

Cite as Det. No. 89-111, 7 WTD 191 (1989)

BEFORE THE INTERPRETATION AND APPEALS DIVISION
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 Ruling of Tax Liability of)	
)	No. 89-111
)	
...)	Registration No. ...
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)	

- [1] RULE 245: RETAILING B&O TAX -- RESELLING LOCAL NETWORK TELEPHONE SERVICE -- GROSS PROCEEDS OF SALE. Where taxpayer contracts with and is billed as the solely liable party by local telephone companies to receive telephone service at the residences or offices of its customers/consumers who pay the taxpayer for such service plus a "handling charge," the taxpayer is reselling "network telephone service." The amounts billed by the taxpayer to its customers/consumers are the gross proceeds of sale subject to Retailing B&O tax with no deduction allowed for taxpayer's payments to the local telephone companies.
- [2] RULE 245: RETAILING B&O TAX -- BUSINESS ACTIVITY -- NETWORK TELEPHONE SERVICE -- PROVIDING ACCESS. Where taxpayer provides its customers/consumers with access to a local telephone network, the taxpayer is engaged in the business activity of network telephone service. It is not required that the taxpayer operate and manage the local telephone lines and exchanges; that service can be rendered by the local telephone companies who sell that service to the taxpayer who, in turn, sells the service to its customers/consumers. Thus, the telephone company is a wholesaler and the taxpayer is a retailer of network telephone service subject to Retailing B&O tax.

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: ...

NATURE OF ACTION:

Petition for a ruling that the taxpayer's business activity is not "network telephone service" for business and occupation (B&O) tax purposes.

FACTS AND ISSUES:

Krebs, A.L.J. -- [The taxpayer is] engaged in the business of providing or, as in the taxpayer's words, "arranging for the provision" of telephone service to customers who are unable to get such service on their own because their prior telephone service was disconnected due to failure to pay their telephone bills.

The taxpayer and . . . , have an understanding, per letter dated February 2, 1987 from . . . to the taxpayer, whereby . . . provides telephone service to the taxpayer for use by the taxpayer's customers and the taxpayer is held responsible for the charges incurred. The taxpayer has a similar understanding with . . . , another provider of network telephone service.

The taxpayer solicits customers among persons whose telephone service have been disconnected because they failed to pay their telephone bills. The taxpayer enters into a written agreement with the customer who wishes to use the taxpayer's service. The agreement in pertinent part provides for the following:

1) The customer agrees to have the taxpayer establish limited telephone service at his residence. Telephone service will be provided by the local telephone company in the customer's area.

2) The customer agrees to make monthly payments on the current telephone service, plus \$12.00 each month directly to the taxpayer for managing the account. The taxpayer will then forward the exact amount of the current monthly telephone service to the telephone company on the customer's behalf. The taxpayer assumes all responsibility on the current telephone service provided.

A written statement dated May 11, 1988 by the taxpayer fully describes its business activity and its relationships with its customers and the telephone companies. The statement in its entirety states:

[Taxpayer] arranges for the provision of limited local telephone service with toll restriction; to be provided to residence/business customers in the state of Washington.

Generally these customers have been disconnected by the local telephone companies because of past delinquent accounts. The local telephone companies, (. . .

& . . .) provide the current telephone service to the customers and [taxpayer] acts as a co-signer for the customer. [Taxpayer] is financially responsible to the telephone companies for payments on these current accounts. [Taxpayer] does not assume any responsibility for a customer's past delinquent accounts with a telephone company.

[Taxpayer] and the customer receiving the telephone service are both the billing customer, (customer of record) on these current accounts. The telephone companies forward the current monthly bill to [taxpayer] and [taxpayer] (in turn) bills the customer for the monthly service. [Taxpayer] bills the customer for the exact amount billed to [taxpayer]. [Taxpayer] does not charge the customer any additional charges for telephone service. The telephone companies, (in turn) receive payments for current telephone service from [taxpayer]. on behalf of their clients.

[Taxpayer] charges the customer a reasonable monthly service charge for management of the current account and assisting the customer with arranging for payments on past accounts with the telephone companies. [Taxpayer's] agreement with the customer does stipulate, (in writing) that the customer must make arrangements with the telephone company for payments on their past delinquent account. These payments will be within the financial ability of the customer.

The customer will make payments on past accounts directly to the telephone company, [taxpayer] is not a collection agency. [Taxpayer] is a telephone assistance company and only charges for management and assistance service. [Taxpayer] does not have any hands on equipment for the transmission of voice communications.

