Cite as Det. No. 97-218, 17 WTD 221 (1998)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of	)	D E T E R M I N A T I O N
	)	
	)	No. 97-218
	)	
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .
	)	

[1] RULE 164; RCW 82.04.260, 48.17.010, 020: INSURANCE -- AGENT -- AMOUNTS ENTITLED TO RECEIVE -- VOLUNTARY EMPLOYEE BENEFIT PLAN (VEBA). The gross income of an insurance agent can include fees or other amounts arising out of the sale of insurance contracts that are subject to the insuranace premiums tax. The special insurance agents, brokers, solicitors B&O tax classification is the proper B&O tax rate for fees an insurance agent receives for administering a self-funded voluntary employee benefit plan (VEBA) because the fees are amounts the agent was entitled to receive with respect to its licensed insurance agent activities.

[2] RULE 164; WAC 296-17-913; RCW 82.04.260; Chapter 48.17 RCW. INSURANCE -- AGENT -- AMOUNTS ENTITLED TO RECEIVE. An employer's payment of workers' compensation premiums to the Department of Labor and Industries does not constitute a contract of insurance. The Department of Labor and Industries is not an insurer as defined in Title 48 RCW. Fees an insurance agent receives for providing administrative services to an employer that participates in the Department of Labor and Industries workers' compensation insurance retrospective rating plan program, is not receiving such fees in respect to its licensed activities. Therefore, these fees are subject to B&O tax under the service and other activities classification not the special insurance agents, brokers, and solicitors B&O tax classification.

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NATURE OF ACTION:

An insurance agency disputes the reclassification of its administrative business activities from the insurance agent, broker, and solicitor Business and Occupation (B&O) tax classification to the selected business services and the other business or service activities classifications.[1]

FACTS:

Danyo, A.L.J. -- Taxpayer is an insurance agency incorporated and licensed in accordance with the laws of this state. It has an insurance agent's license and an insurance broker's license. Taxpayer is a subsidiary corporation of a membership organization (the Organization) consisting of food and pharmacy companies. The Organization formed Taxpayer to procure and administer various insurance plans for its employees and those of its members and customers. The Articles of Incorporation state that Taxpayer was formed:

> To conduct and operate a general insurance agency business in all lines of insurance and to represent as agent or broker insurance companies: [and]
>
> To serve as general agent manager or in other representative capacities insurance companies and to appoint sub-agents, brokers or salesman for such companies under the terms of any contract with such insurance companies . . . .

Most of Taxpayer's income is insurance commissions but, also includes income described as "trust fund" fees, "retro" fees, and, "risk management" fees.

The Audit Division of the Department of Revenue (Department) audited Taxpayer's books and records for January 1, 1991 to December 31, 1994. During its review, the Audit Division found that Taxpayer had incorrectly reported certain of its gross receipts under the insurance agent, broker, and solicitor B&O tax classification. It, therefore, reclassified Taxpayer's activities that generated these receipts to the other business or service activities classification or to the selected business services[2] classification.

As a result of the reclassifications, the Department issued a tax assessment for additional B&O taxes. Taxpayer paid the assessment, but petitioned for reversal of the reclassifications and for a refund of the taxes and interest it paid on the assessment.[3] Taxpayer contends that "the fees are inherently related to the insurance business activity" it conducts in Washington and, therefore, should be taxed at the insurance agent, broker, and solicitor B&O tax rate.

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

[2] The selected business services B&O tax rate was added in 1993 as a "specific rate" for selected business services as defined in RCW 82.04.055. See, RCW 82.04.290 (1). The other business and service activities rate remained applicable to all other activities not specifically identified under chapter 82.04 RCW. See, RCW 82.04.290(4).

[3] Taxpayer originally protested the B&O tax assessed on interest income but, at the hearing, withdrew its objection.

Trust Fund Fees

According to Taxpayer, the trust fund fees are amounts it received for administering the employee benefits trust health care plan (The "Trust" Fund), a voluntary employees' beneficiary association (VEBA). Under the Plan, the employees pay premiums for health care coverage that includes major medical, vision, dental, and pharmaceutical services from participating providers, and premiums for life insurance and disability insurance. Taxpayer collects the insured's premiums, and processes the insurance policies and claims for the insurer. Taxpayer charges the Trust Fund a fee for providing these and other services relating to the administration of the employee benefit plan.

