Cite as Det. No. 06-0048R, 30 WTD 15 (2011)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of . . .	)	D E T E R M I N A T I O N No. 06-0048R Registration No. . . . Document No. . . ./Audit No. . . . Docket No. . . .

[1] Rule 183(2)(b), (m); RCW 82.04.050(3)(a): RETAIL TAXABLE AMUSEMENT AND RECREATION ACTIVITIES -- INFLATABLES. Sales of activities, such as inflatable bouncy houses, mechanical bull rides, trampolines, speed pitch, pool, and air hockey, and similar activities that are participatory in nature are retail-taxable, unless access to those activities is purchased at a central ticket location in a manner similar to a carnival.

[2] RCW 82.04.050(3)(a); RCW 82.04.190(2): AMUSEMENT AND RECREATION ACTIVITIES FOR RESALE. A taxpayer can issue a resale certificate in circumstances where it subcontracts with a vendor to provide wholesale amusement and recreations services that it will, in turn, resell to consumers.

[3] Rule 211; RCW 82.04.050(4)(a)(ii): RENTAL OF AMUSEMENT AND RECREATION EQUIPMENT WITH OPERATOR. Where an operator of amusement and recreation equipment is hired by a taxpayer for its knowledge, skill, and expertise in providing amusement and recreation services, rather than simply to operate rented equipment, then the true object of the rental is amusement and recreation services for resale, and is not retail-taxable.

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.

Weaver, A.L.J. (as successor to Prusia, A.L.J.) – An event planning and production company requests reconsideration of Det. No. 06-0048, which sustained in part and reversed in part the Audit Division's reclassification of its revenue from the service and other activities business and occupation (B&O) Tax classification to retailing B&O tax and retail sales tax, contending Det.

No. 06-0048 incorrectly held that certain entertainment services the taxpayer provided were retail in nature, and incorrectly held that the taxpayer was the consumer of entertainment equipment it used to provide entertainment services. We modify Det. No. 06-0048.[1]

ISSUES

1) Whether amounts related to the entertainment activities available at events coordinated by the taxpayer are service or retail taxable under RCW 82.04.050(3)(a) and WAC 458-20-183(m).

2) Whether the taxpayer purchased amusement and recreation services for resale under RCW 82.04.050(3)(a) and RCW 82.04.190(2).

3) Whether the rental of amusement and recreation equipment with operator can be rented for re-rent under RCW 82.04.050(4)(a)(ii) and WAC 458-20-211.

4) Whether use tax was properly assessed on certain service and rental items, because taxpayer consumed those items in the course of providing its entertainment service.

FINDINGS OF FACT

[Taxpayer] is located in . . . Washington and engages in the business of event planning and production. The majority of its customers are corporations that hire Taxpayer to plan corporate team-building events and other social events. . . . This appeal concerns Taxpayer's activities during the period January 1, 2000 through September 30, 2003 ("audit period").

Clients hire Taxpayer to put on a seamless event. During the audit period, Taxpayer procured all of the catering, entertainment, decorations, prizes, hotel rooms, transportation, and equipment and facility rentals for these events. Taxpayer hired other companies to perform the catering and bar services. It hired another event planning/production company . . . to provide most entertainment and team-building activities, and to provide tables, chairs, and tents. It directly hired some entertainers. It rented the rooms for the events. It hired people to assist at events by offering information and providing directions to attendees, and hired janitorial services.

