

Cite as Det. No. 99-222, 19 WTD 363 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
)	No. 99-222
)	
...)	Registration No. . .
)	FY. . . /Audit No. . . .
)	
)	

[1] RULE 131: B&O TAX – SALES TAX – MERCHANDISE PUNCHBOARDS.
Prior to the amendment of Rule 131, effective April 1, 1999, the gross proceeds from merchandise punchboards were subject to Retailing B&O tax and retail sales tax.

[2] RULE 107: SALES TAX – SEPARATE STATEMENT OF – PRESUMPTION.
There is a presumption that the stated price of an item does not include retail sales tax unless the amount of sales tax is separately stated. In addition to its more conventional application, this principle applies as well to the sale of merchandise punchboards.

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:

Tavern appeals the retail taxation of merchandise punch boards.¹

FACTS:

Dressel, A.L.J. -- . . . (taxpayer) is a tavern. Its books and records were examined by the Department of Revenue (Department) for the period January 1, 1994 through December 31, 1997. As a result a tax assessment, identified by the above-captioned numbers, was issued for \$. . . . The taxpayer is appealing part of the assessment.

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

One form of entertainment at the taxpayer's tavern is merchandise punchboards. These are large boards divided into squares. Tavern-goers may buy chances to win merchandise prizes from the punchboards. The boards include nickel, dime, and quarter squares. When a player buys a square, she or he "punches out" the square of her or his choice. That process tells the player whether she or he has won a prize. The prizes are of merchandise, or tangible personal property, as opposed to cash prizes.

During the audit period, the taxpayer reported the income from this activity under the Service and Other Activities classification of the business and occupation (B&O) tax. Presumably, the taxpayer measured the tax by the difference between gross receipts from the game and the value of merchandise awarded as prizes. In conducting its audit of the taxpayer, the Department reclassified the punchboard income, subjecting gross receipts to the Retailing B&O tax and retail sales tax. The taxpayer objects, not to the reclassification, but to the fact that the above-mentioned retail taxes were measured by gross receipts from the punchboards. The taxpayer believes that those gross receipts should be considered as *including* the sales tax. As an example, if a \$1 punchboard sale was made, the taxpayer contends it should be considered a 92¢ sale, with the remaining 8¢ deemed sales tax. As it was, the Department treated it as a \$1 sale, with an additional 8¢ owed for sales tax. In other words, it measured both the B&O and sales taxes by the \$1 figure, rather than by backing out the sales tax to arrive at a tax measure of 92¢.

As justification for its proposed tax treatment, the taxpayer advises that the Department's Rule 131 is in the process of being revised and, therefore, it is unfair to tax punchboards as proposed by the Department. It also says that it is "allowed to declare tax in gross on other sales", such as beer, wine, and exempt food. Further, it states that it is regulated as well by the Gambling Commission which will not allow it to sell a punchboard chance for more than \$1. The taxpayer also said that for fairs and similar events, people are allowed to sell food and drink and back out the tax. The taxpayer polled three other tavern owners and reports that none said she or he was being taxed on punchboards in the fashion the Department had assessed the taxpayer.

ISSUE:

Should sales tax be considered as included in the sale of a chance at a merchandise punchboard?

DISCUSSION:

Merchandise punchboards are covered in WAC 458-20-131 (Rule 131). This rule, as it existed during the audit period, read, in part:

MERCHANDISING GAMES, GAMES OF CHANCE AND CONCESSIONAIRES.

BUSINESS AND OCCUPATION TAX-RETAIL SALES TAX

...

Punchboards which offer prizes of merchandise are considered as merchandising games, with the prizes being sold for the gross proceeds from the boards, and the gross income from such boards should therefore be reported under the retailing classification.

RETAIL SALES TAX

Persons making retail sales of tangible personal property through merchandising games are liable for the payment of the retail sales tax upon the full retail selling price of the merchandise sold to or won by the customer and whether the tax was actually collected from the customer or not.

...

Punchboards which offer prizes of merchandise are considered as merchandising games, with the prizes being sold for the gross proceeds from the boards, and the retail sales tax is therefore payable on those gross proceeds. For practical reasons, the retail sales tax may be absorbed by the operator, at his option, but the latter will be liable nevertheless to the department of revenue for the full tax on the gross income from each punchboard.

[1] It is clear from this quotation that, during the audit period, the gross proceeds from the punchboards were subject to both the Retailing B&O and retail sales tax.

What, then, should be the measure of the taxes? The retail sales tax is measured by the "selling price". RCW 82.08.020.

"Selling price" means the consideration, whether money, credits, rights, or other property except trade-in property of like kind, expressed in the terms of money paid or delivered by a buyer to a seller without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, *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* . . (Italics ours.)

RCW 82.08.010(1). WAC 458-20-107 (Rule 107) implements these two statutes. Rule 107 reads, in part:

The law creates a "conclusive presumption" that, for purposes of collecting the tax and remitting it to the state, the selling price quoted does not include the retail sales tax. This presumption is not overcome or rebutted by any written or oral agreement between seller and buyer. 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. Even when prices are advertised as including the sales tax, the actual sales invoices, receipts, contracts, or billing documents must list the retail sales tax as a separate charge. Failure to comply with this requirement may result in the retail sales tax due and payable to the state

being computed on the gross amount charged even if it is claimed to already include all taxes due.

[2] We queried the taxpayer's president and accountant at the hearing as to whether a "sales tax included" sign was posted on or near the punchboards. They stated that they had such a sign but were not sure if it was posted when the Department's auditor was at the premises or if it was posted during the audit period. The auditor observed that there was no such sign. Weighing these observations, we find that a "sales tax included" sign that applied to the punchboards was *not* posted during the audit period. Therefore, per the authority quoted above,² we conclude that the gross amounts charged for punchboard chances during the audit period did *not* include sales tax. The Department was correct to measure the B&O and sales taxes by the gross amount charged.

Since the hearing of this matter, Rule 131 has been amended, effective April 1, 1999. From that date forward, merchandise punchboards are subject to Service B&O tax, rather than Retailing B&O tax. The taxpayer is directed to read and comply with the amended rule as of that date. April 1, 1999 is the effective date of the change, though, as is stated in the text of the rule, so Retailing B&O and retail sales taxes were correctly assessed for the audit period.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 30th day of June 1999.

² See also *Det. No. 96-119*, 16 WTD 194 (1996).