Retro Fees

Taxpayer described the "retro" fees as amounts it received for administering the Organization's group worker's compensation plan, which the Organization and its members created for the purpose of participating in the Washington State Group Retrospective Rating Plan. The Department of Labor and Industries is the administrative agency that implements this state's laws on workers' compensation and industrial insurance. The retrospective rating plan was developed by Labor and Industries to encourage employers to improve safety and health conditions in the workplace so as to reduce the frequency and severity of industrial injuries. In order to participate in this program, employers must select one of two "plans" provided in the Washington Administrative Code (WAC) 296-17-91902 (Rule 91902).

The Organization developed a Trust Agreement based on the Rule 91902 plans and submitted a Group Enrollment Application and Participation Agreement (the Agreement) to Labor and Industries. According to the Agreement, the purpose of the Plan is "to develop a retrospective return of part of the accident fund and medical aid fund premiums paid by" the participants. The Plan is "overseen by a Board of Trustees who hold the retrospective returns . . . until disbursed." The funds are subject to the Board's exclusive management and control.

The Agreement specifically states that Taxpayer is appointed the Administrator of the Plan who is responsible for the "day-to-day operation of the Plan." The Agreement states that Taxpayer's duties are to:

> (A) Assist Plan Participants to reduce the frequency and severity of industrial injuries.
> (B) Establish a professional claims management and review program, and report results to Plan Participants.
> (C) Educate Plan Participants on the most appropriate ways to control costs.

The Agreement also states that

> [P]articipants agree to pay an annual administrative fee for services provided by the Plan Administrator. The fees are to be paid by the participants on a prorata basis, based on each participant's Standard Premium. The expenses are to be at actual cost of the Administrator, as approved by the Trustees, but in no case shall they exceed [a set percentage] of standard premium.

[Brackets added]. Taxpayer's petition adds that the "Retro program fees are generated when . . . [it] . . . assists an insured party in obtaining eligible refunds and/or credits from" the Department of Labor and Industries.

Risk Management Fees

Taxpayer disputes the B&O service and other activities tax on income designated as "overhead allocations" . . . . Taxpayer states that these amounts were received from its parent corporation in lieu of insurance commissions from the insurance companies and, therefore, should have been assessed B&O tax at the insurance agent, broker, and solicitor rate. In response to Taxpayer's appeal, the Audit Division wrote:

> With regard to the classification of "risk management," tax has been asserted at the insurance agents tax rate for this particular overhead allocation. From October 1992, a monthly amount . . . has been received by [Taxpayer] from [the Organization] for the placement of corporate insurance . . . . The fee received for the purchase of the insurance has therefore been subject to the lower insurance agents tax. See original and revised audit schedule . . . [of the assessment].

The schedule was revised before Taxpayer's appeal was filed. The revision showed that the Department had included within the total "commissions" line, those amounts the Department considered risk management fees . . . . [but] did not change the original amount on which the insurance agent and broker B&O tax was assessed. It merely broke-out the two sources of income contained within the total amount assessed at the insurance agent and broker rate.

The . . . services and other activities B&O tax, assessed on amounts designated as overhead allocations, however, was not revised The audit report that explained the original assessment states that the tax was assessed on "unreported administrative allocations." These allocations were identified as "intercompany transactions.". . .

On appeal, Taxpayer explained that the "intercompany transactions" were fees it received in lieu of insurance commissions. According to Taxpayer, the Organization purchased various insurance coverages through Taxpayer, its insurance broker. But, instead of paying Taxpayer the premiums, the Organization paid the insurance carriers directly. The insurance carriers, therefore, did not pay Taxpayer a commission on those insurance coverages. Instead, the

Organization paid Taxpayer a "fixed percentage of the total insurance coverages" it purchased directly from the carriers. Taxpayer recorded these payments as "risk management" fees.

ISSUES:

1. Did the Department err in classifying "trust fund" fees Taxpayer received for administering an employee benefit plan under the other business and service B&O tax classification rather than the insurance agent, broker, and solicitor tax classification?

2. Did the Department err in reclassifying the "retro" fees Taxpayer received for its administrative services to employers participating in a Group Workers' Compensation Plan to the other business and service activities and the selected business services classifications?

3. Did the Department err in assessing other business and service activities B&O tax on amounts designated "overhead allocations" but which Taxpayer claims were "risk management" fees?

DISCUSSION:

All persons engaged in business in the state of Washington are subject to a B&O tax based on their business activities. RCW 82.04.220. The legislature has classified most business activities under specific classifications. Chapter 82.04 RCW. Any activity that has not been specifically classified nor exempted from B&O taxation is subject to B&O tax at the other business or service classification rate. RCW 82.04.290 and 82.04.290(4).

RCW 82.04.260(14) imposes B&O tax at a specific rate

> upon every person engaging within this state as an insurance agent, insurance broker, or insurance solicitor licensed under chapter 48.17 RCW; as to such persons, the amount of the tax with respect to such licensed activities shall be equal to the gross income of such business multiplied by the rate . . .

