Cite as Det. No. 93-025, 12 WTD 583 (1993).

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

In the Matter of the Petition For Ruling of Tax Liability of	D E T E R M I N A T I O N
	No. 93-025
. . .	Registration No. . . .
	. . ./Audit No. . . .

[1] RULE 126 -- B&O TAX -- FUEL SALE -- FRANCHISE. Automated fuel franchisee which charges its customers for fuel pumped from other franchises is considered to have purchased the fuel from the other franchisees and resold it to its customers if it reports its fuel tax to the Department of Licensing based on its charges to its customers. If the franchisee's fuel taxes are based on the fuel it pumps regardless of whose customer receives the fuel, a single sale between the franchisee pumping the fuel and the customer occurs at that time.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: . . .

NATURE OF ACTION:

An automated fuel franchisee protests an audit instruction requiring it to pay B&O tax on fuel pumped by other franchises to this franchisee's customers.

FACTS AND ISSUES:

Pree, A.L.J. -- . . . (hereinafter referred to as the taxpayer) is one franchisee in [a franchisor] network (hereinafter referred to as the franchisor) engaged in the business of automated fueling to commercial customers. The taxpayer would not only pump fuel into vehicles, it was responsible for a group of customers in its area. It issued access cards to customers enabling them to have fuel throughout the franchisor's system. It was responsible for obtaining payment from these customers for any fuel obtained throughout the system.

Its customers could pump fuel at any franchisee's location throughout the franchisor's network using a special access-charge card. The taxpayer would pay the pumping franchisee and bill its customer for the fuel. If a customer from another franchisee pumped fuel at one of the taxpayer's locations, the taxpayer would receive payment from the other franchisee through the franchisor at a price set by the franchisor. The other franchisee was responsible for obtaining payment from its customer.

The taxpayer received a letter dated [July 1988] from the Taxpayer Information and Education Section advising it that the fuel sale was taxable as a single transaction by the franchisee delivering the fuel. Any markups by the customer's franchisee was taxable under the service and other business activities classification of the business and occupation tax. Only the markup in the charge was taxable. The sale of fuel was not considered a transaction between franchisees.

The taxpayer's records were examined for the period January 1, 1987 through March 31, 1991 resulting in assessment . . . . The tax assessed is not in dispute here. Rather the following audit instruction to the taxpayer has been appealed:

> No adjustments have been made to the income reported because you have been reporting as instructed in a letter dated [July 1988] (Exhibit A) discussing how [franchisor's] franchise holders are taxable. It appears the person writing the letter did not have a copy of your franchise agreement (a portion is attached as Exhibit B) at the time the letter was written, and therefore did not have all the facts necessary to give the proper reporting instructions. Instructions given in that letter are rescinded as of the date of this audit, and you should begin reporting under the following guidelines.
>
> All sales to other franchise holders through your Washington locations should be reported under the Wholesaling - Other classification on the gross income received (. . .).
>
> All sales to your customer base through your Washington locations should be reported as retail sales subject to the retailing business and occupation tax. . . .

The issue is, whether the franchisee pumping the fuel to another franchisee's customer makes a sale directly to the customer, or makes a sale to the other franchisee who then sells the fuel to its customer that physically receives it. Under the audit instructions, the franchisee pumping the fuel sells it to the

customer's franchisee who sells it to the customer resulting in an additional wholesale sale between franchisees. The taxpayer contends that there is a single sale between the pumping franchisee and the customer with the collecting franchisee receiving a service fee measured by the markup for collecting payment from the customer.

Page 15 of the franchise agreement entered into between the franchisor and all franchisees provides in part B. 3.:

> FRANCHISEE is required to pay other Network Participants [other franchisees] for fuel and related products they have provided to other FRANCHISEE'S Accounts [customers]. . . . The price per gallon for foreign purchases of fuel, which the franchisee must pay, is . . . per gallon. The . . . price is set by FRANCHISOR by the process detailed in the Operations manual. In all cases the transfer price is realistic and capable of verification.

