Cite as Det No. 12-0039R, 32 WTD 139 (2013)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Reconsideration and Refund of . . .	)	F I N A L D E T E R M I N A T I O N No. 12-0039R Registration No. . . . Document No. . . ./ Audit No. . . . Docket No. . . .

[1] RCW 82.04.4286: RETAIL SALES TAX – B&O TAX – FEDERAL PREEMPTION – ANTI-HEAD TAX ACT (AHTA) – SKYDIVING. The AHTA does not preempt Washington's ability to tax skydiving receipts.

[2] RULE 183; RCW 82.04.050: RETAIL SALES TAX – AMUSEMENT – SKYDIVING—UPJUMPER CHARGE. A skydiving service's "upjumper charges" to United States Parachute Association (USPA) A class license holders, were retail sales subject to retail sales tax because non instructional skydiving is an amusement and recreation activity under RCW 82.04.050(3).

[3] RCW 82.04.050, RCW 82.08.050: RETAIL SALES TAX – DVD. DVDs sold to skydivers in Washington are subject to retail sales tax.

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.

Pree, A.L.J. – A Washington corporation, which provides skydiving services, protests retail sales taxes assessed on its skydiving receipts and DVD sales. The corporation contends that its charges were for air commerce, preempted by federal law. Because skydiving is not air commerce, Washington may tax the skydiving charges. Charges to skydivers holding an A class parachute license and charges for instructional DVDs are retail sales. Petition denied[1].

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

ISSUES

1. Does 49 U.S.C. § 40116(b) preempt Washington from taxing skydiving?

2. If subject to Washington excise taxes, under which classification are skydiving receipts taxable?

3. Are sales of instructional DVDs retail sales under RCW 82.04.050?

FINDINGS OF FACT

[Taxpayer] provides parachute services, training, and equipment for skydivers in Washington. The taxpayer's owners also own [an affiliate] which has an FAA air carrier certificate and is authorized to operate as an air carrier. While the taxpayer does not have an FAA air carrier certificate in its name, the taxpayer states that it uses the same equipment, certified pilots, and is subject to the same regulations as affiliate.

. . . [Taxpayer] offers either a tandem dive . . . with [brief] instruction, or [a longer] program with more training and a solo skydive. . . . [J]umpers may purchase a DVD of their skydiving experience.

The taxpayer has a comprehensive student training program incorporating all aspects of the United States Parachute Association (USPA) licensing requirements. The taxpayer's . . . instructors, and jumpmasters conduct the training at the taxpayer's USPA approved drop zone and facility. They are licensed professionals, and are all rated by USPA. The programs satisfy the course requirements for students to obtain a basic skydiver's (A Class) license.

According to the taxpayer, its planes fly in a federal airway, and it notifies the traffic controllers of its flight activities. The skydivers jump over and land at the same airport where the taxpayer's planes take off.

Our primary issue involves "upjumper" fees charged to licensed skydivers. A class skydivers pay the "upjumper" fee to board the plane, jump, and land. [T]here is a $. . . boarding fee plus [a fee based on] altitude. . . . Skydivers may obtain additional instruction for no charge. The taxpayer reported these "upjumper" fees under the service and other activities business and occupation (B&O) tax classification.

In addition, the taxpayer offers . . . skydivers . . . DVDs of their skydiving experience for a separate . . . charge. The taxpayer did not charge sales tax on its DVD sales. While the DVDs may be used as an instructional tool, they are not required for instruction. The taxpayer reported the DVD sales under the service and other activities classification.

The Department of Revenue (Department) reviewed the taxpayer's books and records for the period from January 1, 2007, through September 30, 2010. On March 4, 2011, the Department's

Audit Division issued [an] assessment [and] reclassified the taxpayer's receipts from "upjumper charges" and DVD sales from the service and other business activities classification to the retailing classification. The Audit Division assessed $. . . in retail sales tax on the retailing receipts. We denied the taxpayer's petition for correction of the assessment in Det. No. 12-0039. The taxpayer petitioned for reconsideration of Det. No. 12-0039 and requests a refund of B&O taxes paid on skydiving receipts.

