Cite as Det. No. 13-0217, 33 WTD 130 (2014)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Refund	)	D E T E R M I N A T I O N
	)	
	)	No. 13-0217
. . .	)	
	)	Registration No. . . .
	)	

[1] RULE 183(2); RCW 82.04.050(3): RETAILING B&O TAX AND RETAIL SALES TAX – HUNTING GUIDE SERVICES. Taxpayer's hunting guide services do not involve a specific curriculum, lead to a certification, or result in knowledge in a specialized field of study. Rather, the primary purpose of the guide services and associated activities is for amusement and recreation, and is therefore a retail activity.

[2] RULE 228(1)(a); RCW 82.32A.030: TAXPAYER'S DUTY TO KNOW THEIR TAX REPORTING OBLIGATIONS. Taxpayer's alleged lack of knowledge as to what tax classification to report its revenues under pre-assessment does not justify relief from the assessment. Taxpayer had a statutory duty to know its reporting obligations.

[3] DET. NO. 94-016, 14 WTD 184 (1995); DET. NO. 04-0098, 23 WTD 331 (2004): TAXPAYER'S FINANCIAL HARDSHIP. Taxpayer's alleged financial hardship in having to pay the assessment under appeal is not a grounds for relief from the assessment. However, it is a circumstance that the Department's Compliance Division can consider in deciding whether to accept installment payments of a tax debt.

[4] RULE 254(5); RCW 82.32.070(1): TAXPAYER'S RECORDS OPEN FOR EXAMINATION BY THE DEPARTMENT – THE DEPARTMENT IS REQUIRED TO ASSESS DELINQUENT TAXES FOLLWING A REVIEW OF TAXPAYER'S BOOKS AND RECORDS. The alleged administrative burden placed upon Taxpayer in showing the Department its books and records during the course of an audit is not grounds for canceling the resulting assessment. Taxpayer's books and records are open for examination by the Department any time. The Department is required to assess Taxpayer for any delinquent taxes for the previous four years following a review of its books and records.

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.

Pardee, A.L.J. – A limited liability company (Taxpayer) that provides hunting guide services to customers for a flat fee disputes the Department of Revenue's (Revenue's) reclassification of its revenue from the service and other activities business and occupation (B&O) tax classification to the retailing B&O tax classification, claiming that its services amount to instructional lessons. We deny the petition.[1]

ISSUES

1. Under RCW 82.04.050(3) and WAC 458-20-183(2), are Taxpayer's hunting guide services amusement and recreation activities subject to retailing B&O tax and retail sales tax; or are they instructional lessons subject to service and other business activities B&O tax?

2. Should the Department's assessment be canceled because the Department did not notify Taxpayer that it was reporting incorrectly prior to auditing its records?

3. Is Taxpayer's claim that the Department's assessment creates a financial hardship grounds for cancelling the assessment?

4. Is Taxpayer's claim that the Department's audit of its business records creates an administrative burden on the Taxpayer a basis for cancelling the assessment?

FINDINGS OF FACT

Annually, from roughly mid-October through January, [Taxpayer], headquartered in . . . Washington, provides hunting guide services . . . . The hunting activities that Taxpayer sells involve waterfowl, including geese and ducks. Taxpayer charges its customers $. . . per day to hunt ducks, and $. . . per day to hunt geese. Taxpayer's property is equipped with permanent blinds, decoys, and expert callers. Taxpayer sells hunting packages, which include guide services. . . . Taxpayer also collects non-hunter observation fees from some customers. Taxpayer does not sell ammunition, guns or hunting equipment. Many of Taxpayer's customers return annually to hunt waterfowl. Taxpayer recruits new business by advertising. . . .

