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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ARAMARK EDUCATIONAL SERVICES, LLC,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant Aramark Educational Services, LLC contracted with the Evergreen State College (Evergreen) and Western Washington University (Western) to manage their comprehensive food services and dining hall programs. The institutions paid Aramark weekly for managing and operating their food service programs and providing meals to their students and faculty. Food service management for educational institutions, like most service-type activities, are appropriately classified under the business and occupation tax's catchall "service and other" classification under RCW 82.04.290(2)(b) and WAC 458-20-119(3)(b) because these activities do not fall within one of the specific enumerated classifications within the business and occupation (B&O) tax scheme.

Aramark claims the weekly payments it received, for purposes of the B&O tax, were for "wholesaling," mainly because its agreement with Western uses the term "resell" with respect to the sale of meal plans to students at the beginning of the semester. But Aramark's claim is inconsistent with the law and undisputed facts. The wholesaling classification under RCW 82.04.060(1)(a) and WAC 458-20-119(5) contemplates a sale of tangible personal property to a person who in turn resells the tangible personal property at retail to the final consumer. Neither Evergreen nor Western sold tangible meals to students. Instead,

they sold intangible meal plans. Moreover, Evergreen and Western paid Aramark each week for much more than just making meals under its agreements.

Consequently, the trial court correctly found that Aramark's business activities under its agreements with Evergreen and Western qualified as a "service" that was taxable under RCW 82.04.290(2) and WAC 458-20-119(3)(b)(ii). For these reasons and those discussed below, this Court should affirm the trial court's order granting summary judgment to Respondent Department of Revenue and denying summary judgment to Aramark.

II. STATEMENT OF THE ISSUE

Did the trial court correctly classify Aramark's business activities as a food service management activity under RCW 82.04.290(2), for B&O tax purposes, when Aramark contracted to operate the dining service programs for Evergreen and Western and served meals at the dining halls it managed?

III. STATEMENT OF THE CASE

A. Statement of Facts

Aramark is a "professional service organization" headquartered in Philadelphia, Pennsylvania. CP 367-68. Aramark touts itself as providing "food services, facilities management, and uniform and career apparel" to

institutional clients. CP 105-08. Aramark offers an extensive range of professional services to potential customers. *See, e.g.*, CP at 265-372 (Aramark's 2013 proposal to Evergreen). Aramark protests the Department's application of the "service and other" classification of the B&O tax to the payments it received from Evergreen during 2005 through 2014, and from Western during 2011 through 2014. CP 6, CP 30, CP 140.

1. On-campus food service programs

Evergreen and Western offer campus food service programs for students and faculty to access food services at campus dining halls, restaurants, and convenience stores. CP 378-79, CP 436, CP 541.

Evergreen and Western historically have contracted with third parties, like Aramark, to operate and manage their food service programs. CP 541.

Both institutions had policies requiring certain students to participate in their room and board programs. Evergreen's policy required that resident students with 40 or fewer credit hours (i.e., freshman) to purchase a board meal plan for the entire academic year. *See* CP 227-28, CP 343, 372, CP 535-36. Western's policy required all students living in most of the residence halls to purchase a board meal plan in conjunction with their housing. CP 497. Faculty and staff, and all other students who were not on a mandatory board policy, could purchase optional meal plans. CP 227-28, 253-54, CP 343, CP 449, CP 531-35.

Meal plans offered different combinations of components: “block meal” and “declining balance” (e.g., 100 block meals and 200 declining balance). The “block meal” component allowed the user access to a campus dining hall where the format was “all-you-care-to-eat.” CP 495; *see also* CP 479 (identification cards serve as the “dining access/privilege control platform”). The “declining balance” component involved a dollar value, which the user redeemed by purchasing individual items at the price listed at campus restaurants or convenience stores such as Toppio’s Pizzeria or P.O.D. Market. CP 228, CP 344-50, CP 490, CP 516-26.

Mandatory meal plan participants selected their meal plan as part of their room and board package. CP 227-28, CP 343, 372. Evergreen and Western would then charge the meal plan to the student’s account prior to the start of the term. Optional meal plan participants (students, faculty, or staff) generally purchased their meal plans directly from Aramark. *See, e.g.,* CP 449, CP 707, CP 963; *but see* CP 497 (directing employees to Western’s housing, not Aramark’s campusdish.com, to buy meal plans).

2. Aramark management and operation of dining service programs for Evergreen and Western

In 2004, Evergreen entered into a “Management Agreement” with Aramark to “manage and operate Food Service, which shall include declining balance and block meal plans, catering and vending services for

Evergreen students, faculty, staff, employees and invited guests.” CP 225-26 (2004 Evergreen Agreement). The 2004 Evergreen Agreement defined “Food Service” as “[t]he preparation, service and sale of food, beverages, goods, merchandise and other items at the Premises.” CP 225. Aramark and Evergreen amended and extended the agreement multiple times. *See* CP 240- 63.

In 2013, Evergreen entered into a new agreement titled “Dining Services Contract” with Aramark “for Dining Services provided on the College’s Olympia campus.” CP 373, 378 (2013 Evergreen Agreement). The 2013 Evergreen Agreement defined Evergreen’s “Food Service Program” as “those board, cash, catering and other related food service operations, including, without limitation, the preparation, service and sale of food, beverages, and other approved items at the premises to be provided by ARAMARK under this Agreement.” CP 378-79.

In June 2011, Western executed a “Food Services Management Agreement” to operate “the University Food Service Program” with Aramark. CP 435-36. The agreement with Western states in part: “University hereby engages ARAMARK, on an exclusive basis, to provide University with meals, including a la carte items and non-alcoholic beverages, for University to resell to its students, faculty, staff and guests on its campus in Bellingham, Washington.” CP 435. The

agreements with Evergreen do not include language about the institution reselling meals.

