

Cite as 11 WTD 267 (1991).

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

In The Matter of the Petition	)	<u>D E T E R M I N A T I O N</u>
For Refund of	)	
	)	No. 91-277
	)	
. . .	)	Registration No. . . .
	)	
	)	

RULE 164, RULE 105, RCW 82.05.360 AND RCW 82.04.260:  
INSURANCE AGENT -- INDEPENDENT CONTRACTOR STATUS --  
COMMISSION INCOME. Commission income earned by an  
insurance agent is taxable under the insurance  
agents and brokers classification unless the agent  
is a bona fide employee of the insurance company.

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.

NATURE OF ACTION:

Taxpayer petitions for a refund of B&O taxes paid arguing that  
he is an employee of an insurance company and not engaging in  
business.

FACTS AND ISSUES:

Hesselholt, Chief A.L.J. -- Taxpayer . . . is an insurance  
agent for [an insurance company]. He petitioned [in January  
1991], for a refund of 1989 B&O taxes and stated that he would  
not pay the 1990 taxes, as he stated that the Department had  
previously ruled that [insurance company's] in-house agents  
were exempt.

In response to a request for additional information, taxpayer  
explained his work as follows:

[Insurance company] sets all the rules and time for  
the customer service agent (employee referred to as

inside agent) 8 A.M. to 4:30 P.M. with a 45 minute lunch and two 15 minute coffee breaks. We are not allowed to call out to solicit business or make personal phone calls. We are required to answer 60 or more incoming calls daily. These calls consist of questions about accounting, premiums on payment plans, policy language, verifications for lienholders and mortgage company's. (sic). Deleting and adding coverages for outside agents. If a customer has any policy with an outside agent and they call asking for auto, home, boat, fire or any other policy the inside customer service agent makes no money, only the outside agent is paid for the policy.

The inside customer service agents income comes only from a person that has never been insured previously by [insurance company] and they call in, with proof of a superior driving record and are accepted. The average customer service inside agent only writes about 1 1/2 applications daily, or approximately 30 each month. [Insurance company] does not supply a market for the average to poor driver. We are not allowed to sell a policy for a competitor. Vacations are scheduled by [insurance company] by seniority for the customer service agent. They are terminated as other employees for poor workmanship and are given monthly evaluations.

The Audit Division has interviewed several of the agents and received copies of the contracts used by [insurance company]. According to the contracts, [insurance company] has two programs, a standard agency agreement and an "[A]" agency agreement. The "[A]" agency agreement is what is used for the in-house agents, or what the taxpayer refers to as the "customer service agent." For [A] agents after 1/1/88, [insurance company] provides office space, telephone use and certain supplies and sales materials. The agent is authorized to solicit and submit applications for certain lines of insurance through [insurance company]. According to the contract, postage is paid by the agent. The agent cannot become a representative of another insurer without the prior written approval of [insurance company]. The agent is entitled only to commissions on new policies she/he writes. The agent is required to be a licensed "property casualty agent" by the Washington Insurance Commission, and "nothing in this agreement shall be construed to create the relation of employer and employee between" [insurance company] and the

agent. These agents receive a monthly guaranteed salary for three months, and then receive commissions only.

The standard agency agreement authorizes the agent to solicit and submit applications for certain lines of insurance. All expenses in connection with the solicitation of insurance or any duties under the contract are the responsibility of the agent. The agent cannot become a representative of another insurer without the prior written approval of [insurance company]. The agent agrees, in consideration of the receipt of renewal compensation, not to compete with [insurance company] for insurance coverages she/he has previously written. [insurance company] may furnish supplies to the agent. The agreement states that "nothing contained in this agreement shall be construed to create the relation of Employer and Employee between the Company and the Agent or any sub-agent of the Agent and the Agent shall be free to exercise his own judgment as to the persons from whom he will solicit insurance, the time, place and manner of such solicitations." The agent is entitled to renewal commissions and theoretically to bonuses, but apparently no bonuses have been paid for many years.

There is an addendum to the standard agency agreement that provides that from time to time an agent may be operating under the "[A] program." The addendum states that such program will be conducted on [insurance company]'s premises, and will be subject to [A] rules as established by [insurance company].

After three years on the [A] contract, an agent transfers to the standard agency contract, but may continue to work as an "in-house" or "customer service agent." They still receive commissions on new policies written as [A] agents, but are able to do some soliciting of business that results in their being eligible for renewal commissions.