The Department's Taxpayer Account Administration Division (TAA) performed a desk examination of Taxpayer's account for the period January 1, 2008, through December 31, 2011 (audit period). On April 23, 2012, the Department issued Taxpayer an assessment (Document No. . . . – "Assessment") for the audit period totaling $. . . , comprised of $. . . of retail sales tax, $. . . of retailing B&O tax, a credit for $. . . of service B&O tax paid, adjustments to the small business B&O credit which Taxpayer claimed, a 5 percent assessment penalty of $. . . , and interest of $. . . . The Assessment reclassified Taxpayer's income from its hunting guide services

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

and hunting packages, which it had reported under the service and other activities B&O tax classification, to the retailing B&O tax classification.

On May 25, 2012, Taxpayer timely appealed only the portion of the Assessment resulting from the reclassification of the daily amounts it charges customers for hunting guide services, and for hunting geese and ducks . . . .[2]

On June 20, 2012, TAA provided the Appeals Division with a response to Taxpayer's petition, explaining that it reclassified the hunting guide services because Taxpayer provides the means for its customers to engage in hunting (i.e., actively participate), and its customers (hunters) pay for the opportunity to hunt. TAA deemed these activities analogous to those providing fishing guide services . . . .

On November 5, 2012, Taxpayer supplemented its petition with additional argument. Taxpayer wrote:

> [Taxpayer] provides guide services, which is needed for the instruction that takes place for each hunt, which is what the hunter pays for- (sic) a safe hunt (since there are dangerous guns and ammo). The guide is contracted to instruct the client to the guides (sic) chosen location, show them how to shoot and to insure (sic) they operate their gun safely. One of our contracted guides just had a guy out who had not hunted for a while, and was confused about which gun shells/ammo to put in his gun. If chosen incorrectly the gun could blow up and harm those in close proximity. The guides are providing true instruction, direction and oversight on safety, and not holding a conversational seminar. The guide further instructs as to when to shoot, retrieve the harvested game etc. and when to leave or time is up for the hunt, which is equal to providing personal services. . . .
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> There are some places which do allow hunting, such as the State or Federal refuges, with no guidance where the hunters can enjoy the hunt as an amusement. Also another comparison is that when you go golfing it is taxable, but professional golf instruction is not, which is what the Guides (sic) provide for [Taxpayer] for the clients. Archery is also not taxed, and it has the element of danger to (sic) with the arrows, especially if they are broad heads or razor points which are deadly.

. . . .

In the same correspondence, Taxpayer also asserted that:

- Since Taxpayer opened . . . , the Department never notified Taxpayer to report under the retailing classification, or that it could be assessed for failing to do so;
- The Department is required to educate taxpayers as a pre-condition to assessing them retroactively for prior years;
- The Assessment is a financial hardship on the Taxpayer; and,

[2] On July 24, 2012, Taxpayer paid the Assessment in full.

- The Assessment is an administrative burden on Taxpayer given that the "time to reply to the state, prepare documents, etc., takes away time from normal business activities, which is negatively affecting our businesses."

ANALYSIS

1. Are Taxpayer's hunting guide services amusement and recreation activities, the charges for which are subject to retailing B&O tax and retail sales tax; or are the charges for instructional lessons and subject to service and other business activities B&O tax?

The B&O tax is imposed on every person for the act or privilege of engaging in business activities in Washington. RCW 82.04.220. The tax is measured by applying particular rates against the value of products, gross proceeds of sale, or gross income of the business as the case may be. *Id*. Any person engaged in the business of making sales at retail must pay retailing B&O tax on the gross proceeds of sales. RCW 82.04.250.

RCW 82.04.050 provides that the sale of "amusement and recreation" services is subject to retail tax:

> (3) The term "sale at retail" or "retail sale" includes the sale of or charge made for personal, business, or professional services including amounts . . . 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; [and]
> >
> > * * *
> >
> > (g) The following personal services: Physical fitness services,…

[RCW 82.04.050(3).]

Department regulation WAC 458-20-183(2) (Rule 183(2)), defines amusement and recreation services and physical fitness services, as follows:

> (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. <u>The term "amusement and recreation services" does not include instructional lessons to learn a particular activity such as tennis lessons, swimming lessons, or archery lessons</u>.