The agreements with Evergreen and Western specifically describe Aramark's operations and responsibilities as including: providing the educational institutions' food service programs (CP 378-79, CP 436); managing and operating campus dining halls and restaurants (CP 226, 228-29, CP 387, CP 447-48); preparing, serving, selling, and storing food (CP 225, CP 446); employing staff to manage and operate the food service program (CP 385-86, CP 443-44); paying food and beverage costs associated with operating the Food Service Programs (CP 233, CP 386, CP 445); taking care of small wares and equipment (CP 379-80, CP 436-39); occupying, maintaining, and cleaning facilities (CP 234, CP 380-85, CP 440-41); providing a point of sale system (CP 238, CP 384-85, CP 438); and implementing standards for food preparation, sustainability, and social justice (CP 233-34, CP 389-92, CP 444-45).

Consistent with these agreements, Aramark operated and managed Evergreen's and Western's food service programs and dining halls, which provided food to students and faculty as part of the Evergreen and Western's food service programs. Aramark purchased food and supplies used in the program from wholesalers and food product distributors like Sysco Foods. *See* CP 505, CP 518, 520, CP 537. Aramark hired all the

workers who managed and ran its food service operations, including managers, cooks, dieticians, dishwashers, servers, and cashiers. *See* CP 524-26, 528-30, 895-900 (listing Aramark's employees and job titles). Aramark operated dining facilities at set times to provide meals to students and faculty. CP 525-26.

Aramark provided the food and served it to students and faculty who elected to use a block meal or declining balance option. For example, a typical student arrives at the dining facility and pays with one of his or her block meals at the register. CP 528. An Aramark cashier operates the register. CP 493, CP 529, *see also* CP 885-89 (listing over 200 Aramark employee's with "cashier" job title). The student then accesses the dining hall facility where Aramark serves the food.

Q. So a student would like to, let's say, get an omelet. How does the student do that?

A. There's a little form that they fill out and hand to -- hand to Jeff, and he'll make them an omelet.

Q. Jeff, that's -- he's an Aramark employee?

A. Yes.

Q. What does Jeff, then, do when he gets the slip?

A. He puts the ingredients in a little bowl, and then he puts a little oil in the pan, puts it on the burner, puts the vegetables in, sautés them, pours the eggs over the top, adds cheese, if they ask for cheese. And then when it's ready, puts it on a plate, yelling out the student's name, and they come pick up their omelet.

CP 528-29; *see also, e.g.*, CP 518-21 (student obtaining salad at Toppio's).

Aramark also offered self-service stations, where Aramark set up the station, refilled items, and cleaned up. CP 527-29. When the student finished eating, the student would bus his or her dishes to a conveyer belt. CP 528. Aramark employees then cleaned the dishes, and after the hours of operation, Aramark cleaned the facility. CP 529. No Evergreen or Western employees operated the dining halls or served tangible meals to students. CP 530.

3. Aramark's compensation for food service operations and management

Aramark's costs for managing the food programs, operating the dining halls, and preparing and serving patrons were incorporated in the "profit-and-loss" type contracts with Evergreen and Western. CP 372, CP 509. The costs were factored into a mutually agreed upon "daily cost per person" as well as retail prices and catering prices stated on weekly invoices. CP 448. Aramark and the institutions mutually determined the rates based, in part, on "labor costs" and "direct costs." CP 372; CP 396; CP 448. Aramark also reserved the right to increase the daily rate automatically when there were certain increases in labor costs. CP 448. The sliding scale changed multiple times during the tax periods at issue. *See, e.g.*, CP 227-28, 243, 245, 251, 253-54, 255-56, 259-60, CP 396, 432, 434, CP 448-49.

Aramark received regular compensation for managing and operating the food service programs and dining halls and for preparing and serving meals to students and faculty. The accounting sections in the 2011 and 2013 agreements describe how Evergreen and Western compensated Aramark for its services, including serving meals to board plan patrons. CP 397, CP 493.¹ At the beginning of the academic year, Aramark invoiced Evergreen and Western an estimate for serving patrons during the first four-week period, which it reconciled at the end of each academic year. CP 397. Each week after the first four-week period, Aramark invoiced the institutions for the daily cost of serving patrons for the previous week. CP 366, 372, CP 397, CP 453. Aramark calculated the weekly invoice amount based on the number of persons “entitled” to meals for the prior week, which it reconciled each Wednesday, multiplied by the daily cost per person. CP 448, *see* CP 387-88, CP 397, CP 453, CP 493, 499, CP 902 (sample invoices). No allowance was made for meals or days in which a contract patron missed, unless approved by both Aramark and the institution. CP 448-49. Evergreen and Western agreed to pay invoices within 30 days. CP 453.

¹ Aramark also regularly invoiced Evergreen for the costs associated with catering and other costs such as the childcare center. CP 397-98. Aramark accepted cash or credit cards for retail purchases of food (typically by guests), including at dining halls, convenience stores, food courts, concession stands, and other retail locations. CP 522.

4. The Department's audit of Aramark

When Aramark paid taxes to the Department, it reported on its excise tax returns the income from under its food service contracts with Evergreen and Western under the “wholesaling” B&O tax classification and paid that rate. CP 6-7 (Complaint). The Department audited Aramark’s tax returns for the period January 1, 2005, through December 31, 2014. CP 595. Among other things, the Department’s audit concluded that Aramark primarily performed food service management and should have paid under the “service and other” B&O tax classification under RCW 82.04.290(2) and WAC 458-20-119(3)(b)(ii). CP 602. The audit also concluded that the institutions occasionally paid Aramark to provide meals to guests. CP 602.

The Department reclassified Aramark’s income from “wholesaling” to the “service and other” B&O tax classification, except for guest meal sales, which it reclassified as retail sales. CP 602. Using a two-month block sample, the Department estimated the percentage of income that was attributable to guest meals and assessed the additional tax due. CP 602.

Aramark disputes the reclassification of the income that it received from Evergreen and Western for providing food management services.

