

Cite as Det. No. 13-0338, 33 WTD 166 (2014)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition For Refund	)	<u>D E T E R M I N A T I O N</u>
	)	
	)	No. 13-0338
...	)	
	)	Registration No. . . .
	)	
	)	

[1] RCW 82.04.480; WAC 458-20-159 (Rule 159): SALES IN OWN NAME – SALES AS AGENT. Taxpayer has the burden to establish the agency relationship between itself and its affiliate in accordance with the record keeping requirements in Rule 159, and that it merely acted as its affiliate’s agent in making purchases for tangible personal property to qualify as a sales as agent.

[2] RCW 82.32A.020: ESTOPPEL. The Department’s failure to detect an error in a prior audit does not estop the Department from assessing a tax found to be properly due.

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.

Callahan, A.L.J. – A perishable meat wholesaler (“Taxpayer”) protested the slaughtering/breaking/processing perishable meat wholesaling Business and Occupation (B&O) tax assessed on its sales of perishable meat to its affiliate claiming that it purchased the meat as the affiliate’s agent and the amounts received were not subject to wholesaling B&O tax. Taxpayer further asserts that the Department of Revenue (the “Department”) is estopped from assessing the wholesaling tax on such sales because the Department in a prior audit failed to detect it was not reporting these sales. We deny the petition.<sup>1</sup>

### ISSUES

1. Whether Taxpayer has met its burden to prove that it made sales as an agent under RCW 82.04.480 and WAC 458-20-159 (Rule 159) to its affiliate and the income it received from such sales were reimbursements from its affiliate.

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

2. Is the Department estopped from assessing the perishable meat wholesaling B&O tax because it failed to detect Taxpayer's reporting error in a prior audit?

### FINDINGS OF FACT

Taxpayer wholesales perishable meat in Washington. The Department's Audit Division ("Audit") examined Taxpayer's books and records for the period of January 1, 2008 through September 30, 2011 ("audit period"). On October 11, 2012, Audit issued an assessment against Taxpayer for \$. . . , which consisted of a credit for retail sales tax of \$. . . ,<sup>2</sup> use tax/deferred sales tax of \$. . . ,<sup>3</sup> perishable meat wholesaling B&O tax of \$. . . , and interest of \$. . . . Taxpayer paid the assessment in full but petitioned the Department's Appeals Division for a refund.

During the audit period, Taxpayer reported its taxes for its wholesaling sales of perishable meat under the perishable meat wholesaling B&O tax classification. However, Taxpayer did not report its sales of perishable meat to its affiliated entity. . . .<sup>4</sup> [The Affiliated Entity] operated under [a different] UBI number . . . . Audit assessed perishable meat wholesaling B&O tax on those sales. Taxpayer appealed.

Taxpayer explained that it purchased perishable meat from a meat vendor and resold the meat to [the Affiliated Entity]. The meat vendor billed Taxpayer for the meat purchases and Taxpayer paid the meat vendor directly. When Taxpayer resold the meat to [the Affiliated Entity], it billed [the Affiliated Entity] for the price it paid to the meat vendor plus a fee to cover its administrative expenses. The meat vendor shipped the meat to Taxpayer in some instances and in other instances shipped the meat to [the Affiliated Entity] directly. Taxpayer billed [the Affiliated Entity] in both instances and [the Affiliated Entity] paid Taxpayer. Taxpayer provided no evidence that when it purchased the meat for [the Affiliated Entity], that it was doing so as [the Affiliated Entity]'s agent. Taxpayer stated that there were no contracts between [the Affiliated Entity] and itself regarding the purchasing of the meat as [the Affiliated Entity]'s agent other than the "Commodity Boxed Beef Future Purchasing Plan," which provided in relevant part, as follows:

Objective:

To move the "COMMODITY Boxed Beef" purchasing program to a central point for improved decision making which allows us to take full advantage of market cost differences and allows us to best buy at the market low's, insuring us the lowest prices on commodity products across all branches. This action will ultimately increase sales and

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<sup>2</sup> Audit credits Taxpayer for the tax paid on purchases of machinery and equipment ("M&E") that qualified for the M&E retail sales tax exemption.

<sup>3</sup> The use tax/deferred sales tax was for Taxpayer's purchases of machinery and equipment during the audit period that did not qualify for the M&E retail sales tax exemption. Taxpayer did not present any arguments in its petition on this issue.

<sup>4</sup> Taxpayer and [the Affiliated Entity] are subsidiaries of [Parent Company], UBI #. . . .

improve margins, while also creating a more dynamic “COMMODITY Boxed Beef” program.

(Emphasis in original).

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Phrase 1 Plan:

- 1) Request the Commodity Box, Beef order guides from each branch [[the Affiliated Entity]] to identify all items purchased, including average weekly volume per item.
- 2) Consolidate the branch data into a signal spreadsheet that enables us to look at total sales by items, so that a overall shopping list that enables us to manage minimum freight requirements by the packers is clarified.
- 3) Confirm with the branches any items that are identified as brand specific and whether that specific brand need is customer driven or just a buyer perception of the need, or possibly just an error in the item number use.
- 4) Install the [the Affiliated Entity] . . . buying system at [Taxpayer] with confirmation from Corporate IT that it's ready to go before starting the transfer of work.
- 5) Prior to going live, identify a branch buyer that fits the programs needs and move them to . . . [Taxpayer] employment, potential candidates listed below.
- 6) Once the data is collected and the buyer is in place, remove the actual packer buying decision from the branches, while leaving the actual order quantity and internal detail to the branch buyer.
- 7) Set branch ordering deadlines to a specific day and time, so all orders can be consolidated to maximize our negotiating leverage and potential savings.
- 8) Establish communications with the branch Marketing managers, so that opportunity buys and/or surplus inventory can be promoted on branch flyers.
- 9) There will be the need to assure that a system is in place at the branches for Quality Assurance to view and document coolers for product dating issues, rotation issues and damage issues, since there won't be meat [sic] any buyers in the branches.

