

Cite as Det. No. 15-0147, 35 WTD 400 (2016)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition for Correction of ) Assessment: ) ) ) ) ... ) )	<u>D E T E R M I N A T I O N</u>  No. 15-0147  Registration No. ...
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[1] RULE 183; RCW 82.04.050(3)(a)(i); ETA 3167.2011: RETAILING B&O TAX - RETAIL SALES TAX - AMUSEMENT AND RECREATION SERVICES - ENTRY FEES. - Income that a business derived from charges to riders to participate in races are charges to participate in the underlying sporting activity and for periods prior to 2016 were subject to the retailing B&O tax classification, and do not constitute “entry fees” as that term is defined under Rule 183, which are separate from and do not include income derived from charges to participate in the underlying activity.

[2] RULE 166; RCW 82.04.50: LODGING SERVICES - HOTEL/MOTEL TAX. - Charges for providing a space to camp is considered providing lodging services and, correspondingly, a retail sale.

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.

Kreger, A.L.J. – A business that organizes and hosts [vehicle] races protests the reclassification of rider participation/entry fee and combined general admission/camping fees from the service and other business and occupation (B&O) classification to the retailing business B&O and retail sales tax classifications. We affirm the assessment as issued. [U]nder RCW 82.04.050, WAC 458-20-183 [and Excise Tax Advisory (ETA) 3167.2011], the rider participation/entry fee allows for the participation in the sporting activity of [vehicle] racing and . . . is taxable as a retail activity. [Also,] the mingling of the service taxable general admission fees with the retail camping fees subjects the charge to the retail classification. The Taxpayer’s petition is denied.<sup>1</sup>

### ISSUES

1. Are participation/entry fees charges for retail “amusement and recreation services” under RCW 82.04.050(3)(a) and WAC 458-20-183?
2. Are combined general admission/camping fees retail sales under WAC 458-20-166?

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

3. . . .

### FINDINGS OF FACT

[Taxpayer] is a Washington Limited Liability Company engaged in the business of organizing and hosting [vehicle] races in Washington and [out-of-state]. The Taxpayer is an affiliate of another Washington business that is engaged in the business of manufacturing and selling [vehicle] parts and repair services . . . , which predates the formation of the Taxpayer and operates separately. . . .

After an initial review of the Taxpayer's account indicated possible reporting errors, the Taxpayer Account Administration Division (TAA) requested additional detail on the Taxpayer's revenue in July of 2013. After receiving this information, TAA performed a desk audit of the Taxpayer's Washington business activities for the period of January 1, 2010 through December 31, 2013.

On May 6, 2014, the Department issued a tax assessment Document No. . . . in the amount of \$ . . .<sup>2</sup> The majority of the assessment is attributable to . . . the race entry/participation fees and the admission/camping fees being reclassified as retail taxable. The Taxpayer timely appealed the assessment.

At issue are two categories of fees. The first is the participation/entry fee that is paid by riders who are participating in the event. Then, there is an admission/camping fee paid by spectators to the event, which provides for overnight parking and access to the track facilities. The Taxpayer began recording the camping and admission fees separately for periods after the audit period, but for the audit period, the records did not differentiate amounts that were received solely for admission to watch an event.

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### ANALYSIS

Washington's excise tax law requires persons who charge for services defined as retail sales to collect retail sales tax on the charges to their customers and remit the tax to the state. RCW 82.08.020; RCW 82.08.050; *see also* Det. No. 02-0039, 21 WTD 318 (2002).

RCW 82.04.050 states that the term retail sale includes the following services<sup>3</sup>:

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<sup>2</sup> The assessment is comprised of \$ . . . in service and other activities B&O tax, a (\$ . . . ) small business credit, \$ . . . in retail sales tax, \$ . . . in retailing B&O tax, a credit of (\$ . . . ) in service and other activities B&O tax for income that was reclassified to retailing, \$ . . . in convention and trade center tax, \$ . . . in special hotel/motel tax, \$ . . . in interest, and a 5% assessment penalty of \$ . . . .

<sup>3</sup> Recently enacted legislation Chapter 169, Laws of 2015 (HB 1550), effective 1/1/2016, substantially changes the taxation of amusement and recreation services. The statute and rule addressed in this determination are those in force during the audit period at issue. [For tax periods starting in 2016, taxpayers should consult the current versions of the statute and rule.]