. . . Vendor was Taxpayer's principal vendor of entertainment services and equipment. Vendor provided inflatables (bouncy houses), inflatable slides, as well as other activities such as human bowling, sumo wrestling, mechanical bull, trampoline, baseball speed pitch, hoop shoot, Jacob's ladder, orbitron, air hockey, foosball, and dancing. Vendor or one of its vendors set up the equipment, provided the staffing, and took down the equipment. Vendor's staff acted as safety advisors and emcees, who encouraged attendees to participate and interact. As part of its contracts, Vendor also provided banquet tables, chairs, and tents, which it set up and took down. Vendor gave Taxpayer a detailed invoice that itemized the equipment and performers Vendor provided, stating a flat rate for each item (including attendant) or performer. Vendor did not

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

charge Taxpayer retail sales tax on any part of the billings. Vendor explained to Taxpayer that the Department of Revenue's Taxpayer Information & Education (TI&E) Division had issued rulings to the event planning/production industry that all of their revenues were subject to the service & other activities B&O classification, and sales tax would not be collected from their customers.

For the convenience of its clients, on its invoices Taxpayer usually itemized the cost of the various services and goods it provided. For services and goods it purchased, Taxpayer repeated on its invoices its Vendor's breakdown of their charges. Taxpayer usually billed its clients at its cost plus a flat service fee, but sometimes billed an amount for each item that included a markup. Occasionally, when the events did not have an entertainment component, Taxpayer did not itemize the charges, but rather billed a lump sum for the event.

During the audit period, Taxpayer reported its charges for the entertainment services it purchased from Vendor and others, its event coordination charges, and its commission charges, under the service and other activities B&O tax classification. It considered charges by Vendor for tables, chairs, and tents to be part of Vendor's charges for entertainment services, and reported revenue from reselling those items under service and other activities as well. As noted above, Vendor did not charge Taxpayer retail sales tax on any of Vendor's charges.

During the audit period, Taxpayer considered charges for catering, bar services, rooms, and equipment it purchased or rented from someone other than Vendor, to be retail sales to its clients. It reported revenue from those charges under the retailing B&O and retail sales tax classifications. It considered itself to be purchasing those services and items for resale, issued its vendors resale certificates, and did not pay retail sales tax to its vendors.

The assessment

The Department of Revenue's Audit Division examined Taxpayer's books and records for the audit period, January 1, 2000, through September 30, 2003. As a result of its audit investigation, the Audit Division concluded that Taxpayer's primary business activities were retail in nature, and although some of Taxpayer's revenues were not retail in nature, its billing practices did not support bifurcation of revenue between retail and non-retail. The Audit Division also concluded that Taxpayer was the consumer of the tangible personal property it rented from Vendor and others, the consumer of the lodging and banquet rooms provided by hotels, and the consumer of decorations which it did not resell to the client.

The audit write-up stated, with respect to the above:

> [Taxpayer]'s primary business activities are retail in nature, that is: providing catering, bar services, amusement and recreation services, equipment rental, and decorating and installing tangible personal property. [Taxpayer's] reporting practice has been to separately report sales taxable activities from the non-taxable activities, such as: providing entertainers and the occasional charge for coordinating an event, despite the

> fact that its activities are primarily retail and its billing practices do not support bifurcation.

The Audit Division allowed Taxpayer a credit for amounts it had reported under the service and other activities B&O tax classification, then asserted retailing B&O tax and retail sales tax on those amounts. It assessed use tax on "items consumed in providing services," such as rentals of tangible personal property, lodging and banquet rooms provided by hotels, and decorations.

The assessment also allowed a retail sales tax credit for tax paid at source on materials that Taxpayer had resold, and assessed use tax or deferred retail sales tax on consumable supplies. The assessment accepted Taxpayer's treatment of charges for catering and bar services.

Taxpayer appealed the assessment, particularly the reclassification of part of its income from service and other activities B&O tax to retailing B&O tax and retail sales tax.

Det. No. 06-0048

Det. No. 06-0048 granted Taxpayer's petition in part. Det. No. 06-0048 concluded that Taxpayer could bifurcate its income from charges for entertainment services between retail "amusement and recreation services" subject to retailing B&O tax and retail sales tax, and non-retail entertainment services subject to service and other activities B&O tax. It held that Taxpayer's charges for such things as disc jockeys, magicians, clowns, walk around characters, sky dancers, psychics, musicians, and the like are appropriately classified as service taxable. It held that activities wherein the participant takes an active role, such as "rides and attractions" (inflatable rides, human bowling, sumo wrestling, mechanical bull, trampoline, baseball speed pitch, hoop shot, orbitron, pool, air hockey, foosball, dancing, etc.), were "amusement and recreation services" for purposes of WAC 458-20-183 (Rule 183), and properly classified as retailing and subject to retail sales tax.