WAC 458-20-164 (Rule 164), which implements this statute, explains in subsection (3)(a) that

> . . . the gross income of the business is determined by the amount of gross commissions received, not by the gross premiums paid by the insured. The term "gross income of the business" includes gross receipts from commissions, fees or other amounts which the agent, broker, or solicitor receives or becomes entitled to receive. The gross income of the business does not include amounts held in trust for the insurer or the client. (See also, WAC 458-20-111, Advances and reimbursements.)

Taxpayer is an insurance agent, licensed to sell life, disability, property, and casualty insurance. RCW 48.17.010 defines an agent as:

> any person appointed by an insurer to solicit applications for insurance on its behalf. If authorized so to do, an agent may effectuate insurance contracts. An agent may collect premiums on insurances so applied for or effectuated.

Taxpayer is also licensed as an insurance broker who may sell property and casualty insurance. A broker is defined by RCW 48.17.020 as:

> any person who, on behalf of the insured, for compensation as an independent contractor, for commission, or fee, and not being an agent of the insurer, solicits, negotiates, or procures insurance or reinsurance or the renewal or continuance thereof, or in any manner aids therein, for insured or prospective insured other than himself.

1. Trust Fund Fees

The Department reclassified Taxpayer's trust fund fees, finding that "the special insurance agents classification is applicable only to income from the sale of insurance contracts which are subject to the insurance premiums tax." . . . Further, in response to Taxpayer's appeal, the auditor explained:

> The "trust fund fees" are received from the administration of a health insurance trust that provides health insurance coverage to employees . . . Activities performed by taxpayer included customer service to insured parties and accounting and administrative services required to operate the health insurance trust. . . . [These] activities are in addition to commissions earned on the sale of insurance policies and should not qualify under Rule 164 because the taxpayer is not acting in the capacity as agent, broker or solicitor when performing such activities.

Rule 164 states that the gross income of an insurance agent includes fees or other amounts which the agent becomes entitled to receive. It does not limit the gross income to commissions arising out of an insurance contract.

The Trust is a self-funded employee benefit plan.[4] It includes heath care service providers packages, disability insurance, and life insurance. RCW 48.17.065 states that the provisions of chapter 48.17 RCW "shall apply to agents of health care services contractors and health maintenance organizations." Only an agent, licensed to sell disability insurance, may solicit

[4] According to the "Trust" brochure, Taxpayer negotiated with two health care service providers' Plans to service the Organization members' employees. These Plans provided medical coverage options to the employees and were in addition to existing medical coverage plans.

health care service contracts. RCW 48.46.023. RCW 48.11.030 defines "disability insurance" as

> insurance against bodily injury, disablement or death by accident, against disablement resulting from sickness, and every insurance appertaining thereto including stop loss insurance. "Stop loss" insurance is insurance against the risk of economic loss assumed under a self-funded employee disability benefit plan.

[1] We find that Taxpayer's trust fund fees are taxable under the insurance B&O tax rate because they are amounts Taxpayer "was entitled to receive" in respect to its licensed activities as an insurance agent and broker. Rule 164, supra. Therefore, the assessment with respect to the trust fund fees is reversed. This matter is remanded to the Audit Division for reclassification under the insurance agent's classification and for adjustment to the assessment in accordance with this conclusion.

2. Retro Fees

WAC 296-17-913 states that the department of Labor and Industries may enroll interested employers in a retrospective rating plan as a means of insuring their workers' compensation obligations . . . ." RCW 51.04.020 and RCW 51.16.035. WAC 296-17-912 states that Labor and Industries shall offer a retrospective rating plan to qualified employers

> on a voluntary basis . . . The retrospective rating plan shall be consistent with recognized insurance principles and shall be administered according to rules, scales, tables, formulas, schedules and factors promulgated by the department [of Labor and Industries.]

While Taxpayer's fees are based on the employers' premiums under the Department of Labor and Industries' retrospective rating plan, the premiums are not insurance premiums.[5] "[A]lthough employer payments to the State fund are often referred to as premiums, RCW 51.08.015 provides that the term "premium should be construed to mean taxes." Crown Zellerbach Corp. v. Department of Labor & Industries, 98 Wn.2d 102, 108-109, 653 P.2d 626 (1982). RCW 51.08.015 states that these premiums

> . . . are the money payments by an employer or worker which are required by this title [Title 51 RCW] to be made to the state treasury for the accident fund, the medical aid fund, the supplemental pension fund, or any other fund created by this title.