After the Department issued the assessment, Aramark appealed to the Department's Appeals Division, which affirmed the assessment. CP 562.

B. Statement of Proceedings Below

Aramark filed a refund action in superior court against the Department, seeking a refund of \$813,913² in taxes. CP 6-7. Both parties moved for summary judgment. CP 8-11. The Department requested summary judgment on whether it properly classified Aramark's activities as "food service management" taxable under RCW 82.04.290(2) and, if not, whether the activities instead should be classified for B&O tax purposes as retailing or wholesaling. CP 583. Aramark requested summary judgment on whether its activities qualified as wholesale sales.³ CP 666. Aramark attached three reseller's permits⁴ in support of its motion. CP 132-33, CP 199. The Department issued the first permit to Evergreen for the period 2010 through 2013. That permit's stated purpose was for "other

² Aramark's Vice President Sonia Gates submitted a declaration calculating the tax amount attributed to board meals as \$717,835. CP 14; *but see* CP 968-70 (auditor's testimony calling into question some of Ms. Gates' calculations).

³ Aramark initially stated that it sought summary judgment only with respect to mandatory meal plan sales to students. CP 665, 976-77, 981. It later clarified that it may have created some confusion in its opening brief by mistakenly suggesting that all charges to the Educational Institutions for board meals related to mandatory meal plans. CP 996 (see n.1).

⁴ A reseller's permit is a form of documentation certifying that a person is authorized to purchase items in bulk from a distributor or wholesaler because the person will then resell the purchased items to another party (either an end consumer, which is a retail sale, or another party who does not use or consume the item). *See* WAC 458-20-102(2). The documentation relieves sellers of the obligation to collect retail sales tax from a buyer when conducting a sale of goods. *See* RCW 82.08.050.

commercial printing.” It said nothing about food or meals. CP 132. The second and third permits, which were effective only for 2014, both listed the “business activity” as “Colleges, Universities, and Professional Schools” and was silent as to what merchandise and inventory the institutions obtained the permits for. CP 133, CP 199.⁵

The trial court granted summary judgment to the Department, concluding that it correctly reclassified Aramark’s business activity as a service under RCW 82.04.290(2) and WAC 458-20-119(3)(b)(ii). CP 1061-64, VRP at 35-37. The trial court also denied Aramark’s motion because its business activity was not the wholesaling of tangible personal property under RCW 82.04.060(1) and WAC 458-20-119(5). CP 1061-64, VRP at 35-36. Aramark appeals.

IV. ARGUMENT

A. Standard of Review and Burden of Proof

A person seeking a refund of excise taxes under RCW 82.32.180 carries the burden of establishing that “the tax as paid . . . is incorrect, either in whole or in part, and to establish the correct amount of tax.” RCW 82.32.180.

⁵ Aramark submitted several declarations in support of its summary judgment motion containing lay witness speculation on which tax classification applied. The Department objected to statements made in the declarations, CP 868, 874, 1043-44; VRP 16-17, and in its opening brief Aramark has abandoned its reliance on these statements. *See Br. Appellant* at 2-5.

Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. CR 56(c). A “material fact” is one upon which the outcome of the litigation depends, in whole or in part. *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980). The party moving for summary judgment has the initial burden of establishing the absence of an issue of material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party makes the initial showing, then the burden shifts to the other party to establish there is a genuine issue for the trier of fact. *Young*, 112 Wn.2d at 225-26.

A grant of summary judgment is reviewed de novo, with the appellate court engaging in the same inquiry as the trial court. *Wash. Imaging Servs., LLC v. Dep’t of Revenue*, 171 Wn.2d 548, 555, 252 P.3d 885 (2011).

B. Under the B&O Tax Scheme, Food Service Management Is a “Service and Other” Activity Taxed Under RCW 82.04.290(2).

The Legislature imposed the B&O tax on the act or privilege of engaging in business activities. RCW 82.04.220(1). In doing so, the Legislature intended “to ‘leave practically no business and commerce free of ... tax.’” *Budget Rent–A–Car of Wash.-Ore., Inc. v. Dep’t of Revenue*, 81 Wn.2d 171, 175, 500 P.2d 764 (1972). The B&O tax is measured by

multiplying the applicable rate against the value of products, the gross proceeds of sales, or the gross income of the business, depending on the classification. RCW 82.04.220(1).

The B&O tax statutes assign different rates to various business activities. For example, businesses that operate cold storage warehouses and smelters that manufacture aluminum have their own tax classifications. RCW 82.04.280(1)(d); RCW 82.04.2909. Thus, the first step for imposing the tax is to identify the statutory classification that applies to the taxpayer's business activity. *Steven Klein, Inc. v. Dep't of Revenue*, 183 Wn.2d 889, 896-97, 357 P.3d 59 (2015).

In this case, Aramark claims it sold tangible personal property. *See* Br. Appellant at 8. A "sale" is defined in pertinent part as "any transfer of the ownership of, title to, or possession of property for a valuable consideration" RCW 82.04.040; *see Rena-Ware Distributors, Inc.*, 77 Wn.2d 514, 516, 463 P.2d 622 (1970) (The term "sale" is ordinarily understood to mean a transfer of goods).

The Legislature divided "sales" into two categories depending on to whom the good is sold. A "sale at retail" or "retail sale" includes, among other things, sales of tangible personal property to consumers. RCW 82.04.050(1)(a); *see* RCW 82.04.190(1) (definition of "consumer"). A "sale at wholesale" or "wholesale sale" generally includes any sale that

is not a sale at retail of “tangible personal property.” RCW 82.04.060(1)(a). In addition, the Legislature has designated certain services as “retail sales.” See RCW 82.04.050(2), (3), (5), (8)(a), RCW 82.04.060(1)(b), (e), (g), (h), (2), and (3). For example, installing, repairing, cleaning, or altering tangible personal property for consumers is a “retail sale” under RCW 82.04.050(2)(a), and providing telecommunications services to consumers is a “retail sale” under RCW 82.04.060(1)(g).⁶

The B&O tax on “sales” activities is equal to the “gross proceeds of sales” multiplied by 0.471 for “retail sales” and by 0.484 percent for “wholesale sales.” RCW 82.04.250, .270. Under these statutes, buyers who are consumers generally pay the retail sales tax to the seller, and sellers are liable for collection and remittance of the tax to the Department. RCW 82.08.050. The seller also pays the retailing B&O tax.

