Cite as Det. No. 94-272, 15 WTD 78 (1995).

BEFORE THE INTERPRETATIONS 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. 94-272
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .
	)	FY. . ./Audit No. . . .

[1] RCW 82.04.080, RCW 82.04.090: B&O TAX -- BARTER -- BROADCASTERS. When a broadcast station receives a license to air programming that includes advertising time sold by the program's syndicator, the transaction involves a barter of the station's advertising time in exchange for a license to air the program.

[2] RULE 254; RCW 82.04.080, RCW 82.04.090: B&O TAX -- BARTER -- BROADCASTERS -- VALUATION. In determining the value of bartered advertising time for purposes of assessing B&O tax, the Department is entitled to rely on the value a broadcast station assigns to its advertising time under what it calls a "barter account."

[3] RULE 241; RCW 82.04.280: B&O TAX -- DEDUCTIONS -- BROADCASTERS -- NATIONAL, NETWORK, AND REGIONAL ADVERTISING. Barter income from broadcast advertising sponsored by regional and national sponsors is subject to the deduction for national, network, and regional advertising. A national or regional sponsor's use of a syndicator to arrange and to pay for broadcast advertising neither makes the syndicator the sponsor of the advertising nor changes the nature of the services being provided by the station.

[4] RULE 211; RCW 82.04.050, RCW 82.08.010: RETAIL SALES TAX -- USE TAX -- LEASES OF PERSONAL PROPERTY -- ADDITIONAL RENT. When a lessee under an equipment lease agrees to assume the lessor's obligation to pay

the personal property tax, such payments are additional consideration for the lease and are subject to retail sales or use tax.

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:

Independent television station protests: 1) the imposition of business and occupation (B&O) tax when it acquires programming at no cost that includes advertising sold by the program's syndicator; and 2) the assessment of use tax on the amount of the personal property tax paid by the taxpayer under the terms of an equipment lease.[1]

FACTS:

Mahan, A.L.J. -- The taxpayer is an independent television station. As an FCC license holder, the taxpayer is ultimately responsible for all programming decisions.

The taxpayer generates income by selling its advertising time. It describes its inventory of advertising time as a "wasting" asset. As the date and time scheduled for a program approaches, the value of the unsold advertising time diminishes. Once a program airs, any unsold advertising time associated with it becomes worthless.
It acquires its programming by several different means. It purchases programs, it receives programming at no cost with a portion of the potential advertising time sold by the program's syndicator, and it is paid to air programs. On rare occasion, the taxpayer may also originate its own programming. By way of example, the taxpayer commonly purchases, produces, or acquires thirty minute tapes, which contain twenty-four minutes of program time and six minutes of advertising time. If it purchases or produces the tape, it will have six minutes of advertising time to sell itself. If it acquires the tape at no cost, three minutes of the advertising time may be filled with commercials sold by the tape's syndicator, leaving three minutes of advertising time for the taxpayer to sell.

The taxpayer initially values the advertising time used by syndicators and accounts for it under what the taxpayer terms a

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[1]Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

"barter account." In its petition, the taxpayer described this account as existing solely for management purposes:

> Although these entries are labeled "bartered", they merely represent an estimate of advertising sales by a syndicator. These entries are fictitious entries which do not represent income. . . . The primary purpose of the fictitious entries is to afford management an estimate of how much . . . broadcasting time is devoted to independent producer programming and the revenue amount generated by advertising sales that fall in these purchase programs applicable to the time related to those programs. The fictitious entry is not an attempt to quantify any perceived value to the time retained by the programmer.

The taxpayer eventually offsets the barter income account by a corresponding barter expense entry, which zeros out the initial entry.

The taxpayer also leases equipment for use by the station. Under the terms of the lease, the taxpayer is required to pay the personal property tax directly to the taxing authority.[2] The lessor, however, paid the tax directly and the taxpayer reimbursed the lessor for the amount of the tax that the lessor paid. The lease does not identify the tax payments as part of the rent and no sales tax was paid on those amounts.

The Department of Revenue (Department) audited the taxpayer for the December 17, 1989 through August 3, 1992 (prebankruptcy) and the August 4, 1992 through June 30, 1993 (post-bankruptcy) periods and issued assessments for each period. Under Schedule II of the assessments, the Department assessed the taxpayer broadcast B&O tax on the barter income account entries.[3] The Audit Division concluded that the taxpayer accrued such income when the taxpayer "acquired syndicated programs in exchange" for advertising time. The Audit Division did not allow the standard

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[2]Paragraph 4 of the Equipment Lease Agreement provides, in relevant part:

> In addition to the monthly rental set forth herein, Lessee shall pay to Lessor, when due, amounts equal to, and hold Lessor harmless from all taxes, ... Personal property taxes assessed on the equipment during the term of this Lease shall be paid directly by Lessee to the appropriate taxing authority, . . .

