Cite as Det No. 09-0311, 30 WTD 1 (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. 09-0311
. . .	)	
	)	Registration No. . . .
	)	Document No. . . ./Audit No. . . .
	)	Docket No. . . .
	)	

RULE 183; RCW 82.04.050(3): RETAIL SALES – AMUSEMENT AND RECREATION SERVICES – CHARGES MADE FOR PROVIDING THE OPPORTUNITY TO DANCE. When a nightclub provides a dance floor along with music, it is clearly providing patrons with "the opportunity to dance." Therefore, the cover charge for admission is subject to retail sales tax and retailing B&O 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, A.L.J. – A nightclub appeals an assessment of retail sales tax and retailing business and occupation (B&O) tax on cover charges claiming that the charges were for listening to music as a spectator and not for dancing. . . . We uphold the assessment.[1]

ISSUE

Are the taxpayer's cover charges subject to retail sales tax and retailing B&O tax as "charges made for providing the opportunity to dance" under WAC 458-20-183 (Rule 183)? . . .

[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 Nonprecedential portions of this determination have been deleted.

FINDINGS OF FACT

[Taxpayer] is a nightclub and . . . restaurant in . . . Washington. Starting in 2003, Taxpayer features . . . music presented through local disc jockeys and live bands. Taxpayer also provides [other entertainment options in addition to] dancing and food. Taxpayer's facility . . . includes a bar, tables and chairs, pool tables, a stage, and a small dance floor . . . .

. . . Taxpayer offers . . . dancing on [one weekday], but provides free admission. Taxpayer brings in local . . . bands and/or disc jockeys on [another weekday and] sells tickets for admission to its facility on [that day].

[On weekend days] taxpayer brings in local . . . bands [and] offers free admission to [some] customers. Taxpayer [charges a cover charge and] claims that the cover charge is to help pay for the bands that it attracts to its nightclub. Taxpayer pays service and other activities B&O tax on these cover charges. . . .

Audit audited Taxpayer's records for the period of January 1, 2004, through June 30, 2008 [and] issued an assessment against Taxpayer in the amount of $. . . . This amount included: $. . . in retail sales tax, $. . . in retailing B&O tax, a credit of $. . . in service and other activities B&O tax, $. . . in use tax, a credit of $. . . in litter tax, $. . . in interest, and $. . . in a five percent assessment penalty. Taxpayer appeals this assessment.

In its assessment, Audit reclassified Taxpayer's cover charges from service and other activities B&O tax to retail sales because Taxpayer provides its customers with "an opportunity to dance" as described in Rule 183. Audit explains that reviews of Taxpayer's business show that dancing is a major attraction to its facility.

. . . Reviews of Taxpayer's facility show Taxpayer's facility is attractive for both its music and dancing. . . .

On appeal, Taxpayer [argues that] while some patrons dance at Taxpayer's facility, the focus of Taxpayer's services is to provide a venue where patrons can listen to music . . . .

Taxpayer claims that the focus of its nightclub is listening to music, not dancing, which it believes is de minimus. Taxpayer explains that it provides a small dance area where customers may dance, but most of the facility includes tables and chairs where Taxpayer's customers merely listen to the music. Taxpayer also claims that its uses the cover charge as a means to pay for the live bands to come to its facility. Taxpayer claims that it makes most of its money from selling alcohol to its patrons.

Based on personal observation, one of Taxpayer's owners claims that [the majority of people who go to the nightclub do not dance]. This [claim] has not been independently verified. . . .

ANALYSIS

Washington law imposes a retail sales tax on every "retail sale" in this state. RCW 82.08.020. Washington also imposes its B&O tax "for the act or privilege of engaging in business" in this state. RCW 82.04.220. Washington law imposes separate B&O tax rates on various activities conducted in this state, including on "every person engaging within this state in the business of making sales at retail." RCW 82.04.250.

"Retail sale" is defined in RCW 82.04.050 and includes:

> [T]he 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 the following business activities:
>
> (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) (emphasis added).

The Department promulgated Rule 183 to implement the above statute. Rule 183 defines the term "amusement and recreation services" to include "the provision of related facilities such as basketball courts, tennis courts, handball courts, swimming pools, and *charges made for providing the opportunity to dance*." Rule 183(2)(b) (emphasis added). We note that charges for use of facilities are equivalent to charging to participate in the underlying amusement activity. *See* Det. No. 98-141, 18 WTD 333 (1999); Det. No. 88-247, 6 WTD 105 (1988). . . .

At issue in this case is whether Taxpayer's cover charge is a charge "made for providing the opportunity to dance." Taxpayer argues that the cover charge is for listening to music and the fact that some dancing occurs does not render the cover charge a retail sale. To support its argument, Taxpayer explains that: (1) only [a small portion] of the building is dedicated to dancing, whereas most of the facility includes tables and chairs from which patrons can merely listen to the music; and (2) based on Taxpayer's observation, most of the patrons that come to Taxpayer's establishment do not dance.

We conclude that Taxpayer's cover charge is for "the opportunity to dance" and is, therefore, subject to retail sales tax and retailing B&O tax. Clearly, dancing and listening to music are important draws for Taxpayer's customers. However, the fact that Taxpayer provides a dance floor along with the music clearly shows that it is providing its patrons with "the opportunity to dance." It does not matter if, as Taxpayer claims, most of its customers do not dance. Taxpayer still provides them with the opportunity to do so.

Taxpayer also argues that its cover charges should not be taxed as an amusement activity because Rule 183 contemplates that the primary activity controls the taxability of the cover

charges. Taxpayer relies on Rule 183's definition of "retail sale" to make this argument. That definition provides:

> *. . . The term "sale at retail" or "retail sale" 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*; the sale or charge made for instructional lessons, or league fees and/or entry fees; 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 predominate activities in the area are similar to those found at carnivals*.

Rule 183(2)(m) (emphasis added).

Taxpayer's interpretation of this definition is incorrect. The "predominate activities" language cited above only explains that charges for entry to amusement parks are not "retail sales" when the "predominate activities" at the park are similar to the activities found at a carnival. It does not mean that all amusement related activities are only subject to tax based on the primary, or predominate, activity performed at that location. . . .

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 12th day of November, 2009.