Det. No. 06-0048 further held that Taxpayer could give resale certificates to its vendors of retail-classified services and vendors of tangible personal property that Taxpayer resold . . . when Taxpayer purchased the items for resale without intervening use. However, Taxpayer could not give a resale certificate to vendors of supplies that Taxpayer put to intervening use, including decorations, signs, flowers, and the equipment used to provide retail-taxable amusement and recreation services (mechanical bulls, inflatable rides, etc.), because Taxpayer was the consumer of those items in providing retail sales-taxable amusement and recreation services.

With respect to billings where Taxpayer billed the client a lump sum fee for its event planning services without a specific breakdown, Det. No. 06-0048 held that Taxpayer's entire event planning fee was taxable under the service and other activities classification, and Taxpayer was considered the consumer of all the tangible personal property or retail services it purchased in providing its service-taxable event planning activities.

Petition for reconsideration

Taxpayer petitions for reconsideration of Det. No. 06-0048. Taxpayer protests the conclusion that sales of certain entertainment services, the "amusement and recreation services," were subject to retailing B&O and retail sales tax rather than the service and other activities classification. Taxpayer further protests the holding that it is the consumer of entertainment equipment used to provide entertainment services, and therefore liable for sales tax on the rental of the equipment. Taxpayer also protests Det. No. 06-0048's failure to address Taxpayer's assertion on appeal that the assessment improperly included nontaxable items in the assessment of use tax on "items consumed in providing services."

ANALYSIS

Washington imposes the B&O tax "for the act or privilege of engaging in business" in the State of Washington. RCW 82.04.220.[2] The tax generally is levied on the gross receipts of the business; the rate of the tax depends upon the activity engaged in by the taxpayer. Unless otherwise exempt, retailers must also collect the retail sales tax on their sales. RCW 82.08.020.

Business activities other than or in addition to those that are specifically enumerated elsewhere in chapter 82.04 RCW or RCW 82.04.290(1) are taxed under the service and other activities B&O tax classification. RCW 82.04.290(2). Persons taxed under the service and other activities classification do not have to collect retail sales tax in relation to their business activities. *See* RCW 82.04.050; RCW 82.08.020. In respect to tangible personal property or services purchased by a business in providing its service taxable activities, RCW 82.04.190(2)(a) specifically includes within the definition of "consumer" all persons taxable under the service and other activities classification. The retail sales tax applies to all sales of tangible personal property or retail classified services to consumers. RCW 82.04.050; 82.08.020.

Lump Sum Fees

Det. No. 06-0048 held that to the extent Taxpayer opted to bill a client a lump sum service fee for its event planning services without a specific breakdown, the contract is taxed based on the true object of the contract. Further, Det. No. 06-0048 held that the true object was service and other activities; thus, Taxpayer could not give a resale certificate.[3] The Department hereby reverses Det. No. 06-0048 on the issues of tax classification and use of resale certificates. Under these facts, as discussed more fully below, the Department finds that the "true object" of Taxpayer's services is "amusement and recreation services" which are properly classified as

[2] "Business" includes "all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly." RCW 82.04.140.

[3] Effective January 1, 2010, the resale certificate was replaced with a reseller permit issued by the Department of Revenue. *See generally* Laws of 2009, ch. 563, § 205.

retailing. RCW 82.04.050(3)(a); Rule 183(2)(m).[4] However, as is discussed below, the Department further holds that Taxpayer's right to issue resale certificates to vendors from which it purchases wholesale goods and services is not dependent upon whether Taxpayer bifurcates its charges or whether it bills in a lump-sum.

