

Cite as Det. No. 92-360E, 12 WTD 513 (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 Correction of Assessment)	
of)	No. 92-360E
)	
. . .)	Registration No. . . .
)	. . ./Audit No. . . .
)	. . ./Audit No. . . .
)	

[1] RULE 224 -- RCW 82.04.190 -- SERVICE PROVIDERS -- USE TAX. Taxpayer engaged in personnel training business held not to be the seller of tangible personal property when the charge for taking the taxpayer's course of instruction is measured by the number of course books purchased by customers. Course books used in training by customer employees held to be an extension of the training service provided by the taxpayer. The taxpayer is liable for retail sales tax on the printing cost of the course books based on the location of the printing activity. Accord: WAC 458-20-224 & RCW 82.04.190(2).

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: . . .

NATURE OF ACTION:

Petition at the Executive Level of the Department by a management training company protesting the assessment of business and occupation (B&O) tax under the Retailing classification and assessment of sales tax liability on the alleged sale of workbooks used in the training program.

FACTS AND ISSUES:

Faker, A.D.¹ -- [Taxpayer], headquartered [out-of-state], is in the business of selling employee training programs to employers. The training program is titled " . . . " ([program]). The taxpayer has nexus in Washington through its area representatives who solicit customers and are available for consultation by customers and its certified instructors. The taxpayer has been offering its employee training program to employers (both private and governmental) in Washington for several years. In 1989, the Department became aware of the taxpayer's activities and requested that the taxpayer register with the Department of Revenue by completing and filing a Master Business Application which the taxpayer did in July 1990.

The Department examined the taxpayer's business records for the period from January 1, 1986 through June 30, 1990. As a result of this audit, the Department issued tax assessment . . . [in December 1991] asserting excise tax liability and interest due in the amount of \$ The taxpayer made a payment of \$. . . [in March 1992] against this assessment and the balance remains due. The Department also issued tax assessment . . . [in December 1991] for the period from January 1, 1984 through December 31, 1985 asserting excise tax liability and interest due in the amount of \$ The taxpayer made a payment of \$. . . (which included extension interest of \$. . .) [in March 1992] against this assessment.

The taxpayer trains employees selected by an employer such as the Department or large private companies to become "certified instructors" of [the program]. The taxpayer does not generally charge for this instructor training program. Such training is the same for all instructors who are employees of various entities. The instructors are encouraged to use their own input to accommodate the nature of the work of the students/employees. The training of the instructors consists of . . . getting instructions and . . . participating in a class as if they were the students receiving instruction by a certified instructor. The instructor receives two binders: one outlining the course and the other containing "word for word" lecturing to the student employees. The employee/instructor gets a plaque certifying that he/she has completed the training course to be a "certified instructor" for the employer. The instructor then conducts classes for his/her employer's employees. The instructor occasionally consults by telephone with the taxpayer's representative who occasionally shows up to observe the class and to discuss recruiting of employees/students. The taxpayer mails quarterly newsletters to the instructors as to developments in

¹Taxpayer Information Specialist, Richard Dittrich, also participated in this Determination.

the training program. The taxpayer sponsors semi-annual meetings or seminars so that instructors of various employers can get together and share their experiences.

As part of the training program sold to employers, the taxpayer supplies its copyrighted workbooks, training packets, manuals and related materials (resource guides) which are used by the employees/students prior to attending seminars, at the seminars and at follow-ups after the seminars are finished.

When the seminars are conducted by the employer's/customer's own certified instructor, either an employee or a hired independent contractor, the taxpayer invoices the customer [listing a Program Fee for 125 participants; 125 Resource Guides; the sub total; shipping and handling; and the invoice total].

When the seminars are conducted by the taxpayer's own employee or by independent contractors/certified instructors hired by the taxpayer, the taxpayer charges the customer/employer more than the \$. . . per participant (apparently to cover the cost of its own employee or the independent contractor).

The resource guides are printed [out-of-state] and delivered to the employer/customer in Washington. The taxpayer pays 6% sales tax to the [out-of-state] printer.

Auditor's action.

In the instances where the taxpayer itself does not provide its own employee/instructor or an independent contractor/instructor, the auditor concluded that the taxpayer had made a retail sale of the resource guides as tangible personal property similar to the sale of "off-the shelf" self-instruction manuals. The taxpayer was held liable for Retailing B&O tax and sales tax liability measured by the total amount of the invoice. (Schedule III of the audit report.)

