

Cite as Det. No. 19-0085, 40 WTD 188 (2021)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS 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. 19-0085
)	
... )	Registration No. ...
)	

[1] RCW 82.04.050; WAC 458-20-183: RETAILING B&O TAX AND RETAIL SALES TAX – HUNTING GUIDE SERVICES. Taxpayer’s hunting guide services did not involve a specific curriculum, lead to a certification, or result in knowledge in a specialized field of study. Rather, the primary purpose of the guide services and associated activities is for amusement and recreation. Therefore, under the version of RCW 82.04.050 and WAC 458-20-183 in effect in 2014 and 2015, Taxpayer’s services constituted a retail activity.

[2] RCW 82.32.105; RCW 82.32A.030; WAC 458-20-228: TAXPAYER’S DUTY TO KNOW THEIR TAX REPORTING OBLIGATIONS. Taxpayer’s alleged lack of knowledge of its tax liability is not a valid basis for a penalty waiver. Taxpayer had a statutory duty to know its reporting obligations.

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.

Farquhar, T.R.O. – A Washington hunting guide protests the Department’s assessment of retail sales tax and penalties on the grounds that hunting guide services were not subject to retail sales tax until January 1, 2016, and, regardless, the guide was unaware that it was required to collect sales tax. We find that hunting guide services were indeed subject to retail sales tax throughout the audit period and the guide’s lack of knowledge regarding its tax liability is not a valid basis for a penalty waiver. Petition denied.<sup>1</sup>

ISSUES

1. Whether hunting guide services were subject to retail sales tax under RCW 82.08.020 and RCW 82.04.050 prior to January 1, 2016.
2. Whether Taxpayer is entitled to a penalty waiver under RCW 82.32.105 and WAC 458-20-228 due to a lack of understanding regarding its tax liability.

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

## FINDINGS OF FACT

(“Taxpayer”) is a Washington hunting guide. Taxpayer registered its business with the state of Washington in 2010. Between 2014 and 2016, Taxpayer offered guided big-game hunting excursions in Washington and [out-of-state].

In April of 2018, the Department’s Audit Division (“Audit”) began a review of Taxpayer’s books and records for the period of January 1, 2014, through December 31, 2016 (“the Audit Period”). Audit found that Taxpayer did not report any income or file tax returns during the Audit Period. Audit reviewed Taxpayer’s federal income tax returns, profits and loss statements, and bank records and determined that Taxpayer’s gross receipts in Washington during the Audit Period totaled \$ . . . .<sup>2</sup> Audit assessed business and occupation (“B&O”) tax and retail sales tax on the unreported amounts and, on September 24, 2018, issued an assessment in the amount of \$ . . . (“the Assessment”). The Assessment is comprised of \$ . . . in taxes (as detailed in the table below), a \$ . . . assessment penalty, \$ . . . in delinquent penalties, and \$ . . . in interest.

<b>Tax Year</b>	<b>B&amp;O Tax</b>	<b>Retail Sales Tax</b>	<b>Small Business Credit</b>	<b>Total</b>
2014	\$ . . .	\$ . . .	(\$ . . .)	\$ . . .
2015	\$ . . .	\$ . . .	(\$ . . .)	\$ . . .
2016	\$ . . .	\$ . . .	(\$ . . .)	\$ . . .
			<b>Total</b>	<b>\$ . . .</b>

On October 15, 2018, Taxpayer submitted a timely petition for review. Taxpayer protests the \$ . . . in retail sales tax assessed on its services in 2014 and 2015, as well as the “late penalty,” which we understand includes the full amounts of both the assessment and delinquent penalties. *See* Taxpayer’s October 15, 2018 Review Petition Letter (“the October Letter”). Taxpayer does not protest the taxes assessed in 2016. Taxpayer argues that its services in 2014 and 2015 were not subject to retail sales tax because the “effective date of the taxes-amusement, recreation, and physical fitness services was not ratified into law until 1/1/2016.” *Id.* Taxpayer also argues that it “was unaware that [it] was required to collect sales tax as a hunting guide” and that it “did not have professional accounting guidance and did not realize [it] needed to file a Washington excise return.” *Id.*

On January 21, 2019, Taxpayer submitted an additional letter in support of its petition (“the January Letter”). In the January Letter, Taxpayer states that it “requested a letter ruling to determine the tax classification of hunting excursions.” *See* the January Letter. Taxpayer asserts that the ruling held that “the retailing classification [for hunting guide services] began January 1 of 2016.” *Id.* Taxpayer attached a copy of the letter ruling, which shows that on May 4, 2017, Taxpayer made the following request to the Department: “[Taxpayer] provides big-game hunting excursion (sic) in Washington and Idaho. We would like a ruling on whether they should be classified as retailing B&O tax/retail sales tax or other services.” On May 15, 2017, the Department’s responded with the following:

<sup>2</sup> Taxpayer earned \$ . . . in 2014, \$ . . . in 2015, and \$ . . . in 2016. Taxpayer also earned \$ . . . in 2016 that was attributed to [out-of-state] and included in the Assessment.