(3) The term "sale at retail" or "retail sale" shall include the sale of or charge made for personal . . . services including amounts designated as . . . fees . . . and other service emoluments however designated, 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.

Sales of services falling within the definition of "sale at retail" or "retail sale" are subject to the retailing [B&O] tax classification, and the seller is required to collect retail sales tax from the buyer. RCW 82.04.250, RCW 82.08.020, and RCW 82.08.050

If a service does not fall within the definition of "retail sale" and is not explicitly taxed under another section of Chapter 82.04 RCW, then the gross proceeds derived from rendering the service are subject to tax under the service & other activities (Service) B&O tax imposed in RCW 82.04.290(2), and not subject to retail sales tax.

WAC 458-20-183(2) (Rule 183) is the administrative regulation that addresses the taxation of amusement, recreation and physical fitness services, and expands on the limited exemplar activities listed in the statute in the following definition:

"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.

Rule 183(2)(b).

The rule then [explains the distinction between] retail amusement and recreation or physical fitness services [taxed as a retail sale, and certain charges that do not fall within the definition of a retail sale]:

"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 providing facilities where a person is merely a spectator, such as movies, concerts, sporting events, and the like; the sale of 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 predominant activities in the area are similar to those found at carnivals.

Rule 183(2)(m).

The rule defines an entry fee as: “those amounts paid solely to allow a person the privilege of entering a tournament or other type of competition. The term does not include any amounts charged for the underlying activity.” Rule 183(2)(f).

In July of 2011, the Department issued an Excise Tax Advisory (ETA) 3167.2011 specifically addressing the taxability of fees charged for amusement and recreation services. This ETA clarifies that if the fee paid allows the person to participate in the underlying amusement and recreation activity then the fee will be subject to retail sales tax and retailing B&O tax. The ETA states:

[I]f the fee is paid for the right to engage in the amusement and recreation activity, the fee is not an entry or league fee as those terms are defined in Rule 183. Thus, whether referred to as an entry fee, league fee, participation fee, or player fee, or some other name, if the fee entitles the person or team to engage in an amusement and recreation activity it is subject to retail sales tax.

ETA 3167.2011. Under this guidance only entry fees that are solely paid to join an association, group, or tournament and are separate from fees that cover participation are service taxable under Rule 183. If the fee also covers participation in the underlying amusement and recreation activity then it is retail.

The Taxpayer initially objects to the classification of the [racing] activity as an amusement and recreation activity noting that [racing] is not specifically listed as one of the qualifying activities, and that it therefore, should not be included in the category. We disagree. We note initially that the list of specifically enumerated activities in the rule and statute are not exclusive but rather representative activities.

The type of activities enumerated by the rule, while not exclusive, provides a framework for identifying the type of activities that will be considered retail under the statute and rule. The rules of statutory construction support a uniform construction so that any non-enumerated retail amusement and recreation activities should be comparable to those identified. Under the *ejusdem generis* (literally, “of the same kind”) rule, specific words identify the class and restrict the meaning of the general words to things within that identified class.<sup>4</sup> See *City of Mercer Island v. Kaltenbach*, 60 Wn.2d 105, 371 P.2d 1009 (1962) (Terms in statute or ordinance take their meaning from context in which they are employed.)<sup>5</sup> “Rules of statutory construction apply

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<sup>4</sup> *In re Estate of Jones*, 152 Wn.2d 1, 11, 93 P.3d 147 (2004) (“The rule of *ejusdem generis* states that when general terms are in a sequence with specific terms, the general term is restricted to items similar to the specific terms.”); *City of Seattle v. State Dep’t of Labor and Indus.*, 136 Wn.2d 693, 965 P.2d 619 (1998). Accord *Meresse v. Stelma*, 100 Wn. App. 857, 999 P.2d 1267 (2000) (Under rules of construction “*ejusdem generis*” and “*noscitur a sociis*,” the meaning of items in a list is ascertained by referring to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope.)

<sup>5</sup> *Shurgard Mini-Storage of Tumwater v. Dep’t of Revenue*, 40 Wn. App. 721, 700 P.2d 1176 (1985) (Proper analysis of West’s RCWA 82.16.010, defining “public service business” is to consider “rule of *noscitur a sociis*,” which teaches that meaning of doubtful words may be determined by reference to the relationship with other associated words and phrases).

to administrative rules and regulations.” *State of Washington v. Burke*, 92 Wn.2d 474, 478, 598 P.2d 395 (1979). *See also* Det. No. 87-143, 3 WTD 91 (1987); Det. No. 88-155, 5 WTD 179 (1988); Det. No. 89-524, 8 WTD 407 (1989) (Where the rules of statutory construction were used to interpret the Department's regulations). The commonality amongst the identified activities is an element of sporting, athleticism, or gaming.

