Cite as Det. No. 92-190, 12 WTD 227 (1993).

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

In the Matter of the Petition For Correction of Assessment of	D E T E R M I N A T I O N
	No. 92-190
. . .	Registration No. . . .
	. . ./Audit No. . . .

[1] RULE 159: BUSINESS AND OCCUPATION TAX -- RETAILING AND WHOLESALING. A taxpayer who sells wood products in its own name is taxable as a seller of such products for purposes of wholesaling business and occupation tax, regardless of a contract designating it as an "agent."

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 HEARING: . . .

NATURE OF ACTION:

The taxpayer, an Oregon corporation, protests the assessment of wholesaling business and occupation tax on amounts received from a subsidiary corporation and other customers on grounds that it was acting as a purchasing agent for its various subsidiaries and thus should only be liable for service business and occupation tax upon the "commissions" it receives from said subsidiaries.

FACTS AND ISSUES:

Roys, A.L.J. -- The taxpayer's records were examined for the period from October 1, 1983, to March 31, 1987 and an assessment was issued.

Taxpayer is an Oregon corporation with principal offices in that state. The taxpayer asserts that it functions merely as a purchasing agent or broker in making purchases of wood and wood products which are utilized by its Washington-based manufacturing subsidiaries in the production of plywood. Taxpayer maintains that, as an agent, it should only be liable for taxation under the service classification of business and occupation tax on the amount of markup between the amounts paid to supplier(s) and the amounts invoiced to the manufacturers ("commission").

In the typical transaction between taxpayer and its subsidiaries, the subsidiaries determine the kind and quantity of wood product needed for production and notify the taxpayer. The taxpayer then purchases the wood products on the open market, and the products are transported to the manufacturing subsidiaries via common carrier or taxpayer-owned truck.

The taxpayer contends that, since it received prior instructions in which the Department found that it had not established the requirements of a principal/agent relationship, it has carried out its obligation to maintain books and records which do sufficiently establish the agency relationship.

At issue is the assessment of wholesaling business and occupation tax on the taxpayer's gross sales to Washington customers.

DISCUSSION:

RCW 82.04.480 provides the statutory guidelines for taxation of sales by an agent. RCW 82.04.480 provides that:

> 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 within the meaning of this chapter; and further, the consignor, bailor, principal, or owner shall be deemed a seller of such property to the consignee, bailee, factor, or auctioneer.
>
> The burden shall be upon the taxpayer in every case to establish the fact that he is not engaged in the business of selling tangible personal property but is acting merely as broker or agent in promoting sales for a principal. Such claim will be allowed only when the taxpayer's accounting records are kept in such

> manner as the department of revenue shall by general regulation provide.

(Emphasis supplied.)

The Department has interpreted this statute in WAC 458-20-159 (Rule 159), which states, in pertinent part:

> A consignee, bailee, factor, agent or auctioneer, as used in this ruling, refers to one who has either actual or constructive possession of tangible personal property, the actual ownership of such property being in another, or one calling for bids on such property. The term "constructive possession" means possession of the power to pass title to tangible personal property of others.

Rule 159 then goes on to impose the relevant tax classifications upon agents:

> BUSINESS AND OCCUPATION TAX
>
> 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.

(Emphasis supplied.)

Therefore, Rule 159 establishes that, irrespective of the presence of an agent/principal relationship, if a party owns property in its own name, has the power to sell the property in its own name, and has in fact sold the property in its own name, that party will be presumed to be a seller and will be taxable as

either a wholesaler or retailer. However, the rule notes this presumption of wholesale/retail sale may be rebutted:

> 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.

In essence, Rule 159 requires a taxpayer to satisfy three conditions before it will be recognized as an agent/broker: 1) a contract must exist which "clearly establish[es] the relationship of principal and agent;" 2) books and records must show that the transactions were made in the name of and for the account of the principal; and 3) books and records must show the amount of gross sales and the amount of commissions.

[1] Taxpayer maintains that it was functioning as a purchasing agent for its various subsidiaries and therefore should not be taxable on the gross proceeds of sales to those subsidiaries but rather on the amount of "commissions" garnered from the sales (the sales price less the price paid by taxpayer for the wood products). In making this argument, the taxpayer contends that its books and/or records clearly bear out the existence of a principal/agent relationship. We disagree. Taxpayer's argument does not appear to be supported by the requirements of Rule 159 and RCW 82.04.480.