The taxpayer received written responses as to the tax consequences of its business activities from the Department's Taxpayer Information & Education Section on May 27, 1987 and June 30, 1988 which held:

- 1) The taxpayer provides "network telephone service" per definition in WAC 458-20-245 (Rule 245).
- 2) The taxpayer purchases telephone service from the telephone companies for resale to its customers. The taxpayer should give a resale certificate to the telephone companies.
- 3) The taxpayer's income from sales of telephone service to its residential and business customers is subject to Retailing B&O tax, but only the residential customers are exempt from sales tax.
- 4) The taxpayer's income from its customers for the following items are also subject to Retailing B&O tax as part of the gross income received for "network telephone service":
 - a) Initial processing fee of between \$9.95 and \$69.95 for arranging for the customer's telephone service to be reconnected.
 - b) The monthly handling charge paid for managing the customer's current account and

assisting the customer with arranging for payments on past accounts with telephone companies.

5) The taxpayer's income from its customers for fees (one time basis) charged in submitting orders to long distance telephone service providers is subject to Service B&O tax. The long distance telephone service providers bill directly the taxpayer's customers for long distance telephone service.

The issue raised by the taxpayer's appeal is whether its business activity is "network telephone service" under Rule 245 for B&O tax purposes. If so, its receipt of amounts from its customers for current telephone service is subject to Retailing B&O tax.

TAXPAYER'S POSITION:

The taxpayer asserts that the money it receives for telephone service is sent to the telephone company and the telephone company pays the B&O tax. The taxpayer further asserts that such money received is not gross income and that the only income is its charge for handling the account.

The taxpayer points out that the Washington Utilities & Transportation Commission (UTC) has determined it is not a "reseller of telecommunication under the provisions of RCW 80.36.350."

The taxpayer asserts that it "acts as a cosigner for current phone service" so that if a customer fails to make payments the telephone company is authorized to disconnect the service.

The taxpayer stresses that it does not "provide" telephone service but only arranges for the "provision of" telephone service.

For all of the above reasons, the taxpayer believes that its business activity is not "network telephone service."

DISCUSSION:

RCW 82.04.050(5) defines "retail sale" to "include the providing of telephone service, as defined in RCW 82.04.065, to consumers."

RCW 82.04.190(2) defines "consumer" to include "any person who purchases, acquires, or uses any telephone service as defined in RCW 82.04.065, other than for resale in the regular course of business."

RCW 82.04.060 defines "sale at wholesale" to include "any sale of telephone service as defined in RCW 82.04.065, which is not a sale at retail."

Clearly, the foregoing statutes envision the retailing of "telephone service" to consumers and the wholesaling of "telephone service" to persons who will resell the "telephone service" to consumers. The issue to be decided is whether the taxpayer is a retailer of telephone service and

thus subject to Retailing B&O tax.

RCW 82.04.065(3) defines "telephone service" to mean:

...competitive telephone service or network telephone service, or both, as defined in subsections (1) and (2) of this section. (Emphasis supplied.)

Rule 245, . . . , implements the foregoing statutes and in pertinent part provides:

Persons engaged in the "telephone business" or rendering "telephone service" are taxable under the retailing or wholesaling classification of the business and occupation tax, whichever is applicable, on total gross revenues, as described herein. Such persons who are taxable under retailing must also collect retail sales tax from consumers,...

DEFINITIONS

As used herein: The term "telephone service" includes competitive telephone service and network telephone service.

The term "telephone business" means the business of providing network telephone service...

...

The term "network telephone service" means the providing by any person of access to a local telephone network,... toll service,...or the providing of telephonic,...or similar communication...for hire, over a local telephone network...

...

BUSINESS AND OCCUPATION TAX

RETAILING AND WHOLESALING. Persons making retail sales of telephone service to consumers are taxable upon the gross proceeds of sales under the retailing classification. Persons making sales of telephone services for resale in the regular course of business are taxable upon the gross proceeds of sales under the wholesaling classification.

...

...The business and occupation tax shall also apply to the gross proceeds of sales of network telephones service..., measured by total gross billings to customers.

...

SERVICE. Persons engaged in the telephone business or rendering telephone service are

taxable under the service and other activities classification on their income from services which are not included within the definition of the terms "sale at retail" in RCW 82.04.050 or... "network telephone service" as defined herein. Included under this classification are..., and any other miscellaneous income.

...

SPECIAL SITUATIONS

Persons making sales of telephone service for resale in the regular course of business must follow the provisions of WAC 458-20-102 concerning resale certificates. (Emphasis supplied.)

[1] In this case, the pertinent facts with respect to the taxpayer's business activity are:

1. The taxpayer contracts with local telephone companies to receive telephone service at the residences or offices of its customers. The companies send the monthly telephone bills to the taxpayer.
2. The taxpayer alone is liable to the local telephone companies for payment of the bills.
3. The taxpayer in turn bills its customers charging the same amount plus a handling charge.
4. Upon receipt of payment from its customers, the taxpayer then makes payment on the amount it owes to the telephone company.

Clearly, the taxpayer is reselling the local network telephone service it purchased from the local telephone companies. Thus, . . . and . . . are the wholesalers, the taxpayer is the retailer, and the taxpayer's customers are the consumers. Accordingly, the taxpayer is subject to Retailing B&O tax on the "gross proceeds of sale." Rule 245.