* * *

(l) "Physical fitness services" include, but are not limited to: All exercise classes, whether aerobic, dance, water, jazzercise, etc., providing running tracks, weight lifting, weight training, use of exercise equipment, such as treadmills, bicycles, stair-masters and rowing machines, and providing personal trainers (i.e., a person who assesses an individual's workout needs and tailors a physical fitness workout program to meet those individual needs). "Physical fitness services" do not include instructional lessons such as those for self-defense, martial arts, yoga, and stress-management. Nor do these services include instructional lessons for activities such as tennis, golf, swimming, etc. "Instructional lessons" can be distinguished from "exercise classes" in that instruction in the activity is the primary focus in the former and exercise is the primary focus in the latter.

(m) "Sale at retail" or "retail sale" include the sale or charge made by persons engaged in providing "amusement and recreation services" and "physical fitness services" as those terms are defined in (b) and (l) of this subsection. The term "sale at retail" or "retail sale" does not include: The sale of or charge made for providing facilities where a person is merely a spectator, such as movies, concerts, sporting events, and the like; the sale of or charge made for instructional lessons, or league fees and/or entry fees; charges made for carnival rides … or, the charge made for entry to an amusement park or theme park where the predominant activities in the area are similar to those found at carnivals.

Rule 183(2) (emphasis added). The definitions of both amusement and recreation and physical fitness services make clear that charges for instructional lessons in activities that are otherwise defined as retail sales are not classified as retail sales because the primary focus of the activity is the instruction.

ETA 3104.2009 (ETA 3104) gives guidance on what amounts to instructional lessons in the context of physical fitness services and Rule 183:

Instructional lessons for activities such as Body Pump and Pilates are generally characterized as teaching the participant how to perform certain activities, generally following a specific curriculum that includes the study of the underlying philosophy of the activity. The purpose of the instruction includes the participant obtaining certification as a physical fitness trainer or group fitness instructor, or mastery of the techniques and philosophy with possible advancement in levels of achievement usually associated with martial arts.

The primary purpose of the activity as instructional or physical fitness is the determining factor, not the label. For example, if techniques associated with a martial art or Body Pump are used in a physical fitness exercise context, the service is subject to retail sales tax. A Pilates "class," for example, may be instructional (subject to the service and other activities B&O tax) if the class is taken by the participants as a part of a curriculum to

> gain certification as instructors. If the class or activity is primarily to improve flexibility, strength, or general fitness for the participant, the charge for participation is a retail sale.

ETA 3104 (emphasis added).

While instructional services are specifically excluded from the definition of a retail sale under Rule 183(2), they are also not specifically classified under any other provision of chapter 82.04 RCW. For B&O tax classification purposes, every person that engages within this state in any business activity other than or in addition to an activity explicitly classified under chapter 82.04 RCW, is subject to the service and other business activities B&O tax on account of such activities at the rate specified therein multiplied by the gross income of the business. RCW 82.04.290(2); WAC 458-20-224(2). In general, this B&O tax classification includes persons that render professional or personal services to persons, and not to those that render services to the personal property of persons. *Id.* Thus, gross income from engaging in the business of providing instructional services persons is subject to the service B&O tax.

Under RCW 82.04.050(3) and Rule 183, the central issue is whether Taxpayer's services are instructional, or simply amusement and recreation. Guidance on what is deemed to be instructional can be obtained from Department precedent that has addressed the taxability of physical fitness services.

In Det. No. 02-0039, 21 WTD 318 (2002), where the taxpayer sought to have its personal strength enhancement services characterized under Rule 183 as instructional lessons, as opposed to retail physical fitness services, the Department said:

> The taxpayer contends its sessions were instructional, which are not included in the "physical fitness services" definition. Instructional lessons primarily educate, rather than enhance fitness, strength, or health condition. The taxpayer's members paid and attended the sessions based upon physicians' orders for health purposes. Other members attended the sessions to become physically fit, whether in the form of an increase in strength or to lose weight. We do not find members attended sessions primarily for instruction. They attended to improve their physical fitness. The taxpayer's charges were for "physical fitness services."

