

Cite as Det. No. 95-020, 15 WTD 118 (1996).

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. 95-020
	)	
. . .	)	Registration No. . . .
	)	FY. . . /Audit No. . . .
	)	

RCW 82.04.080: GROSS INCOME OF THE BUSINESS. Where a collection agency's fee is a fixed percentage of the amounts collected on behalf of its client, the collection agency is subject to B&O tax on the entire fee. This is true even though the collection agency contracts with a second collection agency to share in the work and agrees to pay the second agency a portion of the fee.

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 collection agency protests the assessment of business and occupation (B&O) tax on fees retained by other collection agencies when the other agency collects on an account for taxpayer's customer.<sup>1</sup>

FACTS:

Coffman, A.L.J. -- The taxpayer is a debt collection agency. The taxpayer's books and records were reviewed by the Department of Revenue (Department) for the period January 1, 1990 through September 30, 1993. The sole finding of the Department was that the taxpayer failed to pay B&O tax on amounts retained by forwarding agents.

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<sup>1</sup>Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

The taxpayer states that it receives a percentage of the amount actually collected.<sup>2</sup> The audit file includes copies of two brochures used by the taxpayer. The forms are identical with the exception of the normal fee charged (38% on one and 35% on the other). Both brochures state that accounts which are reassigned will be charged a fee of 50% of the amount collected.

The taxpayer described the relevant activities during a telephone conference as follows. The taxpayer has standing arrangements with numerous businesses for the collection of delinquent accounts. These businesses assign debts to the taxpayer with a detailed statement of how the debt was incurred. If the debtor is not located in the taxpayer's area, the taxpayer will attempt to trace the debtor. When the debtor is found, the account is reassigned to a forwarding agent together with the detailed statement of account. The forwarding agent is selected by the taxpayer from members of the American Collector's Association. When the forwarding agent collects the debt, it retains its percentage (usually 40%) and forwards the balance to the taxpayer. The taxpayer retains the balance of the 50% fee (usually 10%) and remits fifty percent to the creditor.

The taxpayer explains that to fully document the total amount paid by the debtor, it is necessary to record on its books the amount of "fees deducted by forwarding agent." The taxpayer raises several complaints about the tax assessment. Primarily the taxpayer argues that the amounts retained by the forwarding agent were never received by the taxpayer, therefore, the taxpayer claims that it does not owe B&O tax on those amounts.

The taxpayer states that when an account is transferred to a forwarding agent either the creditor or the taxpayer will make the assignment. The taxpayer was specifically requested to provide copies of the two types of assignments used by the taxpayer and the creditor. Copies were not provided. The audit report accompanying the tax assessment states that the taxpayer declined to provide a copy of the standard assignment statement from the creditor.

The taxpayer, also, stated that the creditor would know that the account had been assigned because there is a computer code on the remittance to the creditor. Further, the taxpayer states that the debtor is entitled to know the identity of the creditor. The Audit Division states that the taxpayer failed to provide any documentation showing that the creditor had any direct relationship with the forwarding agent.

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<sup>2</sup> During the telephone conference, the taxpayer's representative described the arrangement as "no collection, no fee".

## ISSUE:

Are fees deducted by transfer agents from amounts collected on behalf of the taxpayer's clients part of the taxpayer's "gross income of the business?"

## DISCUSSION:

The taxpayer makes several arguments why the taxpayer is not liable for the B&O tax on amounts retained by the forwarding agent. Specifically, the taxpayer argues that: (1) The taxpayer did not receive those fees, therefore the tax may not apply; (2) If the tax is applicable multiple taxation of the fees occurs; and (3) The taxpayer is entitled to the benefit of Excise Tax Bulletin 563.04.128 (ETB 563).

1. Receipt of Fees.

The B&O tax is imposed on the "gross income of the business." RCW 82.04.290(3).<sup>3</sup> Gross income of the business is defined in RCW 82.04.080 as:

the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

(Emphasis added.)

