

Cite As Det. No. 94-118, 16 WTD 11 (1994)

BEFORE THE INTERPRETATION AND 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)	
	)	No. 94-118-
)	
[Taxpayer A]	)	Registration No.
	)	FY. . . /Audit No.
)	
[Taxpayer B]	)	Registration No.
	)	FY. . . /Audit No.
AND)	
)	
In the Matter of the Petition)	
for Prior Ruling of)	
)	
[Taxpayer C]	)	Registration No.
	)	FY. . . /Audit No.
)	
[Taxpayer D]	)	Registration No.
	)	FY. . . /Audit No.

RULE 183; RCW 82.04.050; ETB 531: RECREATION AND AMUSEMENT ACTIVITIES. Fishing guide services include the provision of a boat, fishing tackle, poles, and bait under circumstances where the customers do the fishing. Fishing guide services are amusement activities. Amusement activities that require active participation by the customer are retail sales. Therefore, the provision of fishing guide services as described is a retail sale.

Headnotes are provided as a convenience for the reader and is 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:

Fishing guides¹ licensed by the Department of Fisheries request a ruling that they were subject to service and other activities business and occupation (B&O) tax during the period prior to July 1, 1993.²

FACTS:

Coffman, A.L.J. -- The taxpayers are "fishing guides" whose appeals have been consolidated at the request of the taxpayers' representatives.

Taxpayer A registered his business with the Department of Revenue (Department) in 1987, and paid B&O tax on his gross receipts at the service and other activities tax rate. The Department audited Taxpayer A's records for the period January 1, 1989 through December 31, 1992, and issued a tax assessment. The Department characterized Taxpayer A's fishing guide activities as an amusement and recreation business because the customers actively participated and, therefore, retail sales were being made on which retail sales tax should have been collected.³ Taxpayer A was assessed uncollected retail sales tax and B&O tax at the retailing rate. A credit was given for the B&O tax previously paid at the rate for service and other activities.

Taxpayer B did not register his business with the Department until after the Department contacted him. The Department audited Taxpayer B's books and records for the period January 1, 1987 through March 31, 1993.⁴ Taxpayer B was assessed retail sales tax and B&O tax at the rate for retailing on the taxpayer's fishing guide activities on the same basis as Taxpayer A. Additional assessments included B&O tax at the service and other activities rate on income from river excursions⁵ and use tax on capital purchases. The Department assessed a twenty percent (20%) delinquency penalty on the total tax assessed.

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

² Effective July 1, 1993, the definition of a retail sale was expanded to include "guided tours and guided charters" (RCW 82.04.050(3)(g)). The taxpayers state that their activities are taxable as retail sales under the new law.

³ The Audit Division also relied on Excise Tax Bulletin 531 (ETB 531).

⁴ WAC 458-20-230(3) permits a seven-year audit where the taxpayer was unregistered and discovered by the Department and there was no evidence of evasion.

⁵ The taxpayer was not assessed any business and occupation tax for several years of the audit period because the total gross receipts were less than \$12,000.

Taxpayers C and D voluntarily registered with the Department immediately prior to submitting their petitions. The Department had not contacted them prior to registering. They are requesting a ruling on their responsibilities during the period prior to July 1, 1993. They are engaged in the same activities as Taxpayers A and B.

The taxpayers are licensed by the Department of Fisheries (Fisheries) as "fishing guides." They are not licensed to operate a "charter boat."

All taxpayers' fishing guide activities consisted of providing customers with a piloted boat, bait, fishing poles and tackle, and direction to where to fish. The customers provided fishing licenses, lunch, drinks, and proper clothing. Occasionally, the taxpayers provided scenic river rides without any fishing.

Finally, the taxpayers claim that the Department provided inconsistent information to taxpayers, generally.⁶

ISSUE:

Were "fishing guide" services subject to the retail sales tax prior to July 1, 1993?

1 Are the taxpayers entitled to relief because the Department is alleged to have provided inconsistent advice to licensed fishing guides?

DISCUSSION:

1. Statutory Definitions.

RCW 82.04.050(3) defined a retail sale prior to July 1, 1993, as including:

. . . the 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, and others;⁷

⁶ We have reviewed all the documentation submitted by the taxpayers. We have not specifically mentioned all such documentation because it is repetitive.

⁷ RCW 82.04.050(3)(a) was amended in 1996 to read as follows:

The Department interpreted this provision in WAC 458-20-183 (Rule 183) and ETB 531.8 Rule 183 states, in part:

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. Nor does the term include activities of an instructional nature, even though the person is physically participating in the activity.

(Emphasis added.)

ETB 531 clarified this interpretation by stating:

Amended Rule, WAC 458-20-183 effective July 1, 1984, distinguishes between amusement and recreation type activities and businesses for taxation purposes, based upon whether the customer-consumer is an "active" participant in an actual, physical way, or is a mere passive recipient of a service primarily controlled and operated by the seller. The former activities and businesses, for which a charge of any kind is made, directly or indirectly, are tax classified as Retailing for B&O tax, and the charges are subject to retail sales tax. The latter activities and businesses are generally tax classified as Service and Other Business Activities, and the charges are not subject to retail sales tax.

[1] When the taxpayers provided equipment and piloted the boat to fishing locations, but the customers actually engaged in fishing, the customers were active participants. By providing the means to engage in the activity, the taxpayers were engaging in retail sales.