Bifurcation

Det. No. 06-0048 concluded that Taxpayer could properly bifurcate its revenue between retail-taxable and service-taxable. The Department holds that Det. No. 06-0048 correctly concludes that under the facts of this case there is a reasonable basis for bifurcation and affirms the analysis in section 2 of Det. No. 06-0048.[5]

Classification of Charges for Entertainment Services

[1] Det. No. 06-0048 bifurcated Taxpayer's charges for entertainment services, holding that charges for such things as disc jockeys, magicians, clowns, walk around characters, sky dancers, psychics, musicians, and the like are appropriately classified as service taxable, but activities wherein the participant takes an active role, such as "rides and attractions" (inflatable rides, human bowling, sumo wrestling, mechanical bull, trampoline, baseball speed pitch, hoop shot, orbitron, pool, air hockey, foosball, dancing, etc.), were "amusement and recreation services" for purposes of WAC 458-20-183 (Rule 183), and properly classified as retailing and subject to retail sales tax.

The terms "sale at retail" and "retail sale" are defined by the Revenue Act to 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 "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." RCW 82.04.050(3)(a). The implementing regulation, Rule 183, provides a non-exclusive list of activities deemed to fall within this definition. Included in this definition are "golf, pool, billiards, skating, bowling, swimming, bungee jumping, ski lifts and tows, basketball, racquetball, handball, squash, tennis, and all batting cages." Rule 183(2)(b). The term "'amusement and recreation services' also includes the provision of related facilities such as basketball courts, tennis courts, handball courts, swimming pools, and charges made for providing the opportunity to dance." *Id.*

[4] Effective July 1, 2008, Washington enacted various amendments and provisions to conform Washington tax laws to the Streamlined Sales and Use Tax Agreement. Laws of 2007, ch. 6 (S.S.B. 5089). As part of this law change, Washington enacted RCW 82.08.190 and 82.08.195 applicable to "bundled transactions." These provisions provide guidance on how to tax transactions that involve a combination of retail sales and non-retail services. These provisions supersede use of the "true object test." Therefore, the analysis in this determination is only applicable to tax periods before July 1, 2008.

[5] However, we do not adopt Det. No. 06-0048's conclusions as to which charges are retail-taxable and which are service-taxable, as explained hereinafter.

On the other hand, the term "amusement and recreation services" does not include:

> [T]he sale of or charge made for providing facilities where a person is merely a spectator, such as movies, concerts, sporting events, and the like; charges made for carnival rides where the customer purchases tickets at a central ticket distribution point and then the customer is subsequently able to use the purchased tickets to gain admission to an assortment of rides or attractions; 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)(m).

Activities Provided by Vendor

On reconsideration, Taxpayer argues that the activities such as inflatables, mechanical bulls, trampolines, baseball speed pitch, hoop shot, human bowling, sumo wrestling, orbitron, pool, air hockey, foosball and dancing are not "amusement or recreation services." Taxpayer notes that these activities are provided by Vendor, exclusively. Taxpayer's position is that these activities are event planning services provided by Vendor and, as such, are not subject to retail sales tax or use tax. Alternatively, Taxpayer argues that the entertainment activities provided by Vendor are "similar to a carnival" and are therefore not subject to sales tax.

The Department concludes that these activities are not spectator events like a concert or movie. Instead, these activities are analogous to the amusement and recreation services listed in the statute and the rule, in that they are participatory in nature. For that reason, the Department affirms the holding in Det. No. 06-0048 that these activities are "amusement and recreation services" and are therefore properly characterized as "retail sales" when provided to consumers.

