Cite as Det. No. 05-0190ER, 27 WTD 11 (2008)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment and Refund . . .	)	E X E C U T I V E LE V E L D E T E R M I N A T I O N No. 05-0190ER Registration No. . . . . . . /Audit No. . . . Docket No. . . .

[1] RCW 82.08.020: RETAIL RENTAL CAR TAX – RENTAL OF MOTOR HOMES. Imposition of the retail rental car tax requires fulfillment of three requirements: (1) The rental of a "passenger car," (2) used "solely" by a "rental car business," and (3) a rental without driver for a period greater than 30 consecutive days. As a finding of law we conclude motor homes are a subset of passenger cars and fulfill the statute's first requirement. The statute's second and third requirements are fact driven and are determined by the circumstances of the rental.

[2] RCW 82.08.020, RCW 82.08.050: RETAIL RENTAL CAR TAX – TRUST FUNDS. The retail rental car tax is a sales tax on the retail rental of cars. Retail sales taxes are trust funds, collected by the seller from the buyer, held in trust and then remitted to the Department. The retail rental car tax collected by a seller belongs to the customer or the State and not to the seller. Thus, the tax cannot be refunded to the seller.

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.

DIRECTOR'S DESIGNEE: Jeffrey B. Mahan, Appeals Review Manager

NATURE OF ACTION:

Lewis, A.L.J -- Taxpayer seeks reconsideration of Det. No. 05-0190, which affirmed the assessment of the retail rental car tax (RRCT) on the rental of motor homes and which disallowed any refund of RRCT . . . . We affirm Det. No. 05-0190's conclusion that the RRCT is due on the rental of motor homes and deny any refund of RRCT. We affirm the imposition of a higher rate in the PAA . . . .[1]

ISSUES:

1. Does the RRCT imposed by RCW 82.08.020 apply to the rental of motor homes?

2. Is Taxpayer entitled to receive a refund of RRCT that Taxpayer collected from its customers during 1999? . . .

FINDING OF FACTS**:**

Taxpayer's business includes the sale, rental, and repair of motor homes. Most of the motor homes that Taxpayer rents belong to third parties.

Taxpayer was incorporated in . . . . Prior to Taxpayer's incorporation, the business was operated by a predecessor corporation . . . . From the time the business first rented motor homes, . . . Taxpayer's predecessor paid annual license fees and the motor vehicle excise tax ("MVET") on the motor homes, and collected and remitted retail sales tax on the rental charge.[2]

[During the year of its incorporation], Taxpayer changed its tax practices and began charging and collecting the RRCT in addition to the regular retail sales tax from its customers and stopped paying the MVET. Taxpayer continued to pay the required annual license fees. Taxpayer neither registered with the Department of Licensing as a rental car business nor registered the individual motor homes as required by RCW 46.87.023.

Initiative 695 repealed the MVET. Thus, . . . when initiative 695 became effective, Taxpayer discontinued collecting the RRCT, since there was no need to charge the RRCT in order to avoid paying the MVET.[3]

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

[2] The MVET was based on approximately 2% of the vehicle's value. RCW 82.44.040.

[3] In January 1, 2000, Initiative 695 became effective and was codified as RCW 46.16.062, later recodified as RCW 46.16.0621. RCW 46.16.0621(1) states that "License tab fees shall be thirty dollars per year for all vehicles."

The Department of Revenue ("Department") audited Taxpayer's books and records for the period February 1, 1999 through September 30, 2002. On March 11, 2004, the Department issued a $. . . assessment. . . . Taxpayer made a $. . . payment towards satisfaction of the assessment. . . . Taxpayer filed a petition requesting correction of the assessment. Taxpayer challenged:

- The assessment of the RRCT on the rental of motor homes;
- The assessment of the RRCT on related charges such as, pre-cleaning services, prepaid dumping services, repair services, the rental of televisions, kitchen equipment, and other optional items.
- The Audit Division's failure to refund the RRCT collected in error on the optional rental of equipment. . . .

On September 16, 2005, the Department issued Det. No. 05-0190. Det. No. 05-0190 concluded:

- The Audit Division correctly assessed RRCT on Taxpayer's rental of motor homes, whether the motor home was owned by Taxpayer or owned by another and consigned to Taxpayer for rental;
- RRCT was not due on separately itemized charges such as gasoline, vehicle insurance, pre-cleaning services, prepaid dumping services, television rentals, and other equipment rentals;
- No refund would be made on RRCT collected in error on the optional rental of equipment. . . and
- Remanded various factual adjustments to the Audit Division for consideration.

On November 16, 2005, the Department issued a post assessment adjustment, which after taking into account the $. . . payment, reduced the amount of assessment owing to $. . . . Taxpayer still disagreed with the assessment. On October 17, 2005, Taxpayer filed a petition requesting an Executive Level Reconsideration of Det. No. 05-0190 and contended that:

- RRCT was not due on the rental of motor homes;
- Taxpayer was entitled to a refund of RRCT collected in error on the optional rental of equipment;. . . and
- The Audit Division's Post Assessment Adjustment was inaccurate.

