

Cite as Det. No. 92-050, 12 WTD 101 (1993).

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 Balance Dues of)	No. 92-050
)	
. . .)	Registration No. . . .
)	Balances Due . . .
)	

[1] RULE 140 & RULE 148: B&O TAX -- RETAIL SALES TAX -- DEFINITION -- PHOTO SESSION FEE. Photo session fees and beauty salon services were held taxable under the Service and Other Activities tax classification when invoiced and paid separately from an order for prints.

[2] RULE 140: USE AND/OR DEFERRED RETAIL SALES TAX -- COMPONENT PART -- FILM. Film purchased by photographers and used to make prints for sale to consumers was found subject to use and/or deferred retail sales tax because it did not become a component part of the photographs sold to the customer.

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 TELECONFERENCE: . . .

NATURE OF ACTION:

The taxpayer protests a ruling from the Taxpayer Information and Education Section and the issuance of several notices of balance due regarding the reclassification of beauty salon services and photo session fees from Service to the Retailing and retail sales tax classifications.

FACTS:

Okimoto, A.L.J. -- . . . (taxpayer) operates a combination photography studio and beauty shop in Washington. Because the taxpayer was delinquent in filing its annual state excise tax returns, the above estimated balance dues were issued for the years 1988-1990. The taxpayer disagreed with the way the Department's file auditor classified some of its income on the estimated tax returns and filed a letter with the Department's Taxpayer Information and Education Section (TI&E) on August 14, 1991 to obtain a written ruling. TI&E agreed with the file auditor's interpretation, and now the taxpayer appeals both rulings. The entire amount remains owing.

The taxpayer operates a photography studio that also contains a licensed in-house beauty salon. It charges all customers [a set fee] for the initial photo session which includes in-house hairstyling, make-up, and a manicure. This charge is paid in advance and written on a separate invoice from any order for prints. Normally, it will take at least another three to six weeks before the customer will be able to examine the proofs and place an actual order for prints. In some instances, however, the customer will pay the photo session fee several months in advance.

Occasionally, a customer will only want the beauty services but still must pay the same [set fee]. All patrons must undergo the beauty salon services prior to any photo session. The taxpayer explains that this is because the primary product/service that it sells is its expertise in knowing the type of salon services and beauty aids that look good under its photography lights. The taxpayer explains that it sells "quality" photographs.

The photo session involves exposing up to ten rolls of film and can take all day to complete. These rolls are then developed and proofs made for examination by the customer. The taxpayer retains ownership to all negatives, proofs, and reproduction rights. After the customer examines the proofs, it may order prints, but is under no contractual obligation to do so. However, the photo session fee is non-refundable. If the customer does order prints, a separate invoice is issued and retail sales tax is charged on that total amount.

TAXPAYER'S EXCEPTIONS:

The taxpayer was advised by the file auditor and TI&E, that if only beauty salon services were rendered, the income was taxable under the Service and Other Activities tax classification. The file auditor and TI&E also stated, however, if the above [set fee] charge was for both beauty salon services and photo session services, then the entire amount was subject to Retailing and

retail sales tax. The taxpayer objects to these instructions and the corresponding adjustments made by the file auditor.

The taxpayer argues in a supplemental petition as follows:

... From my point of view in a photo session the client receives absolutely nothing except my time and expertise. They don't receive any film, pictures, props, or any other tangible property or product. Nor are they required or contracted to purchase any of the above at any time. The [set fee] charged is done so in the hopes that they will keep their appointment.

(Brackets supplied.)

The taxpayer also argues that the film purchased and used by the taxpayer in the photo session should be exempt from retail sales tax because it is essential in order to make the finished product and is virtually worthless for any other purpose.

ISSUES:

1. Are photo session fees and beauty salon services included within the definition of a retail sale even though billed separately from any charge for making prints?
2. Is use and/or deferred retail sales tax due on film purchased by photographers and used to make prints?

DISCUSSION:

[1] WAC 458-20-148 (Rule 148) is the lawfully-promulgated rule governing the taxability of beauty salons. It states in part:

Barber and beauty shops are subject to the business and occupation tax as follows:

SERVICE AND OTHER BUSINESS ACTIVITIES. Taxable under the service and other business activities classification upon the gross income from charges for the rendition of personal services, such as hair cutting, shaving, shampooing, tinting, bleaching, setting and the like.

The beauty services when performed without a photo session are clearly personal services and taxable under the Service and Other Business Activities tax classification. Similarly, the photo session services do not, in themselves, fall within the definition of a retail sale. This is because the contract specifically provides that the taxpayer retains ownership and

reproduction rights to all negatives and proofs. The photo session fee does not entitle the customer to any tangible personal property, whatsoever. It states in part:

5. ... Unless otherwise specifically stated herein, negatives and proofs remain the property of the studio, and the studio has the exclusive right to make additional reproductions from them for the client.

Accordingly, we find that the [set fee], by itself, is a professional service and taxable under the Service and Other Activities tax classification.

Nor do we believe that under these facts the tax classification of the photo session fee retroactively changes if the customer subsequently purchases prints. For administrative reporting purposes, we believe that it is preferable for a prudent taxpayer to be able to determine with certainty and finality the tax classification of a given activity by the time the activity is performed, billed and reported. It should not be subject to a retroactive reclassification based on a subsequent event or decision over which the taxpayer has no control. Accordingly, we find that the beauty services and photo session fee are to be reported under the Service and Other Activities tax classification¹. The taxpayer's petition is granted on this issue.

[2] WAC 458-20-140 (Rule 140) is the lawfully promulgated rule implementing the above statute. It specifically states:

Sales by supply houses to a portrait or commercial photographer of the paper upon which such photographs are printed are not taxable because such material becomes an ingredient of the final product sold for consumption. However, sales to a photographer of materials and equipment used in processing, whenever such materials do not become a component part of the final photograph or are not chemicals used in processing are taxable under the retail sales tax.

(Emphasis supplied.)

The taxpayer's contract specifically states that it retains ownership of the negatives. As a result, the film does not

¹This does not mean, however, that under all circumstances photo session fees are to be reported under the Service tax classification. Photo session fees which are invoiced and billed together with the printing charges may not be deducted from the gross proceeds of sale.

become a component part of the final product (photographs) being sold to the customer. Therefore under Rule 140 it is subject to the retail sales tax. The taxpayer's petition is denied on this issue.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part.

DATED this 27th day of February 1992.