

Cite as Det. No. 19-0021, 40 WTD 117 (2021)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 19-0021
)	
...)	Registration No. . . .
)	

[1] RCW 82.08.0262; WAC 458-20-175: RETAIL SALES TAX – EXEMPTION FOR WATERCRAFT USED IN INTERSTATE COMMERCE. The purchase of a cruise ship to be used to transport persons to out of state destinations is exempt from retail sales tax.

[2] RCW 82.08.0261; WAC 458-20-175: RETAIL SALES TAX – EXEMPTION FOR PURCHASES OF FUEL TO BE CONSUMED OUTSIDE OF WASHINGTON. A cruise ship operating in interstate or foreign commerce does not owe retail sales tax on purchases of fuel to be consumed outside of Washington. Fuel consumed while the vessel is in Washington waters is subject to use 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.

Jensen, Administrative Review Manager (successor to Stojak, T.R.O.) – A taxpayer that plans to offer custom round trip sightseeing tours via water from Washington to [out-of-state] seeks review of a binding letter ruling that: (1) its purchase of a vessel was not exempt from retail sales tax under RCW 82.08.0262 because the taxpayer would be offering sightseeing tours; and (2) its purchases of fuel to be consumed outside of Washington are not exempt from retail sales tax under RCW 82.08.0261. We grant the petition.¹

ISSUES

1. Is the purchase of a vessel to be used in custom round trip cruises from Washington to [out-of-state] exempt from retail sales tax under RCW 82.08.0262?
2. Is fuel purchased in Washington to be consumed by a vessel when operated outside of Washington exempt from retail sales tax under RCW 82.08.0261 when the vessel is used to provide custom round trip cruises from Washington to [out-of-state]?

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

FINDINGS OF FACT

. . . , doing business as . . . , (Taxpayer) plans to offer round trip sightseeing tours via water from Washington to [out-of-state]. Before beginning its business operations, Taxpayer contacted the Department on January 7, 2017, to seek a binding tax ruling regarding the chartered boat excursions it intends to offer. Taxpayer's request was as follows:

[Taxpayer] is a USCG regulated commercially skippered charter boat company that provides overnight sightseeing excursions for up to ... passengers for hire on a ... foot passenger vessel between and within the waters of the states of Washington and [out-of-state]. More specifically, [Taxpayer's] expeditions provide overnight sightseeing excursion charter tours, for hire from 3 to 10 days, in and around [Washington and out-of-state waters]. . . .

Taxpayer's Ruling Request, January 7, 2017. Taxpayer asked for the following three rulings in its request: (1) that it is exempt from paying retail sales tax on "products or services related to purchase of watercraft, labor and service, rendered to construct, repair, clean, alter or improve [the watercraft]" under RCW 82.08.0262; (2) that it is exempt from paying retail sales tax under RCW 82.08.0261 on fuel it acquires in Washington for use outside of Washington on its sightseeing tours; and (3) that its provision of charter boat sightseeing services is exempt from public utility tax "as discussed in DOR Special Notice . . . Taxability of Charter Boat Industry dated [A]ugust 13, 2009; page 2 'Skippered Charters', item 3 and WAC 458-20-179 & RCW 82.16.020." *Id.*

Taxpayer provided a copy of its business plan to the Department when it requested the tax ruling. The business plan describes its primary intended business activity as offering "scheduled all-inclusive 6 day/5 night cruises" in Washington [and out-of-state]. The business plan explains that Taxpayer intends to offer cruises that start and end at different ports of call where passengers "will board at one port and disembark at another port." The plan further explains that the primary tourist cruising areas will be [out-of-state]. The plan explains that the "remote environments only accessible by smaller vessels and not the larger cruise ships," offered by [out-of-state] make it an ideal location for its passenger cruise service. The plan states that "tidewater and hanging glaciers, deep fjords, waterfalls, rugged coastlines, snow-crested mountains, secluded coves, abundance of wildlife, and limited boat traffic will be part of the one week cruise experience." The Plan states that its crew will include a chef and a naturalist/sea kayak guide. In addition, cruise activities offered by Taxpayer "will include kayaking, whale watching, bird viewing, beachcombing, hiking, sightseeing, ship handling, and optional navigational instruction." The naturalist Taxpayer plans to employ onboard will "be a resource for local geological, cultural, wildlife, and conservation information." Finally, the plan explains that Taxpayer's cruises will include "client transportation on the [out-of-state] train between [cities out-of-state]."

