

FILED
Court of Appeals
Division II
State of Washington
3/2/2018 2:32 PM

No. 51527-0-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

ARAMARK EDUCATIONAL SERVICES, LLC,

Plaintiff-Appellant

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Defendant-Respondent

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. John C. Skinder)

BRIEF OF APPELLANT

Scott M. Edwards, WSBA No. 26455
Ryan P. McBride, WSBA No. 33280
Daniel A. Kittle, WSBA No. 43340
*Attorneys for Plaintiff-Appellant
Aramark Education Services, LLC*

LANE POWELL PC
1420 Fifth Avenue, Suite 4200
P.O. Box 91302
Seattle, WA 98111-9402
Telephone: 206.223.7000
Facsimile: 206.223.7107

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ASSIGNMENT OF ERROR AND STATEMENT OF ISSUE	2
III. STATEMENT OF THE CASE.....	2
A. Factual Background	2
B. Procedural Background.....	4
IV. ARGUMENT	6
A. Standards of Review	6
B. The Wholesaling B&O Tax Applies To The Income Aramark Receives From The Universities To Provide The Board Meals That The Universities Resell To Students, Staff And Faculty	7
C. Rule 119 Confirms That The Wholesaling B&O Tax Applies Where, As Here, A Food Service Contractor Sells Meals To A University For Resale to Students, Staff And Faculty	13
V. CONCLUSION.....	17

TABLE OF AUTHORITIES

CASES

<i>Ass'n of Wash. Bus. v. Dep't of Revenue,</i> 155 Wn.2d 430, 120 P.3d 46 (2005).....	7
<i>Bowie v. Dep't of Revenue,</i> 171 Wn.2d 1, 248 P.3d 504 (2011).....	11
<i>Canteen Corp. v. Goldberg,</i> 592 S.W.2d 754 (Mo. 1980)	12, 13
<i>Coast Pacific Trading, Inc. v. Dep't of Revenue,</i> 105 Wn.2d 912, 719 P.2d 541 (1986).....	13, 14
<i>Estate of Ackerley v. Dep't of Revenue,</i> 187 Wn.2d 906, 389 P.3d 583 (2017).....	6
<i>Irwin Naturals v. Dep't of Revenue,</i> 195 Wn. App. 788, 382 P.3d 689 (2016)	6
<i>Lamtec Corp. v. Dep't of Revenue,</i> 170 Wn.2d 838, 246 P.3d 788 (2011).....	6
<i>Rho Co., Inc. v. Dep't of Revenue,</i> 113 Wn.2d 561, 782 P.2d 986 (1989).....	8
<i>Slater Corp. v. South Carolina Tax Comm'n,</i> 242 S.E.2d 439 (S.C. 1978)	11,12
<i>Steven Klein, Inc. v. Dep't of Revenue,</i> 183 Wn.2d 889, 357 P.3d 59 (2015).....	7, 8, 13
<i>Tesoro Ref. & Mktg. Co. v. Dep't of Revenue,</i> 164 Wn.2d 310, 190 P.3d 28 (2008).....	7, 13
<i>Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n,</i> 123 Wn.2d 621, 869 P.2d 1034 (1994).....	7

<i>Weyerhaeuser Co. v. Dep't of Revenue,</i> 106 Wn.2d 557, 723 P.2d 1141 (1986).....	8
--	---

STATUTES AND RULES

RCW 82.04.050(1)(a)(i).....	8
RCW 82.04.060(1)(a)	8
RCW 82.04.220(1).....	7
RCW 82.04.270	1, 7, 8, 13, 15, 16
RCW 82.04.290	5, 8, 13
RCW 82.04.440(1).....	7
RCW 82.04.470(5).....	16
RCW 82.32.150	5
RCW 82.32.180	5, 6
RCW 82.32.410	10
RCW 82.32.780	16
WAC 458-20-102.....	15, 16
WAC 458-20-102A.....	15, 16
WAC 458-20-119.....	<i>passim</i>
WAC 458-20-166(5)(b)(v).....	10