ANALYSIS

[1] RCW 82.04.4286 provides a tax deduction for "amounts derived from business which the state is prohibited from taxing under . . . the Constitution or laws of the United States." Our issue involves whether federal law prohibits Washington from assessing retail sales tax on amounts derived from skydiving.

In 1970, Congress established the Airport and Airway Trust Fund to funnel federal resources to local airport expansion and improvement projects. *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 8 (1983). As originally devised, the Trust Fund received its revenues from several federal aviation taxes, including an 8% tax on domestic airline tickets, a $3 head tax on international flights out of the United States, and a 5% tax on air freight. The Supreme Court ruled in *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines*, 405 U.S. 707 (1972), that neither the Commerce Clause nor the Airport and Airway Development Act precluded state or local authorities from assessing head taxes on passengers boarding flights at state or local airports. . . . Committees in both Houses of Congress held hearings on local taxation of air transportation. *Aloha Airlines*, 464 U.S. at 9. Both Committees concluded that the proliferation of local taxes burdened interstate air transportation, and, when coupled with the federal Trust Fund levies, imposed double taxation on air travelers. *Id.* To deal with these problems, Congress passed the Anti-Head Tax Act (AHTA), which has been recodified . . . as amended, at 49 U.S.C. § 40116(b) as:

> Prohibitions.--Except as provided in subsection (c) of this section and section 40117 of this title, a State, a political subdivision of a State, and any person that has purchased or leased an airport under section 47134 of this title, may not levy or collect a tax, fee, head charge, or other charge on--
>
> (1) an individual traveling in air commerce;
> (2) the transportation of an individual traveling in air commerce;
> (3) the sale of air transportation; or
> (4) the gross receipts from that air commerce or transportation.

The taxpayer first contends that the AHTA preempts Washington's ability to tax the taxpayer's skydiving receipts. In Det. No. 12-0039 we analyzed whether the taxpayer's skydiving receipts were for air transportation. Because the aircraft and skydivers returned to the same airport, and the taxpayer was not a certified air carrier, we determined that the receipts at issue were not for "air transportation" under 49 U.S.C. § 40116(b)(3). On reconsideration the taxpayer contends its skydiving receipts are exempt as derived from air commerce, which does not require interstate or foreign transportation. "Air commerce" is defined in 49 U.S.C. § 40102(a)(3) as, "foreign air

commerce, interstate air commerce, the transportation of mail by aircraft, the operation of aircraft within the limits of a Federal airway, or the operation of aircraft that directly affects, or may endanger safety in, foreign or interstate air commerce."

The taxpayer is not involved in foreign air commerce, interstate air commerce, or the transportation of mail by aircraft. Therefore, for the preemption to apply as air commerce, the taxpayer's receipts must be from the operation of aircraft within the limits of a Federal airway, or the operation of aircraft that directly affects, or may endanger safety in, foreign or interstate air commerce. Congress enacted a law that prohibits any direct or indirect tax or charge "on the sale of air transportation or on the gross receipts derived therefrom." *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority*, 906 F.2d 516, 519 (11th Cir. 1990). The prohibition of a tax on the "carriage of persons traveling in air commerce," apparently added late in the legislative process, is in effect a ban on the direct or indirect taxation of intrastate airline fares. *State ex rel. Arizona Dept. of Revenue v. Cochise Airlines*, 128 Ariz. 432, 436, 626 P.2d 596, 600 (Ariz. App. 1980). The federal district court in New York emphasized that the AHTA applies only to aircraft when it quoted the "air commerce" definition used for the AHTA:

> "Air commerce" means "interstate, overseas, or foreign air commerce or the transportation of mail *by aircraft* or any operation or navigation of aircraft within the limits of any Federal airway or *any operation or navigation of aircraft* which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce."

Salem Transp. Co. of New Jersey, Inc. v. Port Authority of New York and New Jersey. 611 F. Supp. 254, 257 (S.D..N.Y. 1985) (emphasis in original). That "air commerce" definition should be applied to the AHTA to determine its parameters. *Id*. (*citing* 1973 U.S. Code Cong. & Ad. News 1452).