In addition to the foregoing designated business activities, the Legislature has provided a “catchall” B&O tax classification taxed at a rate of 1.5 percent times the gross income of the business for all activities not specifically enumerated in another provision. RCW 82.04.290(2)(a).

⁶ With respect to retail sales classification for sales tax purposes: “[t]he common statutory pattern in most states is to tax tangible personal property unless specifically exempted, but to exclude services unless specifically enumerated.” Richard D. Pomp, *State & Local Taxation*, Vol. I, ch. 6, p. 27 (7th ed. 2011).

This catchall category includes the “business of rendering *any type* of service which does not constitute a ‘sale at retail’ or a ‘sale at wholesale.’” RCW 82.04.290(2)(b) (emphasis supplied). This means if a business is rendering a “service,” and it is not one of the services explicitly identified as a retail sale or a wholesale sale, then the income from that service is taxed at the “service and other” rate of 1.5 percent. RCW 82.04.290 is a catchall section that provides for the levy of B&O taxes on the gross income of any business engaged in rendering any type of service. *Rho Co. v. Dep't of Revenue*, 52 Wn. App. 196, 202, 758 P.2d 553 (1988), *aff'd*, 113 Wn.2d 561, 782 P.2d 986 (1989).

Providing food management services, such as the management and operation of dining halls or institutional food programs, is not a service that is specifically listed in the retail sale or wholesale sale classifications. *See* RCW 82.04.050(2), (3), (5), (8)(a), RCW 82.04.060(1)(b), (e), (g), (h), (2). Hence providing a food service falls within the catchall “service and other” classification.

Aramark claims that it is wholesaling tangible personal property, i.e., food or meals, to Evergreen and Western under RCW 82.04.060(1)(a). Br. Appellant at 8. The Department determined that Aramark’s business activities were not sales of food as such, but primarily food management

services, which fall under the “service and other” rate under RCW 82.04.290(2).

The trial court concluded the Department’s classification of the activity as a service taxed under the service and other rate was correct. CP 1069-71. The trial court stated that the “payments in this case are services taxed as a service and other rate” under RCW 82.04.290(2). VRP 35. The trial court also concluded Aramark’s activities were not wholesale sales of tangible personal property under RCW 82.04.060(1). VRP 36. The undisputed material facts show that Evergreen and Western paid Aramark to provide food services. *See* VRP 35. The undisputed facts also confirm Aramark was not selling tangible meals to Evergreen and Western. *See* VRP 35-36. For these reasons, this Court should affirm the trial court’s summary judgment order.

C. Evergreen and Western Hired Aramark to Provide Food Management Services, Not to Make Wholesale Sales of Tangible Personal Property.

In deciding Aramark provided food management services, not selling of tangible meals, the trial court examined the pleadings and all of the supporting documentation, including the contracts between Aramark and Evergreen and Western. CP 1069-71; *see* VRP 36-37 (Aramark’s counsel questioning the Court on whether particular language in a contract was a key factor in the decision and court’s response). Contracts are

commonly used in tax cases to determine the nature of the business activities subject to tax. *Gen. Motors Corp. v. State*, 60 Wn.2d 862, 876, 376 P.2d 843 (1962), *aff'd on other grounds*, 377 U.S. 436, 84 S. Ct. 1564, 12 L. Ed. 2d 430 (1964). Contracts can be particularly useful because they provide material evidence of the parties' intent regarding specific business transactions. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990).

Using contract language to identify the business activity for B&O tax classification is appropriate when the contracts confirm the actual “substance” of the business activities being conducted. *Gen. Motors Corp.*, 60 Wn.2d at 876. Courts reject relying solely on contract terms for tax classification when the substance of the activities at issue do not in fact match the form of the contracts. *Gen. Motors Corp.*, 60 Wn.2d at 876; *see also Time Oil Co. v. State*, 79 Wn.2d 143, 146, 483 P.2d 628 (1971) (substance rather than form should be used to assess tax classifications). This is especially the case where the terms of the contract appear to be for the purpose of reducing or avoiding excise taxes or obtaining a preferential tax status. *See, e.g., Ford Motor Co.*, 160 Wn.2d 32, 43, 156 P.3d 185 (2007); *Getty Images (Seattle), Inc., v. City of Seattle*, 163 Wn. App. 590, 605-06, 260 P.3d 926 (2011).

Here the undisputed material facts, including the language in the contracts and the actual substance of Aramark’s activities, support only one reasonable conclusion—that Evergreen and Western paid Aramark for food management services.

1. The undisputed material facts show that Evergreen and Western hired and paid Aramark to provide food management services.

Both the contract language and other evidence in the record are consistent. As a matter of law, Aramark provided food management services to Evergreen and Western.

First, Aramark generally describes itself as being in the business of providing food services. Specifically, Aramark describes itself as “a leader in *professional services*, providing award winning *food services*” bringing their skills “in professional services—hospitality, food, facilities and uniforms—to the goals and priorities” of their client institutions. CP 368 (emphasis added). Regarding higher education institutions, Aramark states “[w]e *serve* students, faculty, and staff” and provide “[r]esidential dining and retail operations.” CP 370 (emphasis added). Even its name, Aramark Educational Services, LLC, denotes a service-based purpose.

