Cite as Det. No. 98-060, 17 WTD 202 (1998)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Interpretation	)	D E T E R M I N A T I O N
	)	
	)	No. 98-060
	)	
. . .	)	Registration No. . . .
	)	REQUEST FOR PRIOR RULING
	)	

[1] RULE 183; RCW 82.04.050(3): RETAIL SALE – BOAT CHARTERS -- DAY TRIPS FOR SIGHTSEEING PURPOSES. The chartering of boats with a skipper for weddings, funerals, office meetings or corporate social gatherings does not constitute "day trips for sightseeing purposes" which would make such trips subject to retailing B&0 and require the charter operator to collect sales tax.

[2] RULE 183; RCW 82.04.050(3): RETAIL SALE – BOAT CHARTERS -- AMUSEMENT AND RECREATION SERVICES. The chartering of boats with a skipper for weddings, funerals, office meetings, or corporate social gatherings is not an amusement and recreation service.

[3] RULE 179; RCW 82.16.010(10): PUBLIC UTILITY TAX -- WATER TRANSPORTATION BUSINESSES NOT SUBJECT TO STATE CONTROL. Water transportation businesses which are not specifically mentioned in subdivisions (1) - (9) of RCW 82.16.010(10) and are not subject to control by the state or declared by the legislature to be of a public service nature are not taxable as an "other public service business" under the Public Utilty Tax.

[4] RULE 224; RCW 82.04.290(4): SERVICE AND 0THER ACTIVITIES B&0-- SKIPPERED CHARTERS FOR WEDDINGS, FUNERALS, CORPORATE MEETINGS AND PARTIES. The chartering of boats with a skipper for weddings, funerals, office meetings, or corporate social gatherings is classified under "service and other activites" B&0 tax.

NATURE OF ACTION:

The taxpayer appeals from a letter from the Taxpayer Information and Education Section of the Department of Revenue advising the taxpayer that skippered charters for one day or less are subject to the retailing classification of the Business & Occupation ("B&O") tax and that the taxpayer must collect retail sales tax from the passengers. The taxpayer petitions for an interpretation of RCW 82.04.050(3) and WAC 458-20-183 recognizing that skippered charters

have a different tax classification if they are engaged for a purpose other than one-day sightseeing trips. Although not requested by the taxpayer, the proper classification of its activities arises as an inevitable result of its petition and so must be addressed here as well.[1]

FACTS:

Bianchi, A.L.J. -- The taxpayer owns and operates vessels which provide harbor tours, narrated tours, launch services, and boats for charter with skippers (skippered charters). The taxpayer provides these services both on a wholesale basis and directly to consumers. In 1996, as the result of an audit, the Department instructed the taxpayer to report its charter revenue under the "other public service business" public utility tax classification.

Over the years, the tax classification of skippered charters has been interpreted to vary according to the purpose of the charter, whether it be for sports, instruction, transportation, or commercial activity.[2] In 1996, amendments to RCW 82.04.050(3)(a) provided that boats chartered for sightseeing purposes for consumers for one day or less were subject to the retailing classification of the B&0 tax, and the charter owner had to collect retail sales tax from the passengers.[3] A charter may be engaged, however, for a day, or less, for a purpose other than sightseeing, such as holding a wedding, meeting, memorial service, or an office party on board. The purpose of these events is not specifically for sightseeing, yet sightseeing opportunities may be available.

On April 29, 1996, the Department of Revenue issued a Special Notice, detailing the legislative changes as they would affect the charter industry. The notice stated:

> Day trips for sightseeing are still subject to sales tax. Such taxable trips include whale watching excursions, walking tours of historic areas, bus tours, boat tours and aerial tours of scenic areas.

Except for the reference to "boat tours . . . of scenic areas," the notice did not attempt to define sightseeing activities. It did not specifically address either the different purposes for which boats might be chartered or the different tax classifications that might arise as a result.

