Cite as Det. No. 92-004, 11 WTD 551 (1992).

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

In the Matter of the Petition For Determination of Tax Liability of	)	D E T E R M I N A T I O N
	)	No. 92-004
. . .	)	Registration No. . . .

[1] RULE 224: B&O TAX -- SERVICE -- WRITERS AND SERVICE PROVIDERS. Royalties received for the sale of books represent income from engaging in a business activity. A corporation which is formed by writers to employ them, own the copyrights from their works, receive the royalties, engage in product management and render promotional services is subject to service B&O tax on the gross income of the business.

[2] RULE 194: B&O TAX -- SERVICE -- APPORTIONMENT. The situs of a royalty payment is the situs of the royalty owner. Authors who operate their corporation solely from their Washington residence and who sold both books in question after they moved to Washington are not entitled to apportion income notwithstanding the fact that incidental promotional services are rendered elsewhere. ACCORD: Det. No. 88-233, 6 WTD 59 (1988); Det. No. 87-186, 3 WTD 195 (1987); 88-233, 6 WTD 59 (1988).

[3] ETB 412.32.99 -- ESTOPPEL -- ORAL INSTRUCTIONS FROM THE DEPARTMENT. Department does not have authority to grant exemption from a proposed, correct tax assessment on the grounds that taxpayer alleges it received erroneous oral instructions regarding the taxability of its activities in this state. ACCORD: Det. No. 86-82A, 1 WTD 133 (1986); Det. No. 86-232, 1 WTD 93 (1986); Det. No. 87-136, 3 WTD 67 (1987).

[4] MISCELLANEOUS -- RCW 82.32.330 -- SECRECY CLAUSE. Department of Revenue employees are expressly

> prohibited by the legislature from disclosing information about taxpayers to others. Alleged transactions with one taxpayer will not form the basis for finding that another taxpayer is exempt from B&O tax.

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: . . .

NATURE OF ACTION:

Taxpayer, a closely-held corporation, petitions for determination of tax liability following instruction from the Department of Revenue that its income is subject to B&O tax.

FACTS AND ISSUES:

Adler, A.L.J. (successor to Heller, A.L.J.) -- Taxpayer is a closely-held corporation whose two officer-employees write books and engage in related activities.

When the corporation hired staff and registered this information with the Department of Labor and Industries, the state's Uniform Business Identifier system automatically informed the Department of Revenue's Taxpayer Account Administration (TAA) division of the corporation's existence. Following a routine inquiry, a TAA staff member informed the corporation that royalty income was subject to Washington State business and occupation tax. Prior to any assessment, the corporation appealed on the issue of whether the tax applies.

Taxpayer was incorporated in 1982 in another state. Shortly thereafter, it moved its headquarters to Washington.

Two books are at issue: Book A and Book B. Both were copyrighted and published after the corporation moved to Washington. The hardcover editions' publisher is a large New York company. The paperback editions are each published by a New York company with permission of the corporation and the hardcover publisher.

Both of the taxpayer's officer-employees actively participate in the work of creating and promoting a finished product. Through their corporation, they engage in a number of activities prior to and after publication by the New York-based publisher.

Taxpayer-corporation's president explains its

> business is the development and exploitation of literary works - in a word publishing books in conjunction with [the publishing company located in] New York who prints and distributes [taxpayer's] product. (Emphasis and brackets supplied.)

Among the activities engaged in by the corporation are:

> developing ideas for books, obtaining financing commitments for publication, writing and editing manuscripts, selecting and electronically setting the manuscript type, proofing the printed product, developing the jacket art and book design concept, engaging the jacket and book interior designer, selecting the paper and cloth for the interior and the jacket, selecting type face for and proofing the jacket through all phases of development, and writing flap copy and catalog copy.
>
> In addition, [the corporation] participates in the development of advertising copy and art, the setting of simultaneous nation-wide releases, meetings with the sales force prior to publication, and the determination of which cities should be part of promotional tours and which media events to include in those tours. In each city, we work with booksellers and visit book stores to meet customers and sign autographs. During the tours, we conduct marketing research and analysis and transmit marketing data to [the publisher] in New York and to book sellers in the cities which have not yet been visited. (Brackets supplied.)

