

Cite as Det. No. 88-310A, 10 WTD 270 (1990)

BEFORE THE DIRECTOR
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the)	<u>F I N A L</u>
Petition for Refund of)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 88-310A ¹
)	
...)	Registration No. ...
)	Tax Assessment Nos. ... &
)	...
)	

- [1] **RULE 100 AND RCW 82.32.160:** DEPARTMENTAL HEARINGS -- SCOPE OF REVIEW -- AUTHORITY OF ADMINISTRATIVE LAW JUDGE. Rules of evidence and strict judicial protocol are neither present nor proper in a review conducted pursuant to RCW 82.32.160.
- [2] **RULE 100, RCW 82.32.160 AND RCW 34.04.010:** CONTESTED CASE HEARINGS. Tax appeal hearings are governed by RCW 82.32.160 and are not contested cases per RCW 82.34.010.
- [3] **RULE 224, RCW 82.04.260 AND RCW 82.04.290:** SERVICE B&O TAX -- TRAVEL AGENT COMMISSIONS -- TOUR OPERATORS -- TOUR PACKAGES. Travel agents and tour operators provide identifiably different services for their clients/customers and are consequently liable for different business taxes.

SINCE THE ISSUANCE OF THIS DETERMINATION, THE DEPARTMENT HAS RESOLVED THE TAX CLASSIFICATION BY PROMULGATION OF WAC 458-20-258, ATTACHED. RULE 258 NOW DESCRIBES THE CORRECT TAX CLASSIFICATION FOR SUCH ACTIVITIES.

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.

¹ The original determination, Det. No. 88-310, is published at 6 WTD 273 (1988).

NATURE OF ACTION:

Taxpayer petitions from Determination 88-310, assigning error to the Administrative Law Judge in the findings and procedural acts followed in arriving at the findings.

FACTS AND ISSUES:

Fujita, A.D. - Taxpayer is engaged in business as a tour operator and travel agent. Determination 88-310 held that taxpayer is liable for Service and Other Business and Occupation tax on receipts for packaged tours, less amounts paid over to third party service providers. Determination 88-310 also held taxpayer to be liable for B&O tax under the Travel Agent classification for commissions received from various third party service providers.

TAXPAYER EXCEPTIONS:

The taxpayer charges that the Administrative Law Judge exceeded the scope of his authority in directing that future reporting be accomplished under a classification other than that at issue in the original appeal.

The taxpayer charges the Administrative Law Judge with failure to comply with the basic tenets of due process and thus failing to achieve a just and lawful result.

The taxpayer contends, citing prior rulings of the Department of Revenue, that all its taxable income is properly reported under the Travel Agent classification.

DISCUSSION:

[1] With respect to the taxpayer's "scope of authority" argument, we find that the rules of evidence and strict judicial protocol are neither present nor appropriate in the Department's hearing procedure. That procedure provides an administrative review to confirm the proper identification of tax liability. The courts have allowed the agency great latitude in determining its duty to administer the laws. State ex rel. Country Club v. Dept. of Public Service, 198 Wash. 37, 86 P.2d 1104 (1939). Further, speaking to the actions of administrative and regulatory bodies, the court, in State Ex Rel Northern Pacific Railway Co. et. al. v. Public Service Commission, 95 Wash. 376, 163 P. 1143 (1917) said:

[the agency] is not bound, as is a court, to acquire its information concerning all matters involved in the proceeding before it wholly and entirely from the evidence of witnesses or other evidence produced before it, but may take into consideration the results of its general investigations, general information upon a given subject within its powers, and all matters which affect the matter. . .

We reject the taxpayer's position that the Administrative Law Judge exceeded his authority.

[2] RCW 34.04.020 reads in pertinent part:

contested case means a proceeding before an agency in which an opportunity for a hearing before such agency is required by law or constitutional right prior or subsequent to the determination by the agency of the legal rights, duties, or privileges of specific parties.

The procedure under which excise tax appeal hearings are conducted is governed by RCW 82.32.160 which allows the Department to conduct conferences. The review the taxpayer received was granted as a matter of Departmental discretion. The statute is designed in a way that allows the taxpayer to obtain a contested case review by appealing to the Board of Tax Appeals under the provisions of RCW 82.03.

We reject the taxpayer's position that the taxpayer is entitled to a contested case hearing under RCW 34.04.010.