OTHER AUTHORITIES

Wash. Tax Det. No. 90-154, 9 WTD 286-29 (1990) 10

Wash. Tax Det. No. 00-092, 20 WTD 47 (2001) 10

I. INTRODUCTION

The sole issue in this tax refund case is the proper B&O tax classification for the business income Aramark Educational Services, LLC (Aramark) received from Western Washington University (Western) and Evergreen State College (Evergreen) to provide meals that the universities resell to their students, staff and faculty. Aramark reported this income under the wholesaling B&O tax classification. After an audit, however, DOR reclassified the income to the catchall “other ... activity” B&O tax classification, and assessed Aramark additional taxes, penalties and interest. The trial court agreed with DOR’s reclassification and, on summary judgment, dismissed Aramark’s complaint.

This Court must reverse. Under the plain and unambiguous language of RCW 82.04.270 and WAC 458-20-119 (Rule 119), the wholesaling B&O tax applies where a food service contractor sells meals to a university that the university resells to others. That is precisely what Aramark did here. It is undisputed that both universities paid Aramark to provide meals that the universities resold to students, staff and faculty as part of their tuition or through pre-paid meals plans (referred to as “board meals”). Because the wholesaling B&O tax applies to Aramark’s sale of board meals to the universities as a matter of law, the trial court erred in upholding DOR’s erroneous application of the catchall B&O tax rate.

II. ASSIGNMENT OF ERROR AND STATEMENT OF ISSUE

The trial court erred when it entered its October 27, 2017 order denying Aramark's motion for summary judgment and granting DOR's cross-motion. CP 1061-64. The issue is whether the wholesaling B&O tax applies where, as here, a university buys meals from a taxpayer that the university resells to students, staff and faculty.

III. STATEMENT OF THE CASE

A. Factual Background

Western and Evergreen offer students, staff, faculty and guests the ability to purchase meals on campus in a variety of ways. At issue in this case are the meals students, staff and faculty purchase directly from the universities, either as a mandatory component of tuition or through voluntary meal plans. CP 1036 (Supp. Gates Decl., ¶ 2); CP 1033 (Supp. Wadsworth Decl., ¶ 2); CP 1038 (2d Supp. Striggow Decl., ¶ 2); CP 497 (McLaughlin Depo, p. 16). These pre-paid meals are collectively referred to herein as "board meals." Those purchasing board meals can select from different plans, *e.g.*, unlimited meals per quarter, 125 meals per quarter, fifteen per week, etc. CP 135 (Wadsworth Decl., ¶ 6); CP 26 (Striggow Decl., ¶ 6); CP 494-95 (McLaughlin Depo, pp. 13-14).

Western and Evergreen contracted with Aramark to serve as the exclusive provider of the board meals the universities sell to students, staff

and faculty. CP 140-92 (Wadsworth Decl., Ex. A (Western Contract)); CP 30-130 (Striggow Decl., Ex. A (Evergreen Contract)). The Western contract provides that Aramark is “to provide University with meals ... for University to resell to its students, faculty, staff and guests on its campus.” CP 140, 153-54 (Wadsworth Decl., Ex. A, §§ 2.0 & 4.1). The Evergreen contracts do not specifically use the term “resell,” but they likewise require Aramark to “manage and operate [Evergreen’s] ... block meal plans,” which include “the preparation, service and sale of food ... to be provided by ARAMARK under this Agreement.” CP 31, 74-75 (Striggow Decl., Ex. A, 2004 Contract, § 1.0; 2013 Contract, §§ 1.1, 1.3.1.E).

