

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. 87-21
)
)
 . . .) Registration No. . . .
) Tax Assessment Nos. . . .
)
)

- [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. (Klickitat County v. Jenner, cited.)
- [6] 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 82.32.105 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: December 2, 1986

NATURE OF ACTION

The taxpayer, an insurance agent, protests the assessment of B&O tax on his commissions.

FACTS AND ISSUES

The taxpayer has been an independent insurance agent in Washington since 1971. He was not registered with the Department of Revenue until contacted by the Department in April of 1986.

The taxpayer's records were examined for the period January 1, 1979 through March 31, 1986. The audit disclosed . . . in taxes owing. Two assessments were issued on July 8, 1986: Assessment No. . . . for . . . and Assessment No. . . . for Interest and penalties were included in both assessments. The taxpayer paid the assessments and petitioned for a refund.

The taxpayer protests the assessments for the following reasons:

- 1) As a "captive agent", he has no way of passing on the B&O tax to his customers. Premiums are set by the insurance company and approved by the State Insurance Commissioner;
- 2) The tax is "double taxation", as both the company and the agent are taxed on the same income;
- 3) He was never informed by the Insurance Commissioner or the Department that he was required to register and file an excise tax return; and
- 4) The business or inventory (policy holders) is not owned by the agent, but is solely the property of the insurance company.

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.¹

[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

¹The 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.

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. (Emphasis added.) (See WAC 458-20-105 - Employees.)

In Armstrong v. State, 61 Wn.2d 116 (1962), the appellant was a general agent engaged in the business of selling insurance. Mr. Armstrong challenged the B&O tax upon him as unconstitutional, because RCW 82.04.320 exempts branch offices of insurance companies from the tax. The Court, however, upheld the tax and dismissed his complaint with prejudice. The court found "the exemption does not apply to those who engage in the business of representing insurance companies." 61 Wn.2d at 120.

In reaching this decision, the court noted that the appellant performed the same function for insurance companies as did the employees in branch offices. That fact was not dispositive. The court stated:

The crux of the matter is that the appellant operates his own separate business, which performs services for the insurance companies; whereas the branch offices are an integral or organizational part of the insurance companies. The separate, independent nature of the appellant's business is indicated by the fact that he rents his own office space, hires his own employees, is personally liable for expenses and losses incurred in the operation of his business.

The court in Armstrong found support for its conclusion from the following language from its prior decision in Supply Laundry Co. v. Jenner, 178 Wash. 72, 77 (1934):

" . . . there is , in our opinion, equal ground and logical basis for a distinction between those who are privileged to conduct a business of their own, professional or otherwise, in the community, and those who are simply employed by others. . . ." 61 Wn.2d at 121

[4] Armstrong quoted Rule 105, noting that the Department had utilized the distinction between an employee from a person engaging in business in levying the B&O tax. Rule 105 states in pertinent part:

The Revenue Act imposes taxes upon persons engaged in business but not upon persons acting solely in the capacity of employees or servants.

. . . .

PERSONS ENGAGING IN BUSINESS. A person engaging in business is generally one who holds himself out to the public as engaging in business either in respect to dealing in real or personal property or in respect to the rendition of services; one to whom gross income of the business inures; one upon whom liability for losses lies or who bears the expense of conducting a business; one, generally, acting in an independent capacity, whether or not subject to immediate control and supervision by a superior, or one who acts as an employer and has employees subject to his control and supervision.

Persons . . . deemed to be engaging in business . . . must . . . pay the business and occupation tax . . .

EMPLOYEES AND SERVANTS. An employee or servant is an individual whose entire compensation is fixed at a certain rate per day, week or month, or at a certain percentage of the business obtained by such employee or servant, payable in all events; one who has no direct interest in the income or profits of the business other than a wage or commission; one who has no liability for

the expenses of maintaining an office or place of business, for other overhead or for compensation of employees; one who has no liability for losses or indebtedness incurred in conducting the business; one whose conduct with respect to services rendered, obtaining of, or transacting business, is supervised or controlled by the employer. A corporation, joint venture, or any group of individuals acting as a unit, is not an employee or servant.

. . . .

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.)

. . . .

In the present case, the taxpayer does not meet the Rule 105 distinction between an employee and an independent contractor because 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 from both the initial commissions and policy renewals is subject to B & O tax. The fact that the insurance company sets the rates and owns the policies, and the fact the taxpayer is in some ways a "captive agent" is not controlling.

[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 when policies are initially written or 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] 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

The taxpayer's petition for refund is denied.

DATED this 22nd day of January 1987.