[3] The next question raised is whether the taxpayer should be classified as a travel agent under RCW 82.04.260 (10) or as a service provider under RCW 82.04.290. The classification is significant, because the rate difference is large.

This issue is especially difficult, because neither the statute nor the administrative rules help us understand the difference between these terms. We are aware of no canon of statutory construction that aids us in determining what burdens or presumptions prevail in classifying activity for purposes of taxation. Thus, we are left with what tools are at our disposal to determine if there is a difference.

The taxpayer is correct in questioning the Administrative Law Judge's reliance on the "yellow pages." Washington's tax system is not based on the labels a business might give itself. It is an excise tax system in which the tax determination is dependent on the type and kinds of activities engaged. And, any business can conduct a variety of activities, each having its own classification. Here, it does not matter if the business calls itself a tour operator or a travel agent. If it performs the activities of a tour operator, its B&O rates will be determined by that activity; if it performs the activities of a travel agent, B&O rates will be determined accordingly. As the taxpayer notes, there are times when it does only what a travel agent does, and times when it does what a tour operator does. Each of these activities has its own attendant tax liabilities. This discussion, however, puts the cart before the horse. The question is, are these two different activities?

Absent statutory definitions pertaining to certain specific words or phrases, they must be taken in their ordinary sense. Here, we find some assistance in the dictionary. In Webster's II New Riverside University Dictionary, we find the following definitions:

travel agency: an agency that arranges for travel itineraries, tickets, and accommodations. -travel agent n.

tour: 1. a comprehensive trip including visits to points of interest. 2. a group organized for a comprehensive trip or for a shorter sightseeing excursion (Emphasis ours.)

excursion: 2a. a pleasure tour, esp. one of limited duration and at a special reduced fare.

operator: 2. the owner or manager of a business

From these definitions, we perceive a difference in the activities of a travel agent and those of a tour operator. We believe the term travel agent is intended to apply to those who make arrangements for clients, based on the client's preference, with specific carriers, hotels, and the like on an individualized basis to meet particular needs or desires. On the other hand, we believe a tour operator is one who packages travel arrangements, lodging accommodations, and so on, and then sells an excursion.

The taxpayer points out that the travel agent performs its services on a piecemeal basis and that a tour operator does not. We agree. We believe this difference lends support to the notion that the two are different.

In 1985, the Department issued letters to the travel industry which stated that travel agents and tour operators were to be taxed under the travel agent rate. While we do not treat these letters as qualifying under an estoppel analysis, we do believe they articulated the position of the Department at that time. While the letters were not explicit as to the basis for treating the activities similarly, we feel the industry had the right to rely on those letters as reporting instructions. For this reason, we agree that there should be no adjustment to amounts reported by tour operators under the Travel Agent classification for the audit period, or for periods up to the date of this Final Determination.

DECISION AND DISPOSITION

The taxpayer's petition is granted in part, denied in part, and Determination 88-310 is reversed to the extent that it called for the application of the Service and Other Activities tax on income derived from tour operations. The taxpayer will be held accountable for reporting according to the instructions in Determination 88-310 prospectively from the date of this Final Determination.

It is our understanding that the Audit section has accomplished the adjustments called for by Determination 88-310 with regard to Advances and Reimbursements. If this is not the case, the taxpayer is advised to contact the Audit section to arrange for the completion of those adjustments.

DATED this 9th day of May 1989.

WAC 458-20-258, attached

WAC 458-20-258 TRAVEL AGENTS AND TOUR OPERATORS.

(1) INTRODUCTION. This section describes the business and occupation (B&O) taxation of travel agents and tour operators. Travel agents are taxed at the special travel agent rate under RCW 82.04.260(10). Tour operators are generally taxed under the service or other business classification under RCW 82.04.290. However, the business activities of tour operators may sometimes include activities like those of a travel agent. This section recognizes the overlap of activities and taxes them consistently.

(2) DEFINITIONS:

(a) "Commission" means the fee or percentage of the charge or their equivalent, received in the ordinary course of business as compensation for arranging the service. The customer or receiver of the service, not the person receiving the commission, is always responsible for payment of the charge.

(b) "Pass-through expense" means a charge to a tour operator business where the tour operator is acting as an agent of the customer and the customer, not the tour operator, is liable for the charge. The tour operator cannot be primarily or secondarily liable for the charge other than as agent for the customer. See: WAC 458-20-111 Advances and reimbursements.