The Department further holds that the fees attributable to these activities are not analogous to "charges made for carnival rides" or "charges made for entry to an amusement part or theme park." Taxpayer charges its client to provide event activities. Taxpayer is not operating a carnival or an amusement park. Taxpayer's events do not require that customers purchase tickets at a central ticket distribution point. *See* Rule 183(2)(m). Taxpayer's events do not require individuals to use purchased tickets to gain admission to rides or attractions. *Id*. Likewise, Taxpayer's events do not charge individual customers for entry, like an amusement park or a theme park. *Id*. Finally, while the activities may be similar to those found at carnivals, the language in the rule turns on how fees are charged. *Id*. Taxpayer charges a company a fee for putting on a corporate event. Taxpayer does not charge the public for access to a carnival. For these reasons, we affirm Det. No. 06-0048 and hold that these enumerated activities are "retail sales."

Spectator Entertainment Separately Booked by Taxpayer

Det. No. 06-0048 concluded that Taxpayer could bifurcate its income from charges for entertainment services between retail "amusement and recreation services" subject to retailing

B&O and retail sales tax, and non-retail entertainment services subject to service and other activities B&O [tax].

On reconsideration, the Department agrees with the result, but distinguishes the reasoning in Det. No. 06-0048. The operative language differentiating "amusement and recreation services" and non-retail entertainment services is: "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." Rule 183(2)(m). Det. No. 06-0048 states that the test between retail "amusement and recreation services" and non-retail entertainment activities depends upon whether the participant takes an "active role." The Department hereby modifies that test.

The Department holds that Taxpayer's charges for such things as disc jockeys, magicians, clowns, walk around characters, sky dancers, psychics, musicians, and the like are for "spectator" entertainment, and those services are most analogous to other "spectator" entertainment like movies, concerts and sporting events. *See* Rule 183(2)(m). To the extent Taxpayer bifurcates its revenue, the Department holds that Taxpayer's charges for such things as disc jockeys, magicians, clowns, walk around characters, sky dancers, psychics, musicians, and the like are appropriately classified as service taxable. While the Department modifies the holding of Det. No. 06-0048, the result is the same. "Spectator" entertainment is properly categorized as service taxable.

Resale of Amusement and Recreation Services

[2] After determining the proper classification of Taxpayer's charges to its customers, the Department must now analyze whether Taxpayer is required to pay retail sales tax on the amusement and recreation services provided by Vendor.

As discussed above, RCW 82.04.050(3)(a), defines "sale at retail" or "retail sale" to include the sale of or charge made for services provided by a person engaged in:

> (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;

RCW 82.04.050(3)(a) (emphasis added). Because Taxpayer provides amusement and recreation services to its customers, those services are provided to "consumers" and are properly categorized as retailing.

However, the amusement and recreation services provided by Vendor are purchased by Taxpayer. RCW 82.04.190(2) defines "consumer" to include:

> (d) Any person who purchases, acquires, or uses any amusement and recreation service defined in RCW 82.04.050(3)(a), other than for resale in the regular course of business;

RCW 82.04.190(2). Because Taxpayer is purchasing Vendor's amusement and recreation services for resale in the regular course of business, Taxpayer is by definition not a "consumer." *See* RCW 82.04.190(2). Therefore, Taxpayer is not required to pay retail sales tax on the amusement and recreation services provided by Vendor, provided Taxpayer gives Vendor a resale certificate. *See id.*; RCW 82.04.470.

Det. No. 06-0048 states that "[t]he taxpayer may not give a resale certificate for equipment that is rented or leased by the taxpayer for purposes of providing retail taxable amusement and recreation services." The Department agrees with the reasoning, as stated in Det. No. 06-0048, in the circumstance where a taxpayer is purchasing or renting tangible personal property as the consumer, in order to provide its amusement and recreation service. However, the Department hereby clarifies the holding in Det. No. 06-0048 and holds that there are circumstances where "amusement and recreation services" can be purchased for resale. By excluding the purchase of "amusement and recreation service for resale" from the definition of "consumer," RCW 82.04.190(2) clearly contemplates that "amusement and recreation services" can be purchased for resale.