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

[2] For example, if the purpose of the charter is for sports fishing it is taxed under the retailing classification of B&O and sales tax is required. Det. 94-118, 16 WTD 11 (1994). If it is instructional, it is taxed as service B&O. RCW 82.04.290; WAC 458-20-183(3)(b). Where its purpose is to transport individuals, it has been taxed under public utility tax. RCW 82.16.010. If the boat is rented with the skipper for a commercial purpose, such as diving for salvage, rather than transporting divers to dive for amusement, it would be taxed as a retail sale under RCW 82.04.050(4)--rental of equipment with an operator. This list is not intended to be exhaustive.

[3] Prior to the 1996 amendments, scenic cruises were taxed under service B&0. WAC 458-20-181 (Rule 181). This rule has not been amended since the passage of the 1996 amendments, but the amended statute would control over the rule with regard to scenic cruises lasting one day or less.

On February 7, 1997, the Department issued a Technical Notice on the taxability of the charter boat industry that stated:

> *1.* A day trip for sightseeing (i.e. whale watching and harbor tours) or a fishing trip is subject to *retailing* B & O and retail sales tax. *See RCW 82.04.050(3)(a).*
>
> *2.* Boating instruction, or for an educational purpose is subject to *service and other* B&O tax. *See WAC 458-20-183.*
>
> 3. A skippered charter for more than one day, or for any purpose other than mentioned above, is subject to public utility tax under either the *Urban Transportation Vessels Under 65 feet* classification or the *Other Public Service Business* classification if the vessel is longer than 65 feet. (The public utility classifications are on page two of the Combined Excise Tax Return). *See RCW 82.16.020.*

(Emphasis added.)

Upon receipt of this notice, the taxpayer's accountant requested clarification from the Department's Taxpayer Information and Education Section (TI&E) regarding the meaning of boat tours and harbor tours referenced in the notices. The taxpayer contended that many boats are chartered for a day or less for a purpose other than sightseeing and should not be taxable under the retailing rate or as retail sales.

On June 25, 1997, TI&E responded and stated that boat tours of one day or less were taxable as retail sales. The letter concluded:

> As a result of this change in the law [1996 amendment], guided tours and charters lasting more than one day are no longer subject to retailing and retail sales tax, while day trips which did not constitute a "guided tour or guided charter" and were subject to the public utility tax, are now subject to retailing B&O and retail sales tax.
>
> . . . Thus, income derived by [the taxpayer] from narrated tours and skippered charters lasting less than one day, other than charters which are for a specific educational purpose, is subject to the retailing classification of the B&O tax.

The taxpayer objected to this conclusion. TI&E, in a second letter dated July 1, 1997, advised the taxpayer that "sightseeing purposes" encompassed any boat tour in which sightseeing was possible.

> The Department can find no substantive distinction between a trip whose sole purpose is to provide "sights to see" and a trip whose purpose is to provide sights to see as a back drop [sic] for an event.

Taxpayer appeals TI&E's interpretation that all of taxpayer's skippered charters lasting a day or less, which do not have an educational purpose, are subject to retailing B&O classification and retail sales tax.

ISSUES:

1. Are all of taxpayer's one-day skippered charters, except those with an educational purpose, "day trips for sightseeing purposes," even though sightseeing is not the purpose of the trip, simply because sightseeing opportunities may be available?

2. Are taxpayer's one day charters for funerals, weddings, meetings, and corporate social gatherings amusement or recreation services that are taxable as retail sales and retailing B&O?

3. Whose activities are determinative of whether amusement and recreation services have been provided to consumers for purposes of retailing B&0 classification and retail sales tax?

4. If skippered charters are not taxable as retail sales then is public utility tax or service B&O the proper tax classification of skippered charters?

