

Cite as Det. No. 02-0040, 21 WTD 324 (2002)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition For Refund of	)	<u>D E T E R M I N A T I O N</u>
	)	
	)	No. 02-0040
	)	
...	)	Registration No. . . .
	)	FY . . . /Audit No. . . .
	)	Docket No. . . .
	)	

ETA 2006: SERVICE B&O TAX – CARRIAGE BY AIR OF INSPECTORS OBSERVING AERIAL SPRAYING OF INSECTICIDE. Gross income from the carriage of federal inspectors in helicopters or other aircraft to observe the aerial spraying of insecticide to eradicate the Asian Gypsy Moth is subject to service B&O tax because the flights, like examples given in ETA 2006, originate and end in the same location.

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.

NATURE OF ACTION:

A foreign corporation (the taxpayer) seeks a partial refund of service business and occupation (B&O) tax it paid on income received pursuant to a federal contract for the aerial spraying of insecticide to control a Gypsy Moth infestation.<sup>1</sup>

FACTS:

De Luca, A.L.J. -- The Department of Revenue's Appeals Division has issued two prior determinations (Det. No. 95-072 and Det. No. 95-072R) concerning issues arising from the same audit period that generated this refund claim. The first determination was issued after the taxpayer filed a petition with the Appeals Division for a correction of an assessment of taxes. The second determination followed a petition for reconsideration of the first determination. In particular, much of Det. No. 95-072R focused on exactly the same issue presented in this refund

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<sup>1</sup> Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

claim. Although Det. No. 95-072R granted the taxpayer relief on some other claims it presented, the determination denied the relief requested again in this refund claim. Procedurally, the Department of Revenue (the Department) considers this matter a new and separate claim because the taxpayer timely filed a refund application pursuant to RCW 82.32.060.

We will restate the pertinent facts and issue in this matter as we described them in the prior determinations. The taxpayer is a foreign corporation that is based outside Washington. It provides helicopter services throughout the nation and many parts of the world. The taxpayer leases the helicopters from its parent corporation. During the audit period (January 1, 1990 through December 31, 1992), the taxpayer performed fire watch/work in Washington for the U.S. Forest Service. The fire watch/work issue was resolved in Det. No. 95-072R. Also during the audit period, the taxpayer sprayed insecticide aerielly over approximately 130,000 acres in [Washington] to eradicate Asian Gypsy Moths.

The taxpayer contracted with the U.S. Department of Agriculture, which oversees the Forest Service, to provide these services. . . . The spraying contract required the taxpayer to provide the insecticide, the aircraft, and personnel. Contract Sections B.1 and C-1. The spraying contract and the invoices the taxpayer submitted to the Department of Agriculture were for lump sum amounts (\$/acre of application) without separately stating a charge for the insecticide.

Section C-7 of the contract for the insecticide spraying pertained to “administrative helicopter flights.” The contract section required the taxpayer to provide:

. . . passenger-carrying helicopters . . . for inspection of boundary marking and insecticide application, reconnaissance of treatment areas, and occasionally for transportation of ground personnel and equipment.

The contract section further declares that the “inspection helicopters are intended solely as platforms for Government personnel to inspect the spraying operation.” Furthermore, the contract required the taxpayer to furnish one “inspection” helicopter for each “application” helicopter it used. On reconsideration, the taxpayer claimed its records show that non-spraying, passenger-carrying helicopters incurred 49.6% of the total flight time in the Asian Gypsy Moth eradication program.

The taxpayer reported service B&O tax on income it earned from the aerial spraying after deducting amounts it paid for work performed by subcontractors. The Audit Division credited the taxpayer for the taxes it reported and paid. However, the Audit Division disallowed the deductions for payments to the subcontractors. The Audit Division then assessed service B&O tax on the total spraying contract price. The taxpayer timely appealed the tax assessment to the Appeals Division. Det. Nos. 95-072 and 95-072R sustained the assessment of tax on the total contract price for the insecticide spraying, including the revenue earned for carrying the federal inspectors in separate observation aircraft.

#### TAXPAYER’S EXCEPTIONS:

In its initial appeal and reconsideration petitions, the taxpayer protested the assessment of B&O tax on the income it earned for both the spraying and providing the observation flights. The taxpayer no longer disputes that the income it received from helicopter flights carrying only its flight crews to do the spraying was subject to service B&O tax. However, the taxpayer contends its revenue for carrying the federal spray inspectors in separate helicopter flights is exempt from B&O tax as exempt air commerce under 49 U.S.C. § 40116(b),<sup>2</sup> 49 U.S.C. § 40102(a)(3)<sup>3</sup> and Aloha Airlines v. Director of Taxation of Hawaii, 464 U.S. 7 (1983).

The taxpayer also cites Det. No. 98-092, 17 WTD 388 (1998) in support of its argument. That determination held that income earned by an air ambulance service for the carriage of patients in air commerce (including interstate flights and intrastate ones, fixed wing or helicopter) was exempt by federal law from gross receipts taxes, such as the B&O tax and the public utility tax. Det. No. 98-092 was issued although the Department's policy at the time (as stated in former Excise Tax Bulletin 321.16.179.224 (ETB 321) (Second Revision, Issued April 1, 1991)<sup>4</sup>) provided that income from air ambulance operations was subject to service B&O tax.<sup>5</sup> The taxpayer argues the issuance of Det. No. 98-092 requires the Department to grant the refund it now requests because the taxpayer believes Det. No. 98-092, by inference, "overturned" all of the examples in former ETB 321 that allowed for the taxation of income received for the carriage of persons. Such examples included, among others, air ambulance operations, sightseeing flights, as well as student instruction and training flights. Infra.