On January 26, 2017, the Department's Taxpayer Information and Education ("TI&E") unit responded to Taxpayer's request for a binding tax ruling. In its response, TI&E ruled as follows: 1) Taxpayer's business does not qualify for the sales tax exemption provided in RCW 82.08.0262; 2) Taxpayer's business does not qualify for the exemption from sales tax on purchases of fuel to be consumed outside of Washington in RCW 82.08.0261; and 3) Taxpayer's business is not subject to the Public Utility Tax ("PUT").

On January 30, 2017, Taxpayer responded to the Department's ruling and requested that TI&E reconsider the ruling issued on January 26, 2017. Taxpayer provided additional information about its anticipated business activities to support this request. Taxpayer wrote, in pertinent part:

[Taxpayer] is a fully crewed United States Coast Guard regulated commercial vessel charter company that will provide passenger service, on an ... foot vessel, with service between several ports of call. These ports of call include, but [are] not limited to, the following locations allowing passengers to board (start) and disembark (end) at the identified locations at predetermined schedule departures that provides our clients with . . . cruising adventures.

[In-state and out-of-state ports of call]

More specifically, during [Taxpayer's] primary service season (spring, summer and early fall), the company will offer multi-day/overnight charter service for up to ... paying passengers on different scheduled itineraries (routes) between the several ports of call as listed above. These different ports of call allow our clients to select which scheduled itineraries (routes) best meet their needs. For example, our clients can book an Inside Passage charter boarding in [Washington] and disembarking in [out-of-state], or book a departure from [out-of-state] and then disembark in [out-of-state]. During the "off-season", [Taxpayer] will most likely provide some limited (non-scheduled/by reservation only) multi-day/overnight charter service between and around [Washington] and [out-of-state] waters where passengers may board and disembark the vessel at the same or different ports of call in both [Washington and out-of-state].

. . . [Taxpayer] is requesting verification and to receive a binding tax ruling letter from [TI&E] confirming the understanding of the tax law and the associated tax exemption.

1) [Taxpayer] is exempt from paying state sales tax for such product or services related to the purchase of watercraft, labor and service, rendered to construct, repair, clean, alter or improve for hire carrier due to the fact that the vessel will be engaged in interstate and foreign commerce activity and that its passengers board (start) and disembark (end) their cruise journeys of different port of calls from the various locations of Washington, [and out-of-state]. (Ref. RCW 82.08.0262).

2) Tax on fuel that is consumed by the vessel owned by [Taxpayer] when operated outside the state of Washington transporting passengers from different ports of call as discussed above (Ref. RCW 82.08.0262 and WAC 458-20-175).

3) That [Taxpayer] is exempt from the Public Utility Tax due to [Taxpayer] providing full crewed charter services on a watercraft/vessel that is subject to the B&O under service and other activities classification unless the service to be provided by [Taxpayer] is bundled within other sold sales and service activities. (Reference: DOR Special Notice – Taxability of the Charter Boat Industry; dated August 13, 2009; page 2 Skipped Charters paragraphs 2 & 3 – "The public utility Tax does not apply to any charter boat service"; and WAC 458-20-175).

Taxpayer Letter, January 30, 2017.² TI&E responded to Taxpayer's request for reconsideration of its original ruling on March 2, 2017, and issued a ruling that superseded its January 26, 2017, ruling. TI&E's ruling stated, in pertinent part:

Question 1)

Is [Taxpayer's] purchase of a vessel exempt from retail sales tax under RCW 82.08.0262?

Response 1)

No, based on the information provided, your business does not qualify for the sales tax exemption provided in RCW 82.08.0262. Therefore, you must pay sales/use tax on your purchase of watercraft, labor and services, rendered to construct repair, clean, alter or improve your watercraft.

