

Cite as Det. No. 20-0051, 41 WTD 42 (2022)

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. 20-0051
)	
...)	Registration No. . . .
)	

[1] RCW 82.04.260(5); WAC 458-20-258(3)(a): BUSINESS & OCCUPATION TAX – TOUR OPERATOR CLASSIFICATION. A cruise operator providing overnight ocean cruises, including transportation, lodging, and meals, qualifies as a tour operator and its income from such activities is generally subject to business & occupation tax under the tour operator classification.

[2] RCW 82.04.050(15)(A)(viii); RCW 82.08.020; WAC 458-20-258(3)(b): RETAIL SALES TAX – DAY TRIPS FOR SIGHTSEEING PURPOSES. Sales of day trips lasting less than 24 hours for sightseeing purposes are retail sales subject to business & occupation tax under the retailing classification and retail sales tax. An overnight ocean cruise operator that also sells day trips for sightseeing purposes to cruise passengers as an excursion option is making retail sales.

[3] RCW 82.04.050(14); RCW 82.04.060(3); RCW 82.04.470(1); WAC 458-20-102(6): BUSINESS & OCCUPATION TAX – WHOLESALE SALE OF A SERVICE. The sale of a retailing service for later resale by the buyer is considered a wholesale sale so long as the parties can substantiate its wholesale nature. A cruise operator may purchase day trips for sightseeing purposes from a third party at wholesale to later resell to cruise passengers as retail sales.

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.

McBryde, T.R.O. – A cruise line offering cruises to [out of state] from Washington disputes the Department’s assessment of retail sales tax for certain optional tours [. . .] lasting less than 24 hours that it provided to its customers. [The cruise line asserts] that it is a tour operator and that all of its gross income, including the revenue received from the tours at issue, is subject to a preferential tax rate and not retail sales subject to retail sales tax. We deny the petition.¹

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

ISSUES

1. Is a cruise line conducting cruises to [out of state] from Washington and providing excursion tours in Washington operating as a tour operator and thus subject to business and occupation (B&O) tax under RCW 82.04.260(5) [on at least a portion of its income]?
2. Are the sales of optional [. . .] excursion tours by a cruise line to its customers part of its activities as a tour operator and taxable under the travel agent/tour operator B&O tax classification under RCW 82.04.260(5), or were they separate “day trips for sightseeing purposes” subject to retail sales tax under RCW 82.32.050?
3. Are the purchases of [. . .] excursion tours by a cruise line for resale to customers eligible wholesale sale purchases under RCW 82.04.470 and not subject to retail sales tax?

FINDINGS OF FACT

. . . (Taxpayer), is a cruise line that transports passengers . . . from port to port. As part of its business, Taxpayer conducts cruises between [out of state] and Washington, originating and concluding in [Washington]. In addition to its primary business activity of transporting passengers, Taxpayer offers other amenities to its customers to provide a more enjoyable experience, including providing local excursion tours. One such excursion tour Taxpayer offers to its customers is a bus tour of [Washington] (Tours) that it purchases from [another] company . . . [(Company)]. Taxpayer then resells the Tours to its customers. The Tours are optional and are charged separately from the cruise packages to [out of state] that Taxpayer sells to its customers. The Tours are approximately three and a half hours in duration.

Beginning in 2017 and finishing in 2018, the Department’s Audit Division (Audit) conducted an audit of Taxpayer’s business activities for the period of January 1, 2014, through December 31, 2017. During the course of the audit, Audit discovered that Taxpayer did not report the revenue it received from selling the Tours. Specifically, Audit determined that the Tours were “day trips for sightseeing purposes” under WAC 458-20-258 (Rule 258) and were subject to retail sales tax under RCW 82.04.050(15)(a)(viii) and RCW 82.08.020.

On December 14, 2018, the Department issued . . . a notice of audit balance due (Assessment) to Taxpayer for the periods covered by the audit. The Assessment included \$. . . in assessed taxes, \$. . . in delinquent penalty, and \$. . . in interest, for a total of \$. . . due January 16, 2019. In a letter dated January 8, 2019, . . . the Department extended the due date for the Assessment to February 15, 2019.

