

Cite as Det. No. 92-107, 12 WTD 139 (1993).

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	<u>D E T E R M I N A T I O N</u>
For Correction of Assessment)	
of)	No. 92-107
)	
. . .)	Registration No. . . .
) . . . /Audit No. . . .)

[1] RULE 181 AND RULE 183: B&O TAX -- BOAT -- CHARTER OF -
- DIVERS -- TRANSPORTATION OF. The transportation of
divers via a charterer-operated boat to a diving site
at which the activities of the divers are controlled by
a third-party diving school or group is not a retail
sale.

Headnotes are provided as a convenience for the reader and are
not in any way a part of the decision or in any way to be used in
construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: . . .

NATURE OF ACTION:

Taxpayer protests classification of its boat charters as retail
sales.

FACTS AND ISSUES:

Dressel, A.L.J. -- . . . (taxpayer) charters boats for scuba
diving, fishing, and sightseeing. Its books and records were
examined by the Department of Revenue (Department) for the period
January 15, 1986 through September 30, 1988, and a tax assessment
was issued. The taxpayer appeals a portion of the assessment.

One of the business activities of the taxpayer is to use one of
its boats to transport scuba divers from shore to diving sites
out on the waters of Puget Sound. Typically, the taxpayer's boat
is chartered by a diving shop, school, or group. The dive shop
or other group contracts directly with the taxpayer to provide
this transportation service. The students and customers of the
dive shop businesses do not contract with the taxpayer. The

taxpayer operates the boat. Its charges are determined by the number of divers transported. Once at the diving site, the taxpayer's skipper waits while the divers use the boat as their base of operations. The skipper has no instructional or other role. The diving activities are directed by the diving school or group with which the taxpayer has no affiliation. Frequently, those activities will include diving instruction. When the diving is finished, the skipper brings the divers back to port.

The Department's auditor has classified this business activity of the taxpayer as a retail sale. He reasoned that diving is a participatory recreational activity and, thus, is a retail sale. Because the boat is utilized in this participatory activity, says the auditor, it is, effectively, part of the retail diving activity.

The taxpayer, on the other hand, argues that it is merely providing transportation for the diving school or group. This is a service activity, it claims, properly classified under the Service and Other Activities classification of the business and occupation (B&O) tax. It is the dive shops that are providing the participatory activity, not the taxpayer. As to the divers, taxpayer argues it is conducting a passive activity, transportation. Because its activity is not of the participatory recreational variety, it should not be classified as a retail sale.

Alternatively, the taxpayer argues that if, in fact, its transportation activity is a retail sale, those trips which are for the purpose of diving instruction are taxable under the Service B&O category because of certain provisions found in WAC 458-20-183 (Rule 183) and ETB.531.04.08.183 (ETB 531).

The issue is whether the transportation of groups to scuba diving sites is a participatory, recreational activity which should be tax-classified as a retail sale.

DISCUSSION:

The position of the auditor that participatory recreational activities are retail sales is correct.

The term "sale at retail" is defined by RCW 82.04.050 to include the sale of or charge made by persons engaging in certain business activities, including "amusement and recreation businesses."

. . . .

The term "sale at retail" includes all activities wherein a person pays for the right to actively participate in an amusement or recreation activity.

Rule 183.

[1] The participatory recreational activity in this case is diving. The divers do not pay the taxpayer, however, for the right to engage in that activity. They pay the dive shop. The dive shop is the party that pays the taxpayer, but it does not pay the taxpayer for diving. It pays the taxpayer for transportation out to the site of the dive and back. This is a passive activity. The divers just sit as the taxpayer transports them out to the place where they will actively participate in diving. Rule 183 goes on to state that the "term [sale at retail] does not include the sale of or charge made for providing facilities where a person is merely a spectator or passive participant in the activity, such as movies, concerts, sports events, and the like". [Brackets added.] The taxpayer's transportation of the divers comports with this description and is not a retail sale.

WAC 458-20-181 (Rule 181) has to do with vessels operating upon waters in the state of Washington. It reads, in part:

SERVICE AND OTHER BUSINESS ACTIVITIES. The business of operating lighters is a service business taxable under the service and other business activities classification upon the gross income from such service. Also taxable under this classification is gross income from operation of vessels to provide scenic cruises.

Whereas sports fishing on a charter boat is a participatory, retail activity, scenic cruises are a passive activity, the income from which is subject to Service B&O tax rather than the retailing taxes. Rule 181, ETB 531, and Det. No. 91-151, 11 WTD 193 (1991). We believe that the taxpayer's activity of transporting divers to their diving site is akin to scenic cruises and should be tax-classified similarly. Both involve transportation over the water and only passive participation on the part of the customers. Moreover, ETB 531 lists guided excursions, motorized river rafting, airplane rides, ballooning, and similarly conducted and service-provider-operated activities as passive and subject to Service B&O tax. The taxpayer's activity in this case is, in our judgment, analogous to those.

Had these been "bare boat" charters for which the taxpayer did not furnish a skipper or other personnel, they would be tax classified as retail sales as rentals of tangible personal property. WAC 458-20-211.

Inasmuch as we agree with the taxpayer's primary argument, we will not discuss its alternative argument, that some of the

diving was instructional in nature and, therefore, ought to be Service B&O taxable.

DECISION AND DISPOSITION:

The taxpayer's petition is granted.

DATED this 27th day of April 1992.