There was no credit given for the sales tax paid by the taxpayer to the [out-of-state] printer of the resource guides.

Where the taxpayer provided its own employee or hired an independent contractor/certified instructor to conduct the training program, and supplied the customer's employees/students with the resource guides, the income from this activity was held subject to Service B&O tax. The taxpayer's income for training a customer's employee to be a certified instructor was also held subject to Service B&O tax. (Schedule II of the audit report.) The taxpayer does not disagree with this assessment of Service B&O tax.

Taxpayer's position.

The taxpayer contends that it did not sell tangible personal property, the resource guides/work books, subject to sales tax in Washington. It asserts that its income should properly be subject to Service B&O tax, not Retailing B&O tax.

The taxpayer's arguments are summarized as follows:

1. The customer/employer is buying primarily a training service, not tangible personal property. The resource guides, as an aid to the training, are merely incidental to the training service.
2. Other states, . . . , have ruled that the taxpayer is selling a service, with "the booklets . . . special printed matter transferred as an incident to the sale of training services by the training company."
3. The Department's auditor erroneously compared the taxpayer's activity to that of selling off-the-shelf computer software. The taxpayer asserts that its activity more appropriately resembles that of marketing custom software, which is not sales taxable.

DISCUSSION:

[1] The central issue of both the audit report and the taxpayer's petition is the proper characterization of the taxpayer's activities for taxation purposes in this state. Is the taxpayer rendering a service taxable under the Service and Other Business Activities classification of the business and occupation tax? Or, is the taxpayer engaged in two separately taxable activities as a service provider and as a retailer of teaching tools?

After a careful review of the audit report and the taxpayer's petition as well as discussions with [people] trained as presenters by the taxpayer, we are persuaded that the totality of the taxpayer's activities constitute the rendition of a service and are taxable as such. The sale of workbook materials by the taxpayer is an inherent part of and inseparable from the rendition of the training service sold by the taxpayer. Accordingly, the gross income of the taxpayer from customers located in Washington is subject to business and occupation tax under the classification Service and Other Business Activities. As the provider of a service, the taxpayer is responsible for the payment of retail sales tax on its acquisition of workbook materials.

Our reasons for reaching this conclusion are based on the following factors:

1. The workbook materials supplied by the taxpayer are of little value without the core of instruction provided by the taxpayer through its trained instructors. The initial training of instructors, monitoring, follow-up training, newsletters and telephone assistance offered by the taxpayer all serve the goal of servicing the taxpayer's training program. The workbook materials used by participants in the training program are single use items that are of little value once the training is completed. If the training materials were sold apart from the training program, it is obvious that their value would not be \$. . . each.
2. What the taxpayer is selling is a training program for employees that is in large part facilitated by the employees of the customer. The combined training and follow-up by taxpayer employees with the employees of the customer is simply an extension of the original service offered by the taxpayer. It is an important consideration that the initial training of the customer's employees is done at no charge. It is only when the customer implements the taxpayer's training program that the taxpayer charges the customer for the service. The means by which the cost to the customer is allocated is based on the number of employees that participate in the program. This number is reflected in the number of workbooks ordered from the taxpayer. Thus, rather than being the cost per workbook, the charge by the taxpayer is a cost per participant in the program, which is simply reflected by the number of workbooks provided. This is the practical reality of the way the taxpayer does business in the marketplace.
3. We are influenced, though not controlled, by the tax treatment of the taxpayer by other states where it does business. In this case we agree with the conclusions of [other states] that the taxpayer is primarily rendering a service. The taxpayer is not selling workbooks apart from the rendition of the service.
4. When the taxpayer has workbooks printed [by the out-of-state], it pays retail sales tax to the printer.

It should be noted that if at any time the taxpayer does make retail sales of workbook materials apart from its training program, those sales would be fully subject to Retailing Business and Occupation Tax and Retail Sales Tax. However, during the period covered by the audit, no evidence of such activity was noted.

DECISION AND DISPOSITION:

The taxpayer's petition is granted. The taxpayer's file will be returned to the audit division for adjustment. The Retailing business and occupation tax and retail sales tax assessed on workbook sales will be deleted from the tax assessment and reclassified as income taxable under the Service and Other Business Activities classification.

DATED this 15th day of December 1992.