#### ISSUE:

Is the income attributable to carrying federal spray inspectors in helicopters to observe aerial spraying of insecticide exempt from service B&O tax?

#### DISCUSSION:

Under 49 U.S.C. § 40116(b), the states . . . may not levy or collect a tax, fee, head charge, or any other charge on

- (1) an individual traveling in air commerce;
- (2) the transportation of an individual traveling in air commerce;
- (3) the sale of air transportation; or
- (4) the gross receipts from that air commerce or transportation.

<sup>2</sup> Formerly 49 U.S.C. § 1513(a).

<sup>3</sup> Formerly 49 U.S.C. § 1301(4).

<sup>4</sup> On July 1, 1998, the Department converted ETBs to ETAs. Consequently ETB 321 became ETA 321. ETAs explain the Department's policy regarding how tax law applies to a specific issue or specific set of issues. ETAs are advisory to taxpayers; however, the Department is bound by them until superceded by court or legislative action, rule adoption, or an amendment to or cancellation of the ETAs.

<sup>5</sup> The change in the Department's policy regarding taxation of air ambulance services is now also announced in Excise Tax Advisory 2006.16.179 (ETA 2006, Issued September 6, 2001), *infra*. ETA 2006 replaced ETA 321.

The term “air transportation” means interstate or foreign air transportation of passengers or property as a common carrier for compensation, or the transportation of U.S. or foreign transit mail by aircraft. 49 U.S.C. § 40102(a)(5), (23), (25), and (29).

Furthermore, 49 U.S.C. § 40102(a)(3) defines “air commerce” to mean

foreign air commerce, interstate air commerce, the transportation of mail by aircraft, the operation of aircraft within the limits of a Federal airway or the operation of aircraft that directly affects, or which may endanger safety in, foreign or interstate air commerce.

In summary, the above-mentioned federal statutes and Aloha Airlines, supra, pre-empt a state from taxing the gross receipts derived from the carriage of persons or property traveling in “air commerce” or “air transportation.”

In Det. No. 95-072R, we quoted former ETB 321 at length. The ETB referenced the federal statutes and Aloha Airlines, supra, and discussed the various tax classifications that applied to gross receipts earned from air taxi service, charter flights, student flight training, and other activities involving services performed with the use of an aircraft. The ETB contained a list of taxable activities that included, among others, banner towing, crop dusting, spraying, aerial photography, sightseeing, and air ambulance operations. We then stated in Det. No. 95-072R . . . .

this [federal] pre-emption does not apply to income derived from carrying the inspectors who observed the insecticide spraying. The fire fighter flights are exempt from B&O tax because they were in air commerce by transporting fire fighters who embarked at one location and disembarked at another location for the purpose of fire fighting. We noted, by contrast, that income from the “application” (spraying) helicopters is taxable by Washington because it did not involve transporting passengers. We find the accompanying flights by the “inspection” helicopters to be incidental to the spraying and any inspectors riding in the inspection helicopters were not there for the purpose of getting from one location to another. Although the inspectors had a valid business-related purpose to be in the helicopters, their activities were similar to sightseeing. ETB 321. Thus, we find the taxpayer was not transporting the spray inspectors for hire in air commerce.

As noted, after the issuance of Det. No. 95-072R, we issued Det. No. 98-092, extending the federal preemption to air ambulance services, and the Department, accordingly, cancelled ETA 321 and issued ETA 2006 in its place. ETA 2006 describes air transportation activities that are exempt from state taxation under federal law, cited above. ETA 2006 also describes taxable or nonexempt air transportation activities and aviation services. Some of the examples of taxable activities listed in ETA 2006 were found in former ETB 321, while others have been added to the list. Some of the taxable activities listed in ETA 2006 include: crop dusting and similar agriculturally related activities; aerial spraying in urban and suburban areas to eradicate pests such as the Gypsy Moth; banner or glider towing; sightseeing; aerial surveying; and “carrying passengers to look at real estate, take photographs, shoot video, search for persons or property, or for other purposes where the flight originates and ends at the same location.”

Thus, contrary to the taxpayer's argument, Det. No. 98-092 did not exempt, implicitly or otherwise, all examples of what former ETB 321 described as taxable air transportation involving the carriage of passengers.<sup>6</sup> For example, sightseeing was listed as a taxable activity in ETB 321 and is still listed as a taxable activity in ETA 2006. Furthermore, ETA 2006 specifically added examples that income from carrying passengers to look at real estate, take photographs or video, search for persons or property, or for other purposes where the flight originates and ends at the same location is taxable. In addition to sightseeing, these latter activities are very similar to the viewing of the insecticide spraying by the federal inspectors that we found taxable in Det. No. 95-072R. That is, the spray observation flights originated and ended at the same locations. Following Det. No. 95-072R and the examples in ETA 2006, we again find all of the income the taxpayer earned under its contract with the federal government to spray the insecticide to eradicate the Gypsy Moth and to carry the federal inspectors to observe the spraying was subject to service B&O tax.

#### DECISION AND DISPOSITION:

The taxpayer's petition for refund is denied.

Dated this 29<sup>th</sup> day of March 2002.

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<sup>6</sup> Indeed, we stated in Det. No. 98-092 that we chose not to follow only the air ambulance example of taxable activities in ETB 321. We added that the validity of each of the other examples of taxable activities in ETB 321 would have to stand or fall on its own merits.