The representative claims on their behalf that the taxpayer's principals decided to leave their prior state of residence "because of its very high state income tax." Prior to the move, the corporation asked its accountant, who practices in the taxpayer's state of incorporation, to investigate the tax and other ramifications of moving its business to Washington.

The accountant, who also provided a signed declaration of facts, states he contacted the Department directly, described the taxpayer and its principals' activities, and was told that they would not be subject to B&O tax. He did not name the office location or the employee allegedly giving the oral information.

Taxpayer's representative argues vigorously that any assessment of B&O tax against the taxpayer or its principals represents a violation of First Amendment and due process rights, as well as violating the Commerce Clause. He also contends it is an "ex

post facto" application of the laws, if the tax is to be applied for the years during which the statute of limitations is open after taxpayer and its principals were allegedly told it would not apply.

Finally, taxpayer's representative contends another author has been permitted to pay tax at the publisher's B&O tax rate and alleges that, since taxpayer is engaged in the same activity, the Department is bound by the federal constitution to treat it in the same way.

TAXPAYER'S EXCEPTIONS:

On behalf of the taxpayer-corporation, the representative objects to the assessment of tax on royalty income received for books produced and any other income for the surrounding promotion and management services. Those objections are:

[1] The taxpayer and its principals were not engaged in "business" in Washington; subjecting them to taxation under the Service classification of the business and occupation tax results in an unconstitutional burden on their First Amendment rights;

[2] If the taxpayer's income is subject to tax, it must be apportioned between Washington and all other states where the corporation and its principals conduct business;

[3] The Department is estopped from collecting tax, because an unnamed employee allegedly gave erroneous information;

[4] The tax has been selectively enforced against the corporation and its principals in violation of their equal protection rights.

DISCUSSION:

[1] BUSINESS AND OCCUPATION TAX

The business and occupation tax is imposed on every person, including corporations, for the act or privilege of engaging in business activities. RCW 82.04.220.

Generally, for income tax purposes, the right to receive royalties, like other intangible property, follows the residence of the recipient. Washington State, however, imposes no income tax. The B&O tax is on the privilege of doing business; it is not an income or property tax. The measure of the tax is "the gross income of the business," including royalties. The incidence of the tax is on the exercise within this state of the business privilege which generates the royalties or income. The

statutory terms, "business" and "engaging in business" both encompass some activity, which is begun, continued or somehow exercised within this state.

"Business" is defined by RCW 82.04.140 as:

> . . . all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly.

The term "engaging in business" is defined by RCW 82.04.150 to mean:

> . . . commencing, conducting, or continuing in business and also the exercise of corporate or franchise powers...

These statutory definitions are extremely broad and certainly encompass what the taxpayer and its principals do. Writing, consulting, and management of products are each business activities. Taxpayer and its principals conduct these activities, at least in part, for the purpose of making money. By performing activities with the object of monetary gain, the taxpayer and its principals have engaged in business under the statute.

Between them, the principals or the corporation write books, act as consultants in determining the structure and appearance of the final works, manage the careers of the officers and their works, and make personal appearances. The corporation owns the copyrights, and it receives royalties from sales of books the employees have authored and produced. We find that sufficient activities have occurred in Washington to subject taxpayer to B&O tax.

The representative contends the Department, by administrative interpretation of the B&O tax law, has placed an unconstitutional burden on the taxpayer by informing it that it will be taxed at the service B&O tax rate, which is higher than the rate used by other persons exercising First Amendment rights. He contends the Department is prohibited from taxing these rights by RCW 82.04.4286, which permits deductions for

> amounts derived from business which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States.

The representative argues

> the taxation of first-amendment protected activity necessarily raises serious constitutional questions,

> particularly when applied to the actual writing of the literary works which my client develops and exploits.

There is no assertion of actual state or federal constitutional sections barring taxation, and we do not believe such a prohibition exists for this activity.

The only persons who exercise First Amendment rights as a business activity and who pay a lower rate of tax than authors are newspaper, periodical, or magazine publishers and radio or television broadcasters. These activities are specifically designated by the legislature in RCW 82.04.280 as being taxable at a lower rate.

