

Cite as Det No. 12-0043, 32 WTD 51 (2013)

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. 12-0043
)	
...)	
)	
)	Registration No. . . .
)	Document No. . . .
)	Audit No. . . .
)	Docket No. . . .

- [1] RULE 183; RCW 82.04.250, RCW 82.08.020: RETAILING B&O AND RETAIL SALES TAX – MOBILE VIDEO ARCADE. The playing of video games is an “amusement and recreation service” and therefore properly characterized as a retail activity when provided to Taxpayer’s customer, the consumer.
- [2] RCW 82.04.050(3)(a), RCW 82.12.020: RETAIL SALES TAX/USE TAX – VIDEO GAMES/EQUIPMENT. Retail sales tax/Use tax is due on the equipment used to provide an amusement service. When providing the playing of video games, retail sales tax/use tax is due on the video game software and equipment.

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.

Lewis, A.L.J. – Taxpayer protests the reclassification of income derived from providing a mobile video arcade from the service and other activities business and occupation (“B&O”) tax classification to the retailing B&O and retail sales tax classifications. . . . Taxpayer also argues that if the arcade’s income must be reported as retail then a tax credit should be granted for the retail sales tax/use tax paid on the video game hardware and software when acquired. We conclude that: 1) Taxpayer’s video arcade’s income was correctly reclassified to retail; . . . and [2]) no retail sales tax refund is due on the purchase of game software or hardware.¹

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410. Nonprecedential portions of this determination have been deleted.

ISSUES:

1. Is Taxpayer's service of providing a mobile video arcade an amusement and recreation activity requiring payment of retailing B&O tax and collection of retail sales tax under the provisions of WAC 458-20-183 ("Rule 183")?

...

- [2]. Did Taxpayer pay retail sales tax/use tax on the video games/equipment in error?

FINDINGS OF FACT:

Taxpayer derives income from operating a mobile video game arcade. Taxpayer owns a . . . trailer, pulled by a pick-up truck, which is fitted out as a video arcade. . . .

Taxpayer drives the trailer to the customer's designated location. The customer and guests enter the trailer and sit down in front of game consoles to play the games. Taxpayer's employees, act as coaches, helping the guests to select games, set up the consoles, and if necessary assist the guests with their game play. Taxpayer's customers pay a set fee for the first [time period] of game play and can purchase extra playing time based on an hourly rate. . . .

On June 13, 2011, the Department's Audit Division contacted Taxpayer and requested completion of a Washington Business Activities Statement ("WBAS"). On June 15, 2011, Taxpayer returned the completed WBAS to the Audit Division. Based on conversations with Taxpayer's owners, and review of the company's website . . . and the WBAS, the Audit Division concluded that Taxpayer's business activities were taxable as a retail service.

On September 2, 2011, the Department issued a \$. . . assessment.² Taxpayer disagreed with the assessment. On September 17, 2011, Taxpayer filed a petition requesting Correction of the Assessment with the Department's Appeals Division. . . .

ANALYSIS:

[1] Washington imposes the B&O tax "for the act or privilege of engaging in business" in the State of Washington. RCW 82.04.220. 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. Persons engaged in the business of making retail sales are subject to the Retailing B&O tax on the gross proceeds of sales. RCW 82.04.250. Unless otherwise exempt, retailers must also collect the retail sales tax on their sales. RCW 82.08.020.

² The \$. . . consisted of \$. . . tax, \$. . . interest, and \$. . . assessment penalty.

The terms “sale at retail” and “retail sale” are defined by law to include “the sale of or charge made for personal, business, or professional services including amounts . . . 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, provide 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” does not include:

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; . . . 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).

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). The test between retail “amusement and recreation services” and non- retail entertainment activities depends upon whether the participant takes an “active role.”

The Audit Division concluded that the activity Taxpayer provides, the playing of video games, is not a spectator event like a concert or movie. Here, the participant does not sit passively watching the game console; rather, the participant must manipulate a game console to operate the game. There is no game unless the participant takes action. The activity is analogous to the amusement and recreation services listed in the statute and the rule, in that they are participatory in nature. For that reason, consistent with recently published Det. No. 06-0048R, 30 WTD 15 (2011), we conclude that the playing of video games is an “amusement and recreation service” and is therefore properly characterized as a retail activity when provided to Taxpayer’s customers, the consumers. . . .

[2] Finally, we address Taxpayer’s assertion that if it must collect retail sales tax on its services, then it should be entitled to a refund of the retail sales tax/use tax paid on the arcade game hardware and software. Det. No. 98-141, 18 WTD 333 (1999) addressed this issue and concluded that retail sales tax/use tax was correctly paid by the taxpayer on equipment used to provide an amusement service. The determination reasoned:

As discussed above, the taxpayer provides an amusement or recreation service defined as a retail sale in RCW 82.04.050(3)(a). The taxpayer purchased the equipment at retail or

acquired it by lease. The taxpayer's use of that equipment to provide that service is subject to use tax.

The taxpayer contends that it acquired the equipment for resale, and therefore, the purchase was not subject to tax. Its customers operated the equipment. . . .

The taxpayer acquired the equipment to provide an amusement or recreation service at its location. . . .

Regardless of the taxpayer's stated intent for resale, use to provide any amusement or recreation service defined as a retail sale in RCW 82.04.050(3)(a) subjects the equipment to use tax under RCW 82.12.020. The taxpayer's petition is denied on this issue.

Consistent with the published determination, we conclude that Taxpayer correctly paid retail sales tax or use tax on its video game hardware and software and that no refund is due.

DECISION AND DISPOSITION:

[Taxpayer's petition is denied on issues 1 and 2.]

Dated this 12th day of March, 2012.