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No. 51527-0-II

DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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ARAMARK EDUCATIONAL SERVICES, LLC,

Plaintiff-Appellant

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Defendant-Respondent

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

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**REPLY BRIEF**

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## I. INTRODUCTION

DOR concedes, as it must, that the catchall “other . . . activity” B&O classification applies only if an activity does not fall within another specifically enumerated provision, including the wholesaling B&O tax classification. Resp. Br. at 15; RCW 82.04.290(2)(a) & (b). Thus, the *only* issue is whether Aramark’s sales of board meals to the universities were “sales at wholesale”—*i.e.*, sales made “for the purpose of resale.” RCW 82.04.060(1); RCW 82.04.050(1)(a)(i). The undisputed facts show they were. Summary judgment should have been entered for Aramark. At the very minimum, Aramark easily met its burden under CR 56 in response to DOR’s cross-motion by proffering admissible evidence that created a genuine issue of material fact for trial. Reversal is required either way.

## II. ARGUMENT

### A. **The Wholesaling B&O Tax Classification Applies To The Sale Of Meals For Resale; The “Other . . . Activity” B&O Tax Classification Does Not Apply Simply Because The Sale Of Meals Necessarily Requires A Taxpayer To Perform Services.**

DOR argues that because providing “food management services” is not a service that is specifically listed in the retail or wholesale sale classifications, Aramark’s sale of board meals cannot be a wholesale of “tangible personal property.” Resp. Br. at 16. DOR’s framing of the issue simply begs the question, and wrongly suggests that if a seller undertakes services to accomplish the sale, the transaction defaults to the catchall

“other . . . activity” classification. *Id.* at 19-22. Not so. To sell tangible personal property, both at retail and wholesale, the seller’s services and labor is necessarily an integral aspect of the sale, and is reflected (and taxed) as a component of the sales price. The sale of personal property that is researched, designed, marketed, assembled and packaged is still a sale of personal property. The sale of a meal is no different.

Notably, DOR does not argue that a meal is not tangible personal property, the sale of which is subject to wholesaling B&O tax. It can’t. *See* WAC 458-20-124(3) (“**Wholesaling B&O tax.** Persons making sales of prepared meals to persons who will be reselling the meals are subject to the wholesaling B&O tax classification.”). By definition, there can be no sale of a meal unless the taxpayer plans a menu, buys the food, takes the order, prepares the meal, serves the meal, and cleans the dining room—the same services Aramark provides to the universities in connection with the sale of board meals. As discussed below, DOR’s own rule (Rule 119) and precedential tax determination confirm that performance of these ancillary services does not transform the nature of the activity from the sale of a meal (for consumption or resale) to the sale of services.

The quintessential example is a restaurant. Restaurants are subject to retailing B&O tax on the proceeds they receive for the sale of meals. WAC 458-20-124(2). When a customer buys a meal from a restaurant, the

sales price reflects the cost of the labor that goes into planning, preparing and serving the meal, as well as maintaining and cleaning the restaurant. But the customer doesn't pay for these ancillary services separately, nor does the restaurant report them separately for tax purposes. Even though the meal could never be sold without these services, and the cost of labor may far exceed the cost of the food, it is still a sale of "tangible personal property." The same is true when the taxpayer performs those same services in connection with a sale of meals at wholesale.<sup>1</sup> The only difference is that the buyer intends to resell the meal instead of eat it.

Indeed, DOR agrees that it was proper for Aramark to use the retailing B&O tax classification when it sold meals to the universities' guests, students, faculty and staff without pre-paid meal plans. It follows that the wholesaling B&O tax classification should apply when Aramark sells the same meals to the universities for resale. After all, both kinds of sales occur in the same facilities, entail the same services, and result in the

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<sup>1</sup> DOR quotes testimony explaining how Aramark provides an omelet to a student, suggesting that because Aramark employees must make the omelet and serve it, the transaction somehow reflects a service and not the sale of goods for resale. Resp. Br. at 7. But the example simply proves the point. Aramark performs all the same services—purchasing the eggs and ingredients, staffing the kitchen and cash register, cooking and serving the omelet, and cleaning up—when Aramark employees make a retail sale of an omelet to a guest or student without a meal plan. Those services no sooner remove the transaction from the retail sales B&O tax classification than they do the wholesaling B&O tax classification.

same meals. Put differently, if the services Aramark performs to sell meals to the universities trigger the “other . . . activity” B&O tax classification, as DOR claims, then why doesn’t Aramark’s performance of the same services to sell the same meals at retail also trigger the “other . . . activity” classification? DOR does not and cannot explain this disparate treatment.