21 WTD 318 (emphasis added). Again, in Det. No. 07-0113, 26 WTD 250 (2007), the Department was tasked with deciding whether taxpayer, a movement therapist, was providing physical fitness services or instructional lessons. In 26 WTD 250, the Department analyzed what amounted to instruction while applying the predecessor to ETA 3104,[3] and stated:

> In contrast to exercise classes, the ETA describes "instructional lessons" as "generally characterized as teaching the participant how to perform certain activities, generally following a specific curriculum that includes the study of the underlying philosophy of

[3] The predecessor was ETA 2023.08.123 (ETA 2023), which was cancelled and reissued as ETA 3104. The language in ETA 3014 is identical to that in ETA 2023.

> the activity." Again, this is consistent with the dictionary definition of "instruction," which is defined as "to give special knowledge or information to . . . to train in some special field."[4] The ETA goes on to explain that the purpose of the instruction "includes the participant obtaining certification as a physical fitness trainer or group fitness instructor, or mastery of the techniques and philosophy with possible advancement in levels of achievement usually associated with martial arts." The ETA concluded, "The primary purpose of the activity as instructional or physical fitness is the determining factor, not the label."
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> Applying these criteria to the facts here, we cannot conclude that Taxpayer's instruction is primarily "instructional" in nature. While we understand that Taxpayer emphasizes the motion of her clients' neuromuscular skeletal systems, we must conclude that the primary purpose of her instruction is "physical fitness" because her practice improves not only her clients' physical fitness, but also their health.
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> Any exercise class involves some degree of imparting special knowledge or information. In a step aerobics class, students must learn to perform the various steps. In weight-lifting, students must learn how to perform the various exercises. However, the primary purpose of these classes is to improve physical fitness, and physical fitness is characterized as a retail sale.
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> Similarly, Taxpayer instructs her students on proper form and movement, but instruction is not the primary focus. Instead, the primary focus is for the participant to improve or maintain his or her general fitness, strength, flexibility, conditioning, and/or health. As explained in the ETA, such instruction or guidance does not in itself result in that service being an "instructional lesson" subject to the service and other activities B&O tax.
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> We conclude that Taxpayer has failed to demonstrate that her activities as a movement therapist should be excluded from the definition of "physical fitness services." Accordingly, we sustain the letter ruling Taxpayer received from TI&E.

26 WTD 250 (emphasis added).

Taxpayer's charges of $. . . per day for duck hunting, and $. . . per day for goose hunting, include guide services, the provision of blinds and decoys, instruction on the hunt, safety instruction, and the opportunity to hunt. Daily charges customers pay Taxpayer for hunting water fowl do not involve a specific curriculum, lead to a certification, or result in knowledge in a specialized field of study. Rather, the primary purpose of the guide services and associated activities that taxpayers charge their customers for are for amusement and recreation services (i.e., the sport of hunting water fowl), and are therefore subject to retail sales tax.

[4] *Webster's Third New International Dictionary*, p. 1172 (1993).

2. Whether the Department's assessment of Taxpayer [should] be canceled because the Department did not notify Taxpayer that it was reporting incorrectly prior to auditing its records.

To ensure consistent application of the revenue laws, taxpayers have certain responsibilities under chapter 82.32A RCW, including, but not limited to, the responsibility to:

> (2) Know their tax reporting obligations, and when they are uncertain about their obligations, seek instructions from the department of revenue;

RCW 82.32A.030; *see also* WAC 458-20-228(1)(a).