Det. No. 06-0048 held that Taxpayer could not give a resale certificate to Vendor for its rental of amusement and recreation services, because Taxpayer was "using" the equipment to provide its retail taxable amusement and recreation services. The Department hereby reverses Det. No. 06-0048 and holds that Taxpayer can issue a resale certificate in circumstances where Taxpayer is subcontracting with a Vendor to provide wholesale amusement and recreation services for the purpose of reselling those services to consumers.[6]

The Rental of Operated Amusement and Recreation Equipment is not a Retail Sale

[3] Generally speaking, taxpayers who rent tangible personal property with an operator must pay retail sales tax on the rental amount. *See* RCW 82.04.050(4)(a)(ii). In this case, Vendor provides a variety of items and services including inflatable rides, mechanical bull, orbitron, and other services. In determining the proper tax treatment of the services provided by Vendor, the issue is whether the services constitute "amusement and recreation services for resale" or "rental of equipment with operator."

The Department has issued WAC 458-20-211 (Rule 211) to clarify the proper taxation of the rental of equipment with operator. Rule 211 provides in pertinent part:

> (1) . . . [S]ome activities performed by operated equipment may be taxable under classifications other than retail sales if the operator and equipment perform activities as a prime contractor or subcontractor and these activities are specifically classified under other tax classifications by the revenue act.

[6] For example, when Taxpayer is not merely renting "tangible personal property with operator," but is instead subcontracting with a Vendor with "knowledge, skills, and expertise" to provide "amusement and recreation services," Taxpayer may issue a resale certificate. *See* Rule 211(2)(c)-(e). This distinction is discussed in more detail in the next section.

. . . .

(4) . . . Generally persons who rent equipment with an operator are not purchasing the equipment for resale as tangible personal property and must pay retail sales tax or use tax at the time the equipment is acquired. Persons renting operated equipment to others may purchase the equipment without payment of retail sales tax only when the equipment is rented as tangible personal property.

. . . .

(5) . . .

(a) . . .

(ii) Under unique circumstances when equipment is rented for rerent by the lessee, without intervening use, then the original rental is subject to the wholesaling classification of tax and the subsequent rental is subject to the retailing classification. The original seller is required to obtain a resale certificate for these wholesale sales.

. . . .

(b) Persons who provide equipment or other tangible personal property and, in addition, operate the equipment or supply an employee to operate the same for a charge, without relinquishing substantial dominion and control to the customer are providing a service that is classified as a retail sale unless the nature of the activity is specifically classified under another tax classification . . . .

Rule 211 (emphasis added). In determining whether "the nature of the activity" provided to Taxpayer by Vendor is properly classified as "amusement and recreation services for resale" or "rental of equipment with operator," another section of Rule 211 must be analyzed.

In early 1996, the Department adopted the most recent amendments to Rule 211. The amended rule added provisions for distinguishing between "rental of equipment with operator" and subcontracting situations. These provisions state the following:

(c) The term "subcontractor" refers to a person who has entered into a contract for the performance of an act with the person who has already contracted for its performance. A subcontractor is generally responsible for performing the work to contract specification and determines how the work will be performed. In purchasing subcontract services, the customer is primarily purchasing the knowledge, skills, and expertise of the contractor to perform the task, as distinguished from the operation of the equipment.

(d) The term "rental of equipment with operator" means the provision of equipment with an operator to a lessee to perform work under the specific direction of the lessee. In such cases the lessor is generally not responsible for performing work to contract specifications and does not determine how the work will be performed. Though not controlling, persons who rent equipment with an operator typically bill on the basis of the amount of time the equipment is used.

(e) The term "true object test" as it relates to this section means the analysis of a transaction involving equipment and an operator to determine if the lessee is simply purchasing the use of the equipment or purchasing the knowledge, skills, and expertise of the operator beyond those needed to operate the equipment. Even if it is determined that the customer is purchasing the knowledge, skills, and expertise of the operator, the

> transaction may still be a retail sale if the activity is specifically included by statute within the definition of a retail sale. This test can also be applied to rentals of tangible personal property when the seller performs some service in connection with the rental.

