

WSR 23-22-013

EXPEDITED RULES

DEPARTMENT OF REVENUE

[Filed October 19, 2023, 11:18 a.m.]

Title of Rule and Other Identifying Information: WAC 458-20-124 Restaurants, cocktail bars, taverns and similar businesses and 458-20-119 Sales by caterers and food service contractors.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: To update the rules to incorporate SHB 1431's retail sales tax exemption for food, drink, or meals provided by senior living communities.

Reasons Supporting Proposal: To reflect change in law.

Statutory Authority for Adoption: RCW 82.01.060, 82.32.300.

Statute Being Implemented: RCW 82.04.040.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Department of revenue, governmental.

Name of Agency Personnel Responsible for Drafting: Jason Andre, 6400 Linderson Way S.W., Tumwater, WA, 360-534-1580; Implementation and Enforcement: John Ryser, 6400 Linderson Way S.W., Tumwater, WA, 360-534-1605.

This notice meets the following criteria to use the expedited adoption process for these rules:

Content is explicitly and specifically dictated by statute.

Explanation of the Reason the Agency Believes the Expedited Rule-Making Process is Appropriate: The expedited rule-making process is appropriate for this rule because the department is incorporating an exemption added by 2023 legislation and makes no other changes to the rule.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Jason Andre, Department of Revenue, 6400 Linderson Way S.W., Tumwater, WA, phone 360-534-1580, fax 360-534-1606, email jasona@dor.wa.gov, AND RECEIVED BY January 2, 2024.

October 19, 2023
Atif Aziz
Rules Coordinator

OTS-5022.1

AMENDATORY SECTION (Amending WSR 22-14-014, filed 6/23/22, effective 7/24/22)

WAC 458-20-119 Sales by caterers and food service contractors.

(1) **Introduction.** This rule explains Washington's business and occupa-

tion (B&O) tax and retail sales tax applications for sales by caterers and food service contractors.

(a) **Examples.** This rule contains examples that identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all facts and circumstances.

(b) **Other rules that may apply.** The following rules may contain additional relevant information:

(i) WAC 458-20-107 Requirement to separately state sales tax—Advertised prices including sales tax.

(ii) WAC 458-20-124 Restaurants, cocktail bars, taverns and similar businesses.

(iii) WAC 458-20-166 Hotels, motels, boarding houses, rooming houses, resorts, hostels, trailer camps, short-term rentals and similar lodging businesses.

(iv) WAC 458-20-167 Educational institutions, school districts, student organizations, and private schools.

(v) WAC 458-20-168 Hospitals, nursing homes, assisted living facilities, adult family homes and similar health care facilities.

(vi) WAC 458-20-175 Persons engaged in the business of operating as a private or common carrier by air, rail or water in interstate or foreign commerce.

(vii) WAC 458-20-189 Sales to and by the state of Washington and municipal corporations, including counties, cities, towns, school districts, and fire districts.

(viii) WAC 458-20-190 Sales to and by the United States and certain entities created by the United States—Doing business on federal reservations—Sales to foreign governments.

(ix) WAC 458-20-244 Food and food ingredients.

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

(3) **Food service contractors.** The term "food service contractor" means a person who operates a food service at a kitchen, cafeteria, dining room, or similar facility owned by an institution or business. Food service contractors may manage the food service operation on behalf of the institution or business, or may actually make sales of meals or prepared foods.

(a) **Sales of meals.** Food service contractors who sell meals or prepared foods to consumers are subject to the retailing B&O and retail sales taxes on their gross proceeds of sales. For example, the operation of a cafeteria which provides meals to employees of a manufacturing or financial business is generally a retail activity. The food service contractor is considered to be making retail sales of meals, whether payment for the meal is made by the employees or the business, unless the business itself is reselling the meals to the employees.

In all cases where the meals are prepared at off-site facilities not owned by the institution or business, the food service contractor is considered to be making sales of meals and the retailing B&O and

retail sales taxes apply to the gross proceeds of sale, or gross income for sales to consumers.

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

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

(i) Food service contractors operating a cafeteria or similar facility which provides meals and prepared food for employees or guests of a business, but only where the business owning the facility is the one actually selling the meals to its employees.

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

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

(c) **Examples.**

(i) Example 1. GC Inc. is a food service contractor managing and operating an on-site cafeteria for B College. This cafeteria is operated for the exclusive use of students and faculty. Guests of students or faculty members, however, are allowed to use the facilities. All moneys collected in the cafeteria are retained by B College. B College pays GC's direct costs for managing and operating the cafeteria, including the costs of the unprepared food products, employee salaries, and overhead expenses. GC also receives a management fee.

