

Cite as Det. No. 13-0371, 34 WTD 70 (2015)

BEFORE THE APPEALS DIVISION
 DEPARTMENT OF REVENUE
 STATE OF WASHINGTON

In the Matter of the Petition for Refund of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
)	No. 13-0371
)	
...)	Registration 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(3): RETAIL SALES TAX – B&O TAX – AMUSEMENT AND RECREATION SERVICES – TANDEM SKYDIVING – FLIGHTS TO HIGHER ELEVATION. A skydiving service’s charges for tandem skydiving packages and flights to higher elevation are subject to retail sales tax and retailing B&O tax because the primary purpose is amusement and recreational activity.

[3] ESTOPPEL – PRIOR AUDIT. The Department is not estopped from asserting tax liability based on an auditor’s failure to discover the taxpayer’s incorrect reporting in an earlier audit.

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.

Margolis, A.L.J. – A seller of skydiving-related products and services (Taxpayer) appeals the reclassification of video sales from the service and other activities business and occupation (B&O) tax classification to the retailing B&O tax classification and the assessment of retail sales tax on these sales. Taxpayer also appeals instructions that it must begin collecting retail sales tax on sales of tandem skydiving packages and flights to higher elevation. We deny the petition.¹

ISSUES

1. Whether, under RCW 82.04.4286, charges for skydiving are preempted under federal law and thus not subject to Washington state tax.

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

2. Whether, under WAC 458-20-183 (Rule 183), Taxpayer's charges for tandem skydiving packages and flights to higher elevation for skydiving are primarily for amusement and recreation services subject to retailing B&O tax and retail sales tax.
3. Is the Department of Revenue (Department) prevented by RCW 82.32A.020(2), or the common law doctrine of equitable estoppel, from reclassifying receipts from video sales and assessing retail sales tax and interest on these sales because the Department failed to notify Taxpayer of its incorrect reporting during a prior audit?

FINDINGS OF FACT

Taxpayer is engaged in the business of skydiving training services, flights to higher elevation for skydivers, sales of videos and photos of customers' skydiving experience, sales of merchandise and equipment, and airplane leasing. On November 1, 2012, the Department's Taxpayer Account Administration Division (TAA) assessed Taxpayer \$. . . . The assessment was comprised of \$. . . in retail sales tax, \$. . . in retailing B&O tax, a credit of \$. . . in service and other activities business B&O tax, and \$. . . in interest. TAA reclassified receipts from sales of photos and videos from the service and other activities B&O tax classification to the retailing B&O tax classification and assessed retail sales tax on these sales. TAA also instructed Taxpayer that, effective October 1, 2012, Taxpayer must collect and remit retail sales tax and report retailing B&O tax on sales of flights to higher elevation and tandem skydiving packages.²

Taxpayer sells two products that introduce customers to skydiving, namely tandem skydives and accelerated free fall (AFF).³ Taxpayer also sells flights to higher elevation to experienced skydivers that cost \$. . . for 13,000 feet and below, \$. . . for 8,000 feet and below, and \$. . . for 4,000 feet and below. [Taxpayer website <http://. . .>] (last accessed November 26, 2013).

Taxpayer provides some level of training to those who purchase any of the above skydiving packages. Taxpayer's instructors are licensed and rated by [an Association] which is a

² TAA did not assess these taxes for the examination period due to prior written instructions. Taxpayer appealed an August 18, 1993, assessment under which Taxpayer's receipts for instructing and transporting skydivers were reclassified from the service and other activities B&O tax classification to the retailing B&O tax classification and assessed retail sales tax. The Department initially found that receipts for jumps by those who hold an A license and were "off student status" were retail because instruction was optional. In Det. No. 94-160, however, we applied former WAC 458-20-183, and remanded the assessment for adjustment. We found that even licensed skydivers receive constant training and instruction, and concluded as follows:

[h]aving examined all the facts we find that, with the exception of charges made for demonstration jumps or jumps made in competitions, the income received from skydivers who hold an A license is subject to the service B&O tax. The income from providing transportation for demonstration or competitive jumps, which has no instructional component, should be considered a participatory recreational activity and the income is subject to the retailing B&O and retail sales tax classifications.

Det No. 94-160, p. 7.