Although the taxpayer claims to be the publisher of the works, taxpayer clearly is not. The New York hardcover and paperback publishing companies are the actual publishers of the work. The corporation has achieved a level of success that permits it to retain control of virtually every aspect of its work, participating in nearly every pre-publishing decision. This, however, does not constitute the actual activity of publishing; nor does it qualify the corporation for a lower B&O tax rate.

Since the business activity of writing is not enumerated in chapter 82.04 RCW, the statute requires taxation at the higher rate. Additional income, if any, received for its other activities of editing, production management, and promotion services would also be taxable under RCW 82.04.290. Nowhere else in chapter 82.04 RCW are business activities involving the exercise of First Amendment rights identified as having a lower tax rate. They are not otherwise identified at all. Consequently, they must be taxed under the catch-all Service classification of the business tax at RCW 82.04.290. That statute imposes the higher tax rate

> Upon every person engaging within this state in any business activity other than or in addition to those enumerated in RCW 82.04.230, 82.04.240, 82.04.250, 82.04.255, 82.04.260, 82.04.270, 82.04.275, and 82.04.280. . . .

It is measured by "the gross income of the business," which includes royalties. RCW 82.04.080.

This is not a matter of administrative interpretation by the Department. The statute is unambiguous and permits no other application. If the Department were to tax writing, or any of the many other forms of First Amendment expression other than publishing and broadcasting, at any rate besides the Service B&O tax rate, it would be disregarding the authority of the

legislature. It would also violate the separation of powers doctrine, because the executive branch would be usurping the power of the legislative branch. The matter of the constitutionality of the legislative taxing scheme itself must be decided in a different forum than this one.

The representative contends "these issues would make litigation of this matter a very interesting one for the lawyers and judges involved." Be that as it may, if taxpayers' intent is to challenge the constitutionality of the state legislature's acts, they have addressed the wrong forum. As an administrative agency, the Department of Revenue is required to presume the constitutionality of the laws as enacted by the legislature. Only the courts possess jurisdiction to rule upon the constitutionality of statutory law. Bare v. Gorton, 84 Wn.2d 380, 383 (1974).

Further, the representative argues

> The registration fee [to receive a business-registration number with the State] is a flat tax which in effect serves as a charge for engaging in first amendment activity. Although the Supreme Court has recently upheld sales taxes that do not unduly burden such activity, it retained the prohibition against flat license fees and it inferentially raised serious questions about the constitutionality of a gross receipts tax which taxes first amendment activity even when the putative taxpayer has lost money on that activity.

By charging a $15.00 fee to obtain a business license in this state, the Department has not attempted to license the taxpayer's writing or profession, nor does it have the authority to do so. Writers, whether amateur or professional, are not required to be licensed to write. Certain other professional activities do require specific licensing by the Business and Professional Licensing Divisions of the state Department of Licensing. Such licenses and professional activities are provided for under the provisions of Title 18 RCW (Business and Professions), not under Title 82 RCW (the Revenue Act). The Department of Revenue, as the government agency responsible for administration of the Revenue Act, has nothing to do with the administration of professional licenses.

There is a clear distinction, at law and in fact, between a "license" or licensing requirement and a "registration" or registering requirement. Black's Law Dictionary, Fifth Edition, page 929, defines "license" as a

> Certificate or the document itself which gives permission . . . the permission to do an act which, without such permission would be illegal. Permission to do a particular thing, to exercise a certain privilege or to carry on a particular business or to pursue a certain occupation. [Citations omitted.]

The same source, at page 1155, defines the term "registration" to mean

> recording; enrolling; inserting in an official register. Enrollment, as registration of voters, registration for school, etc.

The Department of Revenue cannot and does not permit or deny writers the permission to write or to pursue literary careers for financial gain or otherwise. Rather, the registration certificate which has been issued places the taxpayers' names and pertinent information on the tax records of this state. It is not required under the law, statutory or constitutional, that the Department must have a registrant's approval or agreement to do so. It is also permissible to charge a reasonable fee for issuing the registration certificate. Formal registration is simply the Department of Revenue's method of recordkeeping and assuring compliance with tax liabilities.