Under the contracts, Aramark employees prepare and serve the board meals, which entails (among other things) staffing the dining facilities, planning the menus, purchasing the food, preparing and serving the meals, and clean-up. CP 135; 145, 148-53 (Wadsworth Decl., ¶ 4 & Ex. A, §§ 3.5, 3.9, 3.11); CP 392-93 (McLaughlin Depo, pp. 11-12); CP 26; 31-33, 38; 74-75, 79-82 (Striggow Decl., ¶ 4 & Ex. A, 2004 Contract §§ 1.0, 1.1, 1.2, 3.12, 4.0; 2013 Contract, §§ 1.3.1.E, 1.3.3, 2.4, 2.9, 3.1.1).

Aramark does not charge the universities for the direct cost it incurs in providing the board meals. CP 135-36 (Wadsworth Decl., ¶ 9); CP 26-27 (Striggow Decl., ¶ 9). Nor does Aramark charge the universities a management fee. *Id.* Rather, Aramark periodically invoices the

universities for payment at a negotiated rate based on the number of persons purchasing board meals. CP 135; 153-54,158; 194-97 (Wadsworth Decl., ¶ 5; Ex. A, §§ 4.1, 4.9.4; Ex. B); CP 1033-34 (Supp. Wadsworth Decl., ¶ 3); CP 26, 32-33; 83-84, 93 (Striggow Decl., ¶ 5 & Ex. A, 2004 Contract, §§ 1.2.1-1.2.2; 2013 Contract, §§ 3.1.7, 6.4.2); CP 994 (Supp. Striggow, Ex. C). The amount the universities pay Aramark for board meals is not the same as the universities charge students, staff and faculty for the same meals. CP 135 (Wadsworth Decl., ¶ 6).

B. Procedural Background

From 2005 through 2014, Aramark reported its gross income from the sale of board meals to the universities under the wholesaling B&O tax classification, and paid \$293,804 in wholesaling B&O taxes with its regularly filed tax returns. CP 6 (¶ 6).¹ DOR audited Aramark and, based on a review of a two month block sample of records, reclassified this income to the “other ...activity” B&O tax classification and assessed an additional \$813,913 in B&O taxes. *Id.* (¶ 7); CP 598-662 (audit reports

¹ In addition to the sale of board meals that the universities resell to students and faculty, Aramark performs other business activities for the universities, such as catering events and retail sales. CP 135 (Wadsworth Decl., ¶ 8); CP 26 (Striggow Decl., ¶ 8). None of these other activities are at issue in this case. It is undisputed that Aramark accounts for each revenue stream separately, and then reports and pays tax pursuant to the applicable B&O tax classification for each. CP 14 (Gates Decl., ¶ 13).

and schedules). Aramark administratively appealed, but DOR's Appeals Division upheld the assessment. CP 6 (¶ 8). Aramark paid the additional tax, as well as penalties and interest due under the assessment. *Id.* (¶ 9).

On April 29, 2017, Aramark filed suit under RCW 82.32.150 and RCW 82.32.180 seeking a refund of taxes, penalties and interest it paid following DOR's reclassification. CP 5-7. Aramark did not dispute all of DOR's reclassification or seek a refund of the entire assessed amount. Rather, Aramark sought only a refund of the additional B&O tax it paid on the board meals that the universities resold to students and faculty as part of tuition or pre-paid meal plans (\$714,835), along with penalties (\$35,742) and interest (\$59,286) thereon. CP 13-14 (Gates Decl., ¶¶ 8-12); CP 1036 (Supp. Gates Decl., ¶ 2); CP 1033 (Supp. Wadsworth Decl., ¶ 2); CP 1038 (2d Supp. Striggow Decl., ¶ 2).

The parties cross-moved for summary judgment. Following oral argument on October 6, 2017, the trial court orally ruled that "the payments in this case are [for] services taxed as a service ... under Washington Administrative Code 458-20-119(3)(b)(ii) and RCW 82.04.290(2). VRP Tr. 35-37. On October 27, 2017 the trial court entered an order denying Aramark's motion for summary judgment, granting DOR's cross-motion, and dismissing Aramark's refund claim with prejudice. CP 1061-64. Aramark timely appealed. CP 1065-72.

