Cite as Det No. 11-0170, 31 WTD 48 (2012)

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. 11-0170
. . .	)	
	)	Registration No. . . .
	)	Document No. . . .
	)	Audit No. . . .
	)	Docket No. . . .
	)	

RULE 187 -- BUSINESS AND OCCUPATION TAX -- MEASURE OF TAX -- GROSS INCOME OF THE BUSINESS -- AMUSEMENT DEVICES -- NONDEDUCTIBLE BUSINESS EXPENSE. No deduction is allowed for amounts paid by the owner of an amusement device to the person upon whose premises the device is operated.

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.

Sohng, A.L.J. – A corporate owner of coin-operated amusement devices protests the assessment of business and occupation tax ("B&O tax") on the gross proceeds of the amusement devices by claiming to have joint venture agreements that allow it to reduce its tax liabilities when splitting the revenues with the owners of the establishments where the devices are placed. The petition is denied.

ISSUE

Under WAC 458-20-187, is the owner of amusement devices entitled to pay B&O tax on the gross proceeds of the amusement devices, less the amounts that are paid to establishment owners who agreed to place the amusement devices on their premises?[1]

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

FINDINGS OF FACT

[Taxpayer] is a Washington corporation that operates an electronic gaming business, including coin-operated dart boards, juke boxes, and/or other electronic games (collectively, the "amusement devices"). The amusement devices are placed in a variety of establishments, such as bars, casinos, and clubs. Taxpayer enters into written agreements with the establishment owners to place its amusement devices in their establishments. Taxpayer claims that these agreements are "joint venture agreements."

Under these purported "joint venture agreements," Taxpayer is required, at its own expense, to purchase, set up, and maintain the amusement devices, and to provide supplies needed for their repair or upgrade. The agreements also provide that the establishment owner is required to provide the location space, electricity, and general cleaning services. Taxpayer and the establishment owners typically split the gross proceeds from the amusement devices . . . .

None of the "joint ventures" Taxpayer claims to exist are registered to do business in Washington, and none of them are reporting and remitting excise taxes to the Department. The Audit Division reviewed the taxpayer's books and records for the period from January 1, 2006, through March 31, 2009, and assessed Taxpayer $. . ., including $. . . in taxes, $. . . in interest, and $. . . in penalties. . . .

ANALYSIS

Taxpayer protests the assessment because it disagrees that it must pay B&O tax on 100% of the gross revenue generated by the amusement devices. Taxpayer asserts that the "joint venture agreements" relieve it of the requirement to pay B&O tax on 100% of the gross revenue.

The taxability of persons operating amusement devices is governed by WAC 458-20-187 ("Rule 187"). The term "amusement devices" is defined as "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." Rule 187(2). Rule 187 further provides, in part:

> (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.
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> . . .
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> (8) When coin operated machines are placed at a location owned or operated by a person other than the owner of the machines, under any arrangement for compensation to the operator of the location, the person operating the location has granted a license to use real property and will be responsible for reporting and paying tax upon his *gross compensation* therefor under the service classification.

(Emphasis added.) Thus, Rule 187 makes clear that a person operating amusement devices is taxable on the gross receipts from those devices. A person operating a business location at which the owner places coin-operated machines is separately taxable on the compensation received for allowing their placement.

Taxpayer's dart boards, juke boxes, and other electronic games fall under the definition of "amusement devices" under Rule 187(2) because they permit the patron to play a game or hear something of interest upon the insertion of a coin. And under Rule 187(5), because Taxpayer operates amusement devices, Taxpayer is taxable under the service and other activities classification on the B&O tax on the gross, rather than net, receipts.

The Department addressed this same issue in Determination No. 86-252, 1 WTD 183 (1986). In that determination, an owner and operator of amusement devices placed its coin-operated devices at locations owned and operated by other persons. Some of the devices were subject to "50-50 split of revenue agreements" that were between the owner of the devices and the owners of the locations. The parties opened the coin boxes in the presence of each other at the locations of the devices and divided the money at that time. The owner of the devices asserted that its agreements were "in the nature of joint ventures with the taxpayer contributing the amusement devices and the owner or operator of the business premises contributing the location." Thus, that taxpayer, like the present one, argued that it was liable for tax only upon its share of the proceeds derived from the amusement devices.

The Department ruled that the owner and operator of the amusement devices was subject to B&O tax on the gross receipts from those amusement devices and was not entitled to deduct the amounts paid to the establishments where the devices were located. In addition to the sections of Rule 187 quoted above, the determination relied on the definition of "gross income of the business" found in RCW 82.04.080:

> "Gross income of the business" means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

(Emphasis supplied in 1 WTD 183.) The determination also mentioned legislation that was vetoed by then Governor Gardner in 1986 that would have allowed the owners of the amusement devices to deduct from the measure of the tax the amounts paid to the persons upon whose premises the devices operated.

In accordance with Rule 187 and 1 WTD 183, we conclude that Taxpayer owes B&O tax on the gross income derived from the amusements devices without deducting the portions paid to the establishment owners.

Taxpayer argues that it has valid joint ventures with the establishment owners, and on that basis, should only be taxed on its share of the gross revenues derived from the amusement devices. We disagree. A joint venture is in the nature of a partnership. *Barrington v. Murry*, 35 Wn. 2d 744, 753, 215 P.2d 433, 438 (1950); *see also* Black's Law Dictionary 839 (6th ed. 1991) (defining "joint venture" is "a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit"). One of the requirements of a joint venture is a sharing of profits. *See Refrigeration Engineering Co. v. McKay*, 4 Wn. App. 963, 974, 486 P.2d 304 (1971). Another requirement is that the funds are handled as a joint venture, rather than as separate funds of any party to the joint venture agreement. *See* Determination No. 87-93, 2 WTD 411, 416 (1987). Furthermore, the payments to a venturer cannot be absolute. *See* Excise Tax Advisory 3136.2009 and Det. No. 90-74, 9 WTD 143 (1990).

Taxpayer's agreements do not meet these requirements. As described above, the agreements provide that Taxpayer and the establishment owners generally share the "proceeds" on a [percentage] basis . . . . This distribution of proceeds is not a sharing of profits, but a division of gross revenue. Similarly, the funds are not handled as a joint venture, but clearly are treated as the exclusive or separate funds of the respective parties. And the distributions are "absolute" payments because the parties are always entitled to their respective percentages of the gross revenue, regardless of the amount or extent of profit, if any. Finally, the establishment owner's responsibilities under the agreements are limited to providing the location space, electricity, and general cleaning services. They bear none of the expenses or risk of loss with respect to the ownership and maintenance of the amusement devices.

Finally, Taxpayer argues that assessing B&O tax on 100% of Taxpayer's gross proceeds from the amusement devices and 100% of the establishment owners' gross proceeds from the amusement devices constitutes impermissible "double taxation." We disagree. Taxpayer and the establishment owners are all different legal entities, and as such, are separate taxable persons under RCW 82.04.030. Moreover, as Rule 187 makes clear, there are two separate business activities: (1) Taxpayer is engaged in operating coin-operated amusement devices; and (2) the premises operator is engaged in the business of granting Taxpayer a license to use realty for the purpose of conducting Taxpayer's business. Washington imposes a B&O tax on the gross income received by each person for the act or privilege of engaging in business activities. RCW 82.04.220. Thus, each entity is subject to tax on the gross proceeds of its *own* business activities. Accordingly, there is no double taxation, as each entity pays only one B&O tax, which is measured by the gross income it receives.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 11th day of May 2011.