GC Inc. is managing a food service operation. The measure of tax is the gross proceeds received from B College. GC Inc. may not claim a deduction on account of cost of materials, salaries, or any other expense. GC Inc.'s proceeds are subject to the service and other activities B&O tax classification. B College is considered to be making retail sales of meals to the guests and must collect and remit retail

sales tax on the gross proceeds of these sales. B College should refer to WAC 458-20-167 to determine whether the retailing B&O tax applies.

(ii) Example 2. DF Food Service contracts with Hospital A to manage and operate Hospital A's dietary and cafeteria facilities. DF is to receive a per meal fee for meals provided to Hospital A's patients. DF Food Service retains all proceeds for sales of meals to physicians, nurses, and visitors in the cafeteria.

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

(4) **Retailing B&O and retail sales taxes.** The sales of meals to consumers are subject to the retailing B&O tax and generally subject to retail sales tax. However, a retail sales tax exemption is available for the following sales of meals:

(a) Prepared meals sold under a state-administered nutrition program for the aged as provided for in the Older Americans Act (Public Law 95-478 Title III) and RCW 74.38.040(6);

(b) Prepared meals sold to or for senior citizens, disabled persons, or low-income persons by a nonprofit organization organized under chapter 24.03A or 24.12 RCW. However, this exemption does not apply to purchases of prepared meals by nonprofit organizations, such as hospitals, which provide the meals to patients as a part of the services they render; ~~((and))~~

(c) Food, drink, or meals furnished by a senior living community, as defined in RCW 82.04.040, to tenants as part of a rental or residency agreement for which no separate charge is made, regardless of whether the tenant is a resident for purposes of chapter 18.20 or 18.390 RCW. RCW 82.04.040. However, senior living communities must still report the value of such meals under the service and other activities B&O tax classification or under the classification which otherwise applies to that community; and

(d) Prepared meals sold to the federal government. WAC 458-20-190. However, meals sold to federal employees are taxable, even if the federal employee will be reimbursed for the cost of the meals by the federal government.

(5) **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 a reseller permit for sales from their customers to document the wholesale nature of any sale as provided in WAC 458-20-102 Reseller permits.

(6) **Deferred sales or use tax.** If the seller fails to collect the appropriate retail sales tax, the purchaser is required to pay the deferred sales or use tax directly to the department for many catering and food service items, as follows:

(a) Purchases of dishes, kitchen utensils, linens, and items which do not become an ingredient of the meal, are subject to retail sales tax.

(b) Retail sales tax or use tax applies to purchases of equipment, repairs, appliances, and construction.

(c) Retail sales tax or use tax does not apply to purchases of food or beverage products that are ingredients of meals being sold at retail or wholesale.

(d) Purchases of food products and prepared meals by persons who are not in the business of selling meals at retail or wholesale are subject to the retail sales tax. However, certain food products are exempt from retail sales or use tax. See WAC 458-20-244.

OTS-5023.1

AMENDATORY SECTION (Amending WSR 22-14-014, filed 6/23/22, effective 7/24/22)

WAC 458-20-124 Restaurants, cocktail bars, taverns and similar businesses. (1) **Introduction.** This rule explains how Washington's business and occupation (B&O) tax and retail sales tax apply to sales by restaurants, cocktail bars, taverns, and similar businesses. It discusses sales of meals, beverages, and foods at prices that include retail sales tax. This rule also explains how discounted and promotional meals are taxed. Caterers and persons who merely manage the operations of a restaurant or similar business should refer to WAC 458-20-119 Sales by caterers and food service contractors, to determine their tax liability.

(a) **Definition. Restaurants, cocktail bars, and taverns.** The term "restaurants, cocktail bars, taverns, and similar businesses" means every place where prepared foods and beverages are sold and served to individuals, generally for consumption on the premises where sold.

(b) **Examples.** This rule contains examples that identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all facts and circumstances.

(c) **Other rules that may apply.** The following rules may contain other relevant information:

(i) WAC 458-20-107 Requirement to separately state sales tax—Advertised prices including sales tax.

(ii) WAC 458-20-119 Sales by caterers and food service contractors.

(iii) WAC 458-20-131 Gambling activities.

(iv) WAC 458-20-168 Hospitals, nursing homes, assisted living facilities, adult family homes and similar health care facilities.

(v) WAC 458-20-183 Recreational services and activities.

~~((v))~~ (vi) WAC 458-20-187 Tax responsibility of vending machine owners and operators.

~~((vi))~~ (vii) WAC 458-20-189 Sales to and by the state of Washington and municipal corporations, including counties, cities, towns, school districts, and fire districts.

~~((vii))~~ (viii) WAC 458-20-190 Sales to and by the United States and certain entities created by the United States—Doing business on federal reservations—Sales to foreign governments.