DISCUSSION:

Prior to 1993, scenic cruises were taxed under the Service B&0 classification. WAC 458-20-181 (Rule 181). In 1993, RCW 82.04.050 was amended to include "guided charters" in the definition of retail sale. As a result, guided charter operators were required to collect retail sales tax from their passengers and pay tax on their gross income under the retailing classification of the B&O tax. In 1996, however, the legislature removed "guided charters" from the definition of retail sale and replaced that term with the term "day trips for sightseeing purposes." [4] Further, between 1993 and 1996, the rule interpreting amusement and recreation services was substantially amended, although not specifically in relation to the 1993 or 1996 statutory changes. WAC 458-20-183 (Rule 183). Since the second statutory amendment in 1996, neither Rule 183, nor the two other rules relevant to skippered charters, WAC 458-20-179 (Rule 179) and WAC 458-20-181 (Rule 181), have been amended to reflect the statutory changes. As a

[4] Between 1993 and 1996 guided charters were taxed at the retail rate. RCW 82.04.050(3)(g) was amended in 1996 removing "guided charters" from the definition of retail sales and WAC 458-20-258e was withdrawn. After this, the term "guided" charter no longer appears in either the statute or the rule. Except for its historical role in statutory construction, it has no relevance in tax classification today. Rather, the purpose of a charter, the extent of involvement by the charter operator in the activities on board, its duration, and whether the boat is chartered with or without a skipper are the relevant factors for determining the charter's tax classification.

result of the various statutory and regulatory changes, the taxpayer has experienced uncertainty about how the 1996 legislative changes affected the tax classification of its charter boat activities.

1. Skippered Charters are not subject to retailing B&0 and retail sales tax simply because sightseeing opportunities may be available to passengers.

After the legislative changes in 1996, RCW 82.04.050(3) defines retail sale to include:

> (a) amusement and recreation services, including but not limited to golf, pool, billiards, skating, bowling, ski lifts and tows, *day trips for sightseeing purposes*, and others, when provided to consumers.

(Emphasis added.)

TI&E interpreted the phrase "day trips for sightseeing purposes" to mean that, unless the purpose of the tour is educational, a one-day boat tour has a sightseeing purpose simply because sightseeing is possible. We disagree.

First, the ordinary meaning of the words of this statute do not support such an interpretation. Neither the statute nor Rule 183 defines sightseeing. Where a statute does not define a term, the ordinary, dictionary meaning of the term may be applied. *Seattle v Williams*, 128 Wn.2d 341, 908 P.2d 359 (1995). *Webster's New Universal Unabridged Dictionary* (2d ed. 1979) defines sightseeing as:

> 1. The act of seeing sights; *particularly a going about to see interesting places* and things for pleasure, education, etc.

(Emphasis added). The definition implies a purpose, "a going about to see," not simply an opportunity to see. The fact that a consumer may experience sightseeing during a skippered charter, engaged for another reason, does not transform such a charter into a sightseeing charter.

Second, such an interpretation would be difficult for the taxpayer to administer. TI&E's interpretation would require the charter owner to determine whether customers had any sightseeing purpose when they came on board, or, alternatively, whether they did in fact engage in sightseeing during the trip, even though they came on board for a different purpose. These are intentions and acts that the charter owner would not necessarily know. On the other hand, the charter operator can keep records of the purpose for which a charter is rented, whether for a sightseeing trip, a wedding, a funeral, or a party.

Third, the 1996 legislative history reveals no intent to change the tax classification of all charters with skippers. Where the plain language of the statute is clear and unambiguous, there is no room for reference to legislative history. *WA. Fed. of State Employees v. State Personnel Bd.,* 54

Wn. App. 305, 311, 773 P.2d 421 (1989). We believe the language of the statute, in this instance, is clear and unambiguous. Even so, the legislative history is helpful to explain how the amendment fits into the statutory scheme.

The purpose of the 1996 statutory changes was to remove a threat that the guided tour and guided charter industry might move out of state to avoid Washington taxes altogether, a potentiality looming as a result of *Oklahoma Tax Commission v. Jefferson Lines,* 514 U.S. 175 (1995*).* In that case, the United States Supreme Court held that bus tickets could be taxed as retail sales at the point where payment, agreement, and delivery of some services occurs. The legislature replaced "guided tours and charters" with "day trips for sightseeing purposes." A "daytrip for sightseeing purpose" is essentially a guided charter, which, because of its relatively short duration, would be entirely conducted within the state, avoiding the *Jefferson* problem. Final Bill Report, SHB 2590, 54th Legislative Session, (1996). The legislative history of the 1996 changes supports the conclusion that the term "day trips for sightseeing purposes" was intended to replace "guided charters," not encompass all day trips on a boat.

