

Cite as Det. No. 93-276, 13 WTD 392 (1994).

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. 93-276
	)	
. . .	)	Registration No. . . .
	)	FY . . . /Audit No. . . .

[1] RULE 194; RCW 82.04.460: SERVICE B&O TAX -- COMMISSIONS -- OUT-OF-STATE SERVICES -- APPORTIONMENT. A taxpayer was allowed to apportion commission income earned by its traveling sales staff where the out-of-state services being performed by that staff involved out-of-state solicitations for advertising placed into out-of-state directories.

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 apportionment of sales commissions earned by its local office and generated by activities occurring both within and without the state of Washington.

FACTS:

Okimoto, A.L.J. -- [The taxpayer] is a nationwide sales company. . . . The taxpayer's books and records were examined by a Department of Revenue (Department) auditor for the period January 1, 1985 through September 30, 1989. As a result of the audit, the above amended tax assessment for additional taxes and interest was issued [in March 1991]. . . . The taxpayer has protested the assessment in full and it remains due.

TAXPAYER'S EXCEPTIONS:

Schedules II-VII -- Use Tax Due on Unreported Asset Purchases

In this schedule the auditor assessed use and/or deferred retail sales tax on asset purchases attributed to Washington locations upon which the taxpayer could not document having paid retail sales tax or use tax.

The taxpayer acknowledges that at the time of the audit examination it did not have the required documentation, but now states that it has located original invoices showing that it paid retail sales tax at the time of acquisition. Because this is purely a factual matter, the taxpayer now requests that this issue be remanded back to the Audit Division for examination and verification. We agree. It is so remanded.

Schedule VIII -- Service Tax Due on Unreported Commissions

In this schedule the auditor assessed Service B&O tax on 100 percent of the sales commissions earned by the taxpayer's Washington sales offices. The taxpayer explained at the hearing that it has two sales offices located in Washington, one in [the West], and one in [the East]. The taxpayer concedes that 100 percent of the commission income earned by its [West] office is subject to tax, and states that it has reported all of that income. The taxpayer argues, however, that sales commissions earned by its [East] office are generated by significant business activities occurring both within and without the state of Washington. The taxpayer states that approximately 42 percent of its sales commissions are derived from sales of advertising in telephone directories covering areas outside the state of Washington. The taxpayer argues that because these out-of-state activities are more than incidental, it is entitled to apportionment under RCW 82.04.460 and WAC 458-20-194 (Rule 194).

The taxpayer states that its [East] office is divided into two sales staffs. First, it has telephone staff that solicits directory advertising from the smaller accounts located both within and without Washington. This staff performs its services entirely within Washington, and the taxpayer concedes that it is Washington income for apportionment purposes.

Second, the taxpayer has its [on-site] sales staff that services the bigger accounts. This staff consists of traveling salespersons who have offices in [the East], but spend 90 percent of their time outside the state of Washington soliciting and servicing out-of-state accounts. These staff persons travel to these individual out-of-state accounts and solicit agreements to place advertising in various directories. They also help coordinate the placement of the advertising in the telephone directories. The taxpayer states that approximately 42 percent of its sales commissions are earned by the [on-site] sales staff.

## ISSUE:

1. Is the taxpayer entitled to apportion commission income earned by its out-of-state sales staff?

## DISCUSSION:

[1] RCW 82.04.460 states in part:

(1) Any person rendering services taxable under RCW 82.04.290 and maintaining places of business both within and without this state which contribute to the rendition of such services shall, for the purpose of computing tax liability under RCW 82.04.290, apportion to this state that portion of his gross income which is derived from services rendered within this state. Where such apportionment cannot be accurately made by separate accounting methods, the taxpayer shall apportion to this state that proportion of his total income which the cost of doing business within the state bears to the total cost of doing business both within and without the state.

WAC 458-20-194 (Rule 194) is the lawfully promulgated rule implementing the above statute. It states in part:

When the business involves a transaction taxable under the classification service and other business activities, the tax does not apply upon any part of the gross income received for services incidentally rendered to persons in this state by a person who does not maintain a place of business in this state and who is not domiciled herein. However, the tax applies upon the income received for services incidentally rendered to persons outside this state by a person domiciled herein who does not maintain a place of business within the jurisdiction of the place of domicile of the person to whom the service is rendered.

. . .

Persons engaged in a business taxable under the service and other business activities classification and who maintain places of business both inside and outside this state which contribute to the performance of a service, shall apportion to this state that portion of gross income derived from services rendered by them in this state. Where it is not practical to determine such apportionment by separate accounting methods, the taxpayer shall apportion to this state that proportion of total income which the cost of doing business within this state bears to the total cost of doing business both within and without this state.

(Emphasis ours.)

Rule 194 denies apportionment where the services rendered outside the state of Washington are incidental, or insufficient to support a claim of nexus by the other jurisdiction. See Det. No. 92-262E, 12 WTD 431, (1992). However, if the income generated by the taxpayer's out-of-state activities were the direct result of substantial out-of-state services performed by the taxpayer, then those services are more than incidental and may be apportioned. See Det. No. 89-553, 9 WTD 039 (1989).

After reviewing the taxpayer's situation, we believe the services that it performs out-of-state are more than "incidental." Here, the primary services being provided by the taxpayer were the soliciting and overseeing of the sale of advertising to be placed into out-of-state telephone directories. These services were performed outside the state of Washington. Furthermore, the income sought to be apportioned was directly generated by the performance of these out-of-state services. Therefore, the out-of-state services being performed by the taxpayer were more than incidental and the taxpayer is entitled to apportion its service income.

#### DECISION AND DISPOSITION:

The taxpayer's petition is granted subject to verification by the Audit Division. The taxpayer's petition shall be remanded to the Audit Division and adjusted in accordance with this determination.

DATED this 27th day of October of 1993.