RCW 82.32.030 provides, in pertinent parts, as follows:

> If any person engages in business or performs any act upon which a tax is imposed in the preceding chapters, he shall, whether taxable or not, under such rules and regulations as the department of revenue shall prescribe, apply for and obtain from the department a registration certificate . . . . No person shall engage in any business taxable hereunder without being registered in compliance with the provisions of this section.

We do not perceive, nor does the petition assert, how the mere registration requirements of the statutory law violate the First Amendment of the Constitution. Again, if this question is to be decided at all, it must be decided in the proper forum.

[2] APPORTIONMENT

The representative has raised other constitutional objections, arguing the state is seeking to tax activities which took place outside of Washington and in interstate commerce. We disagree. The activities of writing, managing projects, and making personal appearances do not themselves involve the crossing of state

borders are not in interstate commerce; consequently, taxing the receipt of royalties does not violate the Commerce Clause of the Constitution.

We do agree that only business activities taking place inside Washington may be taxed by the state, but we find that the activities giving rise to the right to receive royalty income occurred in Washington and are properly subject to tax here.

RCW 82.04.460(1) provides:

> Any person rendering services taxable under RCW 82.04.290 and maintaining places of business both within and without this state which contributes to the rendition of such services shall, for the purpose of computing tax liability under RCW 82.04.290, apportion to this state that portion of his gross income which is derived from services rendered within this state. Where such apportionment cannot be accurately made by separate accounting methods, the taxpayer shall apportion to this state that proportion of his total income which the cost of doing business within the state bears to the total cost of doing business both within and without the state.

WAC 458-20-194 (Rule 194), the administrative rule which implements this statute, provides in part:

> For purposes of apportionment under RCW 82.04.460 and this rule the term "place of business" generally means a location at which regular business of the taxpayer is conducted and which is either owned by the taxpayer or over which the taxpayer exercises legal dominion and control. The term does not include locations or facilities lodging nor does it include mere telephone number listings or telephone answering services.

Taxpayer's revenues from the publishers arose by virtue of the ownership and sale of publishing rights, not from the performance of services by them. The sale of the publishing rights occurred in Washington. Thus, the statutory apportionment requirement does not apply to the revenues at issue.

Further, the constitution does not require apportionment of these revenues. The right to receive royalties results from the sale of an intangible property right. The state in which an intangible property owner is domiciled may impose a tax measured by the value of that property even though another state has imposed, or may seek to impose such a tax. Curry v. McCanless, 307 U.S. 357, 83 L.Ed. 1339, 59 S. Ct. 900 (1939); State Tax

Commission of Utah v. Aldrich, 316 U.S. 174, 86 L. Ed. 1358, 62 S. Ct. 1008 (1942).

Intangible property has its situs in the domicile of the owner. Granite Equipment Leasing Corp. v. Hutton, 84 Wn.2d 320, 325 (1974); In re Eilermann's Estate, 179 Wash. 15, 16 (1934).

Both the corporation and its shareholders have a place of business in Washington.

The president alleges that only about six months of the entire time the principals have resided in this state was spent on their business activities. This is not determinative for apportionment purposes.

With regard to the actual creation of the work generating the right to receive royalties, the president states that the corporation's revenues have been generated by two works, Book A and Book B. Book A was written primarily in several other states prior to the corporation's move to Washington. No more than one-seventh of the work developing, writing and editing that work occurred in the State of Washington. On the other hand, most of the creative work on Book B was done in Washington.

We do not find the apportionment is proper for royalties received on either sale. The activities giving rise to the right to receive royalties for Book A occurred after the principals moved to Washington. Although the president states the book was written over a number of years, we do not agree that the royalty income arising from the subsequent sale of the book after the principals moved to Washington should be apportioned. The finished product was the item in which the buyer was interested and for which the royalties were received. The copyright date of the book is after the corporation moved to Washington.
Similarly, the president states most of the creative work in producing Book B occurred in Washington. Even if apportionment had been proper for revenues derived from the sale of publishing rights to Book A, Det. No. 87-186, 3 WTD 195 (1987) and Rule 194 would not allow for apportionment in the case of Book B. The pertinent portion of Rule 194 provides:

> . . . the [service B&O] tax applies upon the income received for services incidentally rendered to persons outside this state by a person domiciled herein who does not maintain a place of business within the jurisdiction of the place of domicile of the person to whom the service is rendered. (Emphasis supplied.)