[3]The law with respect to the broadcast B&O tax is set forth in RCW 82.04.280 and WAC 458-20-241 (Rule 241).

deduction for regional, national, and network advertising under the theory that the syndicator, rather than the station, was the party receiving income from advertising.

Under Schedule V of the assessments, the Department assessed the taxpayer use tax on the amount of the personal property tax it paid to the lessor. The Audit Division concluded that "because sales tax was not included with the property taxes paid to the lessor, use tax is assessed."

With respect to the barter income account, the taxpayer contends that no barter transaction occurred, that any programming it received had no value to the taxpayer for income purposes, and that the Department cannot impute income to the taxpayer based on the "fictitious" entries under the "barter income" account. The taxpayer further contends that its arrangement with its syndicators is common in the industry and, in support, provided a representative copy of an affiliate agreement by a start-up network.[4]

With respect to the use tax on the personal property tax payments, the taxpayer contends that the personal property tax payments were not additional rent because they were neither paid to the lessor nor identified as rent in the contract, and that the parties to such a personal property lease can shift liabilities for such payments without creating a tax liability.

ISSUES:

1. When a broadcast station receives a license to air programming that includes advertising time sold by the program's syndicator, is the arrangement a barter transaction, which gives rise to taxable income?

2. When a lessee under an equipment lease agrees to pay personal property tax directly to the taxing authorities, are such payments additional rent subject to use tax?

DISCUSSION:

1. Barter Account.

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[4]The Audit Division responded to this additional information by stating that, for many years, network affiliates have paid or been assessed B&O tax on barter income when the affiliate acquires syndicated programming in exchange for advertising time; that this taxpayer is not being treated differently.

[1] The state imposes the B&O tax on the gross income of a business. RCW 82.04.220. The gross income of a business includes the "value proceeding or accruing by reason of the transaction of the business." RCW 82.04.080. The "value proceeding or accruing" to a business means the consideration paid to the business, whether in the form of money or other property. RCW 82.04.090. Thus, the amount of consideration "actually received or accrued" includes the value of the property or services a taxpayer receives in lieu of any monetary payment for such services or property. A transaction where goods or services are exchanged without the use of money is commonly identified as a "barter" transaction. In evaluating a barter transaction, we must identify both what the taxpayer exchanged and the value of what was exchanged.

Here, should the taxpayer elect to air a program with commercials included, it is granted a license to use the program. Implicit in this arrangement is the exchange of some of the taxpayer's inventory of advertising time for the license. In this manner, the taxpayer can either sell its inventory and purchase a license to air programming or trade its inventory for the license. This latter situation, which is at issue here, is a barter transaction; that is, the taxpayer exchanges goods or services (advertising time) for other goods or services (a license to air programming) without the use of money.

[2] The taxpayer placed a value on its inventory of air time. Such a valuation of bartered advertising time appears consistent with the Statement of Financial Accounting Standards (FASB) No. 63, Financial Reporting by Broadcasters, subsection 8, which provides in relevant part:

> Broadcasters may barter unpaid advertising time for products or services. All barter transactions except those involving the exchange of advertising time for network programming shall be reported at the estimated fair value of the products or service received. . . . [footnote omitted.]

In referring to a barter of advertising time for network programming, FASB 63, subsection 8, implicitly recognizes that unpaid advertising time can be bartered for other types of programming. This point is later explicitly made in the rule's definition of "barter," which provides in relevant part that stations benefit from "exchanging otherwise unsold time for such things as programs, . . ."

The exclusion of network programming is understandable given the rule's definition of a "network affiliate agreement." Under FASB No. 63's definition of a network affiliate agreement, the network affiliate neither pays for programming nor receives income for

related advertising, but receives compensation from the network. Here we are not concerned with programming received in accordance with a network affiliate agreement. Rather, we are concerned with the taxpayer's exchange of a portion of its available advertising time for a license to air programming provided by the syndicator.
Under WAC 458-20-254 (Rule 254), a taxpayer is required to maintain books and records regarding the "amount of gross receipts and sales from all sources, however derived, including barter or exchange transactions, . . . " The Audit Division accepted the taxpayer's valuation of the subject advertising time or its equivalent, as reflected in its records. We have no basis to believe that the taxpayer over-valued or under-valued such time and, therefore, affirm the Department's valuation of the bartered advertising time.

The taxpayer's reliance on Weyerhaeuser Co,. v. Department of Rev., 106 Wn.2d 557, 723 P.2d 1141 (1986) is misplaced. In that case, the court held that the state could not impute interest where a timber installment contract did not provide for interest. That is not the case here. Implicit in the taxpayer's arrangement is the exchange of intangible goods or services (advertising time) for other goods or services (programming). The issue is not the imputation of interest not provided for in a contract, but the valuation of goods actually exchanged.