The Department granted Taxpayer's request for Executive Level Reconsideration. On March 28, 2006 the Appeals Division held [a] hearing.

ANALYSIS:

RRCT Due on the Rental of Motor Homes. RCW 82.08.020(2) provides that RRCT shall be collected on each "retail car rental." Under the provisions of RCW 82.08.011, the term "retail car rental" means "renting a rental car, as defined in RCW 46.04.465. RCW 46.04.465(1) defines the term "rental car" as:

> A passenger car, as defined in RCW 46.04.382, that is used solely by a rental car business for rental to others, without a driver provided by the rental car business, for periods of not more than thirty consecutive days.

Under RCW 46.04.466 the term "rental car business" means "a person engaging within this state in the business of renting rental cars, as determined under rules of the department of licensing."

Thus, for the RRCT to apply three requirements must be met:

- The rental of a "passenger car"
- used "solely" by a "rental car business," as determined by department of licensing rules,
- without a driver supplied by the rental car business, for a period of no more than thirty consecutive days.

The first inquiry is whether the term "passenger car" should be interpreted to include or exclude motor homes. In interpreting statutes, we must determine legislative intent. To do so we look first to the language of the statute. *Lacey Nursing v. Department of Rev.*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995). Absent ambiguity, we rely on the plain language of the statute. *City of Spokane v. Department of Rev.*, 104 Wn. App. 253, 258, 17 P.3d 1206 (2001).

RCW 46.04.382 defines the term "passenger car" to mean:

> **[E]very motor vehicle except motorcycles and motor-driven cycles**, designed for carrying ten passengers or less and used for the transportation of persons.[4]

(Emphasis added.) The term "motor vehicle" used in this definition is broadly defined under RCW 46.04 320 and would encompass most self propelled vehicles. Accordingly, "every" motor vehicle designed to carry ten passengers or less, with the express exclusion of motorcycles and motor-driven cycles, are considered passenger cars. Under its plain language, the term passenger car would include motor homes.

[4] RCW 46.04.320 defines "motor vehicle" as every vehicle that is self-propelled and every vehicle that is propelled by electric power obtained from overhead trolley wires, but not operated upon rails.

However, the taxpayer contends that because RCW 46.04.305 separately defines the term "motor homes," the legislature intended motor homes not to be considered passenger cars.[5] But RCW 46.04.330 separately defines the term "motorcycles" and RCW 46.04.332 separately defines the term "motor-driven cycle," both of which are expressly excluded from the definition of a passenger car. In contrast, the term "motor homes," although separately defined, is not expressly excluded from the definition of a passenger car.

Under the rule of interpretation *expressio unius est exclusio alterius* (literally meaning: "the expression of one is the exclusion of the other"), the legislative inclusion of certain items in a category implies that other items in that category are intended to be excluded. As stated in *Bour v. Johnson*, 122 Wn. 2d, 829, 836, 864 P.2d 380 (1993), "Legislative inclusion of certain items in a category implies that other items in that category are intended to be excluded." In this case, the inclusion of certain separately defined motor vehicles as excluded from the definition of a passenger car implies the legislative intent not to exclude other separately defined motor vehicles from the definition.

Both passenger cars and motor homes come within the definition of "motor vehicles" and are designed to transport people. The fact that a motor home may also provide habitation does not diminish the fact that motor homes are motor vehicles and designed to transport people. Simply stated, motor homes are a subset of passenger cars, just as passenger cars are a subset of motor vehicles.

Taxpayer also argues that the RRCT should not apply to motor homes under the axiom that any doubts as to the meaning of a statute under which a tax is sought to be imposed will be construed against the taxing power, citing *Duwamish Warehouse Co. v. Hoppe*, 102 Wn.2d 249, 254, 684 P.2d 703 (1984). However, that rule of construction applies only if the statute is ambiguous; absent ambiguity we rely on the plain language of a statute or rule. *Western Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 608-609, 998 P.2d 884 (2000). As discussed, under the plain language of the statute, the definition of a passenger car includes a motor home.

Our conclusion is also supported by how the agency has consistently interpreted and applied the RRCT statute. In interpreting a statute, courts grant deference to the interpretation made by the agency charged with the statute's enforcement. *Impecoven v. Department of Rev.*, 120 Wn.2d

[5] RCW 46.04.305 defines the term "motor homes" to mean:

> [M]otor vehicles originally designed, reconstructed, or permanently altered to provide facilities for human habitation, which include lodging and cooking or sewage disposal, and is enclosed within a solid body shell with the vehicle, but excludes camper or like unit constructed separately and affixed to a motor vehicle.

357, 841 P.2d 752 (1992); *Seattle Bldg. & Construction Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 799, 920 P.2d 581, *cert. denied*, 117 S. Ct. 1693 (1996).[6]

Since enactment, the Department has taken a position that motor homes meet the statutory definition of passenger cars and their rental is subject to collection of the RRCT. The Department has made at least two public pronouncements consistent with that position. The first general public notice appeared in the December 1994 edition of *Tax Topics.* The article entitled "Motor Home Rentals Subject to Rental Car Tax," stated:

> The Department of Licensing has determined that a motor home meets the statutory definition (RCW 46.04.382) of a passenger car for the purposes of the rental car tax.