Instead, DOR erroneously argues Aramark did not actually sell “meals” to the universities because the universities did not sell meals to its students, faculty and staff; rather, DOR claims, they sold “meal plans.” Resp. Br. at 22-23. DOR’s distinction between “meals” and “meal plans” is contrived, and unsupported by authority. Students, faculty and staff eat meals, not meal plans; meal plans are simply the means by which the universities sell the board meals the universities purchased from Aramark.

The method of payment, or the timing of it, does not alter the nature of the thing sold. Cf. Excise Tax Advisory 3093.2009 (“In purchasing the [debit] card, the customer is purchasing the services that the card represents.”). When one agrees to pay for a new car through an installment plan, they are purchasing a car; they are not purchasing a plan. And, likewise, when students, faculty or staff pay for board meals through a pre-paid meal plan, they are still purchasing meals.

**B. The Undisputed Facts Show That Aramark Sells Board Meals To The Universities For The Purpose Of Resale And, Thus, The Sales Are Subject To Wholesaling B&O Tax.**

Aramark's contract with Western recognizes, and expressly states, that Western purchases board meals to "resell" those meals to students, faculty and staff. *See* CP 140, 153 (§§ 2.0 & 4.1). DOR concedes that contracts are "commonly used" and "particularly useful" in determining the nature of the business subject to tax. Resp. Br. at 17-18 (citing *Gen. Motors Corp. v. State*, 60 Wn.2d 862, 876, 376 P.2d 843 (1962)). But it promptly rejects that premise, arguing that the Court should ignore the contract in favor of the "substance" of the parties' activities, especially when it appears the purpose of the contract is to avoid taxes. *Id.*<sup>2</sup> There is no evidence, however, and DOR never argues, that either universities' contracts with Aramark were drafted with eye toward tax avoidance.

In any event, Aramark does not "mainly" rely on that provision of the Western contract as DOR falsely posits. *See* Resp. Br. 1. It doesn't need to. Rather, both universities' contracts as a whole, as well as the

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<sup>2</sup> DOR wants it both ways. It argues that the Court should ignore the Western contract's express recognition that Aramark sells board meals for resale, but at the same time plucks from the contract every reference to a "service," *see* Resp. Br. at 5-6 & 20, and asks the Court to consider the references definitive. DOR goes so far as to point to similar references in Aramark's promotional materials, *id.*, at 2-3, 19 & 27, even though these materials are plainly irrelevant to the nature of the sales at issue.

parties' conduct, confirm the actual substance of Aramark's wholesale activities. As Aramark explained in its opening brief, Aramark's sale of board meals to the universities qualify as a "sale at wholesale" because the undisputed facts show that Aramark sells meals to the universities that they, in turn, sell to students, faculty and staff as part of mandatory or optional pre-paid meal plans. Op. Br. at 8-9. For the reasons discussed below, none of DOR's purported factual distinctions withstand scrutiny.<sup>3</sup>

To begin with, DOR erroneously claims that "Aramark received regular compensation for managing and operating the food service" and, thus, was paid "for its services"—as opposed to being paid for the sale of board meals. Resp. Br. at 9. It is undisputed that Aramark never charged the universities a "management fee," and the universities paid nothing separately to Aramark for the services associated with the sale of board

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<sup>3</sup> DOR suggests that Aramark "abandoned" or "no longer relies" on certain statements contained in declarations it submitted in support of summary judgment. Resp. Br. at 12, n.1 & 35, n.9. Nonsense. *First*, Aramark repeatedly cited to these declarations throughout its opening brief. *See* Op. Br. at 2-5, 9. *Second*, it was entirely proper for Aramark to do so; the trial court refused to strike the declarations or rule that any statement therein was inadmissible. VRP at 16-17 & 37. *Third*, DOR fails to identify the statements to which it objects, much less explain how they are inadmissible. *Fourth*, and finally, to the extent DOR complains about how Aramark's witnesses characterized the activities at issue, *i.e.*, "sale," "resale," "wholesale," etc., DOR misses the point; it is the underlying conduct described in the declarations, not the declarants' characterization of that conduct that entitled Aramark to summary judgment.