...

Question 2)

Is [Taxpayer's] purchase of fuel exempt from retail sales tax under WAC 458-20-175?

Response 2)

No, your business does not qualify for the exemption from sales tax on purchases of fuel to be consumed outside of Washington.

...

Question 3)

Is [Taxpayer's] income from providing guided tours by vessels exempt from PUT? Under what tax classification is the income subject to tax?

Response 3)

We agree that the income received from your guided tours is not subject to Public Utility Tax (PUT).

The income you receive from providing this activity is subject to business and occupation (B&O) tax under the Tour Operator Classification. You do not have to collect sales tax on this activity. . . .

Letter Ruling, March 2, 2017. Taxpayer timely petitioned the Department's Administrative Review and Hearings Division (ARHD) for administrative review of the tax ruling. Taxpayer states in its petition that TI&E erred in its ruling when it determined that Taxpayer's anticipated business activities do not qualify for the exemption from sales tax provided by RCW 82.08.0262. Taxpayer also states that TI&E erred in its determination that Taxpayer would not qualify for an exemption from sales tax on fuel consumed out of state by its vessel as part of its anticipated business activities. Taxpayer agrees with TI&E's ruling that PUT does not apply to its anticipated business activities.

² Excerpted as written without correction for grammar or typographical errors.

To support its position that it qualifies for the exemption from sales tax provided by RCW 82.08.0262, Taxpayer argues that its anticipated business activities entail transporting passengers between different ports of locations in Washington [and out-of-state]. Thus, Taxpayer argues that its vessel will engage in interstate and foreign commerce thereby rendering the purchase of the vessel, any tangible personal property therein incorporated, and labor and services rendered in constructing, repairing, cleaning, altering, or improving the vessel, exempt from Washington's retail sales tax pursuant to the terms of RCW 82.08.0262. Similarly, Taxpayer argues that RCW 82.08.0261 exempts any fuel that its vessel will consume while operating outside the state of Washington.

ANALYSIS

I. Application of RCW 82.08.0262 to Taxpayer's Intended Business Activities

RCW 82.08.020 imposes retail sales tax on all sales of tangible personal property unless a specific exemption applies. The use tax complements the retail sales tax by levying a tax on "the privilege of using within this state as a consumer" any article of tangible personal property on which retail sales tax has not previously been paid. RCW 82.12.020(1) and (2).

RCW 82.08.0262 provides a sales tax exemption for watercraft, components of watercraft, and labor and services rendered in respect to watercraft used in interstate or foreign commerce.

- (1) The tax levied by RCW 82.08.020 does not apply to . . .
- (b) Sales of . . . watercraft for use in conducting interstate or foreign commerce by transporting property or persons for hire . . .
- (c) Sales of tangible personal property that becomes a component part of such . . . watercraft . . . in the course of constructing, repairing, cleaning, altering, or improving the same; and
- (d) Sales of charges made for labor and services rendered in respect to such constructing, cleaning, altering, or improving.

The Department implements the exemptions in RCW 82.08.0261 [(discussed below)] and RCW 82.08.0262 in WAC 458-20-175 ("Rule 175"). Rule 175 repeats the requirements for the retail sales tax exemption provided by RCW 82.08.0262 relevant to watercraft engaged in interstate and foreign commerce. It states:

By reason of specific exemptions contained in RCW 82.08.0261 and 82.08.0262 the retail sales tax does not apply upon the following sales:

- (1) Sales of . . . watercraft for use in conducting interstate or foreign commerce by transporting therein or therewith property and persons for hire;
- (2) Sales of tangible personal property which become a component part of such carrier property in the course of constructing, repairing, cleaning, altering or improving the same;
- (3) Sales of or charges made for labor or services rendered with respect to the constructing, repairing, cleaning, altering or improving of such carrier property;
- (4) Sales of any tangible personal property other than the type referred to in 1 and 2 above, for use by the purchaser in connection with such businesses, provided that any actual use thereof in this state shall, at the time of actual use, be subject to the use tax.

