

Cite as Det No. 12-0126, 32 WTD 144 (2013)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition For	)	<u>D E T E R M I N A T I O N</u>
Correction of Assessment of	)	
	)	No. 12-0126
...	)	
	)	Registration No. . . .
	)	Document No. . . . /Audit No. . . .
	)	Docket No. . . .

Rule 183; RCW 82.04.050: RETAIL SALES TAX – AMUSEMENT AND RECREATION SERVICES – OPPORTUNITY TO DANCE.

A facility that charges a cover or admission charge and provides an opportunity to dance is charging for an amusement and recreation activity. The fact that a patron may elect not to dance after paying the cover charge does not change the outcome. Charges for use of a facility are the equivalent of charging to participate in the amusement activity the facility offers.

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.

Callahan, A.L.J. – A nightclub (“Taxpayer”) appeals an assessment of retail sales tax and retailing business and occupation (B&O) tax on cover charges claiming that the charges should be taxed under the service and other activities (“service”) B&O tax classification under RCW 82.04.050. Taxpayer also asserts that even if the cover charges are subject to the retail sales tax and retailing B&O tax, only a portion of the cover charge should have been classified as retail. We deny the petition.<sup>1</sup>

ISSUES

1. Is a cover charge for entry into a facility that provides its customers an opportunity to dance a retail sale under RCW 82.04.050 and WAC 458-20-183(Rule 183)?

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

2. If the cover charges for an opportunity to dance are subject to retail sales tax under Rule 183,
  - a) does the imposition of tax violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;
  - b) is the law unconstitutionally vague; and
  - c) is the rule beyond the statutory scope?
3. Alternatively, if the tax was properly imposed, should the cover charges be apportioned between the spaces that are designated for dancing and those for activities other than dancing?

### FINDINGS OF FACT

Taxpayer operates a nightclub in [Washington]. . . . The Audit Division of the Department of Revenue (the “Department”) reviewed Taxpayer’s books and records for the audit period January 1, 2006, through March 31, 2010. As a result of this review, Audit found that Taxpayer had reported income from “cover charges” under the service and other activities B&O tax classification. Audit determined that these charges should have been reported under the retailing B&O tax classification and that Taxpayer should have charged retail sales tax on those charges because Taxpayer’s establishment offered its patrons the “opportunity to dance.”

Consequently, Audit reclassified the income reported during the audit period from services to retailing and assessed \$ . . . retailing B&O tax and \$ . . . retail sales tax, providing a credit of \$ . . . for the service B&O tax paid. In addition, Audit assessed use tax/deferred sales tax of \$ . . . and . . . County Food and Beverage tax of \$ . . . . On December 29, 2010, Audit issued an assessment in the amount of \$ . . . (which included interest of \$ . . . and a 5% assessment penalty of \$ . . .). Taxpayer did not pay the assessment. It petitioned the Department’s Appeals Division for a correction of assessment disputing the reclassification of its cover charge income from the services and other activities B&O tax classification to the retailing B&O tax classification and the retail sales tax (which it had not charged or collected) and the interest and penalties assessed thereon. Taxpayer did not dispute the use tax/deferred sales tax and the . . . County Food and Beverage tax assessed.

Taxpayer’s venue is a . . . building [that includes a] dance floor . . . . Taxpayer explains that the club . . . serves food and has dance hours nightly. . . . Taxpayer charges an admission or cover charge . . . . Taxpayer’s staff is responsible for charging and collecting the cover charges from patrons. Based on the information Taxpayer provided . . . , we conclude that Taxpayer charges its patrons a cover charge to gain entrance to the nightclub. The cover charges allow the patrons to access all [areas in] the nightclub. There is no separate entrance for different parts of the nightclub or a separate charge for admission to the dance floor. Once the patrons are admitted to the nightclub, they may choose to dance or not. Taxpayer argues that the cover charges should not be classified under retailing B&O tax classification because many patrons socialize and consume food and beverages, while some dance in the establishment. Taxpayer asserts that the cover charges should be taxed under the service B&O classification because they are not charges for “amusement and recreation” activities under RCW 82.04.050(3).

## ANALYSIS

Washington law imposes a retail sales tax on every “retail sale” in this state. RCW 82.08.020. Washington also imposes its B&O tax “for the act or privilege of engaging in business” in this state. RCW 82.04.220. Washington law imposes separate B&O tax rates on various activities conducted in this state, including on “every person engaging within this state in the business of making sales at retail.” RCW 82.04.250.

“Retail sale” is defined in RCW 82.04.050(3) and includes:

(3). . .[T]he sale of or charge made for personal, business, or professional services including amounts designated as interest, rents, fees, admission, and other service emoluments however designated, received by persons engaging in the following business activities:

...