The "value proceeding or accruing" is defined in RCW 82.04.090 as:

the consideration, whether money, credits, rights, or other property expressed in terms of money, actually received or accrued. The term shall be applied, in each case, on a cash receipts or accrual basis according to which method of accounting is regularly employed in keeping the books of the taxpayer.

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<sup>3</sup> Prior to July 1, 1993, this section was codified as RCW 82.04.290. The addition of subsections (1) and (2) do not affect this taxpayer.

The taxpayer maintains that it keeps its books on a cash basis, therefore, it does not accrue income. Because it never received the fee which the forwarding agent deducted, the taxpayer argues that no value proceeded from the collection of the account. The Department issued WAC 458-20-197 (Rule 197) which specifies when an amount is subject to taxation. Rule 197 states:

(3) CASH RECEIPTS BASIS.

(a) When returns are made upon cash receipts and disbursements basis, value proceeds to a taxpayer at the time the taxpayer receives the payment, either actually or constructively. It is immaterial that the contract is performed, in whole or in part, during a period other than the one in which payment is received.

(Emphasis added.)

The taxpayer has an agreement with the creditor that states a fifty percent fee if the account is assigned to a forwarding agent. The taxpayer's right to receive any payment is derived from the agreement with the creditor. Further, the taxpayer has an agreement with the forwarding agent paying that agent a percentage of the amount collected. The fact that the taxpayer allows the forwarding agent to retain its commission prior to forwarding the collected amount to the taxpayer does not negate the taxpayer's receipt of consideration. The full fee was constructively received by the taxpayer. The amount paid to (or retained by) the forwarding collection agency is simply a "cost of doing business" and is not deductible. RCW 82.04.080.

Further, taxpayers are required to maintain certain books and records and the failure to provide those records to the Department bars the taxpayer from contesting an assessment. RCW 82.32.070. The taxpayer's claim that the creditor, in some instances, makes the assignment of the debt to the forwarding agent is not supported by documentation which was requested during the telephone conference and by the Audit Division.<sup>4</sup> Therefore, we may not consider the taxpayer's claim .

2. Multiple Taxation.

There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

RCW 82.04.220.

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<sup>4</sup> The documentation submitted by the taxpayer did not respond to our requests relating to the reassignment of accounts.

The B&O tax is pyramiding in nature. Det. No. 88-370, 7 WTD 5 (1988); Det. No. 88-197, 5 WTD 369 (1988). The legislature intended to impose the B&O tax upon virtually all business activities carried on within the state. Impecoven v. Department of Rev., 120 Wn.2d 357, 363, 841 P.2d 752 (1992); Time Oil Co. v. State, 79 Wn.2d 143, 146, 483 P.2d 628 (1971). Because the B&O tax is on the act or privilege of engaging in business activities, and not upon the product or service itself, more than one taxpayer may pay B&O tax on proceeds from the sale of the same product or service. This is entirely proper.

### 3. ETB 563.

ETB 563 provides special rules for the shared commissions of real estate brokers. This ETB is based on RCW 82.04.255 which states, in part:

The measure of the tax on real estate commissions earned by the real estate broker shall be the gross commission earned by the particular real estate brokerage office including that portion of the commission paid to salesmen or associate brokers in the same office on a particular transaction: PROVIDED, HOWEVER, That where a real estate commission is divided between an originating brokerage office and a cooperating brokerage office on a particular transaction, each brokerage office shall pay the tax only upon their respective shares of said commission: AND PROVIDED FURTHER, That where the brokerage office has paid the tax as provided herein, salesmen or associate brokers within the same brokerage office shall not be required to pay a similar tax upon the same transaction.

This statute is very specific to real estate brokers. It is an exemption statute which must be strictly construed. Pacific Northwest Conference of the Free Methodist Church of North America v. C. L. Barlow, 77 Wn.2d 487, 492, 463 P.2d 1202 (1983). The court in Impecoven, supra, refused to extend the scope of RCW 82.04.255 to insurance agents. We do not have the authority to extend it to collection agencies.

#### DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 14th day of February, 1995.