

In the Matter of the Petition ) D E T E R M I N A T I O N  
For Correction of Assessment )

)

) Registration No. . . .

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- [1] B & O TAX -- INSURANCE COMMISSIONER -- DUTIES.  
The insurance commissioner's duties do not include disseminating information about this state's B & O taxes.
- [2] RCW 82.32.300 -- B & O TAX -- ADMINISTRATION OF B & O TAXES -- TAX LIABILITY -- DUTY TO INFORM.  
The administration of the B & O tax is vested in the Department of Revenue. Inquiries regarding tax liability must be directed to this Department to receive proper consideration.
- [3] **RULE 164:** RCW 82.04.260 -- INSURANCE AGENT -- COMMISSION INCOME.  
Commission income earned by insurance agents is taxable under the insurance agents and brokers classification unless the agent is a bona fide employee of the insurance company.
- [4] **RULE 105:** RCW 82.04.360 -- INSURANCE AGENT -- INDEPENDENT CONTRACTOR STATUS.  
An insurance agent is not considered an employee under the Revenue Act if not construed to be an employee under the State Employment Security Act or the Federal Social Security Act.
- [5] B & O TAX -- DOUBLE TAXATION.  
There is no Washington or United States constitutional prohibition against double taxation as applied to excise taxes.

- [6] B & O TAXES -- RCW 82.04.080 AND .090 -- GROSS INCOME OF BUSINESS -- LACK OF PROFIT -- HARDSHIP.

The B & O tax is imposed on the gross income of the business without any deduction for business costs. Whether a profit is realized by the business is immaterial.

- [7] B & O TAXES -- RCW 82.04.300 -- EXEMPTIONS -- MINIMUM GROSS.

The Revenue Act excludes those businesses with incomes totaling less than \$1,000 per month.

- [8] RULE 228, RCW 82.32.100 AND RCW 82.32.105 -- UNREGISTERED TAXPAYER -- PENALTIES OR INTEREST -- WAIVER -- CIRCUMSTANCES BEYOND CONTROL OF TAXPAYER.

The Revenue Act requires the Department to add interest and late payment penalties where a taxpayer fails to register and pay taxes as required. Lack of knowledge of a tax obligation or hardship do not render failure to pay taxes "beyond the control" of the taxpayer within the meaning of RCW 82.32.015 and WAC 458-20-228, which allow the Department of Revenue to waive or cancel interest and penalties under limited situations.

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.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: November 17, 1986

#### NATURE OF ACTION

The taxpayer, an insurance agent, protests the assessment of B & O tax on his commissions, primarily on grounds that the imposition of the tax is unfair.

#### FACTS AND ISSUES

Frankel, A.L.J. -- The taxpayer's records were audited for the period March 1, 1984 through March 31, 1986. The audit resulted in Assessment No. . . . , issued June 5, 1986, for \$488.00. The Assessment includes interest and a 20% delinquent penalty.

The taxes were assessed under the Insurance Agents and Brokers classification on insurance commissions which had been unreported. The taxpayer contends that the imposition of the tax will force him to close his operation, as he does not have the income or resources to pay the tax. He states all of his available resources have been exhausted keeping his business going.

The taxpayer seeks a correction of the assessment and a determination that his income should not be subject to Washington's B & O tax. He appealed upon the following:

- 1) When first issued my agents license the Insurance Commissioners Department failed to inform me that I was required to have a Registration Certificate.
- 2) Several years ago misinformation was circulated as to the need for the above.
- 3) There is no way for an agent to pass along the cost of this to his clients.
- 4) This is also a double tax. First the insurance companies pay a premium tax based on premiums charged to clients. Agents commissions are based on those premiums. Then we are taxed based on commissions earned, not on the net but based on the gross commissions earned even if the agency is running at a deficit.
- 5) Based on item 4 above even though I have gross commissions for the year, after taxes and expenses, not including this one, my net income has been less than \$300.00 for the past two years.