Beginning January 1, 2016, charges for guided hunting is (sic) subject [to] business and occupation (B&O) tax under the *retailing* classification and retail sales tax must be collected from your customers, when the hunting occurs in Washington.

See our web page [Recreation Services at a Glance](#) for a list of all the activities that are considered retail sales effective January 1, 2016. Also, see our online [Guided Hunting and Fishing Trips](#) guide.

(Emphasis in original.)

## ANALYSIS

### 1. Taxability of Hunting Guide Services

Generally, retail sales tax is imposed upon all retail sales in Washington. RCW 82.08.020. When a seller makes a retail sale, it is obligated to collect retail sales tax and remit the funds to the state. RCW 82.08.050(1). If the seller fails to collect the tax or, having collected the tax, fails to remit it to the Department, the seller is liable to the state for the amount of the tax, regardless of “whether such failure is the result of the seller’s own acts or the result of acts or conditions beyond the seller’s control[.]” RCW 82.08.050(3).

The types of services subject to retail sales tax are described in RCW 82.04.050. RCW 82.04.050 has been amended a number of times since its inception but, between 1961 and 2015, it contained language substantially similar to the following:<sup>3</sup>

The term “sale at retail” or “retail sale” includes the sale of or charge made for personal, business, or professional services including amounts . . . received by persons engaging in the following business activities:

(a)(i) 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.

Former RCW 82.04.050(3), *amended by* Laws of 2015, ch. 169, § 1.

WAC 458-20-183 is the Department’s Rule that interprets and applies RCW 82.04.050 to a number of services and activities. The version of WAC 458-20-183 (“Rule 183”) in effect in 2014 and 2015 defined “amusement and recreation services” 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

<sup>3</sup> Historical versions of RCW 82.04.050 are available at: <https://app.leg.wa.gov/RCW/default.aspx?cite=82.04.050> and [http://leg.wa.gov/CodeReviser/Pages/session\\_laws.aspx](http://leg.wa.gov/CodeReviser/Pages/session_laws.aspx).

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.*

...

(m) “Sale at retail” or “retail sale” include the sale or charge made by persons engaged in providing “amusement and recreation services” and “physical fitness services” as those terms are defined in (b) and (l) of this subsection. *The term “sale at retail” or “retail sale” does not include . . . the sale of or charge made for instructional lessons, . . .*

Former WAC 458-20-183(2) (emphasis added).

Thus, under those versions of RCW 82.04.050 and Rule 183, an analysis of whether recreational services were subject to retail sales tax depended largely on whether the activity was for “amusement and recreation” or “instruction.” In Det. No. 13-0217, 33 WTD 130 (2014), we specifically addressed whether guided hunting services constitute “amusement and recreation” under that framework. In that case, the taxpayer charged customers a daily fee for duck and goose hunting on the taxpayer’s property. *Id.*, at 131. The charges included guide services, the provision of blinds and decoys, instructions on the hunt, safety instructions, and the opportunity to hunt. *Id.* The taxpayer in that case argued that its services amounted to “instruction” because the purpose of the guide’s services was to teach hunters how to hunt ducks and geese. *Id.*, at 132. However, we found that:

Daily charges customers pay Taxpayer for hunting water fowl do not involve a specific curriculum, lead to a certification, or result in knowledge in a specialized field of study. Rather, the primary purpose of the guide services and associated activities that taxpayers charge their customers for are for amusement and recreation services (i.e., the sport of hunting water fowl), and are therefore subject to retail sales tax.

*Id.*, at 136.

Effective January 1, 2016, the legislature amended RCW 82.04.050 through House Bill 1550 (“HB 1550”). The legislature’s stated goal in amending RCW 82.04.050 was “simplifying the taxation of amusement, recreation, and physical fitness services.” H.B. 1550, 64<sup>th</sup> Leg., Reg. Sess. (Wa. 2015). The amendment removed the language from RCW 82.04.050(3) quoted above and, instead, added a number of specific activities that were subject to retail sales tax. The portion of the current statute relevant to the case at hand reads as follows:

(a) The term “sale at retail” or “retail sale” includes amounts charged, however labeled, to consumers to engage in any of the activities listed in this subsection (15)(a), including the furnishing of any associated equipment or, except as otherwise provided in this subsection, providing instruction in such activities,

where such charges are not otherwise defined as a “sale at retail” or “retail sale” in this section:

...

(xii) Guided hunting and hunting at game farms and shooting preserves, except that hunting contests and license fees imposed by a government entity are not a retail sale under this subsection;

RCW 82.04.050(15)(a).

In response, the Department also amended Rule 183. The language from the former Rule 183 quoted above was removed and, similar to the revisions to RCW 82.04.050, a list of specific “retail recreational services and activities” was added in its place. Under Rule 183’s current form, gross income received from “guided hunting and hunting at game farms and shooting preserves” is subject to retailing B&O tax and retail sales tax. WAC 458-20-183(6)(i).