Det. No. 87-186, 3 WTD 195 (1987) states:

> The key word is incidentally. Where, as here, services are substantially rendered to persons outside this state, the provision has no application. (Emphasis in original.)

Where the activities are incidental, however, the requirement of a place of business within the other jurisdiction(s) still applies. As the rule states, mere transient lodging or maintenance of a telephone number does not qualify as another "place of business."

We find the activities generating the right to receive royalties from both Book A and Book B occurred in Washington. The other activities listed by the president include promotional appearances, autograph sessions, visits to booksellers, meetings with legal counsel, and meetings with the publisher. None of those activities created the work for which royalties were paid. They assisted in making a more attractive work, negotiating contracts to sell the work, or boosting sales of the work. They did not create the work itself. As such, they are incidental to the creation of the work which generated the income; and the royalty income is not subject to apportionment just because the incidental activities occurred elsewhere.

The fact that any of the books are sold worldwide after the creative work is completed is also beside the point in determining whether the income is subject to apportionment.

[3] ESTOPPEL

Taxpayer's representative contends the taxpayer would not have moved to Washington if it had known the B&O tax would apply to it. He also contends that, through its accountant, the taxpayer and the principals received oral information from the Department of Revenue that the B&O tax would not apply to these activities. Excise Tax
Bulletin 419.32.99 (ETB 419) addresses the issue of whether the oral instructions of its employees are binding upon the Department. That bulletin states the Department

> gives consideration, to the extent of discretion vested in it by law, where it can be shown that failure of a taxpayer to report correctly was due to written instructions from the department or any of its authorized agents. The department cannot give consideration to claimed misinformation resulting from telephone or personal consultations with a department employee.
>
> There are three reasons for this ruling:

(1) There is no record of the facts which might have been presented to the agent for his consideration.

(2) There is no record of instructions or information imparted by the agent, which may have been erroneous or incomplete.

(3) There is no evidence that such instructions were completely understood or followed by the taxpayer.

In this case, the taxpayer alleges that its decision to move here and its failure to register were the result of oral instructions given by an unnamed Departmental employee to their out-of-state accountant.

ETB 419 follows the Washington Supreme Court's holding in King County Employees' Assoc. v. State Employees' Retirement Board, 54 Wn.2d 1, 11-12 (1959):

> Estoppel will never be asserted to enforce a promise which is contrary to the statute and the policy thereof.

Further, in Kitsap-Mason Dairymens' Association v. Tax Commission, 77 Wn.2d 812, 818 (1970), the state Supreme Court held:

> the doctrine of estoppel will not be lightly invoked against the state to deprive it of the power to collect taxes. The state cannot be estopped by unauthorized acts, admissions, or conduct of its officers.

The representative also states:

> I have made no provision for interest in light of the fact that the failure to pay the tax earlier was due to the Department's statement that registration was not required and the issues of estoppel and laches that the statement raises.

The ultimate responsibility for registering with the Department and properly reporting taxes rests on the person in business. The state is not required to make sure every person knows his or her tax obligation before it can assess taxes, interest or penalties. The burden on those engaging in business in Washington to inquire about Washington's tax laws is not unreasonable. In this case, the accountant who states he made the inquiry on behalf of the taxpayers admitted to being unfamiliar with the Business and Occupation tax. Because of the

burden on taxpayer and its principals to inform themselves, they could have asked a Washington accountant for information. Such a person, presumably, would be informed about the laws of the state in which he works, unlike an accountant from another state.

Additionally, many states impose business taxes. Taxpayer has repeatedly stated it moved to Washington to find a lower overall tax situs. The principals also incorporated and became the corporation's employees, presumably to obtain federal tax advantages from operating in that form. They have demonstrated a higher degree of sophistication than many taxpayers.