#### DISCUSSION

[1] Title 48 of the Revised Code of Washington (RCW) deals with insurance. Two primary duties of the insurance commissioner are to obtain and publish life expectancy tables showing the values of annuities and of life and term estates and to disseminate information concerning the insurance laws of this state. RCW 48.02.160. Chapter 48.17 deals with the licensing requirements for insurance agents. The primary purpose for licensing is to protect the people of this state. RCW 48.17.070. The statutory provision states that the commissioner shall not issue or renew any license for any person found to be untrustworthy, incompetent, or unqualified.

The duties of the commissioner's office do not include disseminating information about the state's business and occupation taxes.

[2] The administration of the business and occupation tax is vested in the Department of Revenue. RCW 82.32.300. Inquiries regarding tax liability must be directed to this Department to receive proper consideration. The Department does try to provide accessible taxpayer information. There are 17 regional offices around the state to assist taxpayers and answer questions without charge. The state also maintains an office of taxpayer information.

The ultimate responsibility for registering with the Department and properly reporting taxes, however, rests on persons in business. The Department is not required to make sure that every business knows its tax obligations before it can assess taxes, interest or penalties. With over 275,000 registered taxpayers in Washington, the burden must be on the taxpayer to determine if it has an obligation to pay taxes.<sup>1</sup>

[3] Washington's business and occupation tax is imposed on every person for the act or privilege of engaging in business activities in this state. The tax is measured by the application of rates against the value of products, gross proceeds of sales, or gross income of the business. RCW 82.04.220. RCW 82.04.320 states, in pertinent part:

This chapter shall not apply to any person in respect to insurance business upon which a tax based on gross premiums is paid to the state: Provided, that the provisions of this section shall not exempt any person engaging in the business of representing

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<sup>1</sup>The State does recognize that many new businesses have had to register separately with the Department of Revenue, Licensing, Labor & Industries, Employment Security, and the Secretary of State's office. This often requires visits to separate offices and imposes additional burdens for the business person. Because of this problem, the above five state agencies are joining together to provide new businesses with a "one-stop business registration" service. Beginning in January of 1987, a new business applicant, other than one requiring a special license endorsement, will be able to go to one location and get a common number to be used by all state agencies. Although this does not afford any relief to the taxpayer for the assessment at issue, the State is attempting to help businesses and make government more efficient.

any insurance company, whether as general or local agent, or acting as broker for such companies: . . .  
(Emphasis added.)

RCW 82.04.260(14) enacted in 1983 and effective July 1, 1983, created a new classification applicable to insurance agents, brokers, or solicitors licensed under chapter 48.17 RCW. Upon such licensed activity, the tax is imposed at the rate of .011. RCW 82.04.260(14); 82.04.2904.

An insurance company can choose whether to utilize employees or independent agents to sell insurance. When a company chooses to create the relationship of principal and independent contractor, the agent is liable for business and occupation tax. RCW 82.04.360 only provides an exemption from the B & O tax for income earned in respect to employment in the capacity of an employee or servant as distinguished from that of an independent contractor.

WAC 458-20-164 (Rule 164) is the Department of Revenue's duly adopted rule governing the taxability of insurance agents, brokers and solicitors. Rule 164 states:

Every person acting in the capacity of agent, broker, or solicitor is presumed to be engaging in business and is taxable under the insurance agents and brokers classification upon the gross income of the business unless such person is a bona fide employee. The burden is upon such person to establish the fact of his status as an employee.  
(See WAC 458-20-105 - Employees.)

[4] Rule 105 distinguishes employees from persons engaging in business. That rule states in pertinent part:

The fact that a person is construed to be an employee under the provisions of the State Employment Security Act or the Federal Social Security Act, does not conclusively establish such persons as an employee within the provisions of the Revenue Act. However, where a person is not construed to be an employee under the State Employment Security Act or the Federal Social Security Act, such person will not be considered an employee under the Revenue Act. (Emphasis supplied.)

