

Cite as Det. No. 91-210, 11 WTD 389 (1992).

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u> <u>N</u>
For Correction of Assessment of)	
)	No. 91-210
)	
. . .)	Registration No. . . .
)	Balance Due Notices:
)	. . . , . . . ,
)	. . . , . . . ,
)	. . . , . . .

[1] **RULES 111, 159 AND 224:** SERVICE B&O TAX -- GROSS INCOME -- DEDUCTIONS -- AGENT. Taxpayer acting as an agent who solicits subscription renewals on behalf of magazines is liable for Service B&O tax on amounts it receives from subscribers and retains as its commissions and on amounts, if any, it receives directly from publishers for its services. The taxpayer does not owe the tax on amounts collected and remitted to the publishers where the taxpayer is not primarily or secondarily liable for subscription payments to the publishers other than as agent and where it is not entitled to retain the full amount of receipts. Accord: Det. No. 88-377, 6 WTD 439 (1988), Det. No. 91-155, 11 WTD 197 (1991).

[2] **RULES 224 AND 108:** SERVICE B&O TAX -- GROSS INCOME -- REFUNDS -- DEDUCTIONS. Amounts taxpayer magazine subscription service refunds to subscribers due to overpayment are deductible if overpayments were reported as gross income. Overpayments are not gross income because they are not consideration for services rendered. Cancellation refunds in full or part are deductible because sales were not finally completed.

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.

TAXPAYER REPRESENTED BY: . . .

DATE OF TELEPHONE CONFERENCE: . . .

NATURE OF ACTION:

The taxpayer petitions to cancel balance due notices by claiming the Department improperly disallowed deductions it had taken.

FACTS:

De Luca, A.L.J. -- The balance due notices concern Service business and occupation (B&O) tax for Q2-88, Q4-88 and Q1 through Q4-89. The Department's Taxpayer Account Administration division (TAA) issued all the notices [in February 1991], except . . . which was issued [a few days later]. They total \$. . . and are unpaid.

On behalf of various magazines and newspapers, the Washington-based taxpayer contacts current subscribers nationwide about renewing their subscriptions. If the subscribers do renew, the taxpayer bills them. The taxpayer claims it holds the funds it receives from the subscribers in trust for the respective magazines. The taxpayer states it retains a predetermined percentage of such money (ranging from 3% to 90% depending on the publication) and then transfers the balances to the respective publishers. The taxpayer notes it is not liable to the publishers, other than as an agent, for the subscription receipts. Thus, if a subscriber defaults in paying, the taxpayer is not liable to the publisher for the debt.

The taxpayer reported the gross income it received from the subscribers. However, it deducted from that gross income the amounts it remitted to the magazine publishers and the amounts it refunded to subscribers due to overpayment or cancellation.

The Department denied the deductions and assessed tax on the gross incomes the taxpayer reported.

ISSUE:

Should the taxpayer be allowed to deduct from gross income the amounts it remits to the magazine publishers and the amounts it refunds to the subscribers?

TAXPAYER'S EXCEPTIONS:

The taxpayer claims it acts merely as an agent for the publications and therefore should be permitted to take the deductions for amounts it remits to them. The taxpayer also asserts it should be allowed to deduct the refunds.

DISCUSSION:

The B&O tax is imposed by RCW 82.04.120 which provides:

There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sale or gross income of the business, as the case may be. (Emphasis supplied.)

Gross income of the business is defined by RCW 82.04.080 in pertinent part to mean:

. . . the value proceeding or accruing by reason of the transaction of the business engaged in and includes . . . compensation for the rendition of services, . . . fees, . . . and other emoluments however designated, all without any deduction on account of . . . labor costs, . . . delivery costs, taxes, or any other expenses whatsoever paid or accrued and without any deduction on account of losses. (Emphasis supplied.)

However, deductions are permitted in certain instances. Det. No. 88-377, 6 WTD 439 (1988) ruled on a similar matter.

The issue is whether the amounts billed and collected by the taxpayer [management provider] for the partnership represent gross proceeds of the taxpayer's business. . . .

This case is distinguishable from those where a business pays costs on behalf of a customer and receives payment from the customer for the costs. In such a case, the amounts received are included as part of the gross proceeds of the business unless the costs are not part of the businesses' costs in performing its services and the business is not primarily or secondarily liable for payment of the costs, other than as agent of the customer. WAC 458-20-111.

In the present case, the agreement between the taxpayer and the partnership provides that the taxpayer shall do the billing for the partnership and be entitled to 5% of the partnership's gross receipts for its billing and other management services. The taxpayer does not have a right to retain the full amount of the invoiced amount. Nor is the taxpayer liable to the partnership if the patient fails to pay the bill. The taxpayer only is liable for service B&O upon the gross income derived from its business--in this case . . . the amount received or retained from the partnership's gross receipts for management services. The partnership is liable for B&O tax on 100% of its gross receipts with no deduction for the five percent paid to the taxpayer.