IV. ARGUMENT

A. Standards of Review

Aramark has the burden of showing that DOR incorrectly assessed the tax and that it is entitled to a refund. RCW 82.32.180. The trial court upheld DOR's assessment on summary judgment. This Court reviews summary judgment orders *de novo*, engaging in the same inquiry as the trial court. *Irwin Naturals v. Dep't of Revenue*, 195 Wn. App. 788, 793, 382 P.3d 689 (2016). Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c).

The meaning of a statute is also a question of law that this Court reviews *de novo*. *Estate of Ackerley v. Dep't of Revenue*, 187 Wn.2d 906, 909, 389 P.3d 583 (2017). The goal is to determine the legislature's intent by giving effect to the plain meaning of the statute, gleaned both from the words of that statute and those in related statutes. *Id.* at 910. Courts must consider the ordinary meaning of the words, any statutory definitions provided, the context of the statute, related provisions, and the statutory scheme as a whole. *Id.* "When its meaning is in doubt, a tax statute must be construed most strongly against the taxing power and in favor of the taxpayer." *Lamtec Corp. v. Dep't of Revenue*, 170 Wn.2d 838, 842-43, 246 P.3d 788 (2011) (internal quotation marks and citation omitted).

When interpreting DOR’s interpretive rules, this Court follows the same tenets it uses to interpret a statute. *Tesoro Ref. & Mktg. Co. v. Dep’t of Revenue*, 164 Wn.2d 310, 322, 190 P.3d 28 (2008). Notably, however, DOR’s interpretive rules are not binding on the courts. *Ass’n of Wash. Bus. v. Dep’t of Revenue*, 155 Wn.2d 430, 447, 120 P.3d 46 (2005). Moreover, courts may defer to a DOR rule only when it reasonably interprets an ambiguous statute. *Id.* at 447 n.17; *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm’n*, 123 Wn.2d 621, 627-28, 869 P.2d 1034 (1994). By the same token, no deference is owed to DOR rules that are inconsistent with the underlying statutes. *Id.*; *Tesoro*, 164 Wn.2d at 324.

B. The Wholesaling B&O Tax Applies To The Income Aramark Receives From The Universities To Provide The Board Meals That The Universities Resell To Students, Staff And Faculty.

Washington’s B&O tax applies to “the act or privilege of engaging in business activities” in the state. RCW 82.04.220(1). “There are a variety of business activities that receive different tax measures and rates.” *Steven Klein, Inc. v. Dep’t of Revenue*, 183 Wn.2d 889, 897, 357 P.3d 59 (2015). Each activity is taxed separately according to its proper classification. RCW 82.04.440(1). For a business “making sales at wholesale,” the B&O tax is equal to the gross proceeds of such sales “multiplied by the rate of 0.484 percent.” RCW 82.04.270. Where no statute specifically applies to a particular activity, there is a “catchall” provision for all other activities

“equal to the gross income of the business multiplied by the rate of 1.5 percent.” RCW 82.04.290(2)(a); *Steven Klein*, 183 Wn.2d at 897.

Because Aramark’s sale of board meals to the universities plainly qualify as “sales at wholesale” under RCW 82.04.270, the trial court erred in upholding DOR’s reclassification under the catchall B&O tax rate.

“Sale at wholesale” is defined as “any sale, which is not a sale at retail, of ... [t]angible personal property” RCW 82.04.060(1)(a). “Sale at retail,” in turn, is defined as “every sale of tangible personal property ... other than a sale to a person who ... [p]urchases for the purpose of resale ... in the regular course of business” RCW 82.04.050(1)(a)(i). At bottom, then, Aramark’s sale of board meals must be classified as “sales at wholesale” if the universities purchased the meals “for the purpose of resale” in the ordinary course of their businesses. They did.

