

Cite as Det. No. 20-0196, 41 WTD 227 (2022)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS 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>
)	
)	No. 20-0196
)	
...)	Registration No. ...
)	

RCW 82.04.050; RCW 82.08.020; WAC 458-20-183 – DAY TRIPS FOR SIGHTSEEING PURPOSES. Trips for sightseeing purposes, for purposes of retail sales tax and retailing B&O tax, include trips that do not include scenic views.

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.

Fisher, T.R.O. – An operator of a passenger railway protests the assessment of retail sales tax on its revenue, arguing it does not offer day trips for sightseeing purposes. We deny the petition.¹

ISSUES

1. Whether train rides lasting less than a day on old-fashioned passenger trains constitute “day trips for sightseeing purposes” and are therefore subject to retail sales tax and retailing business and occupation tax under RCW 82.04.050 and WAC 458-20-183.
2. Whether a taxpayer may rely on alleged advice from the Department regarding what constitutes a retail sale, [when such advice was provided] before the definition of “retail sale” was changed by the Legislature.

FINDINGS OF FACT

... (“Taxpayer”) operates a railroad entirely within Washington. Taxpayer charges its customers for tickets to go on short train trips and special events, and also sells snacks and drinks. . . . As advertised by Taxpayer, [passengers ride and explore the unique interiors of a steam locomotive “old-time passenger train,” part of “America’s grand railway heritage,” to see rural America.]

...

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

The Department audited Taxpayer to determine if Taxpayer was properly reporting its income on its excise tax returns between the period of January 1, 2015, and December 31, 2018 (“Audit Period”). During the Audit Period, Taxpayer reported all its income under the Service and Other Activities business and occupation (“B&O”) tax classification. After reviewing Taxpayer’s website and speaking with Taxpayer’s President, the Department determined that Taxpayer should have been reporting its income under the Retailing B&O tax classification, and collecting and remitting retail sales tax, because Taxpayer was offering daytrips for sightseeing purposes. Because Taxpayer did not submit its books to the Department for examination, the Department reclassified all the income Taxpayer reported on its excise tax returns as retail. The Department assessed Taxpayer \$. . . in retail sales tax, \$. . . in retailing B&O tax, \$. . . in disallowed small business credits, \$. . . in a substantial underpayment penalty, and \$. . . in interest; the Department credited Taxpayer with having paid \$. . . during the Audit Period.

Taxpayer timely sought administrative review. In its petition, Taxpayer asserts that it does not provide day trips for sightseeing purposes. Taxpayer asserts that people ride the trains to see the trains, not to see the sights outside of the trains. Taxpayer also alleges that it was told by the Department shortly after its founding in . . . to not collect retail sales tax on its train rides. Taxpayer has not provided any written statement from the Department to this effect. In its submission of additional information, Taxpayer further asserts that persons sitting in the aisle seats would not be able to see any sights outside of the trains, and therefore the train rides cannot have a sightseeing purpose.

ANALYSIS

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 sightseeing purposes;” RCW 82.04.050(15)(a)(viii).² Under RCW 82.04.050 and RCW 82.08.020, any sales of day trips for sightseeing purposes are retail sales, and any amounts charged to the purchaser, however labeled, are subject to the retailing B&O tax and retail sales tax. WAC 458-20-183(6)(e) designates that “sightseeing trips . . . that last less than twenty-four hours” are subject to retailing B&O tax and retail sales tax.³ 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

² [RCW 82.04.050 was amended twice during the audit period. This provision, RCW 82.04.050(15)(a)(viii) was codified, effective January 1, 2016. Previous iterations of the statute included the following language: “The term ‘retail sale’ includes the sale of . . . [a]musement and recreation services including . . . day trips for sightseeing purposes . . . when provided to consumers,” which was codified as RCW 82.04.050(3)(a)(i). See RCW 82.04.050(3)(a)(i) (2015). The 2016 statutory changes renumbered the provisions related to the taxation of day trips for sightseeing purposes, but did not otherwise change the relevant statutory language.]

³ [This specific rule language was promulgated, effective June 23, 2018, after the audit period in question in this case. See WAC 458-20-183(6)(e). However, most Department rules are treated as interpretive statements that apply retroactively, unless the interpreted statutory language has changed. See Det. No. 18-0267, 39 WTD 171 (2020) (citing *Ass’n of Wash. Businesses v. Dep’t of Revenue*, 155 Wn.2d 430, 120 P.3d 46 (2005)). Because the statutory language in this case has not changed, we cite WAC 458-20-183(6)(e) as relevant authority.]