The taxpayer agrees he does not meet the Rule 105 distinction between an employee and an independent contractor: his insurance contract states he serves in the status of an independent contractor and that he is to be responsible for all taxes. Rule 105 was duly adopted by the Department to distinguish employees from persons engaging in business. A rule duly adopted by the Department has the same force and effect as if specifically included in the Revenue Act, unless declared invalid by the court. RCW 82.32.300. Rule 105 has not been declared invalid and we find it controlling in the present case. Accordingly, the taxpayer is considered a person in business and his income subject to B & O tax. The fact that the insurance company sets the rates and the taxpayer's B & O tax liability cannot be passed on to his clients is not dispositive.<sup>2</sup>

[5] The taxpayer contends that because both the insurance company and agents pay B & O taxes based on the premiums charged to clients, there is an invalid double taxation. Both the insurance company and the independent agent, however, are separate taxable "persons." RCW 82.04.030. The B & O tax is imposed on the gross income received by each person for the act or privilege of engaging in business activities. RCW 82.04.220. The taxpayer is not subject to double taxation, because he is only subject to B & O tax on his commissions, whether earned as initial premiums or on overrides or premiums earned from renewals of policies written in previous periods. Furthermore, even if that were not the case, there is no constitutional inhibition either of this state or the United States against double taxation as applied to excise taxes. Klickitat County v. Jenner, 15 Wn.2d 373 (1942).

[6] The taxpayer's correspondence indicates he maintains two business addresses and phone listings. During the hearing, he

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<sup>2</sup>In 1973, the Department issued the "Criteria for Establishing Life Insurance Salesman Employee Status" for distribution through the Association of Life Underwriters. The form stated that if a person believed he or she was entitled to employee status, the person could fill out the form and request a ruling from the Department. In limited cases, the Department has granted relief from interest and penalties imposed on a tax assessment where a life insurance agent wrote the Department for a determination of employee status but did not receive an answer. As the taxpayer never requested a ruling from the Department, no relief is warranted because of his allegation that there was "misinformation circulated" as to the taxability of insurance agents.

stated his business costs are extremely high compared to his income. He has submitted copies of his 1984 and 1985 federal income tax returns showing a net income for the two years of only \$1,815.00. He contends an added imposition of this states B & O tax poses an extreme hardship for him. He stated he has already had to borrow over \$12,000.00 from his family just to keep operating.

Subject to narrowly circumscribed exceptions, however, Washington's B & O tax is calculated on the "gross income of the business." RCW 82.04.290; O'Leary v. Department of Revenue, 105 Wn.2d 679, 681 (1986). The "gross income of the business" is defined by RCW 82.04.080 as a tax on the gross income of the business costs:

"Gross income of the business" means 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.

Whether a profit is realized by the business is immaterial. See, e.g. Budget Rent-A-Car v. Department of Revenue, 81 Wn.2d 171, 173 (1972).

[7] The Revenue Act does exclude those whose combined value of products, gross proceeds of sales, or gross income of the business is less than \$1,000 per month. RCW 82.04.300. By that provision, the state does attempt to exclude persons with limited incomes from paying business taxes. The taxpayer's records disclosed that his gross income for each year at issue was over the \$12,000 minimum threshold; thus his income is subject to the business tax. As an administrative agency, this Department's role is not to legislate, but to administer the Revenue Act as enacted. RCW 82.32.300. The legislative authority of the state is vested in the legislature. Constitution of the State of Washington, Article II, Section 1.

[8] As the taxpayer failed to register and pay taxes as required, the Department was required to add interest and late payment penalties. RCW 82.32.090 and .100. The only authority to cancel penalties or interest is found in RCW 82.32.105. That statutory provision allows the Department to waive or cancel interest or penalties if the failure of a taxpayer to pay any tax on the due date was the result of circumstances beyond the control of the taxpayer.

The administrative rule which implements the above law is found in the Washington Administrative Code 458-20-228 (Rule 228). Rule 228 lists the situations which are the only circumstances under which the Department will cancel penalties and/or interest. None of the situations described in Rule 228 apply in the present case. lack of knowledge or a good faith belief that one is not conducting a taxable business, or the fact the imposition of the tax imposes a hardship on a taxpayer, are not identified by statute or rule as a basis for abating taxes, interest, or penalties.

#### DECISION AND DISPOSITION

The taxpayer's petition for correction of Assessment No. . . . is denied.

DATED this 21st day of November 1986.