Before determining whether Taxpayer's purchase of a vessel falls within RCW 82.08.0262, there are a few rules of statutory construction we must consider. When interpreting statutory language, Washington courts strive to ascertain and carry out the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). The starting point to determine legislative intent begins with the statute's "plain language and ordinary meaning." *State v. J.P.* 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)). When the statute's plain language is unambiguous (i.e. "the statutory language admits of only one meaning"), courts do not look beyond that language. *State v. J.P.*, 149 Wn.2d at 450 (citing *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994)).

Pursuant to RCW 82.08.0262 the exemption applies to "[s]ales of . . . watercraft for use in conducting interstate or foreign commerce by transporting property or persons for hire . . ." (Emphasis added.) It also applies to sales of component parts and sales of labor and services related to such watercraft. *Id.* Therefore, under RCW 82.08.0262, sales qualify for the exemption so long as the relevant watercraft is: 1) used in interstate or foreign commerce; and 2) used for "transporting property or persons for hire."³

Here, both elements are in dispute. Taxpayer argues that transporting persons into [out-of-state] waters and returning to Washington is transporting persons in interstate commerce. TI&E concludes that entitlement to this exemption requires the person to be a private or common carrier engaged in interstate commerce and that operating a sightseeing tour does not constitute transporting persons for hire.

The phrase "interstate commerce" is not defined in RCW 82.08.0262 or in Rule 175. Federal law defines "interstate commerce" in some statutes as commerce between different states. *See, e.g.*, 18 U.S.C. § 10. ("commerce between one State, Territory, Possession, or District of Columbia and another State, Territory, Possession, or the District of Columbia."); 21 U.S.C. § 321(b)(1) ("commerce between any State or Territory and any place outside thereof."). Courts have likewise interpreted interstate commerce as commerce moving from one state to another in other contexts. *See Walters v. American Coach Lines of Miami, Inc.*, 575 F.3d 1221, 1229 (11th Cir. 2009) (a bus company's shuttle ride from port to airport is part of interstate commerce); *Marshall v. Victoria Trans. Co., Inc.*, 603 F.2d 1122, 1123 (5th Cir. 1979); *Abel v. Southern Shuttle Services, Inc.* 631 F.3d 1210 (11th Cir. 2011). Because Taxpayer's proposed business involves operating a cruise ship across state lines and into [out-of-state locations], Taxpayer operates in interstate or foreign commerce.

Another key inquiry in this case is whether Taxpayer transports persons for hire. RCW 82.08.0262 does not define "transporting property or persons for hire." Rules of statutory construction instruct us that "[w]hen statutory terms are not defined in the statute, we turn to their ordinary dictionary meaning." *Western Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 609, 998 P.2d 884 (2000).

³ In regards to sales of tangible personal property incorporated into watercraft, as well as sales for labor and services related to the watercraft, we note that any sales must also meet the specific terms established by RCW 82.08.0262(1)(c) and (d). The sales of tangible personal property must involve property that "becomes a component part of such watercraft . . . in the course of constructing, repairing cleaning, altering, or improving" the watercraft. RCW 82.08.0262(1)(c). Sales of labor and services must be "rendered in respect to such constructing, cleaning, altering, or improving." RCW 82.08.0262(1)(d).

The dictionary defines the verb “transport” as “to transfer or convey from one person or place to another.” Webster’s Third New International Dictionary of the English Language 466 (1993). [Taxpayer is “transporting persons” as contemplated by RCW 82.08.0262 because Taxpayer is transferring or conveying persons from one place, the departure point, to other places along a predetermined schedule of departures, and then returning to the original point of departure. Between each point of the route, Taxpayer is conveying persons from one place to another.]

