

Cite as Det. No. 18-0162, 39 WTD 021 (2020)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition for Correction of )	<u>D E T E R M I N A T I O N</u>
Assessment of )	
)	No. 18-0162
)	
... )	Registration No. . . .
)	
... )	Registration No. . . .
)	

[1] RCW 82.08.050; WAC 458-20-124: RETAIL SALES TAX – SELLING PRICE – INCLUSION OF TAX. Retail sales tax must be stated separately from the selling price in any sales invoice or other instrument of sale. However, 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.

[2] RCW 82.32.070; RCW 82.32.100; WAC 458-20-254: SUITABLE RECORDS – FAILURE TO PRESERVE. If a taxpayer fails to keep and preserve suitable records, 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.

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.

Roberts, T.R.O. – Taxpayers appeal the Department’s disallowance of a credit adjustment to sales for retail sales tax remitted. Taxpayers argue that the Department erred in assessing retail sales tax on food sales without backing out an amount equal to the retail sales tax that was separately stated in receipts and collected on food sales. Taxpayers also argue that retail sales tax was included in the price of alcoholic beverages. We deny the petition.<sup>1</sup>

ISSUES

1. Whether, under RCW 82.08.050 and WAC 458-20-124 (“Rule 124”), Taxpayers satisfied the requirements to sell alcoholic beverages at prices inclusive of retail sales tax.
2. Whether, under RCW 82.32.070 and [WAC 458-20-254(3)(b) (“Rule 254(3)(b)”)], Taxpayers provided sufficient documentation to substantiate a credit adjustment to gross food sales for retail sales tax remitted to the Department?

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

## FINDINGS OF FACT

[Taxpayer 1] and [Taxpayer 2]; jointly, “Taxpayers”) each operate a restaurant/bar in . . . Washington.

The Department of Revenue’s Audit Division (“Audit”) conducted an audit of Taxpayers for the tax period of January 1, 2012, through December 31, 2015. On December 15, 2016, Audit issued a tax assessment against [Taxpayer 1] in the amount of \$ . . . for retail sales tax, retailing B&O tax, and interest due,<sup>2</sup> and a tax assessment against [Taxpayer 2] in the amount of \$ . . . for retail sales tax, retailing B&O tax, and interest due.<sup>3</sup>

With regard to each Taxpayer, a review of the record shows that Audit calculated the tax assessment by reconciling Taxpayer’s self-reported sales to the sales documented in the Taxpayer’s Profit & Loss Statements. Each Profit & Loss Statement included a credit adjustment identified as “Sales Tax Adjustment – Liquor.” In both cases, Audit disallowed this credit adjustment because Taxpayers provided no documentation to support the calculation for the credit. The disallowance of the credit resulted in the tax liabilities set forth above.

On July 28, 2017, Taxpayers jointly submitted a Review Petition with the Department. Taxpayers assert that the Department “erred in assessing [retail sales] tax on amounts for food sales without backing out from that gross amount an amount equal to the sales tax that was separately stated [in receipts provided to customers] and collected on food sales.” Review Petition, p. 2.

Taxpayers claim that retail sales tax was included in the prices for alcoholic beverages sold at their establishments, although they concede that they failed to post the necessary signage. Review Petition, p. 2. It is undisputed that Taxpayers also failed to separately state retail sales tax for alcoholic beverages on billing receipts provided to customers.

However, during the audit, Taxpayers alleged that the credit adjustment entitled “Sales Tax Adjustment – Liquor” also accounted for retail sales tax charged on food items. It appears, in most cases, Taxpayers did separately state and charge the retail sales tax for food items on receipts provided to customers. Taxpayers reported these food sales and remitted the associated retail sales tax on monthly excise tax returns. Taxpayers have failed to explain why they would be entitled to an additional credit adjustment. Taxpayers have provided no documentation that establishes that their calculation of gross food sales included the associated retail sales tax

During the course of the audit, Audit made a number of requests for documentation to support the credit adjustment, including an account detail for the credit adjustment for the 2015 tax year and for one week of cash register receipts. Taxpayers provided none of the requested documentation to Audit. In at least once instance, Taxpayers claimed that the point-of-sale system could not provide cash register receipts and that a technician was working to resolve the issue.

. . .

---

<sup>2</sup> The \$ . . . tax assessment was composed of \$ . . . in retail sales tax, \$ . . . in retailing B&O tax, and \$ . . . in interest.

<sup>3</sup> The \$ . . . tax assessment was composed of \$ . . . in retail sales tax, \$ . . . in retailing B&O tax, and \$ . . . in interest.

Taxpayers have provided insufficient documentation supporting the backing out of any retail sales tax. Taxpayers have submitted a sampling of the receipts that they claim show that retail sales tax was properly charged on all food items. However, the receipts provided are not itemized; they set forth only the subtotal, taxes charged, and the grand total amount due. The receipts do not indicate what has been purchased – whether customers were served with food or drink or both. . . .

