

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

In the Matter of the Petition ) D E T E R M I N A T I O N  
For Refund of )  
 ) No. 86-299  
 )  
 . . . ) Registration No. . . .  
 ) Tax Assessment Nos. . . .  
 ) and . . .  
 )

- [1] **RULE 164 AND 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.
- [2] **RULE 105 AND 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.
- [3] **RULE 228 AND RCW 82.32.100:** PENALTIES -- INTEREST -- UNREGISTERED TAXPAYER -- WAIVER -- CIRCUMSTANCES BEYOND CONTROL OF TAXPAYER -- WHAT CONSTITUTES. RCW 82.32.100 provides that the Department shall add late payment penalties if a person fails to make any return required by the Revenue Act. Lack of knowledge of a tax obligation does not render failure to pay taxes "beyond the control" of the taxpayer within the meaning of RCW 82.32.105 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 on grounds he serves in an employee status rather than as an independent contractor.

#### FACTS AND ISSUES

Frankel, A.L.J. -- The taxpayer's records were examined for the years 1979 through March 31, 1986. As a result two tax assessments were issued: (1) Assessment No. . . . , covering the period January 1, 1972 through December 31, 1981, for \$1,863; and (2) Assessment No. . . . , covering the period January 1, 1982 through March 31, 1986, for \$2,778. Both Assessments contained interest and delinquent penalties.

The taxes were assessed under the Service and Other Activities classification for the periods prior to July 1, 1983. After that date, taxes were assessed under the Insurance Agents and Brokers classification. Taxes were assessed on insurance commissions which had been unreported. The taxpayer paid the total amount assessed, petitioned for a refund and for a determination that his income should not be subject to Washington B & O tax.

The taxpayer believes his commissions from selling life insurance for . . . are exempt because earned as an employee rather than an independent contractor. Primarily, the taxpayer contends he serves in the status of an employee because the insurance company sets the rates and the B & O tax cannot be passed on to his clients. He states he is a "captive agent" for his insurance company. He contends that he is an employee in the same sense as his agency manager, agency director, or any other employee of the company.

#### ISSUE

Whether the taxpayer's commission income is exempt under RCW 82.04.360, as income earned in the capacity of an employee rather than as an independent contractor.

#### DISCUSSION

[1] 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 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.)

[2] 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.

[3] As the tax due was not received by the Department when due, interest and delinquent penalties were properly added to the assessments. RCW 82.32.090 and RCW 82.32.100. No exception is provided because the taxpayer had a good faith belief that B & O taxes were not due on this commission income at issue. See WAC 458-20-228.

#### DECISION

The taxpayer's petition for refund is denied.

DATED this 21st day of November 1986.