[2] Thus, "the workers' compensation fund is not considered the equivalent of insurance" even though it is sometimes referred to as "industrial insurance," and the Department of Labor and

[5] See, Title 48 RCW. See also, WAC 296-17-904 for definitions of "standard premium" and "dividends" under the retrospective rating plan.

Industries is not an insurer as defined in Title 48 RCW. Washington Ins. Guar. Ass'n v. Department of Labor and Industries, 122 Wn.2d 527 at 533, 859 P.2d 592 (1993). The Washington State Supreme Court explained the Department of Labor and Industries' role in administering the workers' compensation fund, as follows:

> The Legislature has eliminated private insurance companies from the workers' compensation arena. The only two methods by which an employer may fulfill its duty to provide such compensation is by participation in the state fund or by qualifying as a self-insurer. RCW 51.14.010. The state fund is supported by taxes assessed against workers and employers. RCW 51.08.015. The Department does not compete for insurance business nor does participation in the fund constitute a "contract of insurance." . . .

122 Wn.2d, supra, 535.

Because workers' compensation entitlements are not considered "insurance" under chapter 48.17 RCW, Taxpayer's "retro" fees are not amounts Taxpayer was "entitled to receive" because of its licensed activities as an insurance agent or broker.[6] As the Court of Appeals stated in Fidelity Title Co. v. Dept. of Revenue, 49 Wn. App. 662, 745 P.2d 530 (1987):

> RCW 82.04.260(14) . . . plainly states that the tax rate for insurance agents is to be applied only to gross income from an agent's, broker's, or solicitor's activities as such - i.e., in practical application, to commissions, as a percentage of premiums, for selling insurance policies.

While Rule 164's definition of "gross income" includes amounts other than commissions, we are bound nonetheless by the restrictive language of the statute which requires that these amounts must be in respect to the insurance agent's or broker's licensed activities. To conclude otherwise, we would have to ignore the phrase in the statute that applies the B&O tax "in respect to such licensed activities." This, we may not do.

A statute may not be interpreted in such a manner as to render any portion meaningless, superfluous or questionable. Det. No. 93-102, 13 WTD 246 (1994). Statutes are to be construed, wherever possible, so that "no clause, sentence, or word shall be superfluous, void, or insignificant." United Parcel Service Inc. v. Department of Revenue, 102 Wn.2d 355, 361-62, 687 P 2d 186 (1984).

Therefore, we find that Taxpayer received the fees for providing administrative services to its parent company and the Organization's group workers' compensation plan and are not taxable under the insurance agent, broker, and solicitor tax classification. Thus, the Audit Division was correct in reclassifying these fees. RCW 82.04.440 provides:

[6] See, generally, chapter 48.17 RCW.

> Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in.

However, we also find that the Audit Division erred in reclassifying Taxpayer's administrative services to the selected business services tax classification for the period 1993 - 1994.

RCW 82.04.055, effective 1993, defined selected business services. Based on Taxpayer's description of its activities and the specific language in the group plan agreement, we find that Taxpayer's services are not specifically included within the selected business services classification. Therefore, Taxpayer's "retro" fees should have been reclassified to the other business and service activities B&O tax classification. RCW 82.04.290(4).

This matter is remanded to the Audit Division for reclassification of the "retro" fees and for adjustment to the assessment in accordance with our conclusion.

3. Risk Management Fees

The Audit Division recognized that certain amounts shown as "risk management fees" were properly reported under the insurance classification . . . . However, Taxpayer asserts that other amounts shown . . . , as . . .overhead allocations were also risk management fees arising out of its negotiation with third party insurance carriers on behalf of the Organization. Taxpayer further states that the Organization pays the carriers the premiums directly and allocates the insurance broker commission on those premiums directly to Taxpayer.

There is no controversy that Taxpayer's "risk management fees" are subject to the B&O insurance rate if the amounts are "in respect to its licensed insurance activities." RCW 82.04.260(14). However, we cannot tell from the audit report, whether the "overhead allocations" taxed at the other business or service activities B&O rate were the same as "corporate risk management fees" taxed . . . at the insurance agent rate . . . . This is a factual issue, we cannot verify without further review by the Audit Division. We, therefore, remand this matter to the Audit Division.

We do conclude, however, that if . . . Taxpayer did not receive the "overhead allocations" in respect to its licensed insurance business activities, then the classification of that income is correct and the assessment is sustained. Conversely, if Taxpayer received the income in respect to its licensed insurance business activities, as Taxpayer asserts in its petition, then the assessment is incorrect and should be amended accordingly.

DECISION AND DISPOSITION:

Taxpayer's petition is granted in part and denied in part.

Dated this 30th day of October 1997.