

BEFORE THE BOARD OF TAX APPEALS  
STATE OF WASHINGTON

SIMEON NING,	)	
	)	
Appellant,	)	Docket No. 42433
	)	
v.	)	Re: Excise Tax
Appeal	)	
	)	
STATE OF WASHINGTON	)	FINAL DECISION
DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	
_____	)	

This matter came before the Board of Tax Appeals (Board) for an informal hearing on January 18, 1994. Appellant, Simeon Ning, did not appear and was not represented at the hearing. J. Byron Norton, Administrative Law Judge, appeared for Respondent, Department of Revenue (Department).

This Board heard the testimony, reviewed the evidence, and considered the arguments made on behalf of both parties. This Board now makes its decision as follows:

ISSUES

Kenney, Member--RCW 82.04 levies a business and occupation (B&O) tax on all persons for the privilege of doing business in Washington State. An exemption for employees is created by RCW 82.04.360(1): "This chapter shall not apply to any person in respect to his or her employment in the capacity of an employee or servant as distinguished from that of an independent contractor."

The issue before this Board is determining if Appellant is an employee and exempt from taxation under RCW 82.04, or if he is an independent contractor and subject to the tax.

HISTORY OF THE DEPARTMENT'S EFFORTS TO  
IMPOSE TAX ON LIFE INSURANCE AGENTS

In 1973, the Department issued a letter that set out a five-point test for establishing life insurance

agent employee status.<sup>1</sup> The information was made available to agents through the Washington State Association of Life Underwriters (WSALU). Agents were encouraged to register with the Department or to submit a letter describing the conditions that they believed entitled them to employee status. Apparently, reductions in the Department's budget reduced activities for the next several years, and the matter was not pursued further. In 1985, the Legislature made additional funds available to the Department for collection and enforcement activities. A review of several occupations, including life insurance agents, was begun. It was determined that there were some 40,000 life insurance agents in the state and that turnover in the industry was 25 percent per year. The Department began assessing the tax.

An effort was begun by the industry to obtain a legislative exemption. While the legislative proposals were being considered, efforts to collect the tax were put on hold. In addition, discussions were held with representatives from the industry to provide for orderly implementation of the tax. In 1991, the Legislature enacted an exemption for "statutory employees", as defined in the Internal Revenue Code. The exemption became effective July 1, 1991. The exemption was not retroactive, and the Department began assessing taxes for the previous seven years. By agreement with the industry, the Department said it would not go back more than four years or assess penalties on agents who had registered with the Department, even though they had not paid the tax.

#### PROCEDURAL FACTS

Appellant did not appear at the hearing and his position and arguments are drawn from materials he submitted and factual data included in the Department's prehearing brief.

Appellant was a full-time life insurance agent of New York Life Insurance and Annuity Company (NYL) during the years covered by this appeal. He received some commission income from other insurance companies.

---

<sup>1</sup> The criteria in the 1973 letter are the same as those in the Department's 1989 Special Notice to Life Insurance Agents cited on pages 3 and 4 of this decision.

That income is not at issue in this appeal. NYL provided office space, supplies, and secretarial support, but the Department contends that Appellant was charged for those services. Appellant also received company fringe benefits such as a pension plan and group life, medical, and disability insurance.

NYL provided a form W-2 report to Appellant for the years in this appeal, withholding Social Security taxes for each of the years but not federal income tax, with the exception of 1988. In that year, NYL issued two W-2 forms to Appellant. On one of them, it indicated that federal income tax had been withheld. A W-2 for 1987 also showed withholding of federal income tax.

The Department audited Appellant for the period January 1, 1987, through December 31, 1990. B&O taxes were assessed for 1988 through 1990 plus interest. Interest was not charged for a short period in 1989 and 1990 for administrative reasons. No penalties were assessed.

The general rule in the state of Washington is that exemptions from a taxing statute must be strictly construed. Budget Rent-A-Car, Inc. v. Department of Revenue, 81 Wn.2d 171, 500 P.2d 764 (1972); Evergreen-Washelli Memorial Park Co. v. Department of Revenue, 89 Wn.2d 660, 574 P.2d 735 (1978). Statutory language is to be construed strictly, though fairly, and in keeping with the ordinary meaning of the language employed (Group Health Coop. of Puget Sound, Inc. v. Wash. State Tax Comm'n, 72 Wn.2d 422, 433 P.2d 201 (1967))--in favor of the public and the right to tax. Thurston County v. Sisters of Charity of House of Providence, 14 Wash. 264, 44 P. 252 (1896). Taxation is the rule; exemption is the exception. Spokane County v. City of Spokane, 169 Wash. 355, 13 P.2d 1084 (1932). Exemptions are not to be extended by judicial construction. Pacific Northwest Conference of the Free Methodist Church v. Barlow, 77 Wn.2d 487, 463 P.2d 626 (1969). Nevertheless, statutes must be construed to effect their purpose, and unlikely, absurd, or strained consequences should be avoided. State v. Stannard, 109 Wn.2d 29, 742 P.2d 1244 (1987).