2. ETB 531 Examples.

(3) 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, 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;

⁸ Rule 183 and ETB 531 are unaffected by the 1993 amendments to the excise tax laws.

The taxpayers argue that the definitions found in Chapter 75.28 RCW, when read in conjunction with ETB 531, lead to confusion.

ETB 531 itemizes certain activities as retail sales and certain activities as subject to the B&O tax at the service and other activities tax rate. The ETB states: "This listing may not be all inclusive." The taxpayers point out that ETB 531 listed "charter sports fishing" as a retail sale while "guided excursions" are listed as "non-retail" transactions. The taxpayers further state that their individual Fisheries licenses do not allow them to be charter boat operators.

ETB 531 does not specifically address fishing guides as licensed by Fisheries. However, it provides that "[q]uestions about the taxability of any activities not listed should be submitted in writing to the Department's Interpretation and Appeals Division." The taxpayers did not make such a request.

RCW 75.28.095(4) defines the term "charter boat" for the purpose of Fisheries licensing as:

. . . a vessel from which persons may, for a fee, fish for food fish or shellfish for personal use, and that brings food fish or shellfish into the state ports or brings food fish or shellfish taken from state waters into United States ports. The director may specify by rule when a vessel is a "charter boat" within this definition.⁹ "Charter boat" does not mean a vessel used by a guide for clients fishing for food fish for personal use in freshwater rivers, streams, and lakes, other than Lake Washington or that part of the Columbia River below the bridge at Longview.

Charter boat operators, as licensed by Fisheries, provide their service on Lake Washington, part of the Columbia River and the salt water regions of the state. The taxpayers are licensed to perform their services in all other fishing waters of the state. The two regions are mutually exclusive. Thus, the only distinction between the taxpayers' activities and those of charter boats operators is the location of the service.

The taxpayers state that the operative words in ETB 531 are "chartered" and "guided". These are the adjectives used to modify the terms "sports fishing" and "excursions" respectively. "Sports fishing" more accurately represents the taxpayers' activities than "excursions". Taxes are based on the activity of the taxpayer, not the label the taxpayer or another agency may use to describe it. Det. No. 89-474, 8 WTD 259 (1989), Det. No. 92-392, 12 WTD 535 (1992).

In Det. No. 87-21, 2 WTD 157 (1987) and Det. No. 86-298, 2 WTD 29 (1986) individual insurance agents unsuccessfully argued that because the Insurance Commissioner did not tell them that B&O tax was due on their activities, they should not be required to pay. Likewise, the taxpayer's argument that the definition of a charter boat found in the Fisheries statutes should apply to the Department's ETB 531 to limit its effect is rejected.

3. Inconsistent Treatment by the Department.

The taxpayers provided a witness who presented a letter received by his accounting firm which addressed the same issue as raised by the taxpayers. That letter states that when licensed fishing guides provide the boat for fishing on lands not owned them, a retail sale occurs. However, if the fishing guide merely guided the customer on public land and does not provide a boat, the proper classification was service and other activities.

The common understanding of a fishing or hunting guide is someone who takes the customer to the area where the customer may engage in a particular activity. If this were all that was being done, the service would be treated as a service B&O taxable event as stated in the letter ruling presented by the taxpayers' witness. It is the additional provision of a boat and fishing gear that changes the nature of the transaction to that of a retail sale.

The taxpayers argue that research report number 135 issued by the Federation of Tax Administrators (FTA) contains an entry that shows that fishing and hunting guides are subject to tax at the rate of 1.5% or B&O rate for service and other activities.¹⁰ The taxpayers believe that this entry (which was one of 182) shows that the Department provided inconsistent advice. Surveys, such as used by the FTA, merely list various activities and ask what tax rate applies. The terms are usually not defined. The Department's response is consistent with the letter submitted as evidence by the taxpayers' witness. We note that the report does not refer to chartered sports fishing which would, using normal understanding, include the taxpayer's activities.

4. Reliance.

The central theme of the taxpayers argument is that the Department was confused as to how to classify taxpayers' activities. This alleged confusion, it is claimed, prejudiced

¹⁰ The taxpayers ask that we take administrative notice that the FTA relies on the responses of the individual state taxing agencies in preparing these reports. Notice is so taken.

the taxpayers. Therefore, the taxpayers assert the Department cannot now require them to pay retail sales tax for past activities when the Department was allegedly confused. We disagree.

The taxpayers have not shown any reliance on anything the Department has provided to them specifically, or the public generally. For example, Taxpayer A was unable to state that he was aware of ETB 531 before the tax assessment. Taxpayer B did not register with the Department prior to being audited and Taxpayers C & D were not aware of the need to register with the Department and to pay even the B&O tax. Taxpayers did not even represent that they attempted to contact the Department regarding their activities prior to the audits. ETB 531. Therefore, taxpayers have not shown how they relied on information that they did not view.

Further, none of the taxpayers relied on the FTA research report. The only direct documentation of the Department's position which anyone admits receiving is the letter to the witness' accountants. That letter clearly states that the actual activities performed by these taxpayers as fishing guides are retail sales. The further correspondence between the witness and the Department showed that he questioned the fairness of the ruling. There is no evidence that any of the taxpayers were aware of any statement from the Department which misled them.

DECISION AND DISPOSITION:

The taxpayers' petitions are denied.

DATED this 29th day of June, 1994.