Rule 211(2)(c)-(e). In applying the current Rule 211, the Department has held that where the facts show the operator of equipment is working to contract specifications and determining how the work will be performed, the contract is not "the rental of equipment with an operator" for purposes of RCW 82.04.050(4), and the activity is taxed under some other section of Chapter 82.04 RCW. *See* Det. No. 06-0120R, 27 WTD 70 (2008); *see also* Det. No. 98-165, 19 WTD 122 (2000); Det. No. 01-178, 21 WTD 240 (2002).

The Department concludes that Taxpayer did not rent tangible personal property with operator from Vendor, but instead entered into a subcontract with Vendor to provide "amusement and recreation services." Vendor was Taxpayer's primary vendor during the audit period. Vendor used its own equipment, or procured equipment from its own vendors, in order to provide its services to Taxpayer. While Vendor is instructed to set its equipment up in a place determined by Taxpayer, Vendor never relinquished dominion or control of the equipment to Taxpayer. Vendor is responsible for ensuring the equipment is in proper running order and provides staff to coordinate the event. The Department concludes that Taxpayer subcontracted the "amusement and recreation" portion of its events to Vendor.

The Department finds that the Taxpayer hired Vendor not simply to operate the equipment but also for its "knowledge, skills, and expertise" beyond that needed to operate the amusement and recreation equipment. *See* Det. No. 06-0120R, 27 WTD 70 (2008). Because Vendor was responsible for determining how to perform its work, such activity is not "the rental of equipment with operator." *See* Rule 211(2)(d), (2)(e), and (4). The Department therefore concludes that the "true object" of the services provided by Vendor is "amusement and recreation services for resale." *See* RCW 82.04.050(3)(a); 82.04.190(2)(d); WAC 458-20-211 (2)(e).

To the extent the holding of Det. No. 06-0048 is inconsistent with the Department's finding in this determination, Det. 06-0048 is reversed on this issue.

B&O tax

Consistent with the analysis above, the Department holds that Taxpayer's charges for providing spectator entertainment (such as disc jockeys, magicians, clowns, walk-around characters, sky dancers, psychics, and musicians) is not a retailing activity and is subject to the service and other activities B&O classification. *See* Rule 183(m). Taxpayer's charges for providing "amusement and recreation services" are subject to tax under the retailing B&O classification. Likewise, Taxpayer's charges for providing tables, chairs, and tents, whether rented from Vendor or another vendor, are subject to tax under the retailing B&O classification, and Taxpayer should have collected retail sales tax on those charges. *See* RCW 82.04.050(4)(a)(i). The Department notes that the B&O taxation of Taxpayer's revenue from charges for catering, bar services, and hotel rooms, is not at issue in this appeal.

Resale Treatment of Catering, . . . Bare Equipment, Decorations, Signs, and Flowers

Det. No. 06-0049 held that Taxpayer "may appropriately render a resale certificate for catering services . . . equipment rentals, etc., when the Taxpayer purchases or leases said items/services for the purpose of resale or re-rent to the client without intervening use and imposes retail sales tax on the sale to its customers." Det. No. 06-0048 further held that:

> [A] resale certificate may not be given for supplies purchased by the taxpayer that are "put to intervening use" in providing its event planning services and are not resold, such as decorations, signs, flowers, etc. These items are subject to retail sales tax when purchased by the taxpayer for its own consumption, or are subject to use tax if retail sales tax was not previously paid in relation to these items. RCW 82.12.020; Rule 178. Likewise, the taxpayer may not give a resale certificate for equipment that is rented or leased by the taxpayer for purposes of providing retail taxable amusement and recreation services. For example, the taxpayer may not give a resale certificate to the vendor of a mechanical bull because the taxpayer is not reselling the mechanical bull as tangible personal property, but instead the taxpayer is renting or leasing the equipment from the vendor in order to use the equipment in providing retail sales taxable amusement and recreation services. WAC 458-20-211. In all cases, the burden of maintaining proper records to support its resale claims rests with the taxpayer. RCW 82.32.070.

