

Cite as Det. No. 92-038, 12 WTD 91 (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. 92-038
	)	
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .
	)	

[1] RULE 187: SERVICE B&O TAX -- AMUSEMENT DEVICE -- COIN-OPERATED DART MACHINE. A coin-operated dart machine meets Rule 187's definition of an "amusement device". The machine, which visually gives the viewer/player the rules of the game and keeps score, is independent of the throwing of the darts. The gross receipts from the machine are therefore subject to Service B&O tax.

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: . . .

NATURE OF ACTION:

Petition protesting disallowance of the deduction of the cost of pulltab games from the gross receipts subject to tax. The petition also protests the assessment of Retailing B&O tax and sales tax liability with respect to the gross receipts from coin-operated dart machines.

FACTS AND ISSUES:

Krebs, A.L.J. -- . . . (taxpayer) is a partnership which is engaged in the restaurant and tavern business as well as in speculative and custom home construction.

The Department of Revenue (Department) examined the taxpayer's business records for the period from January 1, 1986 through June 30, 1989, and an assessment was issued.

The taxpayer's protest involves Schedules II and III of the audit report.

#### Schedule II.

In this Schedule, the auditor did a reconciliation of the amounts reported by the taxpayer on its excise tax returns as subject to Service business and occupation (B&O) tax with the amounts recorded in the taxpayer's books of account which should have been reported as subject to the Service B&O tax.

One of the reconciled items was pulltab games. The gross receipts from such games less a deduction for payouts (in effect, the "increases" or gains) were subjected to the Service B&O tax. The taxpayer claims that its cost for the pulltab games should also be a deduction from the gross receipts in determining the "increases" subject to tax. The taxpayer perceives its cost/purchase price of the pulltab game as an amount which it "puts into the game".

#### Schedule III.

In this schedule, the auditor did a reconciliation of the amounts reported by the taxpayer on its excise tax returns as subject to Retailing B&O tax and sales tax with the amounts recorded in the taxpayer's books of account which allegedly should have been reported as subject to Retailing B&O tax and sales tax.

One of the reconciled items was amounts received from coin-operated dart game machines. The taxpayer contends that the coin-operated dart game machine is an "amusement device" per WAC 458-20-187 (Rule 187) and thus taxable under the Service B&O tax classification per Rule 187 (5).

The dart game machine cannot be activated unless a coin is put in the slot. The dart game machines have TV monitors which display the rules and show the progress of the player. Speakers let the player hear when a bulls-eye is scored and when the game is won or lost. The dart game machine permits a player "to see, hear, or read something of interest". Therefore, the taxpayer asserts that the coin-operated dart machines meet all the guidelines of Rule 187 (2).

The issue is whether the coin-operated dart machine is an "amusement device" within the guidelines of Rule 187 and therefore taxable under the Service B&O tax classification, or whether the player of the dart game is paying for the right to actively participate in an amusement or recreation activity which is subject to Retailing B&O and sales tax.

## DISCUSSION:

Schedule II.

The pulltab game is a game of chance wherein players participate with the opportunity of winning a certain sum of money. The taxpayer is taxable under the Service B&O classification upon all "increases" arising from the conduct of such game. Rule 131. The term "increases" is defined in Rule 131 as "the winnings, gains, or accumulations accruing from any one game over and above the amount put into the game by the operator". The measure of the Service B&O tax is the "gross income of the business". RCW 82.04.290. The term "gross income of the business" is defined in RCW 82.04.080 to mean in pertinent part:

...the value proceeding or accruing by reason of the transaction of the business engaged in...all without any deduction on account of...the cost of materials used... or any other expense paid or accrued...

(Emphasis supplied.)

The pulltab game purchased by the taxpayer is an expense or cost incurred by the taxpayer in order to conduct the transaction of a game activity from which the taxpayer receives value expressed in terms of money. Although the taxpayer perceives its cost for the pulltab game to be an amount which it "puts into the game", actually it is the "payouts" to a winning player which the taxpayer puts into the game. The pulltab game device is like any other tool which a person uses to render a service. Its cost or expense is simply not deductible from the gross income. RCW 82.04.080. The taxpayer's contention is respectfully rejected.

Schedule III.

The Department's auditor relied upon WAC 458-20-183 (Rule 183) in concluding that "coin-operated dart games are rightfully taxable as retail sales". However, Rule 183 which discusses "amusement and recreation activities and businesses" states that the types of activities intended to be taxed under the retail sales tax classification "are those in which payment is for participation". Significantly, Rule 183 in pertinent part provides:

Coin operated amusement devices are not governed by this section. See WAC 458-20-187.

(Emphasis supplied.)

[1] Obviously, it is intended that Rule 187's provisions and guidelines be more controlling than Rule 183 with respect to

amusement activities involving coin-operated amusement devices. Rule 187 explains the tax consequences applicable to coin-operated vending machines, amusement devices and service machines. Rule 187 in pertinent part provides:

(2) The term "amusement devices" means those devices and machines which, through the insertion of a coin, will permit the patron to play a game. It includes slot and pinball machines and those machines or devices which permit the patron to see, hear or read something of interest.

...

(5) Persons operating amusement devices, except shuffleboard, pool, and billiard games, are taxable under the service and other business activities classification on the gross receipts therefrom.

(6) Persons engaged in operating shuffleboards or games of pool or billiards are taxable under the retailing classification on the gross receipts therefrom...

(Underlining added.)

In this case, the coin-operated dart games exactly fit the Rule 187 definition of "amusement devices". The machine is coin operated and electronically gives a video display which permits the patron to see and read the rules and the progress of the game. Speakers let the player know when a bulls-eye is scored. In effect, the machine is rendering passive visual and audio services to the player and is not part of the main activity of throwing darts. In other words, throwing darts is independent of the use of the coin-operated machine. Thus, the player is paying for the use of the machine to keep score. Contrast this activity with a coin-operated baseball pitching machine (sales taxable), which is an essential part of batting practice, and with the other specifically named "retailing" activities in Rule 187 of coin-operated shuffleboard, pool and billiard games where pushing the puck or hitting the ball is not independent of the coin-operated facility.

Furthermore, slot machines and pinball machines are more essential to permitting a patron to play a game and involve as much physical activity as throwing darts, but those machines are construed by Rule 187 to be Service B&O taxable as "amusement devices".

For all of the above reasons, we conclude that the taxpayer's coin operated dart games are "amusement devices", and the gross receipts therefrom are properly subject to Service B&O tax. Rule 187.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part as indicated below.

Schedule II. The taxpayer's petition is denied. The cost of the pulltab games is not deductible from the gross receipts subject to Service B&O tax.

Schedule III. The taxpayer's petition is granted. The gross receipts from the coin-operated dart machines are subject to Service B&O tax.

DATED this 24th day of February 1992.