Courts can look both to the terms of the parties’ contracts and the substance of their conduct to determine the proper tax classification. *Rho Co., Inc. v. Dep’t of Revenue*, 113 Wn.2d 561, 569-70, 782 P.2d 986 (1989); *Weyerhaeuser Co. v. Dep’t of Revenue*, 106 Wn.2d 557, 562-63, 723 P.2d 1141 (1986). Not only does the Western contract state that Aramark is “to provide University with meals ... to resell to its students, faculty, staff and guests,” CP 140, 153 (Wadsworth Decl., Ex. A, §§ 2.0 & 4.1), but both universities actually do so. Aramark sells board meals to

the universities, and invoices for those meals separately from the other activities it performs under the contracts; Aramark does not bill the universities for its services or the other costs it incurs in providing the board meals. CP 135-36, 153-54, 158, 194-97 (*id.*, ¶¶ 5, 9; Ex. A, §§ 4.1, 4.9.4; Ex. B); CP 1033-34 (Supp. Wadsworth Decl., ¶ 3); CP 26-27; 32-33; 83-84, 93 (Striggow Decl., ¶¶ 5, 9; Ex. A, 2004 Contract, §§ 1.2.1-1.2.2; 2013 Contract, §§ 3.1.7, 6.4.2); CP 994 (Supp. Striggow, Ex. C).

It is equally undisputed that the universities sell the board meals as part of tuition or through pre-paid meal plans, and that students, staff and faculty purchase the meals from the universities, not Aramark. CP 1036 (Supp. Gates Decl., ¶ 2); CP 134-36 (Wadsworth Decl., ¶¶ 2, 9); CP 1033 (Supp. Wadsworth Decl., ¶ 2); CP 25-27 (Striggow Decl., ¶¶ 2, 9); CP 1038 (2d Supp. Striggow Decl., ¶ 2); CP 497 (McLaughlin Depo, p. 16). By the same token, any refunds due students, staff or faculty for board meals are paid by the university. CP 26-27 (Striggow Decl., ¶ 9). In short, then, the sale of board meals are “sales at wholesale” because there are two sales of the same goods: Aramark’s sale to the universities, and the universities’ resale to students, staff and faculty.

The fact that Aramark must undertake various “services” to consummate its sale of board meals to the universities—*i.e.*, planning, purchasing, preparing, serving, etc.—does not change the nature of the

taxable activity. As DOR itself has recognized, by definition, the sale of a *meal*—as distinguished from the sale of *food*—requires the seller’s services, and the cost components of a meal include the seller’s labor and overhead. *See* Wash. Tax Det. No. 00-092, 20 WTD 47 (2001) (discussing former Rule 119, and distinguishing between cost of “food” and “the cost components of a meal, which could include labor and overhead”); *cf.* WAC 458-20-166(5)(b)(v) (when lump sum charged for lodging and meals, cost of meals “includes price paid for food and drinks served, the cost of preparing and serving meals, and all other costs incidental thereto, including an appropriate portion of overhead expenses.”).

Indeed, DOR’s position is contrary to one of its own published tax determinations. *See* Wash. Tax Det. No. 90-154, 9 WTD 286-29 (1990).² There, the U.S. government contracted with the taxpayer to purchase food that it resold to military personnel on military bases. The taxpayer charged the government for the food and for “staffing military delicatessens and bakeries with taxpayer’s employees, who process and prepare the food products for ultimate sale by the military to its personnel.” *Id.*, *2. DOR’s

² Washington Tax Determinations are available on DOR’s website at <http://taxpedia.dor.wa.gov>. <http://taxpedia.dor.wa.gov/>. By statute, DOR must treat its published determinations as “precedential.” RCW 82.32.410.

Appeals Division concluded that the wholesaling B&O tax applied to all income received by the taxpayer, including staffing and food preparation:

Because the military buys the food products from taxpayer for the purpose of resale in the regular course of business without intervening use by the military, the sales are ... at wholesale.

