Excise Tax Advisory

Excise Tax Advisories are interpretive statements authorized by RCW 34.05.230.

ETA 3133.2019 Issue Date: October 31, 2019

Withdrawal of Published Determinations

Background

The Department is required to provide an internal review system for the Department's actions in the assessment or collection of taxes. RCW 82.01.060(4). The Department reviews taxpayers' petitions for review, and issues written opinions, called determinations. In some cases, the Department concludes that a particular determination provides useful guidance for a number of taxpayers and thus, in accordance with RCW 82.32.410, some are published. These determinations, called Washington Tax Decisions or WTDs, are published by the Department on its Internet website and are available to taxpayers, tax practitioners, Department employees, and the public.

There may be occasions when a WTD does not accurately state the position of the Department, no longer provides useful guidance, or is incorrect. In these instances, the Department needs to inform taxpayers, tax practitioners, and Department personnel when the WTD should not be followed. The Department will often overrule the erroneous WTD in a later published determination. When the Department does not have an opportunity to timely overrule the WTD in this manner, the Department will issue an excise tax advisory (ETA) or ETA supplement to announce the withdrawal of the WTD to avoid misunderstandings about how the Department will apply the law.

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Det. 14-0219, 35 WTD 372 (2016). This determination incorrectly concludes that an in-kind payment of lost and unaccounted for gas is included in a Washington customer's brokered natural gas use tax base. This determination fails to consider and apply the definition of "use" in RCW 82.12.010(6)(h), that specifically applies to natural gas and manufactured gas. In 2010, the Legislature excluded natural gas and manufactured gas from the primary definition of "use" and created a special definition. ESHB 3179, 2010 c 127 s 4. For taxable use to occur, the natural gas must actually be burned by the taxpayer in Washington or stored in the taxpayer's facility

	in Washington for later use by the taxpayer. It is the position of the Department that the pipeline uses such lost and unaccounted for natural gas because it burns or stores such natural gas. For this reason, the Department withdraws the determination. **Det. 91-309, 11 WTD 497 (1992).** Based on authority at that time, The determination concluded that the Employee Retirement Income Security Act (ERISA) broadly preempted Washington's ability to impose the business and occupation tax on any contributions to, distributions from, and investment income generated by ERISA qualified plans. Since the WTD was published, case law has more narrowly construed ERISA preemption provisions. The Department finds that ERISA does not preempt a law of general application like Washington's B&O tax from applying to welfare benefit plans. ERISA may continue to pre-empt ERISA pension plans.
WTD withdrawn October 2, 2019	**Det. 88-311A, 9 WTD 293 (1990).** This determination misapplied the business and occupation (B&O) tax exemption for insurance businesses in RCW 82.04.320, which exempts income received by an insurance business "upon which a tax based on gross premiums is paid to the state." 9 WTD 293 expanded the deduction to activities that were functionally related to an insurance business (such as general administrative services, accounting services, and personnel and data processing services), even though these activities were not subject to the insurance premium tax in Chapter 48.14 RCW. As explained in an Interim Guidance Statement, the Department finds that RCW 82.04.320 does not support the functionally related analysis in 9 WTD 293 and withdraws this determination from publication. Any subsequently published determination or Department guidance that relies on 9 WTD 293 should be disregarded to the extent that it also uses the functionally related analysis.
WTD withdrawn November 17, 2017	**Det. 90-342, 10 WTD 123 (1990)**. This determination misapplies the 20 percent rule found in WAC 458-20-136(3)(d) when a person produces an article from materials furnished in part by that person and in part by the customer. In determining whether such a person is a manufacturer or processor for hire, the rule explains that "[t]he person furnishing the labor and mechanical services will be presumed to be a manufacturer if the value of the materials or ingredients furnished by the person is equal to or greater than twenty percent of the total value of all materials or ingredients which become a part of the produced product." WAC 458-20-136(3)(d)(ii). 10 WTD 123 is confusing to taxpayers because it misapplies this provision, finding that the person who employs the person furnishing the labor must furnish more than 20 percent of the value of the materials to be subject to manufacturing B&O tax. The Rule provides taxpayers with clearer and more accurate guidance on this issue.
WTDs withdrawn July 15, 2015	The Department is withdrawing the following two determinations, each of which directly impacts Washington Indian Tribes.