Although the taxpayer can show the existence of a contract designating it as the "agent" and its subsidiary as "principal," this is but one requirement (albeit the threshold requirement) to be met in overcoming the sales presumption of Rule 159. Contract language by itself is insufficient to establish the existence of an agency relationship. Boise Cascade Corp. v. State, 3 Wn. App. 78, 90 (1970). The bookkeeping and records requirements of Rule 159 must also be met.

The taxpayer's bookkeeping and records are not indicative of a principal/agent relationship. The original invoices of the supplier (taxpayer's exhibit "A") show only that a specified quantity of wood product was sold to taxpayer, with accompanying instructions to ship to its Washington-based subsidiary. Far from indicating the existence of an agency relationship, this invoice shows that taxpayer was not purchasing "in the name and for the account of the principal" but rather had purchased the products in its own name and retained the power to sell such product in its own name.

Further, the taxpayer has not met the requirement set out in condition 2 of Rule 159. This condition requires a taxpayer claiming agency to show books and records indicating the amount of gross sales and the amount of commissions derived from the transaction. Taxpayer relies on its own invoice which indicates that a specified quantity of wood product was purchased from a supplier at various specified prices. The same invoice then shows that (ostensibly) the same products were then sold to a subsidiary for an increased price. However, the invoice does not indicate or designate any amount as being "commissions," it merely shows that taxpayer purchased product from a supplier and subsequently sold product (marked up) to one of its subsidiaries. The simple fact that the taxpayer made a sale to its subsidiary does not, in light of the failure to satisfy the other requirements of Rule 159, establish the existence of a principal/agent relationship between taxpayer and that subsidiary.

In its petition, taxpayer places primary emphasis on the Board of Tax Appeals decision in Wilbur-Ellis Company v. Department of Revenue, Docket No. 80-24. In Wilbur-Ellis, the Board found that appellant was functioning as an agent. Taxpayer maintains that its situation is on point with the appellant taxpayer in that case. Taxpayer points to language in the opinion to the effect that use of terms such as "sold to" and "ship to" are permissible without the use of the terms "principal" or "agent." Taxpayer also relies on the Board's findings that although Wilbur-Ellis's recordkeeping could have been more descriptive, it was sufficient to indicate an agency relationship under Rule 159. In drawing these analogies, however, taxpayer has neglected the substantive facts of Wilbur, which are easily distinguished from the taxpayer's situation.

First, in Wilbur, the appellant taxpayer did not itself place orders to the manufacturer. This function was carried out by "manufacturing representatives," employees of the manufacturer. On shipment from the manufacturer to the consumer, copies of paperwork went to Wilbur-Ellis, who then "serviced" the account.

This service consisted of guaranteeing payment, monitoring the account, and dispute resolution. For this "servicing" Wilbur-Ellis received an agreed upon fee consisting of 5% of the sales price. At no time did ownership of the supplies at issue ever vest in Wilbur-Ellis.

The Board, in looking to the substance of the transactions over the form, found that in this situation, even though Wilbur-Ellis's invoices listed Wilbur-Ellis as "purchaser," the substance of the transaction was that of principal/agent. Indeed, in separate transactions wherein Wilbur-Ellis did become the owner of supplies later sold to consumer companies (apparently utilizing the same invoicing procedures,) assessment of tax on the full transaction price was not even contested.

The Board, in reaching its decision, placed primary emphasis on the facts that: 1) Wilbur-Ellis never had title to nor the power to sell the property in question (and did not in fact sell it); 2) Wilbur-Ellis, by contract, did in fact receive only 5% of the sales price for "servicing" the accounts.

Taxpayer, on the other hand, directly purchases the wood products on the open market. In so doing, it does in fact become the owner of the products, in its own name. Taxpayer has the power to sell the products in its own name, and, unlike Wilbur-Ellis, does in fact sell the products. These facts differ significantly from Wilbur-Ellis, wherein the orders were solicited by the supplier's own employee representatives, not by Wilbur-Ellis. Even though taxpayer's invoicing procedures may resemble those presented in Wilbur-Ellis, the substance of the transactions is inherently dissimilar.

Accordingly, we find that the taxpayer has not made the requisite showing under Rule 159 and RCW 82.04.480 to qualify as an agent. Taxpayer is therefore subject wholesaling business and occupation tax upon the gross proceeds of sales.

DECISION AND DISPOSITION:

The taxpayer's petition for correction of assessment is hereby denied.

DATED this 17th day of July 1992.