* * *

[W]e do not believe that the [service-related] income should be taxed at the service and other rate. It appears that the primary purpose of the contract is the providing of food products at wholesale rather than the subsequent preparation of them by the employees for resale. It also appears that without the base price portion of the contract, taxpayer would not have the contractual right to perform the delicatessen/bakery functions for the military. Such interrelationship among the [various] aspects of the contract probably prevent the setting of different classifications for B&O purposes.

Id. at *5. The same is true here. Aramark cannot sell the board meals without staffing the universities' dining facilities and performing the other interrelated services set forth in the parties' contracts. Those services are simply part and parcel of the cost-of-goods-sold at wholesale and, thus, do not warrant application of the "other ... activity" B&O tax classification.

Although Washington's B&O tax is unique, this Court also can look to cases from other states for guidance. *Bowie v. Dep't of Revenue*, 171 Wn.2d 1, 13, 248 P.3d 504 (2011). These cases likewise confirm that Aramark is selling meals at wholesale—even though the sale of such meals necessarily involves services. In *Slater Corp. v. South Carolina Tax Comm'n*, 242 S.E.2d 439 (S.C. 1978), for example, the South Carolina

Supreme Court applied a nearly identical wholesale statute (“sale of tangible personal property ... for resale”) to nearly identical facts:

The record indicates the students purchased the meals from the respective colleges and not from Slater. ... The students contracted with and paid the colleges, not Slater, for the meals. The colleges, in turn, contracted with and paid Slater. The colleges, not Slater, determined who should be entitled to purchase meals at the dining hall, and if a refund was given, it came from the college, not from Slater.

Id. at 408. The court held, “[t]he meals in question were clearly purchased for resale with the students buying their food from the colleges rather than from Slater.” *Id.* Like in *Slater*, students, staff and faculty contract with and pay for board meals from the universities, not Aramark. And the universities, in turn, contract and pay Aramark to provide those meals.

Similarly, in *Canteen Corp. v. Goldberg*, 592 S.W.2d 754 (Mo. 1980), the Missouri Supreme Court applied a nearly identical statute (“sales at retail’ means any transfer ... of the ownership of, or title to, tangible personal property ... for use or consumption and not for resale”) to a business operating a retirement home’s dining facility:

Canteen rented space from Council Plaza and was in charge of the actual serving of meals to the retirees. Canteen billed Council Plaza monthly for the number of meals served, at a predetermined price per meal. Council Plaza in turn billed the retirees for their meals at a price fixed by Council Plaza. Council Plaza was legally obligated to pay Canteen for the meals whether or not Council Plaza received payment.

Id. at 756. The court agreed that the “operation involved two transactions: (1) sale by Canteen to Council Plaza of meals for resale, and (2) resale of the meals by Council Plaza to the retirees.” *Id.* Aramark’s sale of meals to the universities for resale to students, staff and faculty is no different.

In sum, Because Aramark’s sale of board meals to the universities for resale easily satisfies the plain and unambiguous definition of a “sale at wholesale” under RCW 82.04.270, DOR (and the trial court) erred in taxing Aramark’s activities under RCW 82.04.290’s “other ... activity” classification. By its terms, this catchall only applies to activities that are not “taxed explicitly under another section” in Chapter 82.04 RCW. RCW 82.04.290(2)(a); *Steven Klein*, 183 Wn.2d at 898-99. Here, they are.

C. Rule 119 Confirms That The Wholesaling B&O Tax Applies Where, As Here, A Food Service Contractor Sells Meals To A University For Resale To Students, Staff And Faculty.