Consistent with its stated business model, Aramark entered into three food service contracts that describe Aramark as managing and operating the food service programs and dining halls of Evergreen and

Western. Specifically, the 2004 contract with Evergreen defines Aramark's activities as "*manag[ing] and operat[ing]* Food Service, which shall include declining balance and block meal plans, catering and vending services for Evergreen's students, faculty, staff, employees and invited guests." CP 225-26 (emphasis added). The 2011 agreement with Western requires Aramark to operate "the University Food Service Program." CP 435. The 2013 contract with Evergreen states it is for "*dining services* provided on the College's Olympia campus." CP 373, 378.

Consistent with the title and general descriptions, the contracts laid out a list of specific services Aramark was to perform for each institution. These included, for example: managing and operating campus dining halls and restaurants (CP 226, 228-29, CP 387, CP 447-48); preparing, serving, selling, and storing food (CP 225, CP 446); employing staff to manage and operate the food service program (CP 385-86, CP 443-44); paying food and beverage costs associated with operating the Food Service Programs (CP 233, CP 386, CP 445); maintaining an inventory and caring for small wares and equipment (CP 379-80, CP 436-39); occupying, maintaining, and cleaning the facilities (CP 234, CP 380-85, CP 440-41); providing a point of sale system (CP 238, CP 384-85, CP 438); and maintaining standards for food preparation, sustainability, and social justice (CP 233-34, CP 389-92, CP 444-45).

Aramark's costs for managing the food service programs, operating the dining halls, preparing food, and serving patrons were incorporated into a daily rate described as a daily cost per person for preparing and serving dining meals. CP 448. Aramark's labor costs were factored into the mutually agreed daily cost per person. CP 396; CP 448. The contracts stated that Aramark would invoice Evergreen and Western an initial payment at the beginning of the semester and a weekly invoice for the amounts due for the previous week. CP 397, 453 *see also* CP 366, 372 (Aramark's proposal for weekly billing of the meal plan daily rate and payment to Evergreen).

Additionally, Aramark received weekly income regardless of whether the patron actually came in and ate the meal. Aramark was required to operate campus dining establishments on mutually agreed days and times. CP 220; CP 387, 396, CP 447-48. Aramark's billing was based on the "Two Hundred and Twenty Eight (228) full meal plan *service* days per Operating Year" and no allowances would be made for meals or days, which the contract person missed. CP 448-49 (emphasis added).

Aramark, in fact, provided these services for Western and Evergreen, thus confirming that the contractual provisions described above are consistent with the substance of the actual activities. Aramark managed and operated all aspects of food service programs for participants

in the campus food programs and operating campus dining facilities, from planning meals to washing dishes. CP 518-530. Aramark employed assistants, accountants, baristas, cashiers, chefs, cooks, facilities personnel, food service workers, managers, and marketing staff to manage and operate the campus food programs, dining facilities, and to provide meals to students and faculty. *See* CP 885-900.

Viewed as a whole, the reason Evergreen and Western obtained Aramark's services was to manage and operate their food service programs and dining facilities, which included providing meals to patrons. As a matter of law, that business activity falls within the meaning of a catchall service under RCW 82.04.290(2). This Court should affirm the trial court's order granting summary judgment to the Department.

2. The undisputed facts show Evergreen and Western did not contract with Aramark to purchase tangible personal property for the institutions to resell.

Aramark claims that to establish that its activities were wholesaling under RCW 82.04.060(1)(a), it need only show that Evergreen and Western "purchased the meals 'for purposes of resale' in the ordinary course of business." Br. Appellant at 8. But Aramark overlooks the applicable requirements of RCW 82.04.060.

RCW 82.04.060(1)(a) applies *only* to sales of "tangible personal property." While "tangible personal property" is not defined in the B&O

tax statutes, it is a familiar legal term, and a familiar legal term used in a statute is given its familiar legal meaning. *Cashmere Valley Bank v. Dep't of Revenue*, 175 Wn. App. 403, 417, 305 P.3d 1123 (2013) (quoting *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 530, 554 P.2d 1041 (1976)), *aff'd*, 181 Wn.2d 622, 334 P.3d 1100 (2014). *Black's Law Dictionary* defines "tangible personal property" as "[c]orporeal personal property of any kind; personal property that can be seen, weighed, measured, felt, or touched, or is in any other way perceptible to the senses, such as furniture, cooking utensils, and books." Property – Tangible Personal Property, *Black's Law Dictionary* 1412 (10th ed. 2014). A meal or food, like a salad or omelet, is tangible; it is corporeal and edible. In contrast, a meal plan is not tangible; it is a contractual right consisting of block meals, a declining balance, or both. Selling a meal would constitute a sale of tangible personal property. Selling a meal plan would not constitute a sale of tangible personal property. Consequently, if what is being sold or resold under Aramark's theory of this case is intangible, then Aramark cannot show it meets the elements of a wholesale sale under RCW 82.04.060(1)(a).

Aramark argues what is being sold is a "meal" or "board meal." Br. Appellant at 9. Aramark also makes much of language in one agreement saying that Western purchases meals from Aramark to "resell" to its students and faculty. *Id.* But Aramark's argument and

characterization of the contract conflates meals with selling meal plans. Aramark also misapplies the undisputed evidence.

Looking at the claimed “resale” transaction, the evidence in the record does not show any actual sales of tangible meals by Evergreen or Western to its students and faculty. There is no dispute that Evergreen and Western, and in some cases Aramark, sell intangible meal plans to students and faculty at the beginning of the semester as part of their tuition, room and board packages or voluntary meal plans. *See* Br. Appellant at 9; CP 227-28, CP 343, 372. But again, meal plans are not tangible personal property, they are just an entitlement to access dining facilities. In fact, the declarations Aramark cites in support of its position that it is selling tangible meals each state that the identified educational institution “sells meals to students in *the form of student meal plans.*” CP 134 (¶ 2) (emphasis added); *see* CP 25 (¶ 2) (“Evergreen sells meals to students in the form of mandatory meal plans”); CP 497 (“Q. Where do students go to buy meal plans? A. They purchase them in conjunction with their housing”); CP 1033 (“To clarify, Aramark also sells board meals to Western. . . board meals can include ‘mandatory’ board meals and ‘voluntary’ board meals); CP 1036 (similar); CP 1038 (similar). Accordingly, Evergreen and Western only sell board meal plans to students, not meals, so Aramark cannot show Western and Evergreen

intended to resell tangible personal property for purposes of applying its theory of the case. *See* Br. Appellant at 8.