Taxpayer and its principals complain about the hardship caused by the alleged oral information and by the fact that it took the state several years to discover the taxpayer. We disagree. As a practical matter, it would be impossible for the Department to audit every person doing business in this state or give every person actual notice of potential tax liability. Additionally, the taxpayer will actually receive a benefit. Due to the statute of limitations, not all years between the 1982 move and the present time, during which its income was properly subject to B&O tax, are open to assessment.

Under RCW 82.32.050, the Department is granted limited authority to waive interest. WAC 458-20-228 (Rule 228) addresses the problem of late payments. It lists the only situations under which a waiver may be granted. Lack of knowledge of a tax obligation is not one of them.

Because we find that the tax properly applies, we do not have the authority to abate, in advance, any current or future assessment based on taxpayer's allegation that it received erroneous oral instructions regarding its tax liability. Similarly, we are without authority to grant an interest waiver on an assessment of taxes where the taxpayer failed to register.

[4] SECRECY CLAUSE

The representative alternatively argues it is improper for the Department to find the taxpayer subject to service B&O tax, because

> I have learned that in a similar case involving a famous writer resident in Washington [the Department] did not take such a position.

He concludes this memo by stating:

> If the Department and [the taxpayer] can sign a closing agreement which settles claims for allegedly past due tax on the basis set forth above [naming an amount] and

> also provides that the same method of determining the measure of the tax and the rate shall apply [sic] in the future (absent new legislation), [taxpayer] would be interested in resolving this matter and waiving its claims for an exemption under RCW 82.04 as it is currently written. This would in essence be a resolution similar to the one the Department reached with the writer to whom I referred earlier and thus has the additional merit of providing an even-handed and equal approach to this problem. (Brackets supplied.)

In a subsequent memo, the representative restates his position with regard to the other author. There, he identified the other writer and states, in part:

> we understand that the Department imposed the publisher's tax rate of RCW 82.04.280 on the well-known Washington author, [X]. Because [taxpayer] conducts the same first amendment protected activity, the Department could not constitutionally tax it at a different rate. (Brackets supplied, and Author X's identity withheld.)

First and foremost, we are unwilling to discuss with the taxpayer's representative any of the particulars of Author X's dealings with the Department of Revenue. Our state's legislature has chosen to protect the privacy of every taxpayer in this state by enacting RCW 82.32.330, with its strong language. That statute provides, in pertinent part:

> Returns and tax information shall be confidential and privileged, and except as authorized by this section, neither the department of revenue nor any officer, employee, or representative thereof nor any other person may disclose any return or tax information.

The statute contains several exceptions, permitting the Department to give out information to certain authorized persons. The representative does not qualify under any of the exceptions. RCW 82.32.330 further states that

> [a]ny person acquiring knowledge of any return or tax information in the course of his or her employment with the department of revenue . . . who discloses any such return or tax information to another person not entitled to knowledge of such return or tax information . . . shall upon conviction be punished by a fine . . . and, if the person guilty of such violation is an officer or employee of the state, such person shall forfeit such office or employment and shall be

> incapable of holding any public office or employment in this state for a period of two years thereafter. (Brackets supplied.)

Even if we were inclined to argue the truth of his assertions about Author X's reporting methods, which we are not, we would not do so out of respect for Author X's privacy and in compliance with the law prohibiting discussion of it with an unrelated party.

Additionally, a correct assessment would not be overturned on grounds of selective enforcement. The business and occupation tax is self-assessing in nature. The responsibility for registering with the Department and properly reporting taxes rests on persons in business, not on the state. In Frame Factory v. Dept. of Ecology, 21 Wn.App. 50 (1978), the Washington Court of Appeals rejected a claim that the defendant had engaged in "selective enforcement" against the plaintiff. The court noted that

> The Frame Factory does not allege that it was selected for "prosecution" on the basis of some prohibited grounds such as race, religion or other arbitrary classification. But it asserts there is no justifiable reason why it was selected for enforcement.

The court upheld the enforcement of the regulation against the Frame Factory. Here the taxpayer and its principals do not allege that they were selected for assessment for any prohibited reason, and we do not think this was the cause. The proposed assessment cannot be canceled on grounds of selective enforcement.

DECISION AND DISPOSITION:

The advance petition for a B&O tax exemption is denied.

DATED this 8th day of January, 1992.