The statutory duty was upon Taxpayer to know its reporting obligations pre-Assessment, not the Department. . . . While the Department has implemented programs to inform and assist taxpayers, the ultimate responsibility for knowing its tax obligations rests upon the taxpayer. . . . Because of the nature of Washington's tax system, the burden of becoming informed about tax liability falls upon the taxpayer, and it is the taxpayer who bears the consequences of a failure to be correctly informed. Det. No. 01-165R, 22 WTD 11 (2003).

The Department has repeatedly held that ignorance of one's tax obligation does not constitute a circumstance beyond the taxpayer's control. Det. No. 91-313R, 12 WTD 45 (1993) . . .

Therefore, Taxpayer's lack of knowledge as to how it was to report its revenues pre-Assessment is not grounds for the Department to provide it relief from the Assessment.

3. Whether Taxpayer's claim that the Department's assessment creates a financial hardship grounds for canceling the assessment

Taxpayer's claims of financial hardship in having to pay the Assessment provide it with no relief. As the Department states in Det. No. 94-016, 14 WTD 184 (1995): "Financial hardship is not a basis for forgiving a taxpayer's tax liability, penalties and/or interest imposed thereon." . . .

4. Whether the alleged administrative burden placed upon Taxpayer in having to respond to the Department's audit of its business records is a basis for canceling the assessment.

With regards to a person's obligation to keep and preserve records necessary to determine the amount of tax for which they may be liable, and the Department's ability to examine such records, RCW 82.32.070(1) states, in part, as follows:

> Every person liable for any fee or tax imposed by chapters 82.04 through 82.27 RCW shall keep and preserve, for a period of five years, suitable records as may be necessary to determine the amount of any tax for which he may be liable, which records shall include copies of all federal income tax and state tax returns and reports made by him. <u>All his books, records, and invoices shall be open for examination at any time by the department of revenue</u>.

RCW 82.32.070(1); *see also* WAC 458-20-254(5). [The five-year recordkeeping requirement is consistent with the Department's audit and assessment authority, which includes the tax year and the four previous years] . . . :

> (1) If upon examination of any returns or from other information obtained by the department it appears that a tax or penalty has been paid less than that properly due, the department shall assess against the taxpayer such additional amount found to be due and shall add thereto interest on the tax only. The department shall notify the taxpayer by mail, or electronically as provided in RCW 82.32.135, of the additional amount and the additional amount shall become due and shall be paid within thirty days from the date of the notice, or within such further time as the department may provide.
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> * * *
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> (4) No assessment or correction of an assessment for additional taxes, penalties, or interest due may be made by the department more than four years after the close of the tax year, except (a) against a taxpayer who has not registered as required by this chapter, (b) upon a showing of fraud or of misrepresentation of a material fact by the taxpayer, or (c) where a taxpayer has executed a written waiver of such limitation. The execution of a written waiver shall also extend the period for making a refund or credit as provided in RCW 82.32.060(2).

RCW 82.32.050 (emphasis added). Taxpayer's assumption that the Department was charged with notifying it pre-Assessment on how to report also runs counter to the law. The voluntary nature of the tax system the Department administers is codified in RCW 82.32A.005, which states:

> [T]he Washington tax system is largely based on voluntary compliance and that taxpayers have a responsibility to inform themselves about applicable laws . . . [T]he rights of the taxpayers and their attendant responsibilities are best implemented where the department of revenue provides accurate tax information, instructions, forms, administrative policies, and procedures to assist the taxpayers to voluntarily comply with the provisions of the revenue act, Title 82 RCW, and where the taxpayers cooperate in the administration of these provisions.

RCW 82.32A.005 (emphasis added).

[Under] RCW 82.32.070(1) and RCW 82.32.050(1), (4), Taxpayer was required to open up its books for the Department's examination for the audit period, and the subsequent Assessment. As such, the Department's Assessment was proper, and we conclude that there is no basis for canceling the Assessment.

DECISION AND DISPOSITION

We deny Taxpayer's petition.

Dated this 17th day of July 2013.