Accordingly, trips for one day or less on skippered charters that have a sightseeing purpose are retail sales and taxable under the retailing B&O classification and as retail sales. Where sightseeing is only a collateral benefit of the trip, other tax classifications would apply.

2. Skippered charters which serve as the site for meetings, funerals, and weddings are not subject to retailing B&0 and retail sales tax because they are not amusement or recreation services.

Services which have an amusement and recreation purpose are taxable as retail sales and retailing B&O. If an activity has an amusement or recreation purpose and is provided to consumers, it is taxable as a retail sale even if the activity is not specifically listed in the statute. RCW 82.04.050(3)(a) states:

> (a) amusement and recreation services, *including but not limited* to golf, pool, billiards, skating, bowling, ski lifts and tows, day trips for sightseeing purposes, *and others, when provided to consumers.*

(Emphasis added). Neither the statute, nor Rule 183, defines amusement and recreation. Under these circumstances, pursuant to *Seattle v. Williams, supra*, the dictionary definition is appropriate. *Webster's New Universal Unabridged Dictionary* (2d ed. 1979) defines "amusement" as:

> 1. that which amuses or entertains; an entertainment or pastime, 2. the act of amusing; diversion; recreation; the state of mind of being amused.

The same source defines "recreation" as:

> 1. refreshment in body or mind, as after work, by some form of play, amusement, or relaxation. 2. any form of play, amusement, or relaxation, used for this purpose as games, sports, 3 refreshments, food [Obs.].

Meetings, usually, do not entertain or amuse. Funerals, ordinarily, do not entertain or amuse. They do not have an amusement or recreation purpose. Therefore, boats chartered for these purposes are not taxable as retail sales. Weddings are not primarily amusement or recreation functions, as these activities are commonly understood.

Even if these activities were construed to have an amusement function, charters for such events would not constitute a retail sale. Rule 183 (2)(m) exempts from the definition of retail sale "the charge made for providing facilities where the consumer is merely a spectator, such as movies, concerts, sporting events, and the like." Boats chartered for meetings, funerals, and weddings are merely facilities for events put on by others. Therefore, even if they serve some amusement function, boats chartered for such events would not be taxable as a retail sale.

Parties or corporate social gatherings do appear to have an amusement or recreation purpose. Such charters would not be exempt under the facilities exception because the passengers are not mere spectators. Considering solely the terms of the statute, boats chartered for parties and social gatherings would seem to be taxable at retail.

Prior to the 1996 amendments, however, such charters were not taxed under the sales tax and retailing B&O tax as amusement and recreation activities. They were, instead, subject to the service B&O tax or the public utility tax. Nothing in the 1996 amendments implied an intent to change the tax classification of boats chartered for parties and corporate social gatherings. As we said earlier, the intent of the 1996 amendments was to replace the term "guided charters" with "daytrips for sightseeing purposes."

The Final Bill Report for the 1996 amendment stated, "Guided tours and charters are removed from the definition of retail sale and are replaced with day trips for sightseeing purposes." SHB 2590, 56th Legislative Session (1996), "Guided charters" were boats chartered with guides who "conduct tours of specific locations or attractions by providing a narrative of the area and or by directing the participants through the area toured." Proposed WAC 458-20-258e (withdrawn). The new language, "day trip for sightseeing purposes" was essentially a short-term "guided charter," the guide being either the skipper or another person. Skippered charters for parties or corporate social gatherings would not have been "guided charters" as that term was defined above.

It is clear from legislative history[5] that the Legislature did not intend non-sightseeing skippered charters, that had not previously been taxed under the retailing B&O classification or subject to

[5] Further, the Department's Summary Sheet Legislative Request 1996 regarding the bill stated that the Department proposed "Removing the retail sales tax from guided tours and charters, while *retaining* the sales tax on sightseeing daytrips conducted entirely in Washington." (Emphasis added). Use of the term "retain" clarifies that day

retail sales tax, to become so taxable when it amended RCW 82.04.050(3)(a) to include day trips for sightseeing purposes. Therefore, boats chartered for parties and corporate social gatherings, even though they would seem to serve an amusement and recreation services, are not taxable as retail sales.

