



Excise Tax Advisory

Excise Tax Advisories (ETAs) are interpretive statements issued by the Department of Revenue under authority of RCW 34.05.230. ETAs explain the Department's policy regarding how tax law applies to a specific issue or specific set of facts. They are advisory for taxpayers; however, the Department is bound by these advisories until superseded by Court action, Legislative action, rule adoption, or an amendment to or cancellation of the ETA.

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This ETA has been cancelled as of January 4, 2005, and is no longer in effect

Temporary Staffing Companies

Temporary staffing companies furnish personnel to clients on a part time or temporary basis. Some staffing companies claim that payments received from these clients should be excluded from the measure of the business and occupation (B&O) tax as an advance or reimbursement (commonly referred to as a "pass-through" payment) under the Department's WAC 458-20-111 (Rule 111).

Washington imposes the B&O tax on the act of engaging in business activities. RCW 82.04.220. The law does not allow a deduction from the measure of the tax for the cost of doing business. Some funds received by a taxpayer may not be part of the gross income of the taxpayer's business. Rule 111 recognizes that certain advances or reimbursements "pass through" a business solely in the business' capacity as an agent for a customer or client. Those payments meeting the requirements of Rule 111 are not attributed to the business activities of the business, and may be excluded from the measure of tax. In order to exclude these payments from the measure of tax, the Washington State Supreme Court has ruled that two conditions must be met. The taxpayer must first establish that it received the funds as the agent of the customer or client. If this first condition is satisfied, the taxpayer must also establish that its use of the funds to pay a third party is solely as an agent of the customer or client. *City of Tacoma v. William Rogers Co.*, 149 Wn.2d 169, 60 P.3d 79 (2002).

Is a temporary staffing company an agent of its clients?

The existence of an agency relationship is not controlled by the labels the parties use to describe themselves in their contract documents. Rather, standard common law agency principles are used in analyzing whether an agency relationship exists. The essential elements of common law agency are mutual consent to the relationship between a principal and an agent, and the right of control over the agent by the principal. If these elements are not satisfied, there is no agency relationship.

Is a temporary staffing company liable for paying workers other than as agent of its clients?

Advisories numbered as 2 plus three digits (e.g. 2002.16.179) are advisories issued on or after July 2, 1998.

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If a temporary staffing company assumes any liability to third parties in connection with the receipt of payment, including any liability to the workers, beyond that of an agent of the client, the payments it receives and uses to pay the third parties are not excludable "pass-through" payments. These payments must be included in the measure of tax, notwithstanding that the staffing company or its client may designate these payments for paying workers' wages and benefits. For example, the Washington State Supreme Court held that when a temporary staffing company is the employer of temporary workers, the staffing company is liable for paying the workers as a principal, not solely as an agent. *City of Tacoma v. William Rogers Co.*, 149 Wn.2d 169, 60 P.3d 79 (2002).

Determining the appropriate tax classification.

If a staffing company is the client's agent and has no liability for paying the workers furnished to the client other than as agent, the staffing company's income is subject to the service and other activities B&O tax. The measure of tax does not include funds qualifying for "pass-through" treatment under Rule 111.

When a staffing company is the employer of the workers furnished to the client, the staffing company's B&O tax reporting classification is determined based on the services performed by the staffing company's employees. The measure of tax includes payments that the staffing company or client may designate for paying the employee's wages or benefits. If the work performed is classified as a retailing activity under RCW 82.04.050, the staffing company must collect retail sales tax from its client, unless specifically exempt by law. If an employee performs services subject to one tax classification and, incidental to those services, performs a service subject to a different tax classification, the tax classification of the predominate services performed applies to the gross income associated with that employee.

Examples:

- Income for providing employees that perform engineering services to a manufacturing firm is subject to service and other activities B&O tax.
- Income for providing employees that perform architectural services to a construction company is subject to service and other activities B&O tax.
- Income for providing employees to operate cash registers for a retail clothing store is subject to service and other activities B&O tax.
- Income for providing employees to a homeowner who perform landscape services for the homeowner is subject to the retailing B&O tax. Retail sales tax must also be collected from the homeowner and remitted to the Department.
- Income for providing employees that perform construction cleanup services to a construction company is subject to the wholesaling B&O tax, but only if the staffing company obtains a resale certificate from the construction company. If a resale certificate is not obtained, retailing B&O and retail sales taxes apply.
- Income for providing employees to a television broadcasting company who clean the interior of an office building and sweep adjacent pedestrian entryways and sidewalks is subject to the service and other activities B&O tax because these activities are janitorial services. The service and other activities B&O tax applies to the gross income attributable to these employees even if in addition to the janitorial services the employees incidentally pick up litter from an adjacent parking lot.

- Income for providing employees to a television broadcasting company who perform janitorial services (subject to service and other activities B&O tax) and will also on occasion pressure wash the exterior of the building (subject to retailing B&O and retail sales taxes) must be segregated for tax reporting purposes. The pressure washing of a building is not a service incidental to the janitorial services.
- Income for providing an employee to a client who customizes a software program for the client is subject to the service and other activities B&O tax. The service and other activities B&O tax applies to the gross income attributable to the employee even if at the client's request the employee incidentally installs a different software program onto the client's computer.