Although the noun “hire” is defined as “payment for labor or personal services,” *id.*, the term “for hire” is a legal term that courts have deemed susceptible to more than one reasonable meaning, depending on the context. The Court of Appeals has recognized that “for hire” “could be understood as effecting the engagement or purchase of labor or services for compensation or wages” but also that it could contemplate that passengers are directly responsible for the fare. *First Student v. Dep’t of Revenue*, 4 Wn. App. 2d 857, 867-68, 423 P.3d 921 (2018)[, *aff’d*, 194 Wn.2d 707, 451 P.3d 1094 (2019)]. Other sources have defined the term as transportation offered to the general public for compensation. *See* WAC 480-51-020(7).

Here, whether we lend the term “transporting . . . persons for hire” in RCW 82.08.0262 its ordinary dictionary definition as transferring or conveying persons [from one person or place to another] for payment, or a more specific definition such as requiring that passengers are responsible for the fare or that the transportation is offered to the general public, in either case, the transportation of the passengers at issue would qualify as “for hire.”

Rule 175 provides further guidance on when private carriers transport persons for hire both in and outside of Washington. Rule 175 explains, in pertinent part:

Persons engaged in [operating a business as a private carrier] are not subject to business tax or utility tax with respect to operating income received for transporting persons or property in interstate or foreign commerce. (See WAC 458-20-193).

When such persons also engage in intrastate business activities they become taxable at the rates and in the manner stated in WAC 458-20-179

WAC 458-20-179 (Rule 179) provides an important distinction between hauling by watercraft under certain circumstances between points in Washington, a PUT activity, and sightseeing tours, which are subject to B&O tax and similarly involve transporting persons from one place to another. It explains: “These [PUT] classifications do not include sightseeing tours, fishing charters, or activities that are in the nature of guided tours where the tour may include some water transportation. Persons engaged in providing tours should refer to WAC 458-20-258, Travel agents and tour operators.” Rule 179(101)(a).

In this particular case, Taxpayer takes passengers on a tour of specific locations in Washington [and out-of-state]. The focus of that trip is a tour of the sights along the way, along with specific activities, such as kayaking and whale watching, and, as discussed in more detail below, Taxpayer is subject to the tour operator B&O tax classification on its apportionable Washington income. However, the letter ruling incorrectly relies on the classification of Taxpayer’s business activities for tax purposes to determine whether Taxpayer is eligible for the exemption in RCW 82.08.0262.

Nothing in Rule 175 or Rule 179 compels such a result. More importantly, the plain language of RCW 82.08.0262 contains no such limitation. Here, because Taxpayer will use the vessel both in interstate commerce and to transport persons for hire, its purchase of the vessel qualifies for the exemption in RCW 82.08.0262.

II. Application of RCW 82.08.0261 and Rule 175 to Taxpayer's Purchase of Fuel for its Intended Business Activities

RCW 82.08.0261(1) exempts sales of tangible personal property for use by a business that operates as “a private or common carrier by . . . water in interstate or foreign commerce.” However, any actual use of such property in this state is subject to use tax. RCW 82.08.0261(1). Rule 175(4) implements this exemption by providing that retail sales tax does not apply to sales of tangible personal property for use by purchasers in connection with a business that conducts “interstate or foreign commerce by transporting therein . . . persons for hire[.]” Rule 175.

TI&E ruled that Taxpayer's purchase of fuel for its vessel for its intended business activities would not qualify for an exemption from retail sales tax. Similar to above, TI&E based this ruling on the conclusion that Taxpayer's intent to offer guided excursions removes it from the realm of businesses that transport persons for hire. We disagree with TI&E.

In this case, Taxpayer is not asking for a ruling related to fuel used in Washington State, conceding that such use would be subject to use tax. However, any fuel used outside of Washington to transport persons into [out-of-state] would be exempt under RCW 82.08.0261. Like RCW 82.08.0262, RCW 82.08.0261 does not limit the exemption to retail purchases by businesses subject to PUT. Here, Taxpayer does transport persons for hire and use the property in question in interstate or foreign commerce, even if its activities are subject to the tour operator B&O tax classification.

