

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 Refund of)
) No. 89-286
)
 . . .) Registration No. . . .
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- [1] RULE 159: B&O TAX -- AGENT -- COMMISSION SALES -- CONSIGNMENT -- TEXTBOOK DEPOSITORY. A textbook depository which stores publisher's books, then sells them on behalf of the publisher, is an agent and taxable at the service business and occupation tax rate on commission income rather than at the retail business and occupation tax rate on gross book sales.
- [2] RULE 194: SERVICE B&O TAX -- APPORTIONMENT -- SEPARATE ACCOUNTING METHODS -- COST METHOD -- TOTAL INCOME. Commission income is apportioned by separate accounting methods unless it is not practical, then the cost method may be used. If the cost method is used, the ratio of the cost of doing business in this state to the total cost of doing business both within and without this state is multiplied by total income.

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 3, 1989

NATURE OF ACTION:

Taxpayer petitions for a refund of B&O taxes.

FACTS AND ISSUES:

Free, A.L.J. -- During the refund period from January 1, 1984 through December 31, 1987, the taxpayer was in the textbook depository business. Textbook publishers would contract with the taxpayer to store textbooks in the taxpayer's Oregon location. The taxpayer acted as agent of the publishers sending travelling salesmen to solicit orders in Washington, Oregon, and Alaska. The taxpayer never owned any of the books. Title would pass from the publisher to the school purchasing the books.

During the refund period, the taxpayer paid business and occupation tax on 100% of the gross sales proceeds from Washington sales. The taxpayer now contends that business and occupation tax should have only been paid on only the apportionable commission income from the Washington sales.

DISCUSSION:

[1] WAC 458-20-159 (Rule 159) provides that every agent who makes a sale in the name of the actual owner or as agent of the actual owner is taxable under the service classification upon the gross income derived from the business. This differs from agents who have actual or constructive possession of tangible personal property with the power to sell such in their own name. Rule 159 requires agents who have possession of property with the power to sell in their own name, to pay business and occupation tax at the retailing or wholesaling rate on the gross sales of the products (as opposed to the gross income from commissions for agents).

Rule 159 requires that any person claiming to be acting as an agent in promoting sales for a principal establish that their contract with the principal clearly establish the relationship of principal and agent. In addition, the books and the records of the agent must 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 as well as showing the gross sale amount with the commission separately stated.

A sample page from the 1988 ledger of the taxpayer presented at the hearing by the taxpayer, shows the publisher (principal), gross amount of the sales, and commissions earned. The invoices clearly identify the publishers as

sellers and that the taxpayer is acting as their agent. If the records during the refund period were similar in these respects, the record keeping portion of the rule is met. Two contracts, one with a major publisher labelled, "DEPOSITORY AGREEMENT" and the other, a form contract used by the taxpayer with some of the other publishers labelled, "AGENCY CONTRACT", each clearly established the relationship of principal and agent. The taxpayer is addressed as "agent" in the contracts with the scope of the agency defined. The taxpayer can only sell the publisher's books on behalf of the publisher at prices set by the publisher. The taxpayer is required to notify the principal of all invitations to bid on sales and enter bids as the publisher's agent as directed by the publisher. Under the contract, all textbooks and materials delivered to the depository are to remain the absolute and unencumbered property of the publisher. All proceeds and receivables from textbook sales are the property of the publisher subject to the commission terms of the agreement. Under the agreements, the taxpayer is forbidden to purchase and resell any books except as an agent.

If these agreements are typical of all the taxpayer's agreements with publishers, the taxpayer meets the requirements of Rule 159 to be acting as an agent and its measure of tax is the gross commission income, rather than gross book sales. The audit staff may check the other contracts as well as the taxpayer's books and records during the refund period.

[2] The second adjustment to the measure of tax requested by the taxpayer in the petition for refund pertains to apportioning the taxpayer's income for business done in this state. The taxpayer indicates that it maintains places of business both inside and outside this state. On the original returns, the taxpayer reported 100% of Washington sales. WAC 458-20-194 states:

Persons engaged in a business taxable under the service and other business activities classification and who maintain places of business both inside and outside this state which contribute to the performance of a service, shall apportion to this state that portion of gross income derived from services rendered by them in this state. Where it is not practical to determine such apportionment by separate accounting methods, the taxpayer shall apportion to this state that proportion of total income which the cost of doing business within this

state bears to the total cost of doing business within and without this state.

The taxpayer has submitted an apportionment calculation based on the cost of doing business during the audit period with Washington expenses ranging from 7.2% to 11.8% of total expenses. The taxpayer has then multiplied these percentages by the total expense to arrive at a figure it labeled "Washington Commissions". The service business and occupation tax was computed from that measure.

Several factual matters need to be resolved regarding the apportionment issue. First of all, Rule 194 implies a preference for separate accounting methods if practical. Second, if income is apportioned by costs, costs of doing business within Washington sales must be identified and after the ratio to total costs is computed, the ratio should be multiplied by the total income rather than the costs.

Since resolution of these issues requires examination of the taxpayer's books and records, the apportionment computation will be referred to the audit division.

DECISION AND DISPOSITION:

The taxpayer's petition for refund reducing the measure of tax to the apportioned commission income is granted pending audit verification and computation.

DATED the 9th day of June 1989.