

Cite as Det. No. 92-232, 12 WTD 403 (1992).

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 and Tax Ruling of	)	
	)	No. 92-232
	)	
. . .	)	Registration No. . . .
	)	
	)	

[1] RULE 159: B&O TAX -- PURCHASING AGENT -- BOOKS AND RECORDS -- DOCUMENTATION. Taxpayer's claim of agency allowed where the taxpayer presented written agency agreements, executed purchase orders identifying the member as the "Buyer," and retained other appropriate records to establish a principal/agent relationship.

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:

A taxpayer requests that its agency capacity in negotiating volume discounts for merchandise purchased for and by its members be recognized for purposes of reporting B&O taxes.

TAXPAYER REPRESENTED BY: . . .

DATE OF TELECONFERENCE: . . .

FACTS:

Okimoto, A.L.J. -- [Taxpayer] is a Washington corporation whose shareholders are retailers of merchandise. Shareholders are admitted to "membership" in taxpayer's organization only after they are carefully screened. Its primary business is to negotiate volume discounts with merchandise suppliers on behalf of its members. For these services it receives a fee based on a percentage of all purchases procured through the taxpayer. Members also pay a \$ . . . per month membership fee. Taxpayer carries no significant inventory and does not handle any of the

merchandise ordered. Suppliers usually drop ship all merchandise directly to the ordering member's place of business.

The taxpayer explains [a type of transaction] in its petition as follows:

In all [A] drop shipment transactions, [taxpayer's] members enjoy absolute control over the type and quantity of goods ordered. Whether the members place their own orders for merchandise directly with the vendor, or [taxpayer] writes the order for merchandise to be delivered to the member, the member has complete control over whether to order, what to order, when to order, and so on. The price is determined by the vendor. [Taxpayer] never receives the goods and can only order merchandise specified by its member. [Taxpayer] is not in the business of manufacturing or selling any of the merchandise ordered by its members.

In [this type of transaction, taxpayer] is billed for the purchase price of the merchandise ordered. [Taxpayer] in turn provides a copy of the billing together with an "Addendum of Billing" to its member. The terms require the member to remit the funds to [taxpayer] no later than 20 days prior to the due date of the vendor. The purpose is simply so that [taxpayer] will have the cash flow to pay for the merchandise its member has ordered. The member pays [taxpayer], and [taxpayer] remits payment to the vendor.

In support of its petition, the taxpayer submitted a sample written agency agreement that it has executed with all of its members. It states in part:

Buyer will be solely responsible for payment to vendors and suppliers for goods which Buyer purchases through Agent. Agent shall have no independent responsibility for such payment.

During the refund period [taxpayer's] purchase order identified [the taxpayer] as the person to be invoiced, and listed the member under the "ship to" address. It also contained the following statement that was normally signed by a member's employee or by [an employee of the taxpayer] which the taxpayer contends was acting as agent for the member:

As a member of [taxpayer], we accept all financial responsibility and guarantee payment per terms and conditions of this purchase order.

To clarify the taxpayer's agency capacity, the taxpayer recently changed its blank purchase order to identify the "ship to" person as also being the "buyer" and modified the above language to read as follows:

Buyer is a member of [taxpayer], and shall adhere to all terms & conditions of membership, including accepting all financial responsibility for payment per terms of this purchase order.

#### ISSUE:

Do the taxpayer's books and records support its contention that merchandise was purchased solely as a purchasing agent of its members?

#### DISCUSSION:

[1] WAC 458-20-159 (Rule 159) is the duly promulgated rule governing the tax application of agents. It has the same force and effect as a statute unless declared invalid by the judgment of a court of record not appealed from. RCW 82.32.300. Rule 159 states in part:

RETAILING AND WHOLESALING. Every consignee, bailee, factor, agent or auctioneer having either actual or constructive possession of tangible personal property, or having possession of the documents of title thereto, with power to sell such tangible personal property in his or its own name and, actually so selling, shall be deemed the seller of such tangible personal property and taxable under the retailing or wholesaling classification of the business and occupation tax, depending upon the nature of the transactions. In such case the consignor, bailor, principal or owner shall be deemed a seller of such property to the consignee, bailee, factor or auctioneer and taxable as a wholesaler with respect to such sales.

The mere fact that consignee, bailee or factor makes a sale raises a presumption that such consignee, bailee or factor actually sold in his or its own name. This presumption is controlling unless rebutted by proof satisfactory to the department of revenue.

AGENTS AND BROKERS. Any person who claims to be acting merely as agent or broker in promoting sales for a principal or in making purchases for a buyer, will have such claim recognized only when the contract or

agreement between such persons clearly establishes the relationship of principal and agent and when the following conditions are complied with:

(1) The books and records of the broker or agent show the transactions were made in the name and for the account of the principal, and show the name of the actual owner of the property for whom the sale was made, or the actual buyer for whom the purchase was made.

(2) The books and records show the amount of gross sales, the amount of commissions and any other incidental income derived by the broker or agent from such sales.

SERVICE AND OTHER BUSINESS ACTIVITIES. Every consignee, bailee, factor, agent or auctioneer who makes a sale in the name of the actual owner, as agent of the actual owner, or who purchases as agent of the actual buyer, is taxable under the service and other business activities classification upon the gross income derived from such business.

(Emphasis ours.)

Rule 159 clearly states that before the Department will recognize a claimed agency relationship, the taxpayer must show that: 1) There exists an agency agreement between the two parties establishing a principal/agent relationship, and 2) The books and records of the broker/agent show the transactions were made in the name and for the account of the principal and 3) The books and records show the amount of gross sales and commissions.

The taxpayer has presented a sample written agency agreement which establishes the agency/principal relationship between the taxpayer and its members. Accordingly, we find that the taxpayer has met the first condition.

Second, the taxpayer has submitted excerpts from its general ledger, sales register, and invoices which show the gross amount of the sale and the respective commissions earned. We are satisfied that these records meet the requirement of the third condition.

Our primary concern remains with the second condition. Rule 159 requires that in order for an agency/principal relationship to be recognized, "... The books and records of the broker or agent show the transactions were made in the name and for the account of the principal, and show ... the actual buyer for whom the purchase was made." We have examined the third party supplier invoices regarding [the type of transaction taxpayer explained].

They clearly list the taxpayer as the purchaser and identify the member as only the "ship to" address. Therefore, they do not satisfy the second requirement.

We have also examined the purchase orders signed by the member and sent to the third party suppliers. Prior to the revision of the purchase orders, they too, failed to communicate to the third party supplier, that the taxpayer was acting in an agency capacity when initiating these transactions. On the contrary, they, like the supplier invoices, merely identified the member as the "ship to" address and the taxpayer as the purchaser. Accordingly, we find that these purchase orders also do not satisfy the second requirement.

The revised purchase orders, however, differ substantially from the older purchase orders. They not only identify the member as the "ship to" address, but also as the "buyer" of the merchandise. It also clearly establishes the member/buyer as the person primarily financially liable for the payment of the merchandise. We believe that these two revisions in the purchase order adequately notify the third party suppliers that the sales transactions are made in the name of and for the account of the member as principal. And that, the taxpayer's liability is only that of agent. Accordingly, we rule that the Department will recognize the taxpayer's claimed agency/principal relationship with its members regarding [the type of transaction explained] as of the date the taxpayer implemented the revised purchase orders.

#### DECISION AND DISPOSITION:

The taxpayer's petition for refund is granted in part. The taxpayer's file will be referred to the Taxpayer Accounts Administration for a determination and verification of the proper amount to be refunded.

DATED this 26th day of August 1992.