On February 15, 2019, Taxpayer submitted its petition for administrative review of the Assessment. In the petition, Taxpayer disputed Audit’s determination that its Tours were “day trips for sightseeing purposes” subject to retail sales tax. Taxpayer conceded that its primary business activity is that of transporting passengers from port to port. However, Taxpayer claimed that it “secondarily performs tour operator functions, making local tours available for purchase by its passengers,” including the Tours. Petition, Review Petition Supplement at 1. Taxpayer asserted that when it provides the Tours to its customers, it is acting as a tour operator as defined under

Rule 258(3). Taxpayer further asserted that the income it received from its Tours was included as part of the gross income it derived from its tour operator activities and subject to the B&O tax rate applicable to tour operators under RCW 82.04.260(5). Taxpayer also argued that, even if the day trips for sightseeing purposes were a separate activity, as a tour operator selling only services related to its business as a tour operator, all of the income it received should be included under the single B&O tax classification for travel agents/tour operators under RCW 82.04.260(5).

Taxpayer also disputed the Department's interpretation that day trips for sightseeing purposes are retail activities always subject to the retail sales tax. Taxpayer posited that WAC 458-20-183(6)(e), which designates day trips for sightseeing as being subject to retail sales tax, implies that there may be circumstances in which the sale of a day trip for sightseeing purposes may not be subject to retail sales tax because it includes a reference to Rule 258. Taxpayer asserted that the Department should interpret Rule 258(3)(a)(ii) as applying to sales of day trips for sightseeing purposes by sellers other than travel agents or tour operators. In support of its assertion, Taxpayer cited to the legislative history of RCW 82.04.050, quoting from the final bill report from 1996, as follows:

Summary: Guided tours and guided charters are removed from the definition of retail sale and are replaced with day trips for sightseeing purposes. Wholesales of day trips and other amusement and recreation services, such as golf, pool, billiards, skating, bowling, and ski lifts, are exempted from sales tax.

Final Bill Report, SHB 2590, p.2. Taxpayer argued that the legislative intent behind the use of the term "day trips for sightseeing purposes" was to "allow the travel agents and tour operators (1) to buy day trips at wholesale and (2) to resell the same without collecting sales tax." Petition, Review Petition Supplement at 4. Taxpayer asserted that as a tour operator, its purchase and resale of the tours to its customers was legislatively intended to be exempt from retail sales tax.

A review of the Department's records indicates that Taxpayer previously obtained a Reseller Permit on January 1, 2010, which expired on December 31, 2013. Taxpayer did not obtain another Reseller Permit until February 24, 2018.

Taxpayer also asserted that the Department's use of the term "day trips for sightseeing purposes" is ambiguous as a result of the "inadequate confluence of the rules and the lack of direction in the statute." Petition, Review Petition Supplement at 5. Taxpayer argued that the definition of a tour operator's activities under Rule 258(a)(i) is broad and includes tours that are for less than twenty-four hours, asserting that there is nothing in the rule that excludes day trips for sightseeing purposes from inclusion in the definition of tour operator. Taxpayer contended that the term "tour operator" is clear on its face and that all of the income received for tour operator activities is taxed under the travel agent/tour operator B&O tax classification. Taxpayer claimed that the ambiguity exists because under Rule 258 and WAC 458-20-183 (Rule 183),^[2] the sale of day trips for sightseeing

² [The Department amended Rule 183 on May 23, 2018, to include the definition of "day trips for sightseeing purposes." Prior to this date, Rule 183 did not define "day trips for sightseeing purposes." However, the current version of Rule 183 reflects the Department's long-standing interpretive and policy position regarding such activities, in accordance with RCW 34.05.230(1). Therefore, we refer to the current version of Rule 183 when interpreting

purposes is taxed as a retail sale. Taxpayer argued that the Department should construe RCW 82.04.260(5) in its favor and determine that its Tours should be included in its gross income received from tour operator activities, taxed under the travel agent/tour operator B&O tax classification, and exempt from retail sales tax.

ANALYSIS

1. Taxpayer is a tour operator, and the gross income it receives from its tour operator activities is subject to the travel agent/tour operator B&O tax classification.