III. Application of RCW 82.12.0254 to Taxpayer's Use of the Vessel in Washington

Although RCW 82.08.0262 may provide a sales tax exemption for purchases it makes, it may owe use tax on such purchases if it does not use its vessel *primarily* in interstate or foreign commerce. RCW 82.12.0254 provides a companion use tax exemption to the sales tax exemption provided by RCW 82.08.0262. Like its companion, RCW 82.12.0254 provides a use tax exemption for watercraft used in interstate or foreign commerce as well as tangible personal property that becomes a component of such watercraft and labor and services rendered in respect to the watercraft. RCW 82.12.0254 conditions qualification for this exemption on the watercraft being used *primarily* in conducting interstate or foreign commerce. RCW 82.12.0254(1)(a).

Rule 175 also explains the use tax requirements pertaining to persons engaged in operating as a private carrier by water in interstate or foreign commerce.⁴ It provides, in pertinent part:

The use tax does not apply upon the use of . . . watercraft, including component parts thereof, which are used primarily in conducting such businesses.

⁴ Rule 175 defines “private carrier” to include “every carrier, other than a common carrier, engaged in the business of transporting persons or property for hire.”

“Actual use within this state,” as used in RCW 82.08.0261 does not include use of durable goods aboard carrier property while engaged in interstate or foreign commerce. Thus the use tax does not apply upon the use of furnishings and equipment (whether attached to the carrier or not) intended for use aboard carrier property while operating partly within and partly without this state. Included herein are such items as bedding, table linen and wares, kitchen equipment, tables and chairs, hand tools, hawsers, life preservers, parachutes, and other durable goods

The use tax *does* apply upon the actual use within this state of all other types of tangible personal property purchased at retail and upon which the sales tax has not been paid. Included herein are all consumable goods for use on and placed aboard carrier property while within this state, but only to the extent of that portion consumed herein. Thus the tax applies upon the use of the amount consumed in this state of ice, *fuel* and lubricants which are placed aboard in this state

Rule 175 (emphasis added).

Department precedent holds that a taxpayer uses a vessel “primarily” for interstate or foreign commerce when it uses the vessel more than fifty percent of the time for such commerce. *See* Det. No. 01-190R, 22 WTD 244 (2002) (concluding that a yacht used for crewed charters in Alaska and Washington did not qualify for the use tax exemption provided by RCW 82.12.0254 where the owners used the yacht more than fifty percent of the time as their personal residence); *see also* Det. No. 91-323ER, 13 WTD 39 (1993) (finding that vessels failed to qualify for exemption in RCW 82.12.0254, among other reasons, where interstate or foreign commerce did not constitute 51 percent of the vessels’ use). Thus, unless Taxpayer uses the subject vessel fifty percent or more of the time to conduct interstate or foreign commerce, it will owe use tax on its use of the vessel.

IV. Application of the B&O Tax to Taxpayer’s Intended Business Activities

While not specifically at issue, we also provide additional clarification related to the taxability of Taxpayer’s business activities. TI&E ruled that Taxpayer is subject to B&O tax under the tour operator classification under RCW 82.04.260(5). The term “tour operator” is not defined in Chapter 82.04 RCW, but it is defined in Rule 258(3)(a)(i) as follows:

A “tour operator” is a person engaging in the business activity of providing tours directly or through third-party providers including, but not limited to, transportation, lodging, meals and other associated services that are purchased by the customer. The tour operator generally either purchases or provides some or all of the services offered, and is itself liable for paying for any services it purchases.

Both TI&E and Taxpayer agree that Taxpayer is a tour operator subject to B&O tax under this classification. As Rule 258(5) explains, “[p]ersons engaged in business as a . . . tour operator both inside and outside this state may be eligible to apportion gross income reportable under the travel agent/tour operator B&O tax classification.” *See also* RCW 82.04.460(4)(a)(ii) (the definition of “apportionable activities” specifically includes activities taxed under the tour operator B&O tax classification). This means that you may rely on the apportionment provisions contained in RCW

82.04.460 and WAC 458-20-19402 to apportion the income that you earn because you conduct business activities both inside and outside of Washington.

DECISION AND DISPOSITION

Taxpayer's petition is granted.

Dated this 25th day of January 2019.