Here, Taxpayer argues that its services were not subject to retail sales tax under the 2014 and 2015 version of RCW 82.04.050. This argument directly conflicts with our holding in 33 WTD 130 and none of Taxpayer’s arguments serve to distinguish its circumstances from that case. Taxpayer provided guided hunting services, which, based on the evidence before us, did not include any instructional activities as defined by the version of Rule 183 in effect at the time. Thus, we find that Taxpayer’s services are indeed subject to retail sales tax throughout the entirety of the Audit Period. While Taxpayer may believe that its services constitute “instruction,” unless Taxpayer can show that its services involved “specific curriculum, [led] to a certification, or [resulted] in knowledge in a specialized field of study,” it will not prevail. 33 WTD, at 136.

Taxpayer also argues that the letter ruling supports its position. It appears to argue that by stating that guided hunting services are subject to retailing B&O and retail sales tax “beginning” on January 1, 2016, the ruling implies that such services were not subject to said taxes prior to that date. We disagree. The letter ruling merely states the current version of the law. Taxpayer did not specify in its request that it was seeking advice for the 2014 and 2015 tax years. Had it done so, the letter ruling would have addressed the law as it appeared during that timeframe and, presumably, included an analysis of the “amusement and recreation” versus “instruction” criteria discussed above. Given that Taxpayer did not specify that it was seeking advice for 2014 and 2015, it is not surprising that such an analysis, which is unnecessary under the current version of the law, was not included.<sup>4</sup>

Therefore, because Taxpayer’s services constituted “amusement and recreation” during the 2014 and 2015 tax years, we deny the portion of Taxpayer’s petition regarding the assessment of retail sales tax. Taxpayer failed to collect retail sales tax on taxable sales and, pursuant to RCW 82.08.050(3), is now liable for the tax that it should have collected. Having determined that the Department properly assessed the taxes, we now turn to Taxpayer’s request for a penalty waiver.

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<sup>4</sup> Taxpayer does not argue that it is entitled to rely on the letter ruling as a basis for relief, nor could he. An after-the-fact letter ruling cannot serve as a basis for relief under the taxpayer rights and responsibilities act because a taxpayer could not have possibly relied upon it. *See* RCW 82.32A.020(2).

## 2. Penalty Waiver

The Department has limited authority to waive or cancel penalties. RCW 82.32.105. The Department can cancel a delinquent payment penalty or an assessment penalty if the penalty was the result of “circumstances beyond the control of the taxpayer[.]” RCW 82.32.105(1). WAC 458-20-228 (Rule 228) explains that “[c]ircumstances beyond the control of the taxpayer are generally those which are immediate, unexpected, or in the nature of an emergency. Such circumstances result in the taxpayer not having reasonable time or opportunity to obtain an extension of the due date or otherwise timely file and pay.” Rule 228(9)(a)(ii). The circumstances must directly cause the late payment or substantial underpayment. Rule 228(9)(a)(i).

Rule 228(9)(a)(ii) lists examples of circumstances that are beyond a taxpayer’s control sufficient to cancel penalties:

- Erroneous written information from the Department;
- An act of fraud or conversion by the taxpayer’s employee or contract helper which the taxpayer could not immediately detect or prevent;
- Emergency circumstances around the time of the due date, such as the death or serious illness of the taxpayer or a family member or accountant; or
- Destruction of the business or records by fire or other casualty.

Rule 228(9)(a)(iii) also lists examples of situations that are generally *not* beyond the control of a taxpayer:

- Financial hardship;
- A misunderstanding or lack of knowledge of a tax liability; or
- Mistakes or misconduct on the part of employees or other persons contracted with the taxpayer.

Washington’s tax system places the burden of becoming informed about tax liability upon the taxpayer and it is the taxpayer who bears the consequences of a failure to be correctly informed. Det. No. 01-165R, 22 WTD 11 (2003). Taxpayers are responsible for knowing their tax reporting obligations and, if they are uncertain about their obligations, they must seek instruction from the Department. RCW 82.32A.030(2); *see also* Det. No. 01-165R, 22 WTD 11 (2003).

Here, Taxpayer argues that it was “unaware that it was required to collect sales tax as a hunting guide” and that it “did not have profession accounting guidance” during the Audit Period. Neither of those arguments provide a valid basis for a penalty waiver. Indeed, Rule 228 specifically lists a “misunderstanding or lack of knowledge of a tax liability” as a situation that is *not* considered to be beyond the control of the taxpayer. Taxpayer’s knowledge – or lack thereof – of its responsibilities under Washington’s tax laws is directly within its control. If it was uncertain about its obligations, it was its responsibility to contact the Department for guidance or otherwise seek assistance. Therefore, because Taxpayer has not presented any evidence that its failure to timely pay its tax liabilities was due to a circumstance beyond its control, we cannot grant a penalty waiver under RCW 82.32.105(1) or Rule 228.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 20th day of March 2019.