³ Tandem skydives are where two people are under one canopy. Taxpayer's customer is attached to an instructor. AFF is comprised of 7 levels, starting with jumps where 2 instructors exit the aircraft with the customer and assist with the freefall portion of the jump, followed by instruction in turns and forward and backwards movement, and ultimately more advanced maneuvers such as solo exits and front and back loops.

voluntary, non-regulatory organization that provides for the classification of skydivers. *See* <http://www...> (last accessed November 26, 2013). Taxpayer provides training using the [Association's] Program. Students advance through . . . categories of proficiency to qualify them for their . . . license while logging at least 25 jumps. *Id.* at Sections 3 & 4.

Taxpayer's tandem packages include flights to elevation, pre-jump training, and equipment, and vary in price from \$. . . to \$. . . depending on the day of week, elevation (and duration of skydive), and whether the package includes a t-shirt, logbook, or video and photos of the event. [Taxpayer website <http://...>] (last accessed November 26, 2013).

...

Taxpayer provided a copy of its Student Training Manual, which explains that students can start with tandem jumps and then transition to AFF, and outlines the tandem jumps as follows:

Tandem Level 1: First jump Targeted Learning Objectives (TLO's). Student experiences controlled exit and relative wind, learns proper body position for Tandem Freefall. Student is introduced to altitude awareness and will check altitude during the skydive. Student is introduced to complete canopy control and landing, including left-hand pattern, and landing hazards.

Tandem L1 Sequence: You will have a Tandem Instructor (TI) controlled exit to suit the aircraft. TI will direct arm, head and leg positioning for the correct freefall body position after Drogue inflation. Student will check altimeter during freefall and maintain arched body position through canopy deployment. Student is introduced to canopy control verbally and actively with the TI's direction and assistance if required. Student is introduced to Left hand landing pattern, flare and landing procedures. Student receives First Jump Certificate. TI Review of how to do the next jump and Tandem Level 2 TLO's.

Tandem Level 2: Second Jump TLO's
Student experiences controlled exit and relative wind with immediate arch out the door. Student completes three practice touches. Student waves off at 6000 feet and pulls the ripcord by 5000feet. To progress ripcord must be pulled within 500 feet of 5000. Aspects of canopy control are expanded and practiced.

Tandem L2 Sequence: Student experiences controlled exit and relative wind with immediate arch out the door. Freefall body position is practiced with fewer TI cues and corrections. After the Drogue is deployed, the Student will maintain a heading and maintain altitude awareness. Student will perform three practice touches. Upon TI signal, student will do forward motion for a count of 3000. Student will wave off at 6000 feet and pull the ripcord.

Student's canopy control is expanded by performing a Controllability Check, and the terms "Holding", "Running", "Crabbing", "Flaring", will be explained and demonstrated. Canopy flight plan along with etiquette while returning to the landing area and entering the pattern will be explained. Student assists in landing flare on TI's count. Student debrief and logbook & A-license card are completed.

At the hearing, Taxpayer explained that only about 10 percent of its customers continue pursuing the sport of skydiving after making their first jumps and become avid skydivers.

ANALYSIS

RCW 82.04.4286 provides that "there may be deducted from the measure of tax amounts derived from business which the state is prohibited from taxing under the . . . Constitution or laws of the United States." The Anti-Head Tax Act (AHTA), which was codified at 49 U.S.C. Sec. 40116(b), states as follows:

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.

Taxpayer argues that the AHTA preempts Washington from taxing its receipts on grounds that Taxpayer's gross receipts are from "air commerce." 49 U.S.C. Sec. 40102(a)(3) defines "air commerce" 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."

Taxpayer asserts that its receipts are from "air commerce" because it operates within the limits of a Federal airway and its operation of aircraft directly affects or may endanger safety in, foreign or interstate commerce. We addressed this argument in Det. No. 12-0039R, 32 WTD 139 (2013), and found as follows (in pertinent part, footnote excluded):

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. . . . 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.

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.

In accord with 32 WTD 139 (2013), we conclude that Taxpayer’s receipts for skydiving are not preempted by federal law and are subject to Washington excise taxes.