Persons engaged in any business activity, other than or in addition to those for which a specific rate is provided in Chapter 82.04 RCW, are taxable under the Service & Other Activities B&O Tax Classification. RCW 82.04.290(2). The tax is imposed on the gross income of the business at the rate of 1.5 percent. *Id.* However, RCW 82.04.260(5) provides a lower B&O tax rate of 0.275 percent for “every person engaging within this state in the business of acting as a travel agent or tour operator”

RCW 82.04.260(5) does not define the term “tour operator.” However, the term is defined by Rule 258, which addresses the activities of travel agents and tour operators. Rule 258 defines the term “tour operator” 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.

Rule 258(3)(a)(i). Here, Taxpayer provides cruises to [out of state], including transportation, lodging, and other associated services to its customers. . . . Thus, Taxpayer is operating as a tour operator as defined under Rule 258. Taxpayer also separately sells its Tours to its customers, providing sightseeing tours by bus. Taxpayer’s tour operator activities are subject to the travel agent/tour operator preferential B&O tax classification, unless specifically excluded from the preferential classification. [The question is whether the Tours it sells fall under a different classification.]

2. Taxpayer’s Tours are “day trips for sightseeing purposes” subject to retail sales tax and not taxable under the travel agent/tour operator B&O tax classification.

All persons making retail sales in Washington are taxable under the retailing B&O tax classification. RCW 82.04.250. Additionally, Washington imposes retail sales tax on all retail sales made in this state. RCW 82.08.020.

“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 . . . (viii) Day trips for

Taxpayer’s activities during the audit period at issue. *See Ass’n. of Wash. Businesses v. Dep’t. of Revenue*, 155 Wn.2d 430, 447, 120 P.3d 46, 54 (2005).]

sightseeing purposes; . . .” RCW 82.04.050(15)(a)(viii) (emphasis added). Under RCW 82.04.050 and RCW 82.08.020, any sales of day trips for sightseeing purposes are retail sales, and [such] amounts charged to the purchaser, however labeled, are subject to the retailing B&O tax classification and retail sales tax.

Rule 258 is the Department’s administrative rule for travel agents and tour operators. The gross income received by a taxpayer from its tour operator activity is generally subject to the travel agent/tour operator B&O tax classification. Rule 258(3)(b). However, Rule 258 specifically designates “day trips for sightseeing purposes” as a separate and distinct business activity that is subject to the retailing B&O tax classification and retail sales tax. Rule 258(3)(a)(ii). Rule 258 defines “day trips for sightseeing purposes” as “providing directly or through third-party providers, sight-seeing tours lasting less than twenty-four hours to consumers.” *Id.* Rule 258 also states that day trips for sightseeing purposes are taxable as “amusement and recreation services,” explained in more detail in Rule 183.

Rule 183 [explains] that “sightseeing trips . . . that last less than twenty-four hours” are subject to retailing B&O tax classification and retail sales tax. Rule 183(6)(e). Rule 183 contains the additional instruction, “For information on multiday sightseeing tours, refer to WAC 458-20-258 Travel agents and tour operators.” *Id.*

The Department recently repeated that day trips for sightseeing purposes are “retail sale[s] of services under RCW 82.04.050(15)(a)(viii). This means that providers of these trips to consumers are required to collect and remit retail sales tax, and are subject to the retailing B&O tax on their gross charges.” Excise Tax Advisory Number 3212.2019. To summarize these authorities, the Department has distinguished between tour operator activities, comprising multiday tours and trips, and retailing activities of providing day trips for sightseeing purposes.

Taxpayer does not dispute that its Tours are sightseeing tours and last less than twenty-four hours. However, Taxpayer contends that its sales of the Tours are encompassed as part of its overall activities as a tour operator and should be included in its gross income subject to the travel agent/tour operator B&O tax classification and not subject to the retailing B&O tax classification and retail sales tax. Additionally, Taxpayer contends that the legislative history behind the statutory use of the term “day trips for sightseeing purposes” infers a legislative intent to exempt from retail sales tax a tour operator’s purchase and resale of such day trips. Taxpayer’s contentions do not align with the plain language of the relevant statutes.

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)).