In the trial court, DOR virtually ignored the relevant B&O tax statutes, instead relying on WAC 458-20-119 to avoid application of the wholesaling B&O tax classification. DOR argued that Rule 119 compels use of the catchall classification if Aramark’s activities fit within the rule’s definition of a “food service contractor.” But DOR cannot create a tax classification through its own rules, nor can those rules contradict the underlying B&O tax statutes. *Tesoro*, 164 Wn.2d at 324-25; *Coast Pacific Trading, Inc. v. Dep’t of Revenue*, 105 Wn.2d 912, 917, 719 P.2d 541

(1986). Fortunately, there is no conflict between Rule 119 and the statutes. DOR's application of its own rule is simply wrong.

Rule 119 explains how the B&O tax applies to sales by caterers and "food service contractors," although it is careful to note that its examples only serve as a "general guide." WAC 458-20-119(1)(a). The rule defines a "food service contractor" as a "person who operates a food service at a kitchen, cafeteria, dining room, or similar facility owned by an institution or business." WAC 458-20-119(3). It states in relevant part:

Food service contractors may [1] manage the food service operation on behalf of the institution or business, or [2] make sales of meals or prepared foods.

Id. (numbering added). Under the rule, when a food service contractor "merely manages the food service," its income is subject to the higher rate for the catchall "service and other business activities B&O tax." WAC 458-20-119(3)(b). DOR characterized Aramark's sales of board meals exclusively under this first type of food service activity (management), and wholly ignored the second (sales). That was error.

Aramark's sale of board meals plainly falls within the second food service activity recognized by Rule 119(3). The rule's reference to "sales of meals" includes both sales of meals to consumers and sales of meals to an institution or business for resale. Income from the former is subject to

retailing B&O and retail sales tax; income from the latter is subject to wholesaling B&O tax. The rule specifically provides:

Wholesale sales of prepared meals. Persons making sales of prepared meals to persons who will be reselling the meals are subject to the wholesaling B&O tax classification. Sellers must obtain resale certificates for sales made before January 1, 2010, or reseller permits for sales made on or after January 1, 2010, from their customers to document the wholesale nature of any sale as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits).

WAC 458-20-119(5); *see also* WAC 458-20-119(3)(a) (“The food service contractor is considered to be making retail sales of meals ... unless the business itself is reselling the meals”). As explained, Aramark made “sales of prepared meals” to the universities for its purpose of “reselling the meals” to students and faculty as part of pre-paid meal plans. Rule 119 confirms Aramark’s reporting income under the wholesaling B&O tax.

DOR argued below that Aramark’s sale of board meals could not be classified under Rule 119(5)’s wholesaling provision—and/or RCW 82.04.270’s wholesaling B&O tax generally—because Aramark did not obtain resale certificates or permits from universities for the entire audit period. Wrong. Neither the statute nor Rule 119 required Aramark to obtain a resale certificate or permit. “A seller that does not [obtain a copy of a reseller permit from buyer] may meet its burden of proving that a sale is a wholesale sale ... by demonstrating facts and circumstances ... that

show a sale was properly made” at wholesale. RCW 82.04.470(5). Rules 102 and 102A, expressly incorporated by reference in Rule 119(5), say the same thing. *See* WAC 458-20-102(7)(h); WAC 458-20-102A(5)(a).

For the reasons explained above, Aramark amply showed through “facts and circumstances” that its sale of board meals were sales at wholesale under RCW 82.04.270 and Rule 119(5). Indeed, Aramark did produce several reseller permits for both universities. CP 132-33; CP 199. DOR complained that the permits did not reference meals, but no such specificity is required. *See* WAC 458-20-102(2) (description of items purchased at wholesale “optional”). Nor did DOR produce any evidence to show that the universities did not apply for or receive reseller permits during the audit period, even though only DOR would have such information. *See* RCW 82.32.780. At the very minimum, Aramark’s evidence was sufficient to create a genuine issue of material fact for trial.

Finally, DOR pointed to one of Rule 119’s examples to justify reclassification to the “other ... activity” B&O tax. But rather than support DOR’s position, the example demonstrates its error. In the example, a college contracts with a food service contractor (“GC”) to run its cafeteria. Critically, “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,” and also pays GC “a management fee.”

