

BEFORE THE 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. 96-119
	)	
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .
	)	
	)	

- [1] RULE 183 & 187(6); RCW 82.04.050(3): RETAILING B&O TAX -- RETAIL SALES TAX -- COIN- OPERATED POOL TABLE. The gross receipts from a coin-operated pool table (and other pool tables) are subject to the Retailing B&O tax and retail sales tax.
- [2] RULE 107; RCW 82.08.055: RETAIL SALES TAX -- SELLING PRICE -- DEDUCTION - - IF SELLER ADVERTISES SELLING PRICE AS INCLUDING SALES TAX -- "BACKING OUT" THE SALES TAX. Where the seller advertises under certain conditions and by visible sign to all customers, that the selling price includes the tax or that the seller is paying the tax, the seller may deduct the tax from the selling price by "backing out" the tax from the selling price when reporting retail sales tax and the gross receipts.
- [3] RULE 107(2): RETAIL SALES TAX -- "BACKING OUT" -- SELLING PRICE ADVERTISED AS INCLUDING THE SALES TAX -- PRESCRIBED CONDITIONS FOR SUCH ADVERTISING -- COIN-OPERATED POOL TABLE. Where a Taxpayer/operator of coin-operated pool tables has a sign\nnotice visible and advertising to all customers that the charge/selling price includes sales tax, the sales tax may be "backed out" from the selling price.

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:

Petition protesting reclassification of income from the operation of coin-operated pool tables to being subject to Retailing business and occupation (B&O) tax and sales tax liability. Taxpayer had reported the income as subject to Service B&O tax.<sup>1</sup>

## FACTS:

Krebs, A.L.J. -- Taxpayer is engaged in business as an operator of video games, juke boxes, dart games, and pool tables at various leased locations.

The Department of Revenue (Department) examined Taxpayer's business records for the period January 1, 1990 through June 30, 1994. As a result of this audit, the Department issued the above-captioned tax assessment.

Taxpayer protests the reclassification of his income from coin-operated pool tables, which he had reported as subject to Service (B&O) tax, to Retailing B&O tax and sales tax liability. Taxpayer does not see why the receipts from coin-operated pool tables and shuffleboard machines are taxed differently than coin-operated dart games, video games, and other amusement games. Taxpayer asserts that they're all played the same way "with competition and leagues helping to bring in more players." Taxpayer declares that he has found no explanation in WAC 458-20-187 (Rule 187) or from telephone calls to the Department.

Taxpayer further asserts that the sales tax assessed on his receipts from coin-operated pool tables reduces his income because it leaves him no way to recover it, whereas the retail store is able to get the customer to pay separately the sales tax.

## ISSUES:

- 1) What is the proper tax classification for income from coin-operated pool tables?
- 2) What is the proper measure of the sales tax on gross receipts from coin-operated pool tables where the customer is not separately charged the sales tax that is collected by Taxpayer?

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

## DISCUSSION:

Proper tax classification.

The term "retail sale" is defined to include the sale of or charge made by persons engaged in "amusement and recreation services including but not limited to golf, pool, billiards. . ." RCW 82.04.050(3)(a).

On all retail sales through vending machines, the sales tax need not be stated separately from the selling price or collected separately from the buyer. RCW 82.08.050.

WAC 458-20-183 (Rule 183), in pertinent part, provides:

(1)(b) Persons engaged in operating coin operated amusement devices should refer to WAC 458-20-187 (Coin operated vending machines, amusement devices and service machines).

(Emphasis supplied.)

[1] 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.

(3) The term "service machines" means any coin operated machines other than those defined as. . . "amusement devices." It includes, for example, scales and luggage lockers, but does not include coin operated machines used in the conduct of a public utility business, such as telephones. . . ; also excluded are shuffleboards and pool games.

. . .

(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 and are

responsible for collecting and reporting to the department the retail sales tax measured by the gross receipts therefrom.

(7) Persons operating service machines are taxable under the service and other business activities classification upon the gross income received from the operation of such machines.

. . .

(11) Effective March 11, 1986, on all retail sales through vending machines the tax need not be stated separately from the selling price or collected separately from the buyer. (See RCW 82.08.050.) The seller may deduct the tax from the total amount received in the machines to arrive at the net amount which becomes the measure of the tax.

(Emphasis supplied.)

It is clear that the sale of or charge for pool or billiard services, whether coin-operated or otherwise, is a retail sale subject to Retailing B&O tax and sales tax. RCW 82.04.050(3)(a); RCW 82.04.250; and RCW 82.08.020.

With respect to pool and billiard services (not coin-operated), Rule 183 implements the statutes by declaring that "amusement and recreation services" include pool and billiards. Rule 183(2)(b). Rule 183 further declares that the gross receipts from "amusement and recreation services" are subject to Retailing B&O tax and sales tax. Rule 183(3)(a) and Rule 183(5)(a).