The Department adopts the analysis in Det. No. 06-0048 in this determination.

Use tax

The petition for reconsideration asserts that Det. No. 06-0048 erred in failing to address an issue raised in the original petition for correction, whether there were items in the use tax assessments in Exhibits 2 and 3 which were incorrectly included as retail sales subject to tax. The Department agrees that Det. No. 06-0048 failed to address this question.

The petition for correction had asserted that erroneously included in Exhibit 2 are invoices for non-taxable entertainment (musicians, disc jockeys, comedians, etc.), labor for people to assist at events by offering information and directions, and indoor janitorial services. The petition asserted that Exhibit 2 also erroneously included a $20,000 invoice for rental of the main hall in an exhibition center, and a $1,534 invoice for a cruise on a yacht. The petition for correction asserted that none of these items was subject to retail sales or use tax and should be removed. The petition for correction also asserted that erroneously included in Exhibit 3 is an invoice for childcare labor that should not be included in the use tax assessment for fixed assets.

Under the above analysis, Taxpayer should not have been assessed use tax on entertainment services. "Spectator" entertainment services are not retail taxable. Rule 183(2)(m). Therefore, the invoices for entertainment (musicians, disc jockeys, comedians, etc.) in Exhibit 2 are not subject to use tax. The labor charged for people to assist at events by offering information and directions is properly characterized as "amusement and recreation services," because the

information and directions are given to facilitate Taxpayer's retail amusement and recreation services. *See* RCW 82.04.050(3)(a). Use tax should not be charged on the invoice for indoor janitorial service, as janitorial services are specifically excluded from the definition of a "retail sale." RCW 82.04.050(2)(d); WAC 458-20-172.

Taxpayer's rental of [a convention center] is service taxable. WAC 458-20-118 (Rule 118) states the following:

> (c) RCW 82.04.050(2)(f) specifically defines all services of a hotel, motel, or similar businesses as being retail sales. Thus, the rentals of meeting rooms, display rooms, or ball rooms are retail sales when rented out by such businesses. Persons who are not in the business of selling lodging are taxable under the service B&O tax classification on income from the rental of meeting rooms.

Rule 118(c). Because the exhibition center is not in the business of selling lodging, its rental income is taxable under the service B&O tax classification and Taxpayer is not subject to use tax on the rental of the main hall. *Id*.

The charge to Taxpayer for the cruise on the yacht should be treated in a manner consistent with the "amusement and recreation services for resale" section of this Determination. As discussed above, RCW 82.04.050(3)(a), defines "sale at retail" or "retail sale" to include the sale of or charge made for services provided by a person engaged in day trips for sightseeing purposes, when provided to consumers. RCW 82.04.050(3)(a) (emphasis added). Therefore, Taxpayer should not be charged use tax on the invoice for the cruise on the yacht, as that charge is properly characterized as "amusement and recreation services for resale." *See* RCW 82.04.190(2).

Taxpayer should also not be charged use tax on childcare labor, as childcare labor is not a specifically enumerated retail service. *See* RCW 82.04.050; *see, e.g.,* RCW 82.04.2905. The rental of the cruise on the yacht for sightseeing purposes is retailing "amusement and recreation services" under RCW 82.04.050(3)(a) and should be taxed in the same manner as the other retail amusement and recreation services provided by Taxpayer.

DECISION AND DISPOSITION

Det. No. 06-0048 is affirmed in part, reversed in part, and modified in part. This matter is remanded to the Audit Division for adjustment to the assessment in accordance with this decision.

Dated this 13th day of May 2009.