meals; nor did they reimburse Aramark for its labor costs. CP 26 (Striggow Decl., ¶ 9); CP 135-36 (Wadsworth Decl., ¶ 9). Rather, as DOR admits, the cost of Aramark’s services was “incorporated” into the sales price of the meals—just like a restaurant. Resp. Br. at 21 (citing CP 448).<sup>4</sup>

The fact that the universities purchased meals, not services, from Aramark is equally clear from the contracts and invoices. The universities paid Aramark a daily rate based on the number of students, staff and faculty who purchased board meals from the universities, *and* the rate was based on the number of meals each of those individuals purchased, *e.g.*, unlimited meals, 100 meals or 75 meals per quarter. CP 26 (Striggow Decl., ¶ 5); CP 990-991 (Supp. Striggow Decl., ¶ 2); CP 32-33, 128 (Evergreen contract); CP 994 (Evergreen invoice) CP 135-36 (Wadsworth Decl., ¶ 5); CP 153 (Western contract); CP 194-97 (Western invoices). In other words, consistent with a sale for purposes of resale, the amount the universities paid Aramark for board meals depended entirely on the number of board meals the universities sold to students, faculty and staff.

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<sup>4</sup> DOR points out that the parties set and periodically adjusted the sale price for board meals based on Aramark’s costs, including labor costs, and argues that this shows that Aramark is selling something more than just meals. Resp. Br. at 8 (citing CP 396 & 448) & 23. How? Variable pricing is common in profit-and-loss contracts for the sale of goods over an extended period of time, where the seller bears the risk of loss due to increased costs and overhead. Again, it is no different than a restaurant; when the minimum wage is raised, so does the restaurant’s menu prices.

This Court can similarly reject DOR’s suggestion that Aramark did not sell board meals to the universities for resale because it sometimes sold meals directly to students, faculty or staff. Resp. Br. at 4. DOR concedes that students at both universities were required to purchase board meals, and did so directly from the universities. Resp. Br. at 4; CP 83-84 (Evergreen); CP 143 (Western). And, the same is true for various optional meal plans; students, faculty or staff voluntarily purchasing board meals likewise made those purchases directly from the universities. *See* CP 1033 (Supp. Wadsworth Decl., ¶ 2); CP 1036 (Supp. Gates Decl., ¶ 2); CP 497 (“Q. Just to be clear, would they go to campusdish.com or would they go to [the university’s] housing and food services? A. Housing.”).

To be sure, students, faculty, staff and guests made purchases directly from Aramark—but not of board meals. The proceeds from these retail sales are not at issue; for the most part, DOR did not challenge Aramark’s reporting or payment of B&O tax from proceeds it received from sales made to students, faculty, staff or guests.<sup>5</sup> The only proceeds at issue—which DOR wrongly reclassified from the wholesaling B&O tax classification to the “other . . . activity” B&O tax classification—are the

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<sup>5</sup> Of the revenue originally reported under wholesaling B&O tax classification, the auditor reclassified all but approximately 1% to the “other . . . activity” B&O tax classification. Aramark did not dispute the 1% that was reclassified to the retailing B&O tax classification.

proceeds Aramark received directly from the universities for the sale of board meals. CP 783-84 (Gates Decl. ¶¶ 7-13); CP 969-70, 975 (Chen Decl., ¶¶ 7-11 & Ex. A); CP 1033-34 (Supp. Wadsworth Decl., ¶ 3). By definition, these were sales made to the universities.

Finally, DOR recites the services Aramark performs in providing board meals—suggesting that this shows the sale of services, not goods. Resp. Br. at 4-6, 20 & 22. For the reasons explained above, these services were simply part of the sale of a meal. Not only did the Western contract state that Aramark was to provide the university with meals to “resell,” but the Evergreen contracts also defined the “food service” as “preparation, service *and sale*” of meals. CP 30, 74-75 (emphasis added). Importantly, neither universities’ contract distinguished between the services Aramark provided in selling board meals versus selling meals at retail, *i.e.*, same planning, same purchasing, same preparation, same clean up. CP 30-44, 69-105 (Evergreen); CP 140-67 (Western). There is no basis to treat these services as part-and-parcel of a sale at retail, but not a sale at wholesale.

