

Cite as Det. No. 93-107, 12 WTD 621 (1993).

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 Correction of Assessment of	)	
	)	No. 93-107
	)	
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .
	)	. . ./Audit No. . . .
	)	

[1] RCW 82.04.360, RULE 105: B&O TAX -- EMPLOYEE EXEMPTION. The B&O tax does not apply to persons in respect to their employment in the capacity of an employee. The employment status of an employee shall be determined by an examination of whether the employer had actual control or right to control plus a determination as to whether the employee was actually in business. Accord: Hollingbery v. Dunn, 68 Wn.2d 75 (1966).

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:

Taxpayer petitions for correction of an audit assessment of service business and occupation (B&O) tax on the basis that he is an employee and not an independent contractor.

FACTS:

Lewis, A.L.J. -- . . . (taxpayer) was a "trader" for a securities brokerage firm. His business records were audited by the Department of Revenue (Department) for the period January 1, 1985 through December 31, 1991 with . . . tax, interest, and

penalties assessed. Subsequently, a post assessment adjustment was made reducing the amount of tax, interest, and penalties owing . . . .

The taxpayer was employed . . . as a "trader" <sup>1</sup> from 1985 until February 1989, and for two months in 1990. The taxpayer traded securities "wholesale" (for the account of the securities brokerage firm) and not "retail" (for the account of individual clients).

#### ISSUES:

The issue is whether or not the taxpayer was an employee and thus exempt from B&O taxation pursuant to RCW 82.04.360.

#### DISCUSSION:

[1] A securities brokerage company can choose whether to utilize employees or independent contractors. When a company chooses to create a relationship of principal and independent contractor, the agent is liable for B&O tax. The Revised Code of Washington RCW 82.04.360 only provides an exemption from the B&O tax for income earned in respect to employment in the capacity of employee or servant as distinguished from that of an independent contractor.

Exemptions--Employees. This chapter shall not apply to any person in respect to his employment in the capacity of an employee or servant as distinguished from that of independent contractor.

From the very beginning when the B&O tax was first instituted, the legislature created an exemption for employees. However, it did not define the term "employee" in the statute. The determination of one's status as an employee or an independent contractor is a question of fact that must be based upon the particular facts and circumstances of each case.

In determining employment status, the Washington courts have examined whether the employer had actual control or right to control plus a determination of whether the employee was actually in business. Hollingbery v. Dunn, 68 Wn.2d 75, 80,81, 411 P.2d 431 (1966).

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<sup>1</sup>In the securities industry, a trader is an individual who buys and sells securities, such as stocks and bonds in anticipation of profits for a brokerage firm.

In Hollingbery, the court relied on a much used definition of employee:

A servant or employee may be defined as a person employed to perform services in the affairs of another under an express or implied agreement, and who with respect to his physical conduct in the performance of the service is subject to the other's control or right of control.

Hollingbery, at 79.

Thus, both the right of control and whether the party was in business must be examined to decide whether the taxpayer was working as an employee exempt from tax, or an independent contractor subject to B&O tax. The Department adopted WAC 458-20-105 (Rule 105) to address this distinction which provides in parts:

- (2) While no one factor definitely determines employee status, the most important consideration is the employer's right to control the employee. The right to control is not limited to controlling the result of the work to be accomplished, but includes controlling the details and means by which the work is accomplished.
- (3) Persons engaging in business. The term "engaging in business" means the act of transferring, selling or otherwise dealing in real or personal property, or the rendition of services, for consideration except as an employee. The following conditions will serve to indicate that a person is engaging in business.

If a person is:

- (a) Holding oneself out to the public as engaging in business with respect to dealings in real or personal property, or in respect to the rendition of services;
- (b) Entitled to receive the gross income of the business or any part thereof;
- (c) Liability for business losses or the expense of conducting a business, even though such expenses may be ultimately reimbursed by a principal;

(d) Controlling and supervising others, and being personally liable for their payroll, as part of engaging in business;

(e) Employing others to carry out duties and responsibilities related to the engaging in business and being personally liable for their pay;

(f) Filing a statement of business income and expenses (Schedule C) for federal income tax purposes;

(g) A party to a written contract, the intent of which establishes the person to be an independent contractor;

(h) Paid a gross amount for the work without deductions for employment taxes (such as Federal Insurance Contributions Act, Federal Unemployment Tax Act, and similar state taxes).

(4) EMPLOYEES. The following 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.

In this case, the taxpayer contends that the securities brokerage firm not only set his work hours, but also observed, supervised, and monitored his on-the-job performance. In addition, the taxpayer maintains that the employer retained the right to fire him at will. Furthermore, the securities firm supplied telephone, secretarial services, and office space. Likewise, the securities firm paid for the taxpayer's supplies and postage, marketing materials, and insurance (even state industrial insurance). Finally, the taxpayer was paid at specific intervals, based on his performance. There never was a written contract stating that the taxpayer was an independent contractor. In summary, the brokerage firm provided the taxpayer with all the necessary materials and equipment to accomplish his job - the taxpayer incurred no personal expenses of working.

In regards to whether the taxpayer was subject to the employer's "right of control," it is undisputed that the taxpayer was required to maintain specified office hours and that during those working hours his conduct and job performance were observed and supervised. Although, generally the taxpayer had discretion in the details of the job performance, the employer did retain the right to control even the smallest detail of the taxpayer's job performance. The fact that, a certain amount of freedom was allowed in the performance of the job does not mean the control was absent. The facts of this case convince us that the employer exercised the control that an employer would over an employee.

In regards to whether the taxpayer was actually "engaging in business," the taxpayer did not represent to anyone that he was "in business." The taxpayer did not have a "business license." The securities firm provided all the necessary equipment and supplies. Thus, the taxpayer, did not seek business status by holding himself out to the public as a brokerage firm or by registering as a business. The only . . . "independent contractor" like activity that the taxpayer performed was filing a statement of business income (Schedule C) for federal income tax purposes. That one activity, however, is not determinative of the employment status of the taxpayer.

In this case, the taxpayer must be considered an employee because he has satisfied both common law requirements: 1) he was subject to the "right of control" of the securities brokerage firm and 2) he did not "engage in business." Accordingly, the income the taxpayer earned while in an employee status is exempt from B&O tax under the provisions of RCW 82.04.360.

DECISION:

The taxpayer's petition is sustained. The assessments are hereby cancelled.

Dated this 30th day of February 1993.