[3] Having decided that such barter income is taxable, the next issue is whether the income may be subject to the national, network, and regional deduction. RCW 82.04.280 provides that a broadcaster may be entitled to a standard deduction for "network, national, and regional advertising." WAC 458-20-241 (Rule 241) defines those terms as:

> "National advertising" means broadcast advertising paid for by sponsors which supply goods or services on a national or international basis.
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> "Network advertising" means broadcast advertising originated by national or regional broadcast networks from outside the state of Washington, the broadcast advertising being supplied by national or regional network broadcasting companies.
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> "Regional advertising" means broadcast advertising paid for by sponsors which supply goods or services on a regional basis over two or more state(s).

Some of the advertising time at issue here involved advertising paid for by sponsors who supply goods or services on a regional or national basis. The payments, however, were made to

syndicators, who in turn paid the station through the exchange of programming for advertising time.

Nothing in the statute and rule requires that payment for such advertising be made directly to the station. In this regard, we have previously held that the use of an intermediary does not change the nature of the service being provided or the right to take advantage of the deduction. See Det. No. 86-230, 1 WTD 85 (1986). In that determination we stated:

> The fact that the business may hire an advertising agency to produce the advertisement and that the agency makes the payment to the broadcaster does not make the advertising agency the sponsor of the ad . . . the Department looks to the nature of the services which are the subject of the tax. The deduction for regional advertising, as for example a national food franchise, will not be denied for the sole reason that the broadcaster billed an advertising agent's office located in this state.

We have a similar situation here. The nature of the service being provided by the station--the service of broadcasting advertising and programming to persons within and without this state--does not change. Such service still entails the sale or exchange of advertising time for use by a regional or national sponsor. Under such circumstances, the use of an intermediary--in this case a syndicator--does not in and of itself affect the right to claim the deduction.

Accordingly, we hold that the barter income at issue here may be subject to the deduction for national, network, or regional advertising.

2. Personal Property Tax.

[4] RCW 82.04.050(4) includes within the definition of a retail sale "the renting or leasing of tangible personal property to consumers." A sale is generally defined to include the transfer of the possession of property for a "valuable consideration." RCW 82.04.040.

WAC 458-20-211 (Rule 211) is the administrative rule implementing the above statutes and states in part:

> (1) DEFINITIONS. The terms "leasing" and "renting" are used interchangeably and refer generally to the act of granting to another the right of possession to and use of tangible personal property for a consideration
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> . . .

> (9) RETAIL SALES TAX. Persons who rent or lease tangible personal property to users or consumers are required to collect from their lessees the retail sales tax measured by gross income from rentals as of the time the rental payments fall due.

A lessee of personal property, however, becomes liable for the use tax when it does not pay the sales tax to its lessor. Rule 211(13); Det. No. 87-75, 2 WTD 385 (1987).

Similarly, under the common law a lease involves a transfer of the possession of property for valuable consideration. It commonly involves a contract for a series of transactions, not a single transaction. Gandy v. State, 57 Wn.2d 690, 695, 359 P.2d 302 (1961). The retail sales tax applies to each successive retail sale (here, each lease payment). RCW 82.08.020. The tax is applied to the "selling price," which is the consideration paid by the buyer (here, lessee) without deduction for, among other things, interest. RCW 82.08.010.
Where, by contract, the lessee assumes the lessor's obligation to pay the personal property tax, such payments are part of the consideration paid for the lease.[5] The equipment lease at issue here identifies the taxpayer's obligation to pay taxes as being "in addition" to the stated rent, and such payments are either additional rent or consideration for possession of the equipment.

Retail sales tax is owed on the payment of such additional rent or consideration. This is true even though such payments are not paid directly to the lessor and are not expressly nominated as "rent" under the lease. To hold otherwise would allow the lessee to avoid paying a portion of the retail sales or use tax due on the consideration paid by the lessee for possession of the property. Such a holding would further allow a lessor to, in effect, deduct the cost of the property tax from the measure of the retail sales tax. Such results would violate the applicable statutory provisions. Accordingly, the taxpayer's petition in this regard is denied.

DECISION AND DISPOSITION:

The taxpayer's petition is denied in part and granted in part. The case is remanded to the Audit Division with respect to the

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[5]In accordance with RCW 84.56.070, should an owner not pay personal property taxes, the county treasurer shall "distrain sufficient goods and chattels belonging to the person charged with such taxes to pay the same, . . ."

national, network, and regional advertising deduction, but otherwise the assessments are affirmed.

DATED this 13th day of December, 1994.