Taxpayers have failed to establish that retail sales tax was correctly and consistently charged on all food items. Audit has provided customer billing receipts from its undercover investigations which show irregularities in the imposition of the retail sales tax: tax was sometimes charged on food items and sometimes [not] charged on food items. Such inconsistency casts further doubt on the accuracy of Taxpayers' proffered work papers.

### ANALYSIS

Washington imposes the Business and Occupation (“B&O”) tax on the privilege of engaging in business in this state. RCW 82.04.220. Depending on the nature of the business activity being conducted, the tax is levied upon the value of products, the gross proceeds of sales, or the gross income of the business. *Id.* Persons making sales at retail are taxable under the retailing B&O tax classification. RCW 82.04.250. The term “sale” includes “the furnishing of food, drink, or meals for compensation.” RCW 82.04.040(1).

The retail sales tax is imposed on every retail sale occurring in the State of Washington. RCW 82.08.020(1). A “retail sale” is “every sale of tangible personal property . . . to all persons irrespective of the nature of their business . . .” RCW 82.04.050(1). The sale of [prepared] food is [generally] a [taxable] sale of tangible personal property. [RCW 82.08.0293(2)] . . . .

#### Retail Sales Tax Must be Separately Stated from Selling Price

[The first issue is whether Taxpayers satisfied the requirements to sell alcoholic beverages at prices inclusive of retail sales tax.]

RCW 82.08.050(9) specifically requires that the retail sales tax “must be stated separately from the selling price in any sales invoice or other instrument of sale.” 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. [WAC 458-20-107(2)].

RCW 82.08.050(9) further explains that sellers may advertise that the price includes retail sales tax:

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.

Rule 124(9) provides, “[p]ersons 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.” A similar exception is provided for spirits, beer, and wine restaurant licensees for cocktail lounge areas, where the licensee posts notification that retail sales tax is included in the purchase price in a manner and location so that customers can see the notice without entering employee work areas. Rule 124(10)(a). *See also*, Det. No. 14-0081, 34 WTD 151 (2015).

If a seller fails to collect and remit to the Department the retail sales tax imposed, the seller is personally liable for the amount of the tax. RCW 82.08.050(3).

It is undisputed by the Taxpayers that they failed to either (1) post signage in the restaurants, menus, or anywhere stating that retail sales tax was included in the price of alcoholic beverages, or (2) separately state the retail sales tax for alcoholic beverages on receipts provided to customers. Thus, the Taxpayers [failed to meet the requirements in] RCW 82.08.050(9) [for considering gross food sales to include the associated retail sales tax].

Taxpayers failed to properly collect retail sales tax for the alcoholic beverages sold in their establishments. Pursuant to RCW 82.08.050(3), Taxpayers are personally liable for the retail sales tax that was legally required to have been imposed on the price of alcoholic beverages. Accordingly, to the extent that Taxpayers’ claimed credit adjustment represents alleged retail sales tax amounts collected as a part of the purchase price for alcoholic beverages, we conclude that Taxpayers improperly deducted these alleged amounts and Audit properly reversed this credit.

#### Failure to Provide Suitable Records

[The second issue is whether Taxpayers provided sufficient documentation to substantiate a credit adjustment to gross food sales for retail sales tax remitted to the Department.]

RCW 82.32.070 requires every person liable for the payment of excise taxes to keep and preserve for a period of five years, suitable records as may be necessary to determine the person’s tax liability. The law also requires the person to make those records open for examination at any time by the Department. *Id.*

Rule 254(3)(b) states in pertinent part:

It is the duty of each taxpayer to prepare and preserve all records in a systematic manner conforming to accepted accounting methods and procedures. Such records are to be kept and preserved. All of the taxpayer’s records must be presented upon request by the department or its authorized representatives that will demonstrate:

(i) The amounts of gross receipts and sales from all sources, however derived, including barter or exchange transactions, whether or not such receipts or sales are taxable. These amounts must be supported by original source documents or records including but not limited to all purchase invoices, sales invoices, contracts, and such other records as may be necessary to substantiate gross receipts and sales.

(ii) The amounts of all deductions, exemptions, or credits claimed through supporting records or documentation required by statute or administrative rule, or other supporting records or documentation necessary to substantiate the deduction, exemption, or credit.

...

If a taxpayer fails to keep and preserve suitable records, then RCW 82.32.100(1) provides that 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.” Thus, in the absence of suitable records, the Department has authority to estimate tax liability based on the available information “as it may deem best.” RCW 82.32.100(1).

Taxpayers have failed to provide suitable records substantiating their claimed credit adjustment for the retail sales tax remitted. Taxpayers claim that their reported gross food sales included retail sales tax charged on the transactions. However, based on the documentation provided, it is impossible to determine the actual amount of Taxpayers’ food sales, much less whether retail sales tax was properly imposed on those transactions. Taxpayers’ own receipts . . . show that Taxpayers failed to consistently charge retail sales tax on all food items. Audit properly disallowed the credit adjustment based on Taxpayers’ failure to provide sufficient documentation in support.

#### DECISION AND DISPOSITION

Taxpayers’ petitions are denied.

Dated this 13th day of June 2018.