

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

In the Matter of the Petition For Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment/Refund of)	
)	No. 95-240-
)	
)	Registration No.
)	FY/Audit No.

RULE 224; RCW 82.04.290: SERVICE B&O TAX – COPYRIGHTS – ALLOCATION -- COMMERCIAL DOMICILE. Fee income from licensing the use of copyrighted material in this state by a corporation with its commercial domicile located outside Washington is not subject to B&O tax. In general, intangible rights follow the situs of the commercial domicile of the owner.

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 New York domiciliary seeks a refund of business and occupation (B&O) taxes that were paid on income derived from licensing the right to play copyrighted music in this state.¹

FACTS:

Mahan, A.L.J. -- The taxpayer is incorporated in and has its principal place of business located in the state of New York. By contract, it acquires the assignment of the rights to "publicly perform, and to license others to perform" copyrighted musical works. Such performances generally involve the playing of prerecorded music in commercial settings. In turn, for a fee, it grants commercial enterprises, such as restaurants and hotels, a nonexclusive right to perform publicly what it refers to as "Recorded Background Music" at specified locations.

According to the taxpayer, it "mistakenly" paid B&O tax on income from licensing such uses in Washington in 1990 and 1991. The taxpayer states that, on January 30, 1990, it paid \$. . . and, on January 16, 1991, it paid \$. . . in B&O taxes. On December 29, 1994, it filed a petition for a refund of those amounts.

ISSUE:

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

Whether fee income earned by a corporation domiciled outside this state from licensing the use of copyrighted material in this state is subject to B&O tax.

DISCUSSION:

Included within the bundle of rights created by federal copyright law is the right of the owner to control the reproduction, distribution, and performance of protected works. 17 U.S.C. § 106. Copyrights are generally considered to be intangible property interests. General Insurance Co. of America v. Chopot, 28 Wn. App. 383, 386, 623 P.2d 730 (1981). Ownership of a copyright is distinct from the ownership of the tangible item. 17 U.S.C. § 202. Transfer of a copy does not transfer the copyright and the transfer of a copyright does not grant a property right in the physical object. See Det. No. 93-261, 13 WTD 180 (1993).

As a general rule, intangible rights follow the situs of the domicile of the owner. This rule has been followed in probate cases. See, e.g., In re Eilermann's Estate, 179 Wash. 15, 16, 35 P.2d 763 (1934). It is based on the legal fiction implicit in the maxim mobilia sequuntur personam. O'Keefe v. Department of Rev., 79 Wn.2d 633, 635, 488 P.2d 754 (1971).

The Department of Revenue has followed this rule in excise tax cases. See Det. No. 88-233, 6 WTD 59 (1988), citing Curry v. McCanless, 307 U.S. 357 (1939).² In that case, we held that royalty income earned by a domiciliary of another state from the licensing of patent rights was not subject to this state's B&O tax. We stated: "Neither the taxpayer's legal nor commercial domicile is in Washington. Thus, Washington may not tax this [royalty] income." See also Excise Tax Bulletin 324.04.106.194 (ETB 324).

Based on this precedent, we grant the taxpayer's refund petition. This ruling is without prejudice to later adjustment should the results of an audit of the taxpayer's books and records disclose that the income resulted from activities other than those discussed herein.

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DECISION AND DISPOSITION:

²The state in which an intangible property owner is domiciled may impose a tax measured by the value of that property even though another state has imposed, or may seek to impose, such a tax. Curry v. McCanless, 307 U.S. 357 (1939); see also, 71 Am. Jur. 2d State and Local Taxation, § 670 (1973). As stated in Curry, the "taxation of a copyright by a state where it does business, measured by the value of intangibles used in the business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles." 307 U.S. at 368.

The taxpayer's petition is granted, and this matter remanded to the Taxpayer Account Administration Division for issuance of a refund. For further information, you may call (360) 902-7092.

DATED this 21st day of December, 1995.