~~((viii))~~ (ix) WAC 458-20-243 Litter tax.

~~((ix))~~ (x) WAC 458-20-244 Food and food ingredients.

(2) **Retailing B&O and retail sales taxes.** Sales of meals and prepared foods to consumers by restaurants, cocktail bars, taverns, and similar businesses are subject to retailing B&O tax and generally sub-

ject to retail sales tax. Retail sales tax exemptions are available for the following sales of meals:

(a) Prepared meals sold under a state-administered nutrition program for the aged as provided for in the Older Americans Act (Public Law 95-478 Title III) and RCW 74.38.040(6);

(b) Prepared meals sold to or for senior citizens, disabled persons, or low-income persons by a nonprofit organization organized under chapter 24.03A or 24.12 RCW;

(c) Food, drink, or meals furnished by a senior living community, as defined in RCW 82.04.040, to tenants as part of a rental or residency agreement for which no separate charge is made, regardless of whether the tenant is a resident for purposes of chapter 18.20 or 18.390 RCW. RCW 82.04.040. However, senior living communities must still report the value of such meals under the service and other activities B&O tax classification or under the classification which otherwise applies to that community;

(d) Prepared meals sold to the federal government. WAC 458-20-190. However, meals sold to federal employees are taxable, even if the federal employee will be reimbursed for the cost of the meals by the federal government; and

~~((d))~~ (e) Meals provided without specific charge by a restaurant to its employees. RCW 82.08.9995. These meals are also exempt from B&O tax and use tax. RCW 82.04.750 and 82.12.9995. However, if any charge is made for meals to employees, retailing B&O tax and retail sales tax apply.

For purposes of ~~((d))~~ (e) of this subsection, the following definitions apply:

(i) "Meal" means one or more items of prepared food or beverages other than alcoholic beverages. For the purposes of ~~((d))~~ (e) of this subsection, "alcoholic beverage" and "prepared food" have the same meanings as provided in RCW 82.08.0293.

(ii) "Restaurant" means any establishment having special space and accommodation where food and beverages are regularly sold to the public for immediate, but not necessarily on-site, consumption, but excluding grocery stores, mini-markets, and convenience stores. Restaurant includes, but is not limited to, lunch counters, diners, coffee shops, espresso shops or bars, concession stands or counters, delicatessens, and cafeterias. It also includes space and accommodations where food and beverages are sold to the public for immediate consumption, if a separate charge is made for such food and beverages, and are located within:

- Hotels, motels, lodges, boarding houses, bed and breakfast facilities;

- Hospitals, office buildings, movie theaters; and

- Schools, colleges, or universities.

Restaurants also include:

- Mobile sales units that sell food or beverages for immediate consumption within a place, the entrance to which is subject to an admission charge; and

- Public and private carriers, such as trains and vessels, that sell food or beverages for immediate consumption if a separate charge is made for such food or beverages.

A restaurant is open to the public for purposes of this subsection ~~(2)~~ ~~((d))~~ (e) if members of the public can be served as guests. "Restaurant" does not include businesses making sales through vending machines or through mobile sales units such as catering trucks or sidewalk vendors of food or beverage items.

(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. Sellers must obtain a copy of the purchaser's reseller permit to document the wholesale nature of any sale as provided in WAC 458-20-102 Reseller permits.

(4) **Service and other business activities B&O tax.** Compensation received from owners of vending machines for allowing the placement of those machines at the restaurant, cocktail bar, tavern, or similar business is subject to the service and other business activities tax. WAC 458-20-187. Persons operating contests of chance should refer to WAC 458-20-131.

(5) **Deferred sales or use tax.** If the seller fails to collect the appropriate retail sales tax, the purchaser is required to pay the deferred sales or use tax directly to the department.

(a) Retail sales tax or use tax applies to purchases of dishes, kitchen utensils, linens, and items that do not become an ingredient of the meal.

(b) Retail sales tax or use tax applies to purchases of equipment, repairs, appliances, and construction.

(c) Retail sales tax or use tax does not apply to purchases of food or beverage products that are ingredients of the meals being sold.

(d) Retail sales tax or use tax does not apply to purchases of paper plates, paper cups, paper napkins, toothpicks, or any other articles that are furnished to customers, the first actual use of which renders such articles unfit for further use, when purchased by restaurants and similar businesses making actual sales of meals.

(6) **Combination business.** Persons operating a combination of two kinds of food sales, of which one is the sale of prepared food (i.e., an establishment, such as a deli, selling food products ready for consumption and in bulk quantities), should refer to WAC 458-20-244 for taxability information.