The taxpayer's skydiving receipts are outside the parameters of the AHTA. The parameters of air commerce do not include skydiving activities because skydiving is not the operation of aircraft. While the taxpayer operates its affiliate's aircraft, the taxpayer's receipts in question are not derived from operating the aircraft. Skydivers pay to jump, fall, and parachute down. They are not paying to travel in "air commerce," and the tax is not assessed on "air commerce," but on skydiving, an amusement activity. Skydivers pay for the thrill of going down, not the ride up. Just as Idaho recognizes that skydivers are like skiers who pay to ski down hills, not ride up lifts, in Idaho State Tax Commission Ruling No. 17997, 10/19/2004, we recognize that skydivers pay for the jump and fall. Their object is to skydive, not to obtain transportation or operation of aircraft. The airplane serves the same function as the chairlift and the same reasoning applies. *Id* They do not pay for the *operation of aircraft* in Federal airways.[2]

[2] The taxpayer notes that other states have ruled that the taxability of hot air balloons is preempted by the AHTA. *See, e.g.,* Florida Rule 12A-1.005(2)(l)(2) for untethered hot air balloon rides. Tethered hot air balloon rides are subject to Florida taxes. *Id.* In Arizona, tethered balloons are subject to Arizona taxes. Arizona Transaction Privilege Tax Ruling No. 93-13, 03/15/1993. The analysis in the rulings suggests that these states considered untethered hot air balloons to be aircraft, but we will not attempt to reconcile different outcomes in other states for hot air balloon rides. We do not find these rulings persuasive in determining whether the AHTA preempts the taxability of skydiving. We also recognize that some states have ruled they can tax skydiving. *See, e.g.,* Texas

Moreover, the Airport and Airway Development Act, which established a national Aviation Trust Fund, does not apply to skydiving. Receipts from air transportation for the purpose of skydiving are specifically exempt from the federal taxes under Internal Revenue Code (IRC) § 4261(h). Consequently, the taxpayer did not pay federal taxes into the Airport and Airway Trust Fund on the skydiving receipts at issue under IRC § 4261 or IRC § 4271. Because skydiving is excluded from the federal taxes, double taxation does not result. Preemption is unnecessary. Because 49 U.S.C. § 40116(b) does not preempt the taxability of skydiving receipts, we conclude that the taxpayer's skydiving receipts are not deductible under RCW 82.04.4286 and subject to Washington excise taxes.

[2] We analyzed the classification of the taxpayer's charges in Det. No. 12-0039. Skydiving, though not specifically listed in RCW 82.04.050(3)(a) or WAC 458-20-183 is comparable to other activities listed therein (e.g., skiing, bungee jumping), and is therefore, an "amusement and recreation service" subject to retail sales tax.

. . . The issue before us is the upjumper charge for A class license holders, which are charges for services that are not instructional. Because skydiving is an amusement and recreation activity, we conclude that under RCW 82.04.050(3), the upjumper charges are subject to retail sales tax.

[3] Lastly, the taxpayer contends that its charges for DVDs were not retail because the DVDs were instructional tools.[3] We find the taxpayer's assertion that the DVDs could be used for instruction without merit. Sales of tangible personal property are retail sales under RCW 82.04.050 and subject to retail sales tax under RCW 82.08.020. DVDs are tangible personal property. Sales of instructional materials are not exempt from retail sales tax. As the seller, the taxpayer was responsible for charging retail sales tax on these retail sales and remitting the tax to the Department under RCW 82.08.050. We conclude that the Audit Division properly assessed retail sales tax on the taxpayer's DVD sales.

DECISION AND DISPOSITION

We deny the taxpayer's petition for reconsideration, and its refund petition.

Dated this 24th day of September 2012.

Policy Letter Ruling No. 200909471L, 09/23/2009 (skydiving is a taxable amusement service regardless of whether it occurs in federal airspace); *and also* Texas Comptrollers Decision No. 32,651, 12/28/1995; Missouri Private Letter Ruling No. LR 4727 05/05/2008.

[3] In Det. No. 12-0039, we explained that under WAC 458-20-140, photographers who make negatives on special order and sell photographs to customers must collect the retail sales tax upon such sales. Each photograph sold is a retail sale, regardless of whether the photograph is a color print, a black and white print, or digital file of the image. The digital conversion process for DVDs is comparable to the retail activity of producing a specific photograph for sale.