Aramark's reliance on the contract provision using the word "resell," found only in its agreement with Western to describe its activities as sales of meals is misplaced for two reasons. First, the overall context of the agreement refers to providing services. For example, the same section where the provision appears also describes Aramark as providing "Food Management Activities" (CP 435), using "Food Service Facilities" to provide "food services" (CP 435) (§2.1.6) and defining the "University Food Service Program" as "those board, cash, catering and other related food service operations to be provided by Aramark under this Agreement." CP 436 (§2.1.15). In construing a written contract, the court ascertains the intent from reading the contract as a whole. *Dice v. City of Montesano*, 131 Wn. App. 675, 683-84, 128 P.3d 1253 (2006).

Additionally, contracts can only be relied upon to define a tax classification if they confirm the "substance" of what occurs. *Gen. Motors Corp.*, 60 Wn.2d at 876. Western does not resell tangible food items to students, it resells board plans. Western does not have food service employees managing and operating the dining halls. It does not plan the menus or employ the cashier who swipes the card, the cook that prepares and serves the omelet or salad, or the dishwasher that cleans the dishes. It

hires Aramark to do that, and it pays Aramark the daily cost for serving that to students on board meal plans.

Aramark also argues that it does not bill the universities for its services or the other costs it incurs in providing the board meals. Br. Appellant at 9. But Evergreen and Western were billed the daily rate to pay for the cost of operating the dining halls for board meal plan service. The contract with Western states that the daily cost per person charged is based on the number of “full meal plan service days per Operating Year” and that the daily billings will be based on the number of persons “entitled to meals at Board Plan rates.” CP 448.

Moreover, Aramark’s argument is not consistent with the language of the food services management agreement. For example, in the Western contract, Aramark agreed to manage and operate a food service program and dining facilities (CP 435-36), including performing a number of service activities (CP 436-448) and the agreement states that the weekly billing is based on the number of persons “entitled” to meals at a daily cost per person. CP 448-49. The agreement also does not separately bill providing a meal from providing services. CP 448-50. The undisputed fact that the costs go up based on increases in labor costs (CP 448) shows that Aramark is being paid to do something more than just sell meals.

Aramark admits that it provides numerous services, but asks this Court to ignore those services because it characterizes the primary purpose under the agreements with Evergreen and Western as wholesaling board meal plans to those institutions. Br. Appellant at 8-10. But again, in looking at the totality of Aramark's business activities, those activities fit the business of a food contractor that is providing food management services.

Aramark's position here is also contrary to its business model. Aramark does not describe itself as being a wholesaler or distributor in its general description of itself to its customers. CP 368-72. Aramark is also generally not acting like a wholesaler or a distributor. "[W]holesalers, in the performance of their activities or functions, merely provide a 'merchandising conduit' for the flow of goods, wares, and merchandise from manufacturers and processors to retail outlets, and, finally to the consuming public." *Rusan's, Inc. v. State*, 78 Wn.2d 601, 604, 478 P.2d 724 (1970);⁷ see, e.g., *Perington Wholesale, Inc. v. Burger King Corp.*, 554 F. Supp. 708, 713 (D. Colo. 1982) (describing the nature of exclusive supplier agreements). Wholesalers do not operate the food service

⁷ The Court in *Rusan's* ultimately found the taxpayer was not performing wholesale functions under former RCW 82.04.270(1) (1969), but closely comparable distribution functions under former RCW 82.04.270(2) (1969). See *Rusan's*, 78 Wn.2d at 606.

programs and food service facilities that serve meals to consumers. *Rusan's*, 78 Wn.2d 604 (wholesalers perform few, if any, processing activities or functions with respect to merchandise acquired or purchased). They do not maintain equipment, oversee and train workers, ensure cleanliness of the dining facility, plan menus, serve items to order, and cleanup. *Id.* Aramark was paid weekly to do much more than simply make meals. Rather, taken as a whole, Aramark's activities establish that Western and Evergreen paid Aramark to provide a service, and not simply to sell tangible personal property at wholesale.

Aramark argues that the Department recognized that a sale of a meal is distinguished from the sale of food stuff in 20 WTD 47 (2001). That case involved a fast food chain where the restaurant provided meals to managers at no charge, but did not collect or remit sales tax. 20 WTD at 48. In that case there was no dispute that managers were being compensated with tangible meals. 20 WTD at 51. There, the distinction between meals and food was material for purposes of determining the taxpayer's liability for deferred sales and use tax on purchases of food or beverage products, which are ingredients of meals being sold at retail. The tax determination did not raise the issue of whether a business was making sales of tangible personal property or providing a service for B&O tax purposes.

Aramark points to a second tax determination, related to federal government contracts for military delicatessens and bakeries, to argue that the Department's position is "contrary" to its argument in this case and thus the trial court should be overruled. Br. Appellant at 10-11 (citing 9 WTD 286-29 (1990)). However, there is nothing inconsistent or contrary between the Department's application of law to the facts in that Determination and its positions in this case.⁸ That determination involved a food distributor who sold food products directly to U.S. military bases and used a special pricing factor when employees processed and prepared the food products for "ultimate sale by the military to its personnel." 9 WTD 286-29. The Department's 1990 tax determination did not determine, as Aramark argues, that the services are "simply part and parcel of the cost-of-goods-sold at wholesale." Br. Appellant at 11. Rather, the Department applied a "primary purpose" test to the facts made available to it and determined that the "providing of food products at wholesale" was the primary purpose of the business, not the "subsequent preparation" of food products. 9 WTD 286-29 at *5. In applying the primary purpose test in this case, the Department's auditor and the tax

⁸ Even if contrary, which it is not, the courts have the ultimate authority to construe statutes; an administrative interpretation may be only given deference, it is never authoritative. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 184, 157 P.3d 847 (2007).

review officer in the administrative appeal understandably reached a different outcome due to the extensive amount of service activities provided under the contract. CP 562-72, CP 971-72. Accordingly, the Department's analysis was entirely consistent, and the difference in the outcome resulted from different facts and circumstances in the two matters.