(7) **Discounted meals, promotional meals, and meals given away.** Persons who sell meals on a "two for one" or similar basis are not giving away a free meal, but rather are selling two meals at a discounted price. Both the retailing B&O and retail sales taxes are calculated on the reduced price actually received by the seller.

Persons who provide meals free of charge to persons other than their employees are consumers of those meals. Persons operating restaurants or similar businesses are not required to report use tax on food and food ingredients given away, even if the food or food ingredients are part of prepared meals. For example, a restaurant providing meals to the homeless or hot dogs free of charge to a little league team will not incur a retail sales or use tax liability with respect to these items given away. A sale has not occurred, and the food and food ingredients exemption applies. Should the restaurant provide the little league team with soft drinks free of charge, the restaurant will incur a deferred retail sales or use tax liability with respect to those soft drinks. Soft drinks are excluded from the exemption for food and food ingredients. WAC 458-20-244.

(8) **Sales of meals, beverages and food at prices that include retail sales tax.** Persons may advertise and/or sell meals, beverages, or any kind of food product at prices including retail sales tax. Any person electing to advertise and/or make sales in this manner must clearly indicate this pricing method on the menus and other price information. WAC 458-20-107.

(9) **Spirits, beer, and wine restaurant licensees.** Restaurants operating under the authority of a license from the liquor and cannabis board to sell spirits, beer, and wine by the glass for on-premises consumption generally have both dining and cocktail lounge areas. Customers purchasing beverages or food in lounge areas may not be given sales invoices, sales slips, or dinner checks, nor are they generally provided with menus.

(a) Many spirits, beer, and wine restaurant licensees elect to sell beverages or food at prices inclusive of the retail sales tax in the cocktail lounge area. If this pricing method is used, notification that retail sales tax is included in the price of the beverages or foods must be posted in the lounge area in a manner and location so that customers can see the notice without entering employee work areas. The department presumes that no retail sales tax has been collected or is included in the gross receipts when a notice is not posted and the customer does not receive a sales slip or sales invoice separately stating the retail sales tax.

(b) The election to include retail sales tax in the selling price in one area of a location does not preclude the restaurant operator from selling beverages or food at a price exclusive of retail sales tax in another. For example, a spirits, beer, and wine restaurant licensee may elect to include the retail sales tax in the price charged for beverages in the lounge area, while the price charged in the dining area is exclusive of the retail sales tax.

(c) Spirits, beer, and wine restaurant licensees are not required to post actual drink prices in the cocktail lounge areas. However, if actual prices are posted, the advertising requirements expressed in WAC 458-20-107 must be met.

(d) **Examples.**

(i) Example 1. XYZ Restaurant operates both a cocktail bar and a dining area. XYZ has elected to sell drinks and appetizers in the bar at prices including the retail sales tax while selling drinks and meals served in the dining area at prices exclusive of the retail sales tax. There is a sign posted in the bar area advising customers that all prices include retail sales tax. Customers in the dining area are given sales invoices that separately state the retail sales tax. As an example, a typical well drink purchased in the bar for \$7.00 inclusive of the retail sales tax, is sold for \$7.00 plus retail sales tax in the dining area. The pricing requirements have been satisfied and the drink and food totals are correctly reflected on the customers' dinner checks. XYZ may factor the retail sales tax out of the cocktail bar gross receipts when determining its retailing B&O and retail sales tax liability.

(ii) Example 2. RBS Restaurant operates both a cocktail bar and a dining area. RBS has elected to sell drinks at prices inclusive of retail sales tax for all areas where drinks are served. It has a sign posted to inform customers in the bar area of this fact and a statement is also on the dinner menu indicating that any charges for drinks includes retail sales tax. Dinner checks are given to customers served in the dining area that state the price of the meal exclusive of retail sales tax, the retail sales tax on the meal, and the drink price including retail sales tax. Because the business has met the sign posting requirement in the bar area and has indicated on the menu that retail sales tax is included in the price of the drinks, RBS may factor the retail sales tax out of the gross receipts received from its drink sales when determining its taxable retail sales.

(iii) Example 3. Z Tavern sells all foods and drinks at a price that includes the retail sales tax. However, there is no mention of this pricing structure on its menus or reader boards. The gross receipts from Z Tavern's food and drink sales are subject to the retailing B&O and retail sales taxes. Z Tavern has failed to meet the conditions for selling foods and drinks at prices including retail sales tax. Z Tavern may not assume the gross receipts include any retail sales tax and may not factor the retail sales tax out of the gross receipts.

(10) **Gratuities.** Tips or gratuities representing donations or gifts by customers under circumstances which are clearly voluntary are not part of the selling price and not subject to tax. However, mandatory additions to the price by the seller, whether labeled service charges, tips, gratuities or otherwise are part of the selling price and are subject to both the retailing B&O and retail sales taxes.