Here, the plain language and ordinary meaning of RCW 82.04.050, RCW 82.08.020, and RCW 82.04.260 clearly and unambiguously establish the legislature’s intent to: 1) classify “day trips for sightseeing purposes” as retail sales, subject to the retailing B&O tax classification and retail sales tax; and 2) establish a uniform tax rate for travel agents and tour operators. In Det. No. 98-060, 17 WTD 202 (1998), we reiterated that “[w]here the plain language of the statute is clear and unambiguous, there is no room for reference to legislative history.” Citing *WA Fed. of State Employees v. State Personnel Bd.*, 54 Wn. App. 305, 311, 773 P.2d 421 (1989).

Taxpayer does not contend that any ambiguity exists in the language of the relevant statutes, but asserts that “[t]he inadequate confluence of the rules and the lack of direction in the statute[s] . . . create ambiguity.” Petition, Review Petition Supplement at 5. Taxpayer’s assertion is misguided.

Taxpayer asserts that the definition of a tour operator’s activities under Rule 258(3)(a)(i) is broad and that there is nothing in the rule that excludes tours lasting less than twenty-four hours from being included. However, Rule 258(3)(a)(ii) expressly defines day trips for sightseeing purposes as a separate and distinct business activity, which is statutorily defined as a retail sale. Rule 258 clearly distinguishes between the retail sale of day trips for sightseeing purposes by a tour operator and the other business activities of a tour operator subject to the travel agent/tour operator B&O tax classification, which aligns with the statutory distinction between the two [activities]. Taxpayer’s sales of its Tours to its customers are retail sales subject to the retailing B&O tax classification and retail sales tax, and are separate and distinct from its other business activities as a tour operator, which are subject to the travel agent/tour operator B&O tax classification.³

3. Taxpayer’s purchases of the Tours for resale were eligible wholesale purchases later resold at retail.

Retail sales tax is an excise tax levied on each retail sale in this state, to be paid by the buyer to the seller. RCW 82.08.020; RCW 82.08.050. However, the sale of a retailing service for later resale by the buyer is considered a wholesale sale so long as the parties can substantiate its wholesale nature. RCW 82.04.050(14); RCW 82.04.060(3); RCW 82.04.470(1); WAC 458-20-102(6). If a buyer cannot substantiate the wholesale nature of a purchase, then the buyer owes deferred sales or use tax, equal in amount to the retail sales tax, on the use of items where the retail sales tax has not been paid. RCW 82.12.020; WAC 458-20-102.

Here, Taxpayer purchased the Tours from [Company] for resale, and then resold the tours to its customers. Thus, Taxpayer’s purchases of the Tours from [Company] were wholesale purchases, and Taxpayer was not required to pay retail sales tax on its purchases. However, [Taxpayer’s purchases from Company are not at issue, but rather Taxpayer’s subsequent resale of the Tours is at issue.] As we explained above, Taxpayer’s subsequent sales of the Tours to its customers were sales of day trips for sightseeing purposes to consumers (i.e., Taxpayer’s customers) and were retail sales subject to the retailing B&O tax classification and retail sales tax. Accordingly, Audit assessed both retailing B&O and retail sales tax on those sales of day trips, and Taxpayer does not owe any deferred retail sales tax or use tax on its purchases of the Tours.

³ [. . .]

Taxpayer contends that the legislative history behind the statutory use of the term “day trips for sightseeing purposes” infers a legislative intent to exempt from retail sales tax a tour operator’s purchase and resale of such day trips. However, as explained above, because the plain language of RCW 82.04.050, RCW 82.08.020, and RCW 82.04.260 is unambiguous, we decline to look beyond that language. Under the plain language of the statutes, there is no unique exemption, either express or inferred, from retail sales tax for a tour operator’s resale of day trips for sightseeing purposes. Taxpayer’s purchase of day trips for sightseeing purposes from [Company], like any other [wholesaling] activity, is eligible for wholesale treatment provided it meets the criteria for a wholesale sale as described above. However, Taxpayer’s sales of those day trips to its customers are retail sales and remain retail sales because Taxpayer’s customers do not resell those trips to third parties, but are the final consumers of those services.

DECISION AND DISPOSITION

Taxpayer’s petition is denied.

Dated this 12th day of February 2020.