Aramark cites several out-of-state cases involving other states' retail sales tax codes for the proposition that other states' laws will assist in interpreting our B&O tax scheme. Br. Appellant at 10-13. *See, e.g., Canteen Corp. v. Goldberg*, 592 S.W.2d 754, 755 (Mo. 1980); *Slater Corp. v. South Carolina Tax Comm'n*, 270 S.C. 405, 242 S.E.2d 439 (S.C. 1978). The construction of other states' retail sales tax laws provides minimal assistance because this case involves the B&O tax, which is inherently different from retail sales tax. *Lamtec Corp. v. Dep't of Revenue*, 151 Wn. App. 451, 459, 215 P.3d 968 (2009), *aff'd* 170 Wn.2d 838 (2011). This is because unlike sales tax cases, in which the issue is whether a transaction is subject to the retail sales tax or not, the issue in B&O tax cases requires examination of the business activities to see which classification the business activity falls within. And as discussed in Part B, above, the B&O tax expressly provides for taxation of all services or other business activities that do not constitute a retail sale. *See RCW*

82.04.290(2). Moreover, in seeking to compare retail sales tax exemption cases from other states, Aramark is again conflating sales of board plans, which are intangible, with sales of individual meals.

In summary, the transactions at issue in this case did not involve the sale or resale of tangible personal property because board meal plans are not tangible. Rather, Evergreen and Western paid Aramark to provide food management services, with all that entails, not just to prepare tangible meals.

D. Consistent with the B&O Tax Statutes, WAC 458-20-119 Distinguishes Between Food Wholesalers and Food Service Contractors.

The Department has promulgated rules to address taxation of activities in many industries, including Aramark's industry. WAC 458-20-119 (Rule 119) explains "Washington's business and occupation (B&O) tax and retail sales tax applications for sales by caterers and food service contractors" for companies like Aramark. WAC 458-20-119(1). Rule 119 discusses when food service contractors conduct "service" activities, as opposed to performing a "sale" or some other activity, such as wholesaling. WAC 458-20-119(3), (3)(b), (3)(b)(i)-(iii).

Rule 119 subsection (3) explains that "food service management" is a service activity under RCW 82.04.290, stating "that the gross proceeds derived from the management of a food service operation are subject to

the service and other business activities B&O tax.” WAC 458-20-119(3)(b). It then provides a description of “food service management.”

The rule also identifies three specific situations constituting “Food service management.” WAC 458-20-119(3)(b). One of them, subsection (3)(b)(ii) squarely fits the facts presented here, describing a food service contractor managing or operating a cafeteria, lunchroom, or similar facility for the exclusive use of students or faculty at an educational institution. WAC 458-20-119(3)(b)(ii). The institution “provides these meals to the students and faculty as a part of its educational services.” *Id.* And the “food service contractor is managing a food service operation on behalf of the institution.” *Id.* The rule then distinguishes providing meals to students and faculty from providing food to guests of the institution. *Id.* Rule 119 subsection (3)(b)(ii) is wholly consistent with how Aramark’s employees describe what Aramark is doing.

Q. What, in your mind, does Aramark do for Western Washington University?

A. We contract with them to *provide meals* for the students.

Q. How does Aramark do that?

A. We *operate the dining halls and retail outfits*.

CP 492 (emphasis added).

Accordingly, Rule 119 generally, and its subsection (3)(b)(ii) in particular addresses the situation where institutions, like Evergreen and Western, contract with independent third-party food contractors, like

Aramark, to provide the operation and management of their food service programs. WAC 458-20-119(3)(b)(ii). Under the rule, income received from the educational institution for providing meals to students and faculty as part of managing their food service programs is taxed under the “service and other” classification. WAC 458-20-119(3). In other words, the result under Rule 119 is the same as the result under the B&O tax statutes discussed above.

Aramark argues that its activity falls within the Rule 119 subsection (5), which states:

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). Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

WAC 458-20-119(5). Because wholesale sales must be sales of tangible personal property under RCW 82.04.060(1)(a), subsection (5) applies only to sales of food or prepared meals. It does not apply to an intangible right in the form of a meal plan, and that is all Evergreen and Western sold to their students.

Aramark argues that it can show through “facts and circumstances” that its sale of its board meals were wholesale sales under RCW 82.04.270 and Rule 119 subsection (5), pointing to several reseller permits. Br. Appellant at 16. As explained above, the facts and circumstances do not show Aramark sold tangible personal property to a buyer, which was then resold to students. Moreover, Aramark’s claims that Evergreen and Western obtained reseller’s permits specifically for their business with Aramark is not supported by the record.

Aramark argues the Department must produce evidence of no resellers permit. *See* Br. Appellant at 16. Under the Department’s rules governing the reseller’s permit, Aramark, not the Department, has the burden of proving that the buyer had a reseller permit at the time of sale. *See* WAC 458-20-102(7). A seller may meet that burden by taking from the buyer, at the time of sale or within one hundred twenty days after the sale, a copy of the reseller permit issued to the buyer under RCW 82.32.780 or RCW 82.32.783. *Id.*

Aramark does not meet its burden. First, Aramark produced no reseller permits for the tax period between 2005 and 2009 at Evergreen. Aramark produced an Evergreen reseller’s permit for 2010 through 2013, but that permit specifically states it is for “other commercial printing.” *Id.* CP 132. And Aramark also failed to produce a permit for 2011 through

2013 with respect to its operations at Western. Accordingly, Aramark completely failed to meet its initial burden of producing the permit or certificate required by WAC 458-20-119(5) and WAC 458-20-102(7) for 2005 through of 2013 at either institution.