WAC 458-20-119(3)(c)(i). Unlike a sale of goods, where the seller's labor and overhead are reflected in the sale price, the example posits a scenario where the buyer pays those costs itself and separately pays the seller for its services. The primary object of any such contract is the services, not the product of those services. Here, in contrast, the universities paid only for the board meals themselves, and nothing separate for Aramark's services.

V. CONCLUSION

Aramark properly reported the proceeds from its sale of board meals to the universities under the wholesaling B&O tax classification because the universities purchased those meals for resale to students, staff and faculty. The judgment must be reversed, and the trial court instructed to enter judgment for Aramark on its request for a tax refund.

RESPECTFULLY SUBMITTED this 2nd day of March, 2018.

LANE POWELL PC

By *s/Ryan P. McBride*
Scott M. Edwards, WSBA No. 26455
Ryan P. McBride, 33280
Daniel A. Kittle, WSBA No. 43340
1420 Fifth Ave. Ste. 4200
Seattle, WA 98111-9402
Telephone: 206-223-7000
mcbriider@lanepowell.com
*Attorneys for Appellant Aramark
Educational Services, LLC*

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2018, I caused to be served a copy of the foregoing document to be delivered in the manner indicated below to the following persons at the following addresses:

Andrew Krawczyk Assistant Attorney General Attorney General's Office 7141 Cleanwater Drive SW Olympia, WA 98504-0123 AndrewK1@atg.wa.gov carriep@atg.wa.gov	<input checked="" type="checkbox"/> by CM/ECF/JIS <input type="checkbox"/> by Electronic Mail <input type="checkbox"/> by Facsimile Transmission <input type="checkbox"/> by U.S. First-Class Mail <input type="checkbox"/> by Hand Delivery <input type="checkbox"/> by Overnight Delivery
Cameron G. Comfort Senior Counsel Attorney General's Office 7141 Cleanwater Drive SW Olympia, WA 98504-0123 CamC1@ATG.WA.GOV juliej@atg.wa.gov REVOlyEF@atg.wa.gov	<input checked="" type="checkbox"/> by CM/ECF/JIS <input type="checkbox"/> by Electronic Mail <input type="checkbox"/> by Facsimile Transmission <input type="checkbox"/> by U.S. First-Class Mail <input type="checkbox"/> by Hand Delivery <input type="checkbox"/> by Overnight Delivery

Dated this 2nd of March, 2018

s/Kathryn Savaria

Kathryn Savaria
LANE POWELL PC
1420 Fifth Avenue, Suite 4200
P.O. Box 91302
Seattle, WA 98111-9402
Telephone: (206) 223-7000
Facsimile: (206) 223-7107
Email: savariak@lanepowell.com

LANE POWELL PC

March 02, 2018 - 2:32 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51527-0
Appellate Court Case Title: Aramark Educational Services, LLC v. State of WA, Dept. of Revenue
Superior Court Case Number: 16-2-01779-4

The following documents have been uploaded:

- 515270_Briefs_20180302142959D2512245_1186.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Brief of Appellant.pdf

A copy of the uploaded files will be sent to:

- AndrewK1@ATG.WA.GOV
- cam.comfort@atg.wa.gov
- carriep@atg.wa.gov
- docketing-sea@lanepowell.com
- edwardss@lanepowell.com
- juliej@atg.wa.gov
- kittled@lanepowell.com
- rainesm@lanepowell.com
- revolyef@atg.wa.gov

Comments:

Sender Name: Kathryn Savaria - Email: savariak@lanepowell.com

Filing on Behalf of: Ryan P McBride - Email: mcbrider@lanepowell.com (Alternate Email:)

Address:
1420 Fifth Avenue
Suite 4200
Seattle, WA, 98101
Phone: (206) 223-7741

Note: The Filing Id is 20180302142959D2512245