The agents receive no benefits, and file a Schedule C for their Federal Tax returns.

Apparently, in 1976, one of the [insurance's] in-house agents was told by a representative of the Department of Revenue that they would be considered employees for the purpose of the Revenue Act. No actual documentation of such a meeting or decision can be found.

#### DISCUSSION:

An insurance company can choose whether to utilize employees or independent contractors to sell insurance. When a company chooses to create the relationship of principal and independent contractor, the agent is liable for business and occupation tax. Washington's Revenue Act only provides an exemption from the B & O tax for income earned in respect to employment in the capacity of an employee or servant as distinguished from that of an independent contractor. RCW 82.04.360.

WAC 458-20-164 (Rule 164) is the Department of Revenue's rule governing the taxability of insurance agents, brokers and solicitors. Rule 164 states:

(3) Every person engaging in business as an insurance agent, broker, or solicitor is taxable under the insurance agents and brokers classification upon the gross income of the business.

\* \* \*

(c) Every person acting in the capacity of agent, broker, or solicitor is presumed to be engaging in business and subject to the business and occupation tax unless such person can demonstrate he or she is a bona fide employee. The burden is upon such person to establish the fact of his or her status as an employee. (See WAC 458-20-105 Employees.)

WAC 458-20-105 (Rule 105) explains when a person will be considered an employee:

(4) EMPLOYEES. The following conditions indicate that a person is an employee.  
If the person:

(a) Receives compensation, which is fixed at a certain rate per day, week, month or year, or at a certain percentage of business obtained, payable in all events;

(b) Is employed to perform services in the affairs of another, subject to the other's control or right to control;

(c) Has no liability for the expenses of maintaining an office or other place of business, or any other overhead expenses or for compensation of employees;

(d) Has no liability for losses or indebtedness incurred in the conduct of the business;

(e) Is generally entitled to fringe benefits normally associated with an employer-employee relationship, e.g., paid vacation, sick leave, insurance, and pension benefits;

(f) Is treated as an employee for federal tax purposes;

(g) Is paid a net amount after deductions for employment taxes, such as those identified in subsection (3)(h) of this section.

Insurance agents are considered employees only if they meet the criteria stated in the bulletin. The rule presumes that the agent is an independent contractor; it is up to the agent to show that he/she is an employee.

The agent must either be "subject to the control or right of control of the insurance company in the performance of the details of the work" or be treated as a "common-law" employee for federal income tax purposes. Details of work that the courts consider include whether the insurance agent has fixed hours of work, whether the agent is required to make periodical reports to the insurance company, and whether the agent is free to exercise independent judgment as to persons from whom he or she would solicit insurance.

For federal tax purposes, persons are classified as independent contractors, common-law employees, statutory employees or statutory nonemployees. See IRS Publication 539 on Employment Taxes. The requirements for classification as a common-law employee are set forth in 26 Code of Federal Regulations (CFR) 31.3401(c)-1 (1990). The test is whether the person for whom services are performed has the right to control the result to be accomplished by the work and also the details and means by which the result is accomplished. Employers must withhold federal income taxes for common-law employees.

In the case of the agents operating only under the [A] contract after 1/1/88, they are compensated at a fixed percentage of new business, perform services for [insurance company] in ways specified by [insurance company], have no liability for business losses, but do have some contractual liability for business expenses, do not receive any fringe benefits, are not treated as either common law or statutory employees for federal tax purposes, and are not paid a net amount after deductions. These agents also signed contracts stating that they were independent contractors, and not

employees. We believe that the [A] agents are independent contractors, and are not employees for purposes of the B&O tax.

In the case of the standard agents, they are paid a set amount for commissions and renewals, are performing services for [insurance company], but are able to set their own times and methods of doing business. They have liability for their own business expenses and losses, do not receive any fringe benefits, are not treated as an employee for federal tax purposes, and are not paid a new amount after deductions. In the cases of those agents working under a standard agent contract, the agents are working as independent contractors.

DECISION AND DISPOSITION:

Taxpayer's petition is denied. If taxpayer's 1990 return is filed by . . . , interest will be waived on the tax due. If not paid by that date, an assessment will be issued for the taxes due, including interest.

DATED this 26th day of September, 1991.