Aramark produced reseller permits for 2014 that apply to the last tax year in the audit. CP 133, CP 199. The two reseller permits list the “business activity” as “Colleges, Universities, and Professional Schools,” and are silent as to what merchandise and inventory they obtained the reseller permits for (e.g., printing or food). *Id.* Thus, the 2014 permits substantiate the existence of a general reseller permit, but not the fact that Evergreen and Western obtained this permit specifically because of Aramark’s business dealings with them.⁹ CP 133, CP 199. While the Department’s rule on resellers permits does not require that the reseller’s permit say the reason the reseller obtained it (*see* WAC 458-20-102(2)), the fact that the resellers permit says nothing wholly undermines the proposition that Evergreen or Western acquired them so they could substantiate the intent to resell tangible personal property in the form of food.

⁹ The only “fact” in the record which could be construed as supporting Aramark’s claims are the conclusory statements of Aramark’s witnesses which the Department objected to. *See* CP 868 (Department’s objections to CP 26 and CP 135 and under ER 602, 701, 802). Aramark no longer relies upon these statements in either the facts or argument sections of its appellate briefing.

Accordingly, Aramark provided no evidence that specifically shows either Evergreen or Western obtained the reseller permits because they needed to substantiate a resale transaction to Aramark for 2005-2013. Nor would the use of such permits be consistent with actual business activities provided by Aramark to Evergreen and Western.

E. This Court Can Affirm the Trial Court on the Alternative Ground that the Primary Purpose of Aramark’s Business Activity Is Providing a Service, Not a Wholesale Sale of Tangible Personal Property.

Assuming without conceding that two or more tax classifications could reasonably apply to Aramark’s business activities at issue in this case, the Court may use a primary purpose test to determine whether a particular business activity should be classified either as a “service” or a “sale.” See *Qualcomm, Inc. v. Dep’t of Revenue*, 171 Wn.2d 125, 136-37, 249 P.3d 167 (2011) (the test “seeks the essential reason the buyer enters the transaction”). This test focuses looking at the purpose in obtaining the good or service as whole from the taxpayer’s customer’s perspective. *Id.* at 137, 140-44. In *Qualcomm*, the Supreme Court applied common law “true object” or “primary purpose” test to determine if customer payments for OmniTRACS service should be classified as a telecommunications service, because it transmits data, under RCW 82.04.065 or an information service, because it collects and manipulates data, under former WAC 458-

20-155 for B&O and retail sales tax purposes. *Qualcomm*, 171 Wn.2d at 131-32, 144-45. The Court concluded that the service should be classified as information services, and taxed at the service and other rate, because the overriding purpose of the service as a whole for the OmniTRACS customer was for supervising drivers to ensure efficient deliveries. *Id.* at 141-44.

Accordingly, if the Court were to conclude that Aramark's activities could be classified either as a sale of food management services or as a sale of food or prepared food, this Court should nonetheless affirm the trial court on the alternative grounds that the primary purpose of the activities was to provide the services, not sell food as such. This is because the undisputed facts indicate that the essential reason Evergreen and Western entered into the agreements with Aramark was primarily for Aramark to provide food management. CP 225-26, CP 373, CP 378, CP 435; *see also Qualcomm*, 171 Wn.2d at 137 (the primary purpose test looks to the activities as a whole, not a specific component or provision) (citing Jerome Hellerstein, *Significant Sales and Use Tax Developments During the Past Half Century*, 39 Vand. L. Rev. 961, 968 (1986)).¹⁰ The

¹⁰ While the Supreme Court in *Qualcomm* was united in applying the test and looking at the subject as a whole from the customer's perspective, it was divided on whether the primary purpose test looked to the primary reason the customer purchased the OmniTRACS service or the entire OmniTRACS system (including software, service and hardware). *Qualcomm, Inc.*, 171 Wn.2d at 140-42 (majority) & 145 (Justice Fairhurst

activities as a whole confirm that Aramark is providing food management services to Evergreen and Western.

Again, Aramark was not primarily in the business of selling tangible meals to institutions, and the institutions did not resell tangible meals to the students. Rather, Evergreen and Western sold students board meal plans to access the dining services provided by its food contractor and to obtain meals.

F. Aramark Is Not Entitled to Summary Judgment on Its Request for Tax Refund.

Aramark requests not just reversal, but also entry of summary judgment on its requested tax refund. Br. Appellant at 17. A tax refund action places two burdens on the taxpayer, showing the tax paid was incorrect, and establishing the correct amount of tax. *Texaco Ref. & Mktg. v. Dep't of Revenue*, 131 Wn. App. 385, 398, 127 P.3d 771 (2006); see RCW 82.32.180 (excluding taxpayers who failed to keep and preserve books, records, and invoices from being entitled to a refund).

The Department argued below that Aramark had not provided sufficient evidence establishing the correct amount of tax, nor had it placed facts into the record showing that Aramark's calculation of the

dissenting). The majority looked to the entire system, while the dissent would look only to what motivated the customer in getting the OmniTRACS service. *Id.* at 140-42, 145-50.

requested tax refund was erroneous. *See* CP 868-69, 878-79; CP 968-70. Because the trial court granted summary judgment to the Department, it did not reach the issue of the correct amount of tax. Accordingly, if this Court were to disagree with the trial court and reverse the grant of summary judgment to the Department, it should remand for trial on the correct amount of tax, which is unquestionably a disputed issue of material fact.

V. CONCLUSION

For the foregoing reasons, the trial court correctly granted summary judgment in favor of the Department and correctly denied Aramark's motion for summary judgment. This Court should affirm.

RESPECTFULLY SUBMITTED this 2nd day of April, 2018.

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