

Cite as Det No. 09-0181, 29 WTD 70 (2010)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
)	No. 09-0181
)	
. . .)	
)	Registration No. . . .
)	Document No. . . .
)	Docket No. . . .
)	

RULE 111, RULE 126, RULE 159; RCW 82.04.070; ETA 3134.2009: B&O TAX - FUEL SALE - FRANCHISE. Payments to fuel franchisee (taxpayer) that charged its customers for fuel pumped from other franchises, purchased the fuel from the other franchisees, and resold it to its customers, were not excludable as advances or reimbursements.

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

M. Pree, A.L.J. – A fuel dealer-franchisee requests a refund of B&O tax. Because the franchisee’s customers were liable only to the dealer-franchisee who billed them, we conclude that the franchisee purchased and resold the fuel to its customers at whatever location they purchased the fuel. We deny the petition for refund.

ISSUE

When a dealer-franchisee’s customer obtains fuel from another franchisee’s fueling station, is the dealer-franchisee the retail seller?¹

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

FINDINGS OF FACT

[Taxpayer] is a franchisee in [a] network (hereinafter referred to as the franchisor) engaged in the business of providing motor vehicle fuel. The taxpayer operated . . . fueling stations in areas designated by its franchise agreement. Other franchisees operated . . . fueling stations in other areas both in and outside of Washington designated by their franchise agreements. Customers contract with the taxpayer (or other franchisees) to purchase fuel from any of the fueling stations operating under the . . . network.

The agreements permit customers to obtain fuel without immediate payment [and] allows the [customers] to fill up the vehicles anywhere the network fueling stations are located on a credit basis. The taxpayer bills its customers . . . for the fuel, whether drawn from its own pumps or from any of the fueling stations in the franchisor's network. Each franchisee was responsible for obtaining payment from its customers.

The taxpayer paid B&O tax under the retailing classification on amounts it charged its customers for their fuel purchases from any station in the network. When other franchisees' customers purchased fuel at one of the taxpayer's stations, the taxpayer paid B&O tax under the wholesaling classification based on the transfer price that the taxpayer charged the franchisee that issued the access card used by its customer.

The taxpayer requested a refund of \$. . . B&O tax for the period from January 1, 2003 through March 31, 2007. The taxpayer contends that when its customers pumped fuel at other franchisees' locations, the customers purchased the fuel directly from that franchisee, and reasons that it should not have paid retailing B&O tax on fuel its customers purchased at locations operated by other franchisees. Similarly, the taxpayer contends that fuel pumped for other franchisees' customers at the taxpayer's locations should have been reported as retail sales to the franchisees' customers. After reviewing the taxpayer's books and records, the Audit Division concluded that the taxpayer sold the fuel to its customers at other franchisees' locations, and denied the taxpayer's refund request.

ANALYSIS

The business and occupation tax is imposed for the privilege of engaging in business in Washington. RCW 82.04.220. The term "business" includes "all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or another person or class, directly or indirectly." RCW 82.04.140. The legislature intended to impose the B&O tax on virtually all business activities carried on within the state. *Time Oil Co. v. State*, 79 Wn.2d 143, 146, 483 P.2d 628 (1971).

The taxpayer is engaged in the business activity of buying and selling fuel. The taxpayer contends that it did not sell the fuel that its customers pumped at locations operated by other franchisees because the taxpayer did not own, possess, or have title to the fuel. We must decide under which circumstances the taxpayer sold the fuel, and how those sales are classified. The

taxpayer's customers paid the taxpayer for fuel they pumped throughout the network. The taxpayer paid the other franchisees, through the franchisor's clearing house system, for the fuel they provided. Through the charging system under the franchise agreement, the taxpayer purchased the fuel, and resold it to its customers under its agreements with them. Other franchisees paid the taxpayer through the franchisor's clearing house system for fuel their customers pumped at the taxpayer's locations.

Under RCW 82.04.040(1), "Sale" means any transfer of the ownership of, title to, or possession of property for a valuable consideration. RCW 82.04.040 is written in the disjunctive (i.e., "or"). Use of the disjunctive "of the ownership, title to, or possession" is significant because holding title is not mandatory for the sale to occur. A statute should not be interpreted in such a manner as to render any portion meaningless, superfluous or questionable. Statutes are to be construed, wherever possible, so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *United Parcel Serv., Inc. v. Dep't of Revenue*, 102 Wn.2d 355, 361- 62, 687 P.2d 186 (1984). We strive to give effect to all statutory phrases. *Knappett v. Locke*, 92 Wn.2d 643, 600 P.2d 1257 (1979); *Washington Water Power Co. v. State Human Rights Comm'n*, 91 Wn.2d 62, 586 P.2d 1149 (1978).

While the taxpayer did not physically possess fuel sold at other franchisees' locations, the charges on the franchisor's books reflect a change of ownership and title to the taxpayer who resold the fuel to its customers.

For businesses engaged in wholesale or retail sales, the B&O tax is computed by applying the applicable B&O tax rate against the "gross proceeds of sales of the business." RCW 82.04.250 and 82.04.270. RCW 82.04.070 defines "gross proceeds of sales" as follows:

"Gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property and/or for services rendered, without any deduction on account of . . . labor costs . . . delivery costs . . . or any other expense whatsoever paid or accrued and without any deduction on account of losses.