RCW 82.04.070 defines "gross proceeds of sales" in pertinent part to mean:

...the value proceeding or accruing from the sale of tangible personal property and/or for services rendered, without any deduction on account of the cost of property sold,...taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses. (Emphasis supplied.)

In this case, the value proceeding is the amount received by the taxpayer from its customer on its sale of the telephone service and there is no deduction for the taxpayer's expense in buying the telephone service from the telephone companies. RCW 82.04.070. The fact that the telephone companies also pay B&O tax on their income from selling telephone service to the taxpayer is fully intended by the pyramidal scheme of Washington's tax legislation.

Because the taxpayer's income is from selling telephone service, we reject the taxpayer's contention that its only income is its charge for handling the account.

Contrary to the taxpayer's assertion that the UTC determined that the taxpayer was not a "reseller of telecommunication under the provisions of RCW 80.36.350," the UTC determined in its Order dated May 26, 1988 that "the services rendered by . . . [taxpayer] do not qualify the company as a telecommunications company as defined in RCW 80.04.010," and dismissed the taxpayer's application (withdrawn previously by the taxpayer on May 16, 1988) for registration as a telecommunications company under the provisions of RCW 80.36.350. The UTC merely determined that the taxpayer was not a telecommunications company; the UTC did not determine that the taxpayer was not a reseller of telecommunications.

RCW 80.36.350 provides for the registration of telecommunications companies with the UTC. RCW 80.04.010 defines "telecommunications company" to mean every entity "owning, operating or managing any facilities used to provide telecommunications for hire, sale, or resale to the general public." RCW 80.36.010 defines "facilities" to mean:

...lines, conduits, ducts, poles, wires, cables, cross-arms, receivers, transmitters, instruments, machines, appliances, instrumentalities and all devices, real estate, easements, apparatus, property and routes used, operated, owned or controlled by any telecommunications company to facilitate the provision of telecommunications service.

It appears to us that the taxpayer, although engaged in reselling telephone service, does not "use, operate, own or control" any of the equipment itemized as "facilities" to qualify as a "telecommunications company." In any event, the provisions of Rule 245 are not dependent upon the statutes and rules which affect the UTC and are immaterial in determining whether the taxpayer is reselling telephone service. Rule 245 serves as the basis for making such determination.

While the taxpayer perceives itself as acting as a "cosigner for current phone service," with which we do not agree because the taxpayer is solely liable to the telephone companies, such perception does not change the factual situation that the taxpayer is a buyer of telephone service which it resells to its customers.

The taxpayer's argument that it does not "provide" telephone service but only arranges for the "provision of" telephone service would be well taken if it were not a buyer of telephone service which it resells. It is noted that with respect to long distance service, the taxpayer has arranged for its customer to buy the service directly from and be solely liable to the long distance service providers who bill directly the taxpayer's customers. Hence, in the latter situation, the taxpayer is not a reseller of telephone service and is subject to the Service B&O tax on the fees charged for submitting orders for ("arranging for") long distance telephone service.

[2] As to whether the taxpayer's business activity is "network telephone service," the issue raised by the taxpayer, its definition wording bears repeating: "providing by any person of access to a local telephone network." All that is required is that the taxpayer's services for which income is

received be provided via (the "access to") a local telephone network. It is not required that the taxpayer operate and manage the local telephone lines and exchanges; that service can be rendered by the local telephone companies who sell that service to the taxpayer who, in turn, sells it to its customers/consumers.

RULING:

The taxpayer's business activity of providing to its customers access to a local telephone network is "network telephone service." The taxpayer's income from such business activity is subject to Retailing B&O tax measured by the amounts billed to the customer which includes the taxpayer's handling charge. There is no deduction from the measure of the tax for any of taxpayer's expenses including amounts paid by the taxpayer for purchase of the telephone service, which the taxpayer resells to its customers/consumers, from local telephone companies.

This legal opinion may be relied upon for tax reporting purposes and as support of the reporting method in the event of an audit. This ruling is issued pursuant to WAC 458-20-100(18) and is based upon only the facts that were disclosed by the taxpayer. In this regard, the Department has no obligation to ascertain whether the taxpayer has revealed all of the relevant facts or whether the facts disclosed are actually true. This legal opinion shall bind this taxpayer and the Department upon these facts. However, it shall not be binding if there are relevant facts which are in existence but have not been disclosed at the time this opinion was issued; if, subsequently, the disclosed facts are ultimately determined to be false; or if the facts as disclosed subsequently change and no new opinion has been issued which takes into consideration those changes. This opinion may be rescinded or revoked in the future, however, any such rescission or revocation shall not affect prior liability and shall have a prospective application only.

DATED this 28th day of February 1989.