[The Affiliated Entity] Staff of Interest to . . . [Taxpayer] for this program, 2 needed:

- 1) [Employee], [the Affiliated Entity] [Washington] ....
- 2) [Employee], [the Affiliated Entity] [Idaho]...
- 3) ...
- 4) ...

(Emphasis added).

Taxpayer asserts that it merely acts as a purchasing agent for [the Affiliated Entity] to reduce the cost of the meat for [the Affiliated Entity]. Taxpayer argues that requiring it to report its receipts from [the Affiliated Entity] under the wholesaling classification the Department would be requiring the organization to pay wholesaling B&O tax twice on the same product as [the

Affiliated Entity] pays the wholesaling B&O tax when it sells the meat to retailers. Alternatively, Taxpayer argues that the Department is estopped from assessing the taxes for the audit period because the Department failed to detect Taxpayer's reporting in a prior audit.

### ANALYSIS

Washington imposes a B&O tax "for the act or privilege of engaging in business" in the State of Washington. RCW 82.04.220. "Business" includes "all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly." RCW 82.04.140. The B&O rate is determined by the type of business activity in which a person is engaged. RCW 82.04.290. Wholesalers are liable for B&O tax on "the gross proceeds of sales of such business." RCW 82.04.270. RCW 82.04.260(4) creates a special B&O tax rate equal to 0.138% imposed "[u]pon every person engaging within this state in the business of slaughtering, breaking and/or processing perishable meat products and/or selling the same at wholesale only and not at retail."

It is undisputed that Taxpayer is engaged in the business of selling perishable meats at wholesale and it is entitled to the preferential B&O tax rate under RCW 82.04.260(4). The B&O tax is based on the "value of products, gross proceeds of sales, or gross income of the business, as the case may be." RCW 82.04.220. These amounts do not allow for deductions unless specifically authorized. Taxation is the rule; exemption is the exception. *Spokane County v. City of Spokane*, 169 Wash. 355, 13 P.2d 1084 (1932). Exemptions and deductions are narrowly construed. *Budget Rent-A-Car, Inc. v. Dep't of Revenue*, 81 Wn.2d 171, 500 P.2d 764 (1972). RCW 82.04.480 provides a B&O tax deduction from gross sales [for persons acting merely as an agent in making sales for a principal.] The burden [is] on the person claiming the deduction to establish that he or she is merely acting as agent for a principal in the selling of such property and it is not engaging in the business of making retail sales or wholesale sales. RCW 82.04.480(2).<sup>5</sup> The Department will allow such a claim "only when the [agent's] accounting records are kept in such manner as required by rule by the department." *Id.*

Rule 159 is the Department's administrative rule that implements this statute. Rule 159 explains when the Department will recognize a claim that someone is acting merely as an agent in making

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<sup>5</sup> RCW 82.04.480 provides:

(1) Every consignee, bailee, factor, or auctioneer having either actual or constructive possession of personal property, or having possession of the documents of title thereto, with power to sell such personal property in that person's own name and actually so selling, is deemed the seller of such personal property within the meaning of this chapter. Furthermore, the consignor, bailor, principal, or owner is deemed a seller of such property to the consignee, bailee, factor, or auctioneer.

(2) The burden is on the taxpayer in every case to establish the fact that the taxpayer is not engaged in the business of making retail sales or wholesale sales but is acting merely as broker or agent in promoting sales for a principal. Such claim will be allowed only when the taxpayer's accounting records are kept in such manner as required by rule by the department.

(3) For purposes of this section, "personal property" means tangible personal property, digital goods, digital codes, and extended warranties.

purchases or sales of tangible personal property for another. Det. No. 05-0045, 24 WTD 413 (2005). Rule 159 is expressly limited to cases involving tangible personal property. . . .

Rule 159 states, in relevant part:

Any person who claims to be acting merely as agent or broker in promoting sales for a principal or in making purchases for a buyer, will have such claim recognized only when the contract or agreement clearly establishes the relationship of principal and agent and when the following conditions are complied with:

(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 (emphasis added).

Thus, under RCW 82.04.480 and Rule 159, Taxpayer has the burden to establish the agency relationship between itself and [the Affiliated Entity] and that it merely acted as [the Affiliated Entity]'s agent in making purchases.

To establish entitlement to the deduction, Taxpayer must maintain specific records pertaining to the transactions between itself and its principal under Rule 159. Here, Taxpayer did not provide such records showing when it purchased meat from the meat vendor for [the Affiliated Entity], or that the purchases were made in the name and for the account of [the Affiliated Entity] or that [the Affiliated Entity] was the actual owner of the property for whom the sale was made, as required by Rule 159.

Accordingly, we conclude that Taxpayer has not met its burden of establishing that it was not engaged in the business of making wholesale sales to [the Affiliated Entity] and therefore Taxpayer may not deduct from the measure of its wholesaling B&O tax liability the amounts it received from [the Affiliated Entity] for the sales of the meat.

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#### DECISION AND DISPOSITION

We deny Taxpayer's petition.

Dated this 13th day of November 2013.