Next, we address whether Taxpayer’s charges for tandem skydives and plane flights to higher elevation are for amusement and recreation services subject to retailing B&O tax and retail sales tax. Persons who charge for services defined as retail sales are required to collect and remit retail sales tax and pay retailing B&O tax. *See* RCW 82.08.020, 82.08.050; RCW 82.04.250. In contrast, persons who charge for services not defined as retail sales, or otherwise classified for B&O tax purposes, pay service and other activities B&O tax on those receipts. *See* RCW 82.04.290. RCW 82.04.050(3) states that the term “retail sale” includes amounts received by persons engaged in the following business activities (in pertinent part): “(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”

WAC 458-20-183 (Rule 183) is the administrative rule that implements RCW 82.04.050(3) for providers of amusement, recreation, and physical fitness services. It reiterates that “amusement and recreation services” are retail sales subject to retail sales tax, and defines the terms as follows:

(b) “Amusement and recreation services” include, but are not limited to: Golf, pool, billiards, skating, bowling, swimming, bungee jumping, ski lifts and tows, basketball, racquet ball, handball, squash, tennis, and all batting cages. “Amusement and recreation services” also 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. The term “amusement and recreation services” does not include instructional lessons to learn a particular activity such as tennis lessons, swimming lessons, or archery lessons.

While skydiving is not specifically listed in RCW 82.04.050(3)(a) or Rule 183, it is comparable to the activities listed and is thus an “amusement and recreation service” subject to retail sales tax. Det. No. 12-0039R, 32 WTD 139 (2013).

The Department recognizes, however, that fees for instruction are not retail. Rule 183(2)(1) defines “physical fitness services” and also offers a distinction between retail services and “instructional lessons”:

“Physical fitness services” include, but are not limited to: All exercise classes, whether aerobic, dance, water, jazzercise, etc., providing running tracks, weight lifting, weight training, use of exercise equipment, such as treadmills, bicycles, stair-masters and rowing machines, and providing personal trainers (i.e., a person who assesses an individual's workout needs and tailors a physical fitness workout program to meet those individual needs). “Physical fitness services” do not include instructional lessons such as those for self-defense, martial arts, yoga, and stress-management. Nor do these services include instructional lessons for activities such as tennis, golf, swimming, etc. “Instructional lessons” can be distinguished from “exercise classes” in that instruction in the activity is the primary focus in the former and exercise is the primary focus in the latter.

Gross receipts from amusement, recreation, and physical fitness services defined to be retail sales are taxable under the retailing classification, and are subject to retail sales tax as are sales of meals, drinks, articles of clothing, or other property sold by persons engaged in providing these activities. Rule 183(3)(a). Instructional lessons are taxable under the service and other activities classification. Rule 183(3)(b).

At one time, the Department considered all income from skydiving or parachuting as retail. On January 31, 1996, the Department cancelled Excise Tax Bulletin 531.04.08.183, which had listed parachuting under the retailing B&O tax classification. We recognize that there may be an instructional component of skydiving.

TAA concluded that Taxpayer's tandem jump packages are amusement and recreation services subject to retail sales tax. Taxpayer disagrees, asserting that these packages are instructional lessons not subject to retail sales tax.

Taxpayer's tandem jump packages appear to have elements of instructional lessons and amusement and recreation services. A tandem jump skydive, by itself, would be an amusement and recreation activity. However, skydiving requires a high level of skill and knowledge that must be developed through continual instruction. *See* [Association website <http:// . . .>] (last accessed November 26, 2013). The [Association] has developed requirements of proficiency and experience for each level of licensing. *Id.*

The Department has considered the correct classification for sales of services that involve both retail services and non-retail instruction. In ETA 3104.2009, the Department explains as follows:

Instructional lessons for activities such as Body Pump and Pilates are generally characterized as teaching the participant how to perform certain activities, generally following a specific curriculum that includes the study of the underlying philosophy of the activity. The purpose of the instruction includes the participant obtaining certification as a physical fitness trainer or group fitness instructor, or mastery of the techniques and philosophy with possible advancement in levels of achievement usually associated with martial arts.

The primary purpose of the activity as instructional or physical fitness is the determining factor, not the label. For example, if techniques associated with a martial art or Body Pump are used in a physical fitness exercise context, the service is subject to retail sales tax. A Pilates "class," for example, may be instructional (subject to the service and other activities B&O tax) if the class is taken by the participants as part of a curriculum to gain certification as instructors. If the class or activity is primarily to improve flexibility, strength, or general fitness for the participant, the charge for participation is a retail sale.

(Underlining added.)

In Det. No. 02-0039, 21 WTD 318 (2002), we considered whether a health club's personal strength program, where members work out with one-on-one instruction from personal trainers during each session, was a physical fitness service or instructional. We explained as follows:

Instructional lessons primarily educate, rather than enhance fitness, strength, or health condition. The taxpayer's members paid and attended the sessions based upon physicians' orders for health purposes. Other members attended the sessions to become physically fit, whether in the form of an increase in strength or to lose weight. We do not find members attended sessions primarily for instruction. They attended to improve their physical fitness. The taxpayer's charges were for "physical fitness services."