(c) "Tour operator business" means a business activity of providing directly or through third party providers, transportation, lodging, meals, and other associated services where the tour operator purchases or itself provides any or all of the services offered, and is itself liable for the services purchased.

(d) "Travel agent business" means the business activity of arranging transportation, lodging, meals, or other similar services which are purchased by the customer and where the travel agent or agency merely receives a commission for arranging the service.

(3) TRAVEL AGENTS.

(a) The gross income of a travel agent or a travel agent business is the gross commissions received without any deduction for the cost of materials used, labor costs, interest, discount, delivery cost, taxes, losses, or any other expense. It is taxed at the special travel agent rate.

(b) Gross receipts, other than commissions, from other business activities of a travel agent, including activities as a tour operator, are taxed in the appropriate B&O classification, service, retailing, etc., as the case may be.

(4) TOUR OPERATORS.

(a) The gross income of a tour operator or a tour operator business is the gross commissions received when the activity is that of a travel agent business.

(i) When a tour operator receives commissions from a third party service provider for all or a part of the tour or tour package, the gross income of the business for that travel agent activity is the commissions received.

(b) However, if the activity is that of a tour operator business, receipts are B&O taxable in the service classification without any deduction for the cost of materials used, labor costs, interest, discount, delivery cost, taxes, losses, or any other expense; EXCEPT, receipts attributable to pass-through expenses are not included as part of the gross income of the business.

(5) EXAMPLES:

(a) A travel agent issues an airplane ticket to a customer. The cost of the ticket is \$250 which is paid by the customer. The travel agent receives \$25 from the airline for providing the service.

(i) The gross income of the business for the travel agent is the \$25 commission received.

(ii) The gross income of the business is taxed at the special travel agent rate.

(b) A tour operator offers a tour costing \$1,500 per person. The tour cost consists of \$800 airfare, \$500 lodging and meals, and \$200 bus transportation. The tour operator has an arrangement with each of the service providers to receive a 10% commission for each service of the tour, which in this case is \$150 (\$80 + \$50 + \$20). The tour operator issues tickets, etc, only when paid by the customer and is not liable for any services reserved but not provided.

(i) The tour operator is engaged in a travel agent activity and the gross income of the business is commissions received, \$150.

(ii) The gross income of the business, \$150, is taxed at the special travel agent rate.

(c) The same facts as in example (b) except that the tour operator has a policy of requiring 10% or \$150 as a down payment with the remaining \$1,350 payable 20 days prior to departure with 95% refundable up to 10 days prior to departure and nothing refunded after 10 days prior to departure. The customer cancels 15 days prior to departure and is refunded \$1,425 with the tour operator retaining \$75.

(i) The gross income of the tour operator business is the \$75 retained. No amount is attributable to pass-through expense since the tour operator was not obligated to the service provider in the event of cancellation and the tour operator was not acting as the agent of the customer.

(ii) The gross income of the business, \$75, is taxed in the service B&O tax classification.

(d) A tour operator offers a package tour for the Superbowl costing \$800 per person. The tour operator purchases noncancellable rooms in a hotel for \$300 per room for 2 nights, and game tickets which cost \$100 each. The package includes airfare which costs \$200 per person for which the tour operator receives the normal commission of \$20. As an extra feature, the tour operator offers to provide, for an extra cost, special event tickets, if available, at his cost of \$50 each. The tour operator is B&O taxable as follows:

(i) The gross income of the tour operator business is \$600 (\$800 less \$200 airfare). Because the tour operator purchased the rooms and the game tickets in its own name and is liable for the rooms or tickets if not resold, the tour operator is not operating as a travel agent business and is B&O taxable in the service classification. If the tour operator receives a commission on the rooms sold to itself, the activity remains taxable as a tour operator business under the service classification and the commission received is treated as a cost discount, not included in the gross income of the business.

(ii) The \$50 received for the special event ticket is attributable to a pass-through expense and is not included in the gross income of the tour operator business. The special event ticket receipt is attributable to a pass-through expense because the tour operator is acting as an agent for the customer.

(iii) The \$20 received as commission from the sale of the airfare is a travel agent business activity and is included as gross income of a travel agent and taxed at the special travel agent rate.

[Statutory Authority: RCW 82.32.300. 90-17-003, §458- 20-258, filed 8/2/90, effective 9/2/90.]