3. Operators of charters for meetings, funerals, weddings, and office parties provide transportation services, not amusement and recreation services.

Even if all of these events had an amusement and recreation function, the charter boat operator does not provide the amusement or recreation service. The charter boat operator provides transportation. Where someone else plans and directs the wedding, meeting, or party on board, the amusement or recreation service is provided by that party, not the charter boat operator. RCW 82.04.050(3)(a) applies when the taxpayer provides amusement and recreation services to consumers.

Whether the retail tax applies is easier to distinguish if one looks to the activity of the operator, rather than the activity of the passengers on the boat.[6] A charter operator, who takes a group out on the water, whether they be there for a wedding, a funeral, a meeting, or a party, is performing the same task in each instance--transporting individuals on water. A charter boat operator who takes divers from a school out to dive, where the diving school directs the divers, is still just providing transportation. See Det. 92-103, 12 WTD 139 (1992).

A fishing charter boat operator, however, provides a consumer with both a transportation and an amusement or recreation service. See Det. 94-118, 16 WTD 11 (1994). A charter operator who takes people out for sightseeing and points out the sights provides both a transportation and an amusement or recreation service. RCW 82.04.050(3)(a). In these cases, amusement and recreation services are provided by the charter operator to the consumer. Therefore, these activities are appropriately classified as retail sales.

4. Skippered Charters for weddings, funerals, meetings, and office parties, where the charter operator is only providing transportation and the passengers pay for catering or other services to the service provider directly, should be taxed under the other service rate of B&O tax.

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sightseeing trips *already* taxed as retail sales were intended to continue to be taxed as retail sales. The Legislative Summary does not support TI&E's conclusion that the 1996 amendments reclassified day-long boat trips, which had not been considered subject to retailing classification before the change, into retail activities.

[6] In 1995, Rule 183 was amended to remove the guide the rule had long used to distinguish among activities that were amusement or recreation services, and those which were not--the participatory/nonparticipatory distinction. "Preproposal Statement of Intent, Department of Revenue," filed January 18, 1995, WSR 95-03-092. Under that distinction, attention was focused on whether the passenger participated in the activity on board. The withdrawal of this regulation redirects attention on the statutory requirements--whether the taxpayer is providing amusement and recreation services to consumers.

While the taxpayer has not requested that the Appeals Division review its current tax classification, it would do a disservice to publish this without clarifying the tax treatment of skippered charters.

At issue is the instruction contained in the February 7, 1997, Technical Notice:

> A skippered charter for more than one day, or for any purpose other than mentioned above, is subject to public utility tax under either the *Urban Transportation Vessels Under 65 feet* classification or the *Other Public Service Business* classification if the vessel is longer than 65 feet.

This instruction arose from a 1995, Departmental decision that skippered charters were a form of water transportation covered by the "other public service business" tax under the public utility tax. In a 1995 letter to the taxpayer's representative, the Director of the Department of Revenue stated:

> The statutory definition of "public service business" includes water transportation. RCW 82.16.010(10). There is no stipulation that the transportation must be from one point of land to another. Thus we believe any type of conveyance upon the water is taxable under the public service classification of the public utility tax unless it is specifically taxable under another classification.

In coming to this decision, the Department interpreted its own rule that a water craft had to go from one location to another as not requiring a boat to land at the second point. Accordingly, in a 1996 audit of taxpayer the Department reclassified the skippered charter revenues from service and other activities B&O classification to public utility tax.

Rule 179(3)(d) declares:

> (d) Persons engaged in hauling persons or property for hire by watercraft between points in Washington are taxable under the public utility tax. Income from operating tugboats of any size and income from the sale of transportation services by vessels over sixty-five feet is taxable under the public service utility tax classification. Income from the sale of transportation services using vessels under sixty-five feet, other than tugboats, is taxable under "vessels under sixty-five feet" public utility tax classification. <u>These classifications include businesses engaged in chartering or transporting persons by water from one location in Washington to another location within this state</u>.