WAC 458-20-111 (Rule 111) provides:

The words "advance" and "reimbursement" apply only when the customer or client [subscriber] alone is liable for payment of the fees or costs and when the taxpayer making the payment [to the publishers] has no personal liability therefor, either primarily or secondarily, other than as agent for the customer or client. (Bracketed words and emphasis supplied.)

There may be excluded from the measure of tax amounts representing money or credit received by a taxpayer as reimbursement of an advance in accordance with the regular and usual custom of his business or profession. The foregoing is limited to cases wherein the taxpayer, as an incident to the business, undertakes, on behalf of the customer, guest or client, the payment of money, either upon an obligation owing by the customer, guest or client to a third person, or in procuring a service for the customer, guest or client which the taxpayer does not or cannot render and for which no liability attaches to the taxpayer. It does not apply to cases where the customer, guest or client makes advances to the taxpayer upon services to be rendered by the taxpayer or upon goods to be purchased by the taxpayer in carrying on the business in which the taxpayer engages.

WAC 458-20-159 (Rule 159) pertains to the Service B&O tax classification for agents promoting sales for their principals. The rule also addresses the record keeping requirements placed on agents to permit them to avoid paying tax on gross sales rather than on just their commissions or other incidental income.

AGENTS AND BROKERS. Any person who claims to be acting merely as agent or broker in promoting sales for a principal or in making purchases for a buyer, will have such claim recognized only when the contract or agreement between such persons clearly establishes the relationship of principal and agent and when the following conditions are complied with:

(1) The books and records of the broker or agent show the transactions were made in the name and for the account of the principal, and show the name of the actual owner of the property for whom the sale was made, or the actual buyer for whom the purchase was made.

(2) The books and records show the amount of gross sales, the amount of commissions and any other incidental income derived by the broker or agent from such sales.

SERVICE AND OTHER BUSINESS ACTIVITIES. Every consignee, bailee, factor, agent or auctioneer who makes a sale in the name of the actual owner, as agent of the actual owner, or who purchases as agent of the actual buyer, is taxable under the service and other business activities classification upon the gross income derived from such business.

[1] In the present matter, the taxpayer is not liable to compensate the publishers for the subscriptions other than as an agent. Thus, the taxpayer has no primary or secondary liability to the publishers. Furthermore, the taxpayer is not entitled to keep the receipts except for the predetermined commission percentages. The payments received from subscribers and passed on to the publishers are a deductible cost of the taxpayer's doing business. Therefore, the taxpayer is not liable for B&O taxes for money received from subscribers for magazine and newspaper subscriptions if the money is remitted to the publishers.

However, any amounts the taxpayer retains from such payments, or which it receives directly from the publishers for its services are taxable as gross income. 6 WTD 439.

[2] The next item concerns the deductions for refunds made to subscribers due to overpayments or cancellations. It is important to determine who is reporting the income as taxable and who is giving the refund. Refunds are deductible by the taxpayer if the taxpayer reported the subscription payments as taxable gross income. If a publisher gives a refund, with no adjustment in the taxpayer's commission, then the taxpayer may not adjust its return. If the taxpayer is refunding the subscriptions in whole or part from its own money, then proportionate refunds are deductible by the taxpayer. The refunds are deductible under the same tax classifications as reported on the returns. Refunds in full or part are deductible because the sales were not finally completed. Under WAC 458-20-108 (Rule 108), a taxpayer is entitled to deduct the refunds from the gross amount of income it reports on its tax return.

DECISION AND DISPOSITION:

The taxpayer may deduct from its gross income the amounts it collects and remits to the publishers where the taxpayer is not primarily or secondarily liable for subscription payments to them other than as an agent and where it is not entitled to retain the full amount of receipts.

The taxpayer may also deduct subscription refunds from its gross income to the extent the refunds constitute the taxpayer's commissions, provided the taxpayer had reported the income

previously and had not deducted it. If the taxpayer is not refunding amounts from its own money then it may not deduct the refunds. Refund amounts are deductible under the same classifications as reported on the tax returns.

The taxpayer should pay Service B&O tax on its commissions.

The taxpayer's petition is granted to the extent the taxpayer may deduct income remitted to the publishers or refunded to the subscribers. The petition and Balance Due Notices in Document Numbers . . . , . . . , . . . , . . . , . . . are remanded to TAA in accordance with this decision.

DATED this 31st day of July 1991.