Based on this language, the auditor found that the pumping franchisees sold the fuel first to the customer's franchisee, who then sold it to the customers. Other language in the agreement could support the taxpayer's position that the fuel is sold directly by the pumping franchisee to the customer. For instance, . . . the agreement provides:

> FRANCHISEE shall allow all Accounts of Network Participants to purchase fuel and related products at its Site(s).

[The agreement also] provides:

> FRANCHISEE shall be responsible for billing and collecting payment for fuel purchased by its Accounts regardless of the Site where the fuel was purchased, and FRANCHISEE shall establish its own prices independent from any Network Participants.

Accounts are the customers to whom the franchisees issued access charge cards. These provisions are written in the passive voice, so it is not possible to determine who the customer is purchasing the fuel from. The taxpayer has indicated that there has been no collection or other legal action where a determination of title or ownership of the fuel or receivables has been further interpreted.
The agreement does give the franchisee issuing the card authority to bill its customers its price rather than either the transfer price or the price of the pumping franchisee. The taxpayer

indicates that its customers are billed according to a formula . . . .

Therefore, we must determine who is selling the account customer the fuel, the pumping franchisee or the account franchisee. If we determine that the account franchisee purchases the fuel from the pumping franchisee, an extra transaction is subject to business and occupation tax. If the pumping franchisee sells the fuel directly to the customer, only the markup over the transfer price is subject to service business and occupation tax.

DISCUSSION:

The Business and Occupation tax is imposed on the privilege of engaging in business activities and is measured by the gross proceeds of sales. RCW 82.04.220. RCW 82.04.040 defines "SALE" as:

> "Sale" means any transfer of the ownership of, title to, or possession of property for a valuable consideration and includes any activity classified as a "sale at retail" or "retail sale" under RCW 82.04.050. It includes . . . any contract under which possession of the property is given to the purchaser but title is retained by the vendor as security for the payment of the purchase price.

The contract terms do not provide definitive evidence that possession or title to the fuel transferred to the account franchisee from the pumping franchisee. Without legal actions interpreting the contract to determine from whom the customer purchases the fuel, we will consider how these transactions were reported for other purposes. The business and occupation tax reporting should be consistent with its fuel tax treatment.

The Department of Licensing has analyzed this question to determine the proper reporting requirements for special fuel taxes to be collected and remitted by dealers who sell it to persons who use the fuel in motor vehicles. On September 30, 1992, it stated its policy in a memorandum that dealers could select to report the transactions for special fuel tax purposes under either of the following two methods:

> **TAX REPORTING APPROACH #1:** Each dealer reports only that special fuel that is purchased and distributed by the dealer. Fuel purchases by a dealer's customers, at another dealer within the FMS [Fuel Management System or franchise network], are reported by that dealer. The customer is treated as being the purchaser of the fuel.

. . .

TAX REPORTING APPROACH #2: Each dealer reports that special fuel that is purchased and distributed by the dealer, including that fuel that is purchased by their customers at other dealers within the FMS. This approach has the customers' dealer as being the entity that purchases special fuel.

Therefore, a dealer would report their customer's fuel purchases, at other dealers within the FMS, as their fuel purchases. For distributions, a company would report their fuel distributed to the customer, plus their customers' purchases at the other dealers within the FMS (in essence, the dealers billing invoice to their customer would be recorded as the distribution, as it includes both types of fuel purchases).

CONCLUSION:

For tax purposes under approach #1 or #2, the customer must have a special fuel license to purchase special fuel ex-tax. In theory, both tax reporting approaches will result in the same tax being collected by the state. Please note that the approach selected must be used by all dealers within the fuel management system.

We believe that the method of fuel tax reporting taxpayers select best reflects their intent and the nature of these transactions. According to the Department of Licensing, pumping franchisees in the [franchisor's] system selected TAX REPORTING APPROACH #2. The pumping franchisee sells the fuel to the account franchisee. That transaction is subject to wholesaling business and occupation tax with an additional transaction by the account franchisee subject to the retailing business and occupation tax. The audit instruction was correct.

DECISION AND DISPOSITION:

The taxpayer's petition is denied. The taxpayer must report its income in accordance with the audit instructions.

DATED this 27th day of January, 1993.