**C. Rule 119 Confirms That Aramark’s Sale Of Board Meals To The Universities For The Purpose Of Resale Is Subject To The Wholesaling B&O Tax Classification.**

Rule 119 confirms that the proper tax classification for Aramark’s activities turns on the nature of what Aramark sold, not simply whether it performed services in connection with those sales. Contrary to DOR’s

entire premise, the rule recognizes that a food service contractor” is *not* subject to the catchall “other . . . activity” B&O tax classification when it sells meals directly to consumers, or to institutions for resale, WAC 458-20-119(3)(a) & (5)—even though, in both cases, the taxpayer performs various services (planning, purchasing, preparing, serving, cleaning) in managing the institution’s dining facilities. Rather, it is when a food service contractor sells *only* its management services to an institution that it is to be taxed under the “other . . . activity” rate. WAC 458-20-119(3)(b).

As Aramark argued, *see* Op. Br. at 16-17, this is clear from one of Rule 119’s examples. In it, a food service contractor manages a college’s cafeteria, but the college retains all money collected and, from that money, reimburses the contractor for its costs in managing the cafeteria *and* pays a “management fee.” WAC 458-20-119(3)(c)(i). Unlike here, the college does not pay the contractor for the meals it sells to students, faculty and staff, in which case the contractor’s services must be treated as a cost component of the meal’s wholesale price. Rather, in the example, the college pays the contractor *only* for its services by way of reimbursement and fees. DOR studiously ignores the example, and the clear distinction it (and Rule 119 generally) draws between the sale of meals at wholesale and mere management of food services. Only the former is at issue here.

Indeed, Rule 119 expressly recognizes (as it must under the plain language of the wholesaling B&O tax statute) that when a food service contractor sells a meal to an institution for resale, the contractor is “subject to the wholesaling B&O tax classification.” WAC 458-20-119(5). DOR does not and cannot argue that this rule does not apply where, as here, the taxpayer’s labor and services are necessary component of those meals. As discussed above, whether it is a restaurant selling meals at retail, or a contractor selling meals at wholesale, that will always be the case. Instead, DOR falls back on its erroneous claim that the rule does not apply because a “meal plan” is not a “meal.” For the reasons discussed above, DOR is simply wrong. Aramark sells the universities meals; the universities, in turn, sell those meals to students, faculty and staff through meal plans.

Lastly, DOR does not and cannot argue that Rule 119 *requires* Aramark to produce reseller permits. As Aramark explained, Op. Br. at 15-16, by both statute and rule, producing a reseller permit is only one means by which a taxpayer can show that sales were made at wholesale. *See* RCW 82.04.470(5); WAC 458-20-119(5) (incorporating WAC 458-20-102 & WAC 458-20-102A). Demonstrating “facts and circumstances” works just as well. *Id.* Even putting the reseller permits it produced aside, Aramark easily met that burden, and properly reported income from board meals under the wholesaling B&O tax classification. The trial court should

have granted judgment for Aramark on this basis as well. At a minimum, Aramark’s evidence—both reseller permits and “facts and circumstances”—was sufficient to show a genuine issue of fact for trial under CR 56.<sup>6</sup>

**D. DOR’s Prior Tax Determination And Analogous Case Law Supports Application Of The Wholesaling B&O Tax.**

Even beyond Rule 119, DOR should have followed the reasoning it applied in its own precedent. As explained, *see* Op. Br. at 10-11, there is no difference between Aramark’s sale of meals at the universities here and the taxpayer’s sale of “food products” at military bases in Wash. Tax Det. No. 90-154, 9 WTD 286-29 (1990). There, like here, the taxpayer did not simply sell food for resale, but “staff[ed] 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.

In its own precedential determination, DOR recognized that the primary purpose of the contract was to provide the military with food products that it could resell to its personnel, and that this purpose could

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<sup>6</sup> DOR misconstrues Aramark’s argument on this point. Aramark did not argue that DOR “*must* produce evidence of no resellers permit.” Resp. Br. at 34 (citing Op. Br. at 16) (emphasis added). Clearly, Aramark has the ultimate burden of showing that the sales were sales at wholesale. RCW 82.04.470(1). But, in response to Aramark’s motion for summary judgment, it was DOR’s burden to produce evidence that would refute the “facts and circumstances” upon which Aramark relied. CR 56(e). DOR could have met that burden by showing that the universities did not have reseller permits beyond those Aramark produced—which it failed to do.

not be achieved without the sale of both food and staffing services. *Id.*, \*5. The very same “interrelationship” exists here and likewise should drive application of the wholesaling B&O tax classification.