(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.)<sup>2</sup>

Rule 183 is the Department’s administrative rule addressing the taxation of amusement and recreation activities. Rule 183 was amended in 1995 and it is this version of the rule that was applicable throughout the audit period. Rule 183(2)(b) defines the term “amusement and recreation services” to include “the provision of related facilities such as basketball courts, tennis courts, handball courts, swimming pools, and charges made for providing the opportunity to dance.” (Emphasis added). Rule 183(2)(m) explains that providing facilities where a person is merely a spectator, such as movies, concerts, sporting events, is not a retail sale.

That a patron may elect not to dance after paying the cover charge does not change the outcome. Charges for use of a facility are the equivalent of charging to participate in the amusement activity the facility offers. *See* Det. No. 98-141, 18 WTD 333 (1999); Det. No. 88-247, 6 WTD 105 (1988). Thus, under RCW 82.04.050 and Rule 183’s interpretation, a facility, in this case a nightclub, that charges a cover or admission charge and provides an opportunity to dance is charging for an amusement and recreation activity.

Taxpayer makes several arguments that Rule 183 nonetheless should not be followed. We are unconvinced for the reasons discussed below.

a. Equal Protection. Taxpayer first argues that Rule 183 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. We note that an administrative body does not have the authority to declare the statutes it administers to be unconstitutional, only

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<sup>2</sup> [RCW 82.04.050 was amended in Laws of 2013 c 13 § 802. Effective October 1, 2013, until July 1, 2017, “amusement and recreation services do not include the opportunity to dance provided by an establishment in exchange for a cover charge.” Laws of 2013 c13 § 802.]

courts have that power. *Bare v. Gorton*, 84 Wn.2d 380, 526 P.2d 379 (1975). However, we will provide reasons below why we conclude the statute as interpreted by Rule 183 does not violate the Equal Protection Clause. “State [tax] classifications require only a rational basis to satisfy the Equal Protection Clause.” *General Motors Corp. v. Tracy*, 519 U.S. 278, 311-312 (1997) (where the U.S. Supreme Court upheld an Ohio tax scheme that subjected purchases of natural gas from the non-regulated vendors to sales or use tax but purchases of natural gas from state regulated utilities were exempt finding that there was “a rational basis for Ohio’s distinction between these two kinds of entities.”)<sup>3</sup>

Applying the Court’s reasoning in *General Motors* to the present matter, we conclude that Rule 183 does not violate the Equal Protection Clause because, there is a rational basis for the state of Washington to distinguish between a fee for a participatory activity, such as dancing, and a fee for a non-participatory activity, such as watching concerts and live performances.

The Department’s interpretation of RCW 82.04.050 is consistent with the statute. Thus, cover charges for establishments that provide live music and other forms of entertainment are not retailing activities as long as the cover charges do not provide the patrons with an opportunity to dance. Accordingly, we conclude the Department’s imposition of the retail sales tax on “charges made for providing the opportunity to dance” does not violate the Equal Protection Clause of the U.S. Constitution.

b. Constitutionally Vague. Taxpayer next argues that Rule 183 is unconstitutionally vague. The Washington Supreme Court held in *Ass’n of Wash. Bus. v. Dep’t of Revenue* 155 Wn. 2d 430, 120 P.3d 46 (2005) that the Department had authority to adopt interpretive regulations explaining specific sections of the statutes. The Washington Supreme Court in *Ass’n of Wash. Bus.* explained that it may declare an agency rule invalid if “(1) violates constitutional provisions, (2) exceeds statutory authority of the agency, (3) was adopted without compliance to statutory rule-making procedures, or (4) is arbitrary and capricious.” *Id.* at 437 citing *Wash. Pub. Ports Ass’n v. Dep’t of Revenue*, 148 Wn.2d 637, 62 P.3d 462(2003). Regulations are unconstitutionally vague if they allow an administrative agency to make arbitrary decisions. *Silverstreak, Inc. v. Washington State Dep’t of Labor and Industries*, 159 Wn.2d 868, 890, 154 P.3d. 891 (2007).

Rule 183 is not unconstitutionally vague because it does not allow the Department to make arbitrary decisions. Under Rule 183(2)(b) a cover charge for providing an opportunity to dance is a taxable retail sale, while under Rule 183(2)(m) an admission fee for concerts and live performances is not a retail sale. That Taxpayer’s patrons may choose to dance is not dispositive. What is dispositive is that they have chosen to pay a cover or admission charge to a venue that offers them the opportunity to dance. Det No. 09-0311, 30 WTD 1 (2011).

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<sup>3</sup> The Court further declared it had an obligation to proceed cautiously in examining the Ohio law to avoid imperiling the regulated companies’ ability to deliver gas to their noncompetitive captive market. 519 U.S. at 304. “Prudence thus counsels against running the risk of weakening or destroying a regulatory scheme of public service and protection recognized by Congress despite its noncompetitive, monopolistic character.” 519 U.S. at 309. The Court described the noncompetitive captive market as the vast majority of consumers who had neither the capacity to buy natural gas on the interstate market nor the resilience to forgo the reliability and protection that state regulation provided. 519 U.S. at 294.