	Det. 13-0389R, 34 WTD 147 (2015). This determination is being withdrawn because the Department failed to consult with the tribes before publication in accordance with the Department's tribal consultation policy under RCW 43.376.020. **Det. 10-0307R, 31 WTD 7 (2012).** This determination is being withdrawn because the Department intends to issue an excise tax advisory providing guidance on the issues addressed in the determination.
WTD withdrawn March 17, 2015	**Det. 11-0227, 31 WTD 57.** The determination did not adequately address the application of RCW 82.45.010(3)(j), which provides a REET exemption for transfers or conveyance "made pursuant to … an order of sale by the court in any mortgage, deed of trust, or lien foreclosure proceeding or upon execution of a judgment under Ch. 6.17 RCW," in the context of a receiver appointed during a judicial foreclosure action.
WTDs withdrawn May 16, 2013	**Det. 00-064, 19 WTD 1013 (2000).** The taxpayer in this determination was a private, for-profit transportation company that provided ride sharing services for persons with special transportation needs ("paratransit services"). It leased paratransit vehicles from a transit authority and requested a refund from PUT under RCW 82.16.047. The determination correctly found that the taxpayer could not claim an exemption from PUT because it was not a qualified paratransit provider. Further, the determination correctly required each provider to separately qualify for the exemption. However, the determination also concluded that the transit authority was not a qualified provider since it was not a public social service agency. This conclusion is in conflict with the findings in Det. No. 97-104R, 17 WTD 59 (1998) and Det. No. 00-064, 19 WTD 1013 (2000) and has caused taxpayers confusion. Because of its potential to confuse taxpayers, the Department withdraws this determination. **Det. 01-167E, 21 WTD 272 (2002).** The taxpayer in this determination was a transit authority that provided paratransit services. The determination concluded that a transit authority does not qualify as a public social service agency and, therefore, could not claim the PUT exemption under RCW 82.16.047. This conclusion is in conflict with the findings in Det. No. 97-104R, 17 WTD 59 (1998) and Det. No. 00-064, 19 WTD 1013 (2000) and has caused taxpayers confusion. For this reason, the Department withdraws it.
WTD withdrawn September 28, 2012	**Det. 92-231, 12 WTD 233.** The taxpayer in this determination created gift baskets that contained various individually wrapped food items. The determination correctly reached a conclusion that this activity was not manufacturing. However, WAC 458-20-136 (Manufacturing, processing for hire, fabricating.) was subsequently amended to clarify various factors that the Department considers in determining whether an activity such as creating gift baskets is manufacturing. The determination does not address these factors and has caused taxpayers confusion. For this reason, the Department has determined that it is in the best interests of taxpayers that this determination be withdrawn.

WTD withdrawn September 19, 2005

Det. 04-0232, 24 WTD 230. The taxpayer in this determination manufactured products in a Foreign Trade Zone (FTZ) located in another state. From there, it sold and delivered products directly to its customers in Washington. The taxpayer protested imposition of wholesaling B&O tax on those sales, arguing that Washington's B&O tax on goods coming from an FTZ was preempted by the federal FTZ Act, prohibited by the Import-Export Clause of the United States Constitution, and also prohibited by the Department's own rule, WAC 458-20-193C. The Department ruled that neither the Foreign Trade Zone Act nor the Import-Export Clause preempted Washington's tax and that Rule 193C could not be interpreted to provide an exemption not provided by the United States Constitution.

The Department believes that Det. 04-0232 correctly found that the taxpayer in the determination was liable for B&O tax. However, the Department has decided that publication of the determination's discussion of the federal Import-Export Clause and Rule 193C was premature. In light of the questions raised during the rule-making process for Rule193C on the legal justification of taxing imports and exports while they remain in transit, and the potential impact on Washington businesses, the Department has decided that it should wait for further clarification of the law before proceeding with action in this area. A case involving similar circumstances is pending before the West Virginia Supreme Court. The ultimate resolution of that case may provide additional guidance for the Department. Until further notice, the Department will continue to apply Rule 193C as currently written.

WTD withdrawn October 31, 2003

Det. 98-101, 18 WTD 260. The taxpayer in this determination is engaged in the business of escrow and closing of vessel sale transactions. Standard practice had been that upon closing of a transaction involving a vessel dealer the taxpayer would remit the sales tax collected on the sale to the selling vessel dealer. The taxpayer requested a ruling that it be permitted to collect and pay sales or use tax directly to the Department of Licensing when the vessel dealer was acting as an agent or broker for a vessel owner. This would relieve the vessel dealer of the duty to remit the collected retail sales tax to the Department of Revenue. The determination granted the taxpayer's request on the basis that there was no legal bar to the taxpayer collecting and remitting sales tax on behalf of dealers, as their agent.

This determination has been cancelled because the conclusion is incorrect. The Department of Licensing is by law only authorized to collect use tax on behalf of the Department of Revenue. Thus, in a transaction not involving a vessel dealer and where the owner/seller is not registered with the Department, the taxpayer as agent of the buyer may remit use tax to the Department of Licensing at the time of vessel registration. There is no statutory authority for remitting collected retail sales tax to the Department of Licensing. Consistent with RCW 82.08.040 and WAC 458-20-159 (Consignees, bailees, factors, agents and auctioneers), the selling vessel dealer as agent of the vessel owner is responsible for collecting and remitting retail sales tax to the Department of Revenue.

WTD withdrawn February 14, 2003	**Det. 97-111ER, 19 WTD 116.** The Department has learned that the critical facts described in this determination are inaccurate. Therefore, the Department does not believe this determination provides helpful guidance.
WTD withdrawn January 17, 2003	**Det. 89-38, 7 WTD 125.** The determination incorrectly applied RCW 82.04.260(4) (formerly 82.04.260(8)) and ETA 3059.2008 to a rendering business whose primary function was to produce nonperishable products. Because the taxpayer in the determination was not slaughtering, breaking or processing perishable meat products, it was not entitled to the tax rate contained in RCW 82.04.260(4). Generally, when a taxpayer is engaged in a process that includes multiple related activities, the Department will look to the primary activity to determine the appropriate tax classification for the process. ETA 3059.2008 explains the application of RCW 82.04.260.

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