cafeteria or similar facility are, however, subject to the retailing B&O and retail sales taxes.

The rule also provides some examples of how food service managers are taxed:

(i) GC Inc. is a food service contractor managing and operating an on-site cafeteria for B College. This cafeteria is operated for the exclusive use of students and faculty. Guests of students or faculty members, however, are allowed to use the facilities. All moneys collected in the cafeteria are retained by B College. B College pays GC's direct costs for managing and operating the cafeteria, including the costs of the unprepared food products, employee salaries, and overhead expenses. GC also receives a management fee. GC Inc. is managing a food service operation. The measure of tax is the gross proceeds received from B College. GC Inc. may not claim a deduction on account of cost of materials, salaries, or any other expense. GC Inc.'s proceeds are subject to the service and other activities B&O tax classification. B College is considered to be making retail sales of meals to the guests and must collect and remit retail sales tax on the gross proceeds of these sales. B College should refer to WAC [458-20-167](#) to determine whether the retailing B&O tax applies.

(ii) DF Food Service contracts with Hospital A to manage and operate Hospital A's dietary and cafeteria facilities. DF is to receive a per meal fee for meals provided to Hospital A's patients. DF Food Service retains all proceeds for sales of meals to physicians, nurses, and visitors in the cafeteria.

The gross proceeds received from Hospital A in regards to the meals provided to the patients are derived from the management of a food service operation. These proceeds are subject to the service and other activities B&O tax classification. DF, however, is making retail sales of meals to physicians, nurses, and visitors in the cafeteria. DF Food Service must pay retailing B&O tax, and collect and remit retail sales tax, on the gross proceeds derived from the cafeteria sales.

(Emphasis added).

The rule also addresses food service contractors managing and/or operating dietary facilities of hospitals, nursing homes, or similar institutions for the purpose of providing meals or prepared foods to patients or residents thereof. The rule declares “these meals are provided to the patients or residents by the hospital, nursing home, or similar institution as a part of the services rendered by the institution.” The food service contractor is managing a food service operation on behalf of the institution, and is “not considered to be making retail sales of meals to the patients, residents, or institution.” Rule 119(3)(b)(iii). In either type of setting, such as a cafeteria or lunch room where the customer sells food at retail to its employees or others, or in an institutional setting where the meals are provided as part of the service rendered by the

institution to its residents, the gross income received by the taxpayer for managing the food service operations is subject to service and other activities B&O tax. Rule 119(5)(b).

Similarly, here, Taxpayer's customer is the fraternity and not the students of the fraternity. The fraternity is a nonprofit organization in the business of providing room and board to members. Taxpayer is compensated to manage the kitchen and to provide meals for the members of the fraternity. Taxpayer's shopping for the groceries, paying the bills related to running the kitchen on behalf of the fraternity, planning the menus, preparing meals, and cleaning up the kitchen are part of the kitchen management service provided to the fraternity. Applying example(c)(i) above, Taxpayer is similar to GC Inc. in that she is contracted with the fraternity to manage and operate the fraternity's kitchen to provide meals to the fraternity. The fraternity charges the students fees for rooms and meals, which is similar to B College that moneys collected in the cafeteria are retained by B College. Income derives from such services is subject to the service and other activities B&O tax.^{3]}

The Special Notice on Personal Chefs that the TI&E Section relies on provides that “[p]ersonal chefs are independent contractors (not employees), that prepare food in private homes for consumption by household members. Personal chefs may also prepare meals for social events, such as dinner parties, cocktail parties, engagement parties, weddings, and receptions.” (Emphasis added). Although a private chef makes sales to consumers that is not the case with a food service manager making sales to a fraternity organization. Accordingly, the Special Notice is not applicable here.

We conclude that Taxpayer is a food service contractor and her income is subject to the service and other activities B&O tax. We grant the petition and remand the case back to TAA for a refund of uncollected retail sales tax and an adjustment regarding Taxpayer's service and other activities B&O tax.

DECISION AND DISPOSITION

We grant Taxpayer's petition.

Dated this 8th day of July 2014.

³ [The taxpayer is engaged in managing the food service operations for an institution, and is not engaged in selling meals under RCW 82.04.050(1) and .040(1) or improving tangible personal property for consumers under RCW 82.04.050(2)(a). Therefore the taxpayer is subject to B&O under the service & other activities B&O tax classification. RCW 82.04.290(2)(a).]