"Value proceeding or accruing" means the consideration, whether money, credits, rights, or other property expressed in terms of money, actually received or accrued. RCW 82.04.090. The taxpayer received payments from its customers for the fuel they purchased at the taxpayer's stations as well as for fuel they pumped at other franchisees' locations. The taxpayer was charged for the fuel they pumped. Other franchisees paid the taxpayer for fuel their customers pumped at the taxpayer's locations. The customers' payments, as well as those from other franchisees represented value proceeding to the taxpayer from the sale of fuel, tangible personal property. Unless otherwise excludable, these payments constituted "gross proceeds of sales" from engaging in business subject to B&O tax under RCW 82.04.220. Clearly, the fuel pumped by the taxpayer's customers at the taxpayer's locations was fuel the taxpayer sold to its customers. Likewise, the taxpayer sold fuel pumped by other franchisees' customers at the taxpayer's locations at wholesale to the other franchisees.

Our primary issue is whether the taxpayer was the seller of the fuel when its customers used another franchisee's station to obtain their fuel. The customer owed the taxpayer for the fuel they pumped, which the taxpayer was responsible to bill and collect from them. Under the contract, the franchisor charged the taxpayer for amounts its customers pumped at other franchisee locations, and credited the taxpayer for fuel it provided to customers of other franchisees the settlement process under the franchise agreement. Because the customers paid the taxpayer for the fuel, and the taxpayer paid the franchisor for the fuel, it appears that the taxpayer sold the fuel to its customers. Similarly, it appears fuel pumped by other franchisees' customers at the taxpayer's locations was first sold at wholesale to the other franchisees who paid the taxpayer for the fuel, and then resold the fuel at retail to their customers.

The taxpayer contends that the other franchisees sold the fuel directly to the taxpayer's customers.² If the other franchisees were selling the fuel as the owner or principal to the taxpayer's customers as the taxpayer contends, the taxpayer must show it was acting as the other franchisees' agent when it billed the customers because the customers paid the taxpayer for the fuel.

Under WAC 458-20-159 (Rule 159) to be recognized as an agent, the agent's contract with its principal must clearly establish the relationship of principal and agent. Further, the agent must comply with the following:

- (1) The books and records of the broker or agent show the transactions were made in the name and for the account of the principal, and show the name of the actual owner of the property for whom the sale was made, or the actual buyer for whom the purchase was made.
- (2) The books and records show the amount of gross sales, the amount of commissions and any other incidental income derived by the broker or agent from such sales.

Rule 159.

The taxpayer's contracts do not establish an agency relationship. The franchise agreement does not identify the taxpayer as an agent. The contracts for sales (and price) of fuel are between the taxpayer and its customers (accounts). The records show that the taxpayer billed its customers in the taxpayer's name, and the taxpayer collected payment from its customers regardless of where they obtained the fuel.

The taxpayer seeks to rely on Det. No. 93-025, 12 WTD 583 (1993), which does not apply to the current situation. In Det. No. 93-025 we considered how taxpayers in a similar card franchise system reported the fuel sales to the Department of Licensing (DOL). DOL offered dealer franchisees two options of how fuel sales were reported, and in Det. No. 93-025 we concluded that the taxpayer-franchisee should report its sales in the same manner as reported to DOL

² To support its argument, the taxpayer refers to an unpublished Court of Appeals decision discussing liability of a pumping franchisee for providing contaminated fuel to a customer. We will not cite or rely on the authority of an unpublished case. See RAP 10.4(h). As this case has no precedential value, we do not consider it.

(Approach #2), which is consistent with the manner in which the taxpayer reported receipts from customers who pumped fuel at other franchisees' locations:

The pumping franchisee sells the fuel to the account franchisee. That transaction is subject to wholesaling business and occupation tax with an additional transaction by the account franchisee subject to the retailing business and occupation tax.

Det. No. 93-025 did recognize that DOL offered another option (Approach #1) of how the sales could be reported provided all franchisees in the network reported their receipts in the same manner.³ In our case, the taxpayer has not established that all franchisees reported their sales under Approach #1. As held in Det. No. 93-025, the taxpayer reported its receipts under Approach #2. In addition, we understand that the DOL instructions for dealer-franchisees are no longer applicable. Accordingly, the DOL reporting options discussed in Det. No. 93-025 no longer apply.

In conclusion, because the taxpayer's customers paid the taxpayer for all the fuel they purchased throughout the network, the taxpayer sold the fuel to its customers. The taxpayer properly reported these sales at retail. Similarly, the fuel pumped by other franchisee customers at the taxpayer's locations was first sold at wholesale (and properly reported as such) to the other franchisees who paid the taxpayer for the fuel, and then resold the fuel at retail to their customers. The taxpayer is not entitled to a refund for tax paid on its Washington sales.

DECISION AND DISPOSITION

The taxpayer's petition for refund is denied.

Dated this 14th day of July, 2009.

³ See Approach # 1, 12 WTD at 586.