With respect to coin-operated pool and billiard services, Rule 187(6) implements the statutes by declaring specifically that the gross receipts therefrom are subject to Retailing B&O tax and sales tax.

Taxpayer has questioned why the receipts from coin-operated dart games, video games, and other amusement games are taxed differently, that is, as subject to Service B&O tax. Published Det. No.92-038, 12 WTD 91 (1992), is directly in point, and, in pertinent part, states:

. . . 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".

Det. No. 92-038 held that coin-operated dart games were "amusement devices" per Rule 187(2) and the receipts therefrom were properly subject to the Service B&O tax per Rule 187(5).

We conclude that the reclassification of the income from coin-operated pool tables to being subject to Retailing B&O tax and sales tax was proper. The reclassification is sustained.

#### Measure of the tax.

Taxpayer's other protest against the assessment of sales tax liability is based on his inability to collect the tax from the customer/user of the coin-operated pool table.

Enacted in 1986, RCW 82.08.080, in pertinent part, provides:

Vending machine and other sales. The department of revenue may authorize a seller to pay the tax levied under this chapter upon sales made under conditions of business such as to render impracticable the collection of the tax as a separate item and waive collection of the tax from the customer. . . No such authority shall be granted except upon application to the department and unless the department, after hearing, finds that the conditions of the applicant's business are such as to render impracticable the collection of the tax in the manner otherwise provided.

Revised in 1986, WAC 458-20-107 (Rule 107), in pertinent part, provides:

(1) Selling price. Under the provisions of RCW 82.08.020 the retail sales tax is to be collected and paid upon retail sales, measured by the "selling price."

(a) The term "selling price" means the consideration, whether money, credits. . . expressed in the terms of money paid or delivered by a buyer to a seller without any deduction on account of. . . taxes other than taxes imposed under this chapter if the seller advertises the price as including the tax or that the seller is paying the tax. . . (See RCW 82.08.010(1)).

. . .

(c) . . . However, selling prices may be advertised as including the tax or that the seller is paying the tax and, in such cases, the advertised price shall not be considered to be the taxable selling price under certain prescribed conditions explained in this section. . .

(2) Advertising prices including tax.

(a) The law provides that a seller may advertise prices as including the sales tax or that the seller is paying the sales tax under the following conditions:

(i) The words "tax included" are stated immediately following the advertised price in print size. . .

. . .

(iv) All advertised prices and the words "tax included" are stated in the same medium, whether oral or visual, . . .

(b) If these conditions are satisfied, as applicable, then price lists, reader boards, . . . and other price information mediums need not reflect the item price and separately show the actual amount of sales tax being collected on any or all items.

(c) The scope and intent of the foregoing is that buyers have the right to know whether retail sales tax is being included in advertised prices or not and that the tax is not to be used for the competitive advantage or disadvantage of retail sellers.

(Emphasis supplied.)

[2] and [3] The law allows a Taxpayer/seller to advertise that the sales tax is included in the selling price or that he/she is paying the tax. Rule 107(1)(c). The advertising is to be such that the advertised price, whether visual or oral, have the words "tax included" or that the seller is paying the tax. Rule 107(2). Where the seller advertises that the price includes the tax or that the seller is paying the tax, the tax may be deducted from the selling price; in effect, the sales tax is "backed out" of the selling price. Rule 107(1)(a). This backing out of the tax reduces the amount subject to sales tax and also reduces the amount of gross receipts subject to the Retailing B&O tax.

In this case, when the Department's Audit Division reclassified Taxpayer's reported income from the coin-operated pool tables to being subject to Retailing B&O tax and sales tax, they did not give consideration to the possibility that the sales tax could be "backed out" of the selling price, which would reduce the Retailing B&O tax and sales tax assessed. Consequently, the Department's Audit Division did not inquire and does not know if Taxpayer has met the prescribed conditions in Rule 107(2); that is, whether there was a sign/notice visible to all customers of the coin-operated pool tables that the charge included sales tax. Accordingly, this factual matter will be remanded to the Audit Division to ascertain whether Taxpayer reasonably and credibly met the prescribed condition. If so, the tax assessment will be adjusted accordingly.

#### DECISION AND DISPOSITION:

Taxpayer's petition is denied in part and conditionally granted in part as indicated below.

Proper tax classification. Taxpayer's petition is denied. Income from coin-operated pool tables is subject to Retailing B&O tax and sales tax.

Measure of tax. Taxpayer's petition is conditionally granted for the "backing out" of the sales tax from the selling price; the condition is that Taxpayer credibly establishes that he had a sign/notice visible to all customers of the coin-operated pool games that the charge included sales tax. Accordingly, this matter is remanded to the Department's Audit Division to determine whether to adjust the tax assessment.

DATED this 26th day of July, 1996.