Most recently, during 2004, the Department issued a "Special Notice," which once again announced that the rental of motor homes was subject to the RRCT:

> Motorized RVs and motor homes meet the definition of passenger cars for purposes of the rental car tax. Consequently, rentals of motorized RVs and motor homes for periods of 30 days or less are subject to the rental car tax.

These statements are consistent with the plain language of the statute.

Under the second requirement for the RRCT tax to apply, the motor vehicle must be "used solely by a rental car business" as determined under Department of Licensing rules. The Department of Licensing requires a rental car business to register as a rental car business and to register the vehicles it rents with the Department of Licensing. RCW 46.87.023 explains:

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[6] In reaching this conclusion, we recognize that, for other purposes, motor homes and passenger cars are treated differently. Under WAC 308.96A.099(1), the Department of Licensing assigns use classes to vehicles. Such use classes include taxi cab, camper, commercial, motorcycle, exempt, farm, logging, motor home, passenger, etc. The use classes are assessed to:

> (a) Assess the proper license fees and taxes for vehicles;
> (b) Assign special brands on subsequent owner's certificate of ownership;
> (c) Apply certain restrictions on the use of the vehicles, which prints on the vehicle registration;
> (d) Assign proper license plates

For purposes of the assigned use classes, the passenger class does not include motor homes. *Id.* RCW 46.16.063 also provides that $3.00 will be collected and deposited in the RV account of the RV fund for each motor home that is registered. In addition, under RCW 46.17.020, at the time of initial registration and annual renewal of registration of motor homes, the owner must pay a $75 motor vehicle weight fee. Since passenger vehicles do not pay vehicle weight fees, motor homes, for purposes of initial and annual registration, are treated differently. Although for other purposes motor homes and passenger cars may be treated differently, the taxpayer has not presented any authority by which to conclude that, under the RRCT statutory scheme, motor homes are not treated as passenger cars.

1) Rental car businesses must register with the department of licensing. This registration must be renewed annually by the rental car business.

2) Rental cars must be titled and registered under the provisions of chapters 46.12 and 46.16 RCW.[7] The vehicle must be identified at the time of application with the rental car company business number issued by the department.

3) Use of rental cars is restricted to the rental customer unless otherwise provided by rule.

See also WAC 308-96A-180 (registration of rental cars). Nothing in the Department of Licensing statutes or rules indicates that owners of motor homes being rented to others are not subject to the rental car licensing and registration requirements. Although Taxpayer is not registered as a rental car company, its failure to comply with the registration requirements does not relieve it from RRCT collection responsibilities.

The third requirement of the RRCT, for rental to others without an operator and for consecutive periods of no more than thirty days is not challenged. Accordingly, we conclude that motor homes are subject to the RRCT and affirm the assessment of RRCT.

Refund of RRCT . . . Taxpayer requested refund of the RRCT it collected in error on the optional rental of equipment . . . . The RRCT is a sales tax on the retail rental of cars. RCW 82.08.020. Retail sales taxes are trust funds, collected by the seller from the buyer, held in trust and then remitted to the Department. RCW 82.08.050. The RRCT that Taxpayer requests refunded are funds that belong to its customers, not to Taxpayer. Thus, the tax cannot be refunded to Taxpayer. However, should Taxpayer refund an amount equivalent to the tax to its customers it may then seek a refund from the Department. Such a refund claim must be made within the nonclaim period. RCW 82.32.060; *see also* WAC 458-20-229. . . .

Claimed factual errors. Det. No. 05-0190 remanded the file to the Audit Division for several adjustments, which the Audit Division subsequently made. At the in-person hearing, Taxpayer raised two concerns arising from the post assessment adjustments. Taxpayer maintained that one of the schedules contained an adjustment which used a higher tax rate then had been used for the original assessment. On review it has been determined that Taxpayer was correct and that two different tax rates were used. The original assessment used an incorrect rate. The post assessment corrected the error by changing the tax rate

The Department cannot raise the amount of the assessment. WAC 458-20-230(7). In this case, the total amount of the assessment was not increased. The use of a different, albeit higher, tax rate was made to correct an error. While every effort is made to avoid errors, nevertheless errors sometimes do occur. The Department is not prevented from correcting an error when the overall

[7] RCW Ch. 46.12 discusses Certificates of Ownership and Registration and RCW Ch. 46.16 discusses Vehicle Licenses.

effect is not to increase the amount of the assessment. Accordingly, we deny Taxpayer's request for correction of this adjustment.

Taxpayer also asserts that the post assessment adjustment to Schedule 11 did not contain all the deductions contained in the original audit schedules. That appears to be the case. Recognizing that sometimes an adjustment to one schedule requires an adjustment to another, we will ask the Audit Division to review whether any further adjustment should be made when the assessment is remanded for adjustment in accordance with this decision.

DECISION AND DISPOSITION:

Taxpayer's petition for reconsideration is . . . denied in part. . . . Audit should review whether any adjustment should be made due to the claimed error on the PAA

Dated this 29th day of June, 2007.

STATE OF WASHINGTON DEPARTMENT OF REVENUE