The determination of employee status is a question of fact that must be based upon the particular circumstances of each case. Washington courts have emphasized control or the right of control.

Hollingbery v. Dunn, 68 Wn.2d 75, 80, 411 P.2d. 431 (1966). The court, in that case, said: "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.

WAC 458-20-164(3)(c) states:

Every person acting in the capacity of agent, broker, or solicitor is presumed to be engaging in business and subject to the business and occupation tax unless such person can demonstrate he or she is a bona fide employee. The burden is upon such person to establish the fact of his or her status as an employee.

(Emphasis added.)

In March 1989, the Department issued a Special Notice to Life Insurance Agents outlining five criteria for determining whether an agent is an employee or an independent contractor. The Department emphasized: "The first three criteria are critical. If the life insurance agent's relationship with the life insurance company fails to meet any one of these three criteria, then the agent is an independent contractor." (Emphasis added.) The notice stated that an employee is:

1) One who has no direct interest in the income or profits of the business other than a wage or commission.

To meet this criterion, the Department stated in the notice, "the life insurance agent's sole compensation must be in the form of wages or commissions for insurance policies **which he or she has sold**. If the agent receives commissions for insurance policies sold by others, he or she is not an employee . . .". (Emphasis in original.)

2) One who has no liability for the expenses of maintaining an office or place of business, or for overhead or for compensation of employees.

The Department's notice stated that even if office expenses are ultimately reimbursed, the agent is not an employee if he or she is responsible for those costs. The Department's notice also stated that an agent required to file a Schedule C, Profit or Loss from a Business or Profession, on his or her federal income tax return for the purpose of claiming deductions for business expenses is not an employee.

3) One who has no liability for losses or indebtedness incurred in conducting the business of selling life insurance.

The Department emphasized that the liability referred to is not for the debts or losses of the insurance company which issues the policy, but for the actual "business of selling".

4) One for whom the insurance company provides office space, a telephone and office supplies.

5) One for whom the insurance company provides training, continuing supervision and clerical service.

In April 1990, the Department issued Excise Tax Bulletin 546.04.164 stating that the bulletin did "not change the way that life insurance agents are taxed but formalizes criteria for making that determination of taxability."

The bulletin set the following criteria for employees:

1. They have no direct interest in the profits or losses of the insurance business including no liability for maintaining a place of business and overhead; and
2. Meet one of the following:
  - A. They are subject to the control or right of control of the insurance company in the performance of the details of the work; or
  - B. They are treated as employees for Federal income tax purposes as evidenced by the filing of a W-4 form, and the withholding of income tax, when necessary.

(Emphasis in original.)

ANALYSIS AND CONCLUSIONS

In the statement he submitted to this Board, Appellant failed to adequately address the issue of control. Beyond an assertion that his contract with NYL can be terminated by the company for any of several reasons, he gives no examples that would indicate that he is subject to the company's control. Termination clauses are standard in most contracts.

Appellant was asked to provide copies of the Schedule C submitted with his federal income tax returns to determine if any business deductions had been claimed. The information was not made available.

Appellant has not provided us with the information we need to determine if the Department's decision is incorrect. The Department's regulations and the Washington State Supreme Court make it clear that the burden of proof is on those who seek exemption from a taxing statute.

DECISION

The Determination of the Department of Revenue is upheld for the years 1989 and 1990. The Department is directed to review the information available for 1988 to determine if that part of the income from which federal income tax was withheld is exempt.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 1994.

BOARD OF TAX APPEALS

\_\_\_\_\_  
LAWRENCE KENNEY, Member

I concur:

\_\_\_\_\_  
LUCILLE CARLSON, Vice  
Chair

\* \* \* \* \*

Pursuant to WAC 456-10-755, you may file a petition for reconsideration of this Final Decision. You must file the petition for reconsideration with the Board of Tax Appeals within ten days of the date of mailing of the Final Decision. You must also serve a copy on all other parties. The filing of a petition for reconsideration suspends the Final Decision until action by the Board. The Board may deny the petition, modify its decision, or reopen the hearing.