Accordingly, Rule 183's interpretation is consistent with the statute and it is not unconstitutionally vague.

c. *Beyond Scope.* Taxpayer also argues that Rule 183 exceeds statutory authority. If the statute's meaning is plain on its face, the court must give effect to that meaning as an expression of legislative intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The "plain meaning" of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003); *Campbell & Gwinn*, 146 Wn.2d at 10-12. A statute is ambiguous when it is susceptible to more than one reasonable interpretation. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). Here, the statute is not ambiguous because it is not susceptible to more than one reasonable interpretation. Under the plain meaning of the statute, it is clear that amusement and recreation services are subject to retail sales tax and retailing B&O tax.

Based on legislative history of RCW 82.04.050 from 1965,<sup>4</sup> Taxpayer argues that the retail sales tax applies only to fees for sport and recreation services similar to bowling but not admission fees charged by eating and drinking establishments. In making this argument, Taxpayer does not identify how the statute is ambiguous. Further, this history is not helpful, because the history cited is silent on admission fees charged for the opportunity to dance at an eating and drinking establishment.

Even if the statute is ambiguous, the result is the same. RCW 82.04.050(3)(a) provides a non-exclusive list of activities that fall within the definition of retail taxable amusement and recreation services. Since 1995 the Department has clearly provided that the opportunity to dance falls under the definition of retail taxable amusement and recreation services. Since 1995, the applicable statute has been amended various times without any change to counter the Department's interpretation. Where a statute is ambiguous, construction placed upon it by the officer or department charged with its administration is not binding on the courts but is entitled to considerable weight in determining the legislative intention, and the persuasive force of such interpretation is strengthened when the legislature, by its failure to amend or by amending some other particular without repudiating the administrative construction, silently acquiesces in the administrative interpretation. *White v. State*, 49 Wn. (2d) 716, 306 P. (2d) 230 (1957). To the

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<sup>4</sup> RCW 82.04.050 was amended in 1965, in relevant part, provided:

The term "sale at retail" or "retail sale" shall include the sale of or charge made for personal business or professional services, including amounts designated as interest, rent, fees, admission, and other service emoluments however designated, received by persons engaging in the following business activities: (a) amusement and recreation businesses including but not limited to golf, billiards, skating, bowling, ski lifts and tows and others; . . .

The bowling activity was added to RCW 82.04.050 in 1965, where the prior version of RCW 82.04.050, in relevant part, provided:

(a) amusement and recreation businesses including but not limited to golf, pool, billiards, skating, ski lifts and tows and others but excluding bowling . . .

extent the statute is considered ambiguous, the legislature has acquiesced to the Department's long-standing interpretation.

Alternatively, if the tax was properly imposed, Taxpayer argues that the cover charges should be apportioned based on the square footage of the area designated for dancing. In other words, Taxpayer asserts that only a portion of the cover charges should be classified under retailing, based on the size of the dance floor. Taxpayer cites in support Det. No. 85-306A, 2 WTD 243 (1986), in which we determined that the tax should be imposed on one-third of the cover charge, because dancing was restricted to approximately one-third of the venue.

However, that decision was issued under a prior version of Rule 183, which did not specify that an opportunity to dance was a retail taxable amusement and recreational activity. The pre-1995 version of Rule 183 stated:

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

Thus, the phrase "opportunity to dance" was not in the prior version of Rule 183. The Department's interpretation of the law was changed and clarified in the current Rule 183:

(b) "Amusement and recreation services" include, but are not limited to: Golf, pool, billiards, skating, bowling, swimming, bungee jumping, ski lifts and tows, basketball, racquet ball, handball, squash, tennis, and all batting cages. "Amusement and recreation services" also include the provision of related facilities such as basketball courts, tennis courts, handball courts, swimming pools, and charges made for providing the opportunity to dance. . . . WAC 458-20-183(2)(b) (emphasis added). This interpretation has been in effect since 1995.

Under the current Rule 183, the inquiry is very straightforward: Does the cover charge provide a patron access to a venue that includes a space designated for dancing thus providing its patron the opportunity to dance? If yes, then the cover charge is subject to retail sales tax and retailing B&O tax regardless of whether the patron chooses to dance. Under Rule 183, in effect since 1995, if the charge is for admission where there is "an opportunity to dance" then that charge is a retail sale. The size of the dance floor is not considered in imposing the tax. Accordingly, we affirm the assessment. The determination upon which the taxpayer relies was effectively overruled by the amendment to Rule 183. Assuming arguendo that 2 WTD 243 is still applicable it is hereby overruled for reasons stated above.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 18<sup>th</sup> day of May 2012.