Nor can DOR meaningfully distinguish Aramark’s out-of-state authority. That these cases involved sales tax, rather than B&O tax, is no distinction at all. The relevant statutory language mirrors Washington’s wholesaling B&O tax. *See Slater Corp. v. South Carolina Tax Comm’n*, 242 S.E.2d 439, 411 (S.C. 1978) (wholesale means “sale of tangible personal property . . . for resale”); *Canteen Corp. v. Goldberg*, 592 S.W.2d 754, 756 (Mo. 1980) (retail sale means “transfer . . . of the ownership of . . . tangible personal property . . . not for resale”); RCW 82.04.050(1)(a) (retail sale means “sale of tangible personal property . . . other than . . . for the purpose of resale”). Indeed, even in Washington, the retail sales tax incorporates the B&O tax definition of “wholesale.” RCW 82.08.010(6). At bottom, just like here, these out-of-state cases turned exclusively on whether the taxpayer sold meals “for resale.” Like here, they did.

For the same reasons, DOR’s half-hearted reliance on the “primary purpose” test is unavailing. As a threshold matter, the test only applies where a taxpayer reports undifferentiated income from multiple activities that, standing alone, could be subject to different tax classifications. *See Qualcomm, Inc. v. Dep’t of Revenue*, 171 Wn.2d 125, 136-40, 249 P.3d

167 (2001). The test does not apply here. It is undisputed that Aramark reported income it received from retail sales, catering and other services *separate* from the income it received from the sale of board meals. Since there is only a single activity at issue—the sale of board meals—there is no need to ascertain which activity is “primary.” Indeed, if the wholesale B&O tax classification applies, by definition, the catchall “other . . . activity” classification cannot. *See* RCW 82.04.290(2)(a).

Even if the primary purpose test were inaptly applied to Aramark’s sale of board meals, the wholesaling B&O tax would apply. The “test focuses on the real object of the transaction sought by the taxpayer’s customers and not just the transaction’s different parts.” *Qualcomm*, 171 Wn.2d at 137. Like the military base case, the real object of the sale is to provide the universities with meals they can resell to students, faculty and staff. Aramark’s services are necessary to provide those meals, but are not the object of the transaction. After all, the universities sell—and the students, faculty and staff eat—Aramark’s meals, not its services.

Indeed, as noted, Aramark performs all the same services in connection with the retail sale of meals to individuals without meal plans, yet DOR does not claim the “primary purpose” test removes those sales from the retail sales B&O classification. Why should sales of the same

meals at the same facilities by the same staff performing the same services be treated any different? They shouldn't.

**E. This Court Can And Should Order The Trial Court To Enter Summary Judgment For Aramark Because DOR Does Not Challenge The Refund Amount On Appeal.**

In its opening brief, Aramark argued that the trial court erred in granting DOR's motion for summary judgment, *and* in denying Aramark's cross-motion. Op. Br. at 2. The fact that the trial court did not reach the refund amount poses no limits on this Court's de novo review; the issue was raised below. CP 65; CP 878-79. And, indeed, Aramark pointed to the record evidence proving the amount of refund it was due: \$809,863. Op. Br. at 5 (citing CP 13-14 (Gates Decl., ¶¶ 8-12)); *see also* CP 17 (*id.*, Ex. B). If DOR believed there was a genuine issue of fact, it was incumbent on DOR to explain why; citation to its trial court briefing is insufficient. *See Kwiatkowski v. Drews*, 142 Wn. App. 463, 499-500, 176 P.3d 510 (2008) ("our courts have consistently rejected attempts by litigants to incorporate by reference arguments contained in trial court briefs, holding that such arguments are waived"). No further proceedings on remand are necessary.

**III. CONCLUSION**

Aramark sold board meals to the universities for resale to their students, faculty and staff. It properly reported and paid wholesaling B&O

tax on those sales. 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 May, 2018.

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Dated this 2nd of May, 2018

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