Id. at 321. (Emphasis added.)

In Det. No. 07-0113, 26 WTD 250 (2007), we considered whether a movement therapist was providing physical fitness services or instructional lessons. The taxpayer thought of herself as an

educator whose job was not to get people more physically fit, but to teach them how to reach their maximum potential via movement and patterning. We held that the primary purpose of the participant was to improve/maintain general fitness, strength, flexibility, conditioning and/or health, so the primary purpose was physical fitness. *Id.* at 254. We concluded that the taxpayer failed to demonstrate that the activities should be excluded from “physical fitness services,” and noted that any exercise class involves some degree of imparting special knowledge or information, but that does not in itself result in the service being an instructional lesson. *Id.*

Thus, to determine whether Taxpayer’s services are subject to tax as amusement and recreation services or instructional lessons, we employ the same principles. We look to the primary purpose of the activity, and consider factors including whether participants are taught to perform certain activities and follow a specific curriculum that includes the progressive development of skills needed to gain mastery on the sport, and whether the primary reason for attendance is instruction.

Instruction is a component of the activity that Taxpayer provides to persons making their first twenty-five jumps. Taxpayer’s tandem jump customers who transfer to the AFF program follow a specific curriculum that includes the progressive development of skills needed to gain mastery of the sport. However, as Taxpayer explained at the hearing, only about 10 percent of its customers continue learning skydiving after their introduction to the sport. We find that the brief instruction that these tandem jump customers generally receive is not a curriculum that includes the progressive development of skills.

Further, we do not find that the primary reason for attendance is instruction. Taxpayer’s 2-3 hour tandem jump packages are used predominantly for amusement and recreation focused activities. The instructional element of the program is only 10 minutes, and is focused on body positioning and safety procedures. In addition, Taxpayer’s tandem jump package website emphasizes amusement and recreation rather than instruction, recommending tandem jumps for those who seek [. . . the thrill of jumping from an airplane . . .] rather than learning to skydive. [Taxpayer website <http://. . .>] (last accessed November 26, 2013).

Based on weighing the evidence before us, we conclude that the primary purpose of Taxpayer’s tandem jump packages is skydiving, an amusement and recreational activity, rather than instruction, and Taxpayer must collect and remit retail sales tax and remit retailing B&O tax on charges for these packages. We also find that charges for flights to higher elevation are subject to retailing B&O tax and retail sales tax, as Taxpayer has provided no evidence to indicate that these charges are for instruction.

Finally, Taxpayer asserts that in a prior audit by the Department its receipts for video sales were not reclassified and it was not assessed retail sales tax on these sales, so it understood that it was correctly paying service and other B&O tax on these sales and should not be liable for additional tax and associated interest.

Under RCW 82.32A.020(2), a taxpayer has a right to waiver of tax where it relied to its detriment on specific, official written advice or tax reporting instructions. Taxpayer has not identified any prior audit reports or written statements by the Department to Taxpayer where the Department provided instructions, or even addressed, the classification of charges for video sales

and whether such sales are subject to retail sales tax. Therefore, Taxpayer is not entitled to waiver of taxes under RCW 82.32A.020(2).

In addition, Taxpayer has not shown that it is eligible for waiver of tax under the doctrine of equitable estoppel, based on a prior statement or act of the Department upon which it relied to its detriment, a showing that is necessary to invoke the doctrine. *Kramarevcky v. Dep't of Social & Health Serv.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993). Where a taxpayer's improper reporting was overlooked, the Department is not barred from asserting a tax liability because an auditor failed to find an error during an earlier audit. *Dep't of Revenue v. Martin Air Conditioning*, 35 Wn. App. 678, 688, 668 P.2d 1286 (1983); *Kitsap-Mason Dairymen's Assoc. v. Tax Commission*, 77 Wn.2d 812, 818, 467 P.2d 316-317 (1970); Det. No. 93-191, 13 WTD 344 (1994); Det. No. 91-059, 10 WTD 413 (1990). Thus, Taxpayer's assertion that its charges for videos were not reclassified and made subject to retail sales tax in a prior audit is insufficient to establish equitable estoppel. Based on the foregoing analysis, the Department correctly reclassified the taxpayer's activities and assessed retail sales tax on these activities.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 27th day of November 2013.