The distinction made by the Director in the 1995 letter that Rule 179 contains no requirement that the boat stop at the second terminus overlooks the fact that it is the transportation between two points that makes an activity a common carrier and thus subject to regulation at all. *State v.*

Washington Tug & Barge Co., 149 Wash. 613 (1926). It is the fact that water transportation services are subject to regulation that makes them a "public service business."

Public service businesses which are subject to regulation by the Washington Utilities and Transportation Commission (WUTC) are vessels which operate for hire between fixed termini over a regular route within the waters of the state, as set forth in the act regulating steamboat companies (now commercial ferries). RCW 81.84.010 (1). This statute does not apply to vessels that leave from and return to the point of origin and do not stop at another terminus during the trip. RCW 81.84.010. Further, in 1995, the act was amended to specifically exclude charter services and most excursion services from regulation by the WUTC. RCW 81.84.007.

For revenue purposes, RCW 82.16.010(10) defines other public service businesses as

> ...any of the businesses defined in subdivisions (1), (2), (3), (4), (5), (6), (7), (8), and (9) or any business subject to control by the state, or having the powers of eminent domain and the duties incident thereto, or any business hereafter declared by the legislature to be of a public service nature, except telephone business as defined in RCW 82.04.065 and low-level radioactive waste site operating companies as redefined in RCW 81.04.010. It includes, among others, without limiting the scope hereof: Airplane transportation, boom, dock, ferry, pipe line, toll bridge, toll logging road, water transportation and wharf businesses.

The skippered charter industry is not set out in subdivision 1-9; it does not have the power of eminent domain, and it has not been declared to have a public service nature. Therefore, the only remaining category under which it might qualify as "public service businesses" is if it is "subject to control by the state." Rule 179(2)(c) clarifies that, for an industry to be subject to control by the state, the industry must be regulated either by the WUTC or any other state agency required to exercise control over an industry of a public service nature as to its rates charged or services rendered. Rule 181 also states that boats which are subject to public utility tax are those subject to regulation by the WUTC.

The WUTC does not regulate the skippered charter industry. The act that authorizes the WUTC to regulate other vessels exempts charter services. RCW 81.84.007. Although the Coast Guard certifies vessels over 65 feet in length for seaworthiness, neither it, nor any state agency, regulates the skippered charter industry as to its rates or schedules.

Accordingly, the tax classification of these vessels is controlled by the Washington State Court of Appeals case, *Shurgard v. Department of Revenue,* 40 Wn. App. 721 (1985). *Shurgard* involved storage facilities and public utility tax. The Department had held that such facilities were subject to the public utility tax because they were warehouses and "warehouses" appeared in the statute as an example of "other public service businesses" in RCW 82.16.010(10). The Court of Appeals rejected that argument holding instead that the business entities listed in the statute following "other public service businesses" were intended to be examples of regulated

industries. Shurgard storage facilities were not regulated by any state agency. Therefore, storage facilities were not "other public service businesses" subject to the public utility tax despite the specific reference to "warehouses" in the statute.

The same analysis applies here. Although "water transportation" is listed in RCW 82.16.010(10), and some water transportation is regulated by the WUTC, skippered charters are not so regulated. Therefore, the public utility tax does not apply to them.

Where no other specific classification applies, the service or other activities B&O tax classification applies. RCW 82.04.290(4). Skippered charters for weddings, funerals, meetings, and corporate parties where the passengers pay for other catering services directly to the service provider are taxed under the service or other activities B&O classification .

DECISION AND DISPOSITION:

We hold that taxpayer's activity of chartering a boat with a skipper for one day or less for a purpose other than sightseeing is not subject to the retail sales tax under RCW 82.04.050(3)(a) simply because the consumers also have the ability to engage in sightseeing activities during the charter.

Dated this 31st day of March, 1998.