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APPEALS SECTION

BEFORE THE INTERPRETATION AND

DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u>
<u>N</u>	
For Correction of Refund of)	
)	No. 87-266
)	
. . .)	Registration No. . . .
)	
)	

[1] **RULE 122, RCW 82.04.050 AND RCW 82.04.330:** BUSINESS
AND OCCUPATION TAX

-- AGRICULTURAL EXEMPTION -- CUSTOM FEEDERS.

Persons engaged in business of raising livestock
owned by others, i.e., "custom feeding," are exempt
from B&O tax irrespective of whether they charge the
livestock owner separately for the cost of feed.

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: May 12, 1987

NATURE OF ACTION:

Taxpayer petitions for a refund of business and occupation
(B&O) taxes paid on amounts received for feeding and fattening
cattle owned by others.

FACTS AND ISSUES:

Rosenbloom, A.L.J. -- the taxpayer is engaged in the business
of raising livestock owned by others, i.e., "custom feeding."

Prior to July 28, 1985, custom feeders were subject to B&O tax because they did not qualify for the agricultural exemption provided in RCW 82.04.330. That statute used to read in part:

This chapter shall not apply to any person in respect to the business of . . . raising for sale of any animal . . .

The Department took the position that persons raising animals for hire did not qualify. Such persons did not own the animals and therefore could not be raising them "for sale."

The legislature amended RCW 82.04.330 during the 1985 session by deleting the words "for sale of." The amendment became effective July 25, 1985. However, the taxpayer was not aware of this legislation and continued to pay B&O tax. Upon learning of the legislation, the taxpayer requested a refund. The refund was denied in part by the Audit Section.

The taxpayer, like many other custom feeders, billed the cattle owners separately for the cost of feed. This practice was adopted as the result of a prior interpretation of the Tax Commission, the Department's predecessor. The Tax Commission had determined that custom feeders were taxable under the Service and Other Activities B&O tax classification upon the gross income of the business and subject to sales or use tax on the cost of the feed. However, the Tax Commission also determined that if the custom feeder made a sale of feed to the farmer at a price separate from the custom feeding charge, then the custom feeder was liable for wholesaling B&O tax upon the sale of feed and the service B&O tax upon the charge for custom feeding. Excise Tax Bulletin (ETB) 284.04.209.

Thus, under the Tax Commission's interpretation, custom feeders could avoid paying sales or use tax on the cost of feed as well as reducing their B&O tax liability by billing separately for the cost of feed.

Effective with the 1985 legislation, there is no point in billing feed separately. Custom feeders now qualify for the agricultural exemption provided in RCW 82.04.330. Furthermore, because they qualify for the agricultural exemption, sales of feed to custom feeders are excluded from the definition of retail sale and thus not subject to sales or use tax. See RCW 82.04.050(6) and WAC 458-20-122.

However, because the taxpayer was not aware of the 1985 legislation, it continued its practice of billing separately

for the cost of feed. Because of this, the Audit Section concluded that the taxpayer is not entitled to a full refund. The Audit Section took the position that the 1985 legislation exempts only that portion of income which was previously taxable under the Service and Other Activities classification. The legislation did not affect income taxable under the Wholesale classification, according to the Audit Section. Thus, by continuing to bill separately for the cost of feed after the effective date of the legislation, the taxpayer remained liable for B&O tax as a wholesaler of feed as far as the Audit Section was concerned.

DISCUSSION:

RCW 82.04.330 provides in part:

This chapter shall not apply to any person in respect to the business of . . . raising upon the person's own lands or upon land in which the person has a present right of possession, any animal . . . (Emphasis supplied.)

That is precisely what the taxpayer does. Tax liability is determined by the nature of the business activity, not by the form of the invoice. The taxpayer is a custom feeder regardless of whether it bills separately for the cost of the feed. Put simply, the substance of the transaction prevails over the form.

Consequently, the taxpayer's business is not subject to the tax imposed by "this chapter." In other words, the exemption applies to the B&O tax in general and is not specifically limited to the Service and Other Activities classification.

DECISION AND DISPOSITION:

The taxpayer's petition for refund is granted. The Audit Section will grant an appropriate credit or refund.

DATED this 12th day of August 1987.