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 (“ETA 3212”).⁴

Example 7 from ETA 3212 provides a relevant example:

Day trips for sightseeing – train tour

- **Facts:** Steam Thrills Inc. sells short train trips, leaving and returning to the same location. During the trips, the train passes by scenic lakes, mountain views, and passes over old train bridges.
- **Result:** This activity is a retail sale of a day trip for sightseeing purposes.

(Emphasis in original.)

Taxpayer disputes whether it is selling day trips for sightseeing purposes within the meaning of RCW 82.04.050(15)(a)(viii) and WAC 458-20-183(6)(e). In the phrase “sightseeing purposes,” “sightseeing” is an adjective that modifies the noun “purposes.” Neither term is defined in the statute or the rule. When statutory terms are not defined, the Department applies their “ordinary dictionary meaning.” Det. No. 16-0207, 39 WTD 111 (2020); Det. No. 04-0147, 23 WTD 369 (2004) (citing *Western Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 609, 998 P.2d 884 (2000)). . . . The definition for “sightseeing” as an adjective is “devoted to or used for seeing sights.” *Sightseeing*, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/sightseeing> (last accessed July 15, 2020);⁵ *see also Sightseeing*, Dictionary.com, <https://www.dictionary.com/browse/sightseeing> (last accessed July 15, 2020) (defining “sightseeing” as “seeing, showing, or used for visiting sights.”). A “sight” is “something that is seen.” *Sight*, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/sight> (last accessed July 15, 2020); *see also Sight*, Dictionary.com, <https://www.dictionary.com/browse/sight> (last accessed July 15, 2020) (defining “sight” as “something seen or worth seeing . . .”).

Taxpayer argues that the trains do not go to any “sights.” Taxpayer further argues that its passengers in aisle seats cannot see outside the train, and that there is nothing to see outside the train during some of the night rides. Therefore, according to Taxpayer, its trips are not for sightseeing purposes. We disagree. WAC 458-20-183(6)(e) lists examples of “day trips for sightseeing purposes.” They include “wine tours, scenic tours, culinary tours, educational or nature-related tours, or cultural tours.” We find that Taxpayer’s services are similar to wine tours and culinary tours, in that those activities do not require views to be taxable as “day trips for sightseeing purposes.” *See* WAC 458-20-183(6)(e). Indeed, we find that, based upon Taxpayer’s own description of its historical service, the train trips are “cultural” in nature, and “cultural tours”

⁴ [ETA 3212 was issued on April 5, 2019. ETAs are interpretive statements promulgated by the Department to articulate Departmental policy. They are advisory only. RCW 34.05.230. As such, they can be relied upon when they are a current and persuasive statement of Department policy. *See* Det. No. 99-348, 19 WTD 916, 920 n.4. (2000). In the current instance, the ETA demonstrates the Department’s policy is to include train trip day tours as activities that are for sightseeing purposes.]

⁵ Because this case was written [during COVID-19 workplace limitations], the undersigned tax review officer used online dictionaries, rather than the physical Webster’s Third New International Dictionary.

are specifically included in the list of examples. *See id.* The attraction of Taxpayer's services are the trains themselves. In other words, the "sights" Taxpayer's customers pay to see are the trains in use while the customers ride the trains. Additionally, Taxpayer's website explicitly advertises allowing customers to "see rural America," which is similar to Example 7 of ETA 3212. Because Taxpayer is selling day trips for sightseeing purposes, i.e., trips less than one day that are for the purpose of seeing the old trains, Taxpayer is engaged in retail sales and is properly subject to retailing B&O tax and retail sales tax.

Taxpayer further asserts that it is entitled to rely on instructions it received from the Department in . . . , shortly after it started its business. Taxpayer has not produced the alleged instructions, and the Department's document retention schedules do not permit the Department to keep such documents for . . . years. Furthermore, we note that the Legislature amended the definition of "retail sale" in 1996 to include day trips for sightseeing purposes, which was 19 years before the beginning of the Audit Period [and after the alleged instructions]. *See* Laws of 1996, ch. 148, § 1. So even if the Department provided written instructions to the Taxpayer, which we have no evidence of, those instructions were superseded by the subsequently enacted change to RCW 82.04.050. Although RCW 82.32A.020(2) grants Taxpayers the right to rely on specific, official written advice from the Department, Taxpayer has not provided any written record of any specific, official written advice from the Department. Thus, the assessment cannot be reduced on this basis.

Taxpayer finally asserts that, because it paid fees to the Utilities and Transportation Commission on its gross passenger sales, the Department may not assess taxes on its train rides. Taxpayer cites no authority to support this proposition that taxes are not owed on activities that are subject to regulatory fees by other state agencies. Accordingly, the assessment cannot be reduced on this basis.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 16th day of July 2020.