In this case, the [racing] events are a sporting or athletic type activity. The events are cross country type competitive races and comparable to other recreational sporting or athletic activities. We note that one of the examples detailed as a retail fee in ETA 3167.2011 is an entry fee for a “10k race” and we do not find it materially different that the racing activity at issue here involved [vehicles] rather than running. We conclude that as a sporting/athletic type activity motocross is subject to classification as an amusement and recreation activity and, correspondingly, fees to participate in this activity under the guidance detailed above are retail activities. Thus, the entry fees paid to participate in the [vehicle] races are subject to retail sales tax and retailing B&O tax. *Accord* Det. No 14-201, 33 WTD 612 (2013) (income from organizing basketball tournaments subject to tax as a retail amusement and recreation activity.) Accordingly, we affirm the assessment of retail sales tax and retailing B&O tax on these charges for the time period at issue.

We next turn to the admission/camping fees. Under the authority detailed above, an admission fee for spectators would not be a retail sale. In this case, the available records did not differentiate between admission and camping charges.

Lodging services are subject to retail sales tax. RCW 82.04.050(2)(f). Charges for providing a space to camp is considered providing lodging services and, correspondingly, a retail sale. *See* WAC 458-20-166, Det. No. 98-075, 17 WTD 266 (1998). In addition to the retail sales tax and retailing B&O tax, some of the locations where events were held were at locations that also have special local taxes applicable to lodging services and those taxes were also assessed. The Taxpayer does not substantively dispute that the camping charges are subject to classification as a retail sale, but objects to the taxation of the admission fees as a retail sale. In this case, we have a single fee covering both a retail sale, the camping/lodging, and a service taxable activity, the admission for spectators.

Effective July 1, 2008, the Legislature enacted RCW 82.08.190, 82.08.195, and 82.12.195 to comply with the Streamlined Sales and Use Tax Agreement (or “SSUTA”).<sup>6</sup> Laws of 2007, ch. 6. These provisions apply to “bundled transactions” and explain how to tax transactions that involve both retail and non-retail sales. Before the statute was enacted, the Department looked to the “true object” of the transaction to determine its proper tax classification of a transaction that involved both retail and non-retail services. The bundled transaction statutes supersede the true object test for periods after the law change.

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<sup>6</sup> SSUTA is a multi-state project intended to simplify the administration of sales and use taxes in order to substantially reduce the burden of tax compliance. *Indiana Dep’t of Revenue v. Kitchin Hospitality, LLC*, 907 N.E.2d 997, 1000, n.2 (Ind. 2009). SSUTA seeks to accomplish this goal by, among other things, providing uniform definitions within tax laws. *Id.* Participating states must enact laws, rules, and regulations that conform to its provisions.

The information available indicates that the fee at issue here provided customers multiple services for a single charge, and is a bundled transaction. *See* RCW 82.08.190. Generally, a bundled transaction is subject to retail sales tax if the sale of any of its component products is individually subject to retail sales tax. RCW 82.08.195(1). In this case, . . . camping is a distinct and identifiable product included in the fee that is subject to retail sales tax. Thus, the nonitemized fee is likewise subject to retail sales tax under RCW 82.08.190 and 82.08.195.

Taxpayers have an affirmative duty to maintain adequate records and to provide the Department access to those records so that the Department can reasonably ascertain a taxpayer's tax liability. RCW 82.32.070. *See also* WAC 458-20-254 (Rule 254); Det. No. 99-341, 20 WTD 343 (2001). RCW 82.32.070 specifically requires that "[e]very person liable for any fee or tax imposed by chapters 82.04 through 82.27 RCW shall keep and preserve, for a period of five years, suitable records as may be necessary to determine the amount of any tax for which he may be liable . . . ." *See also* Rule 254.

In this case, the records provided were not sufficient to segregate [and itemize] the admission fees and, correspondingly, the total fee income for the joint sale of the camping and admission was treated as retail, which as detailed above was appropriate under a bundled transaction analysis. Accordingly, we affirm the assessment of retail sales tax and retailing B&O tax on this fee income.

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#### DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 5th day of June, 2015.