Cite as Det. No. 99-064ER, 20 WTD 323 (2001)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	FINAL EXECUTIVE LEVEL DETERMINATION
	)	No. 99-064ER
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

[1] RULE 164: B&O TAX – INSURANCE COMMISSIONS – WHOLESALE BROKER – RETAIL AGENTS. A wholesale insurance broker is taxable on the full amount of the commission paid on insurance it markets even when the retail broker on the transaction collects the gross premium and deducts a share of the commission prior to remitting the balance to the wholesale broker, when the wholesale broker alone has a contractual relationship with the insurance company, and the retail broker's commission is set under an agreement solely between the two brokers. See: Det. No. 88-370, 7 WTD 5 (1988); Det. No. 88-383, 7 WTD 11 (1988).

[2] RCW 82.04.320: B&O TAX -- INSURANCE COMMISSIONS -- SURPLUS LINE BROKER. RCW 82.04.320 does not exempt surplus line brokers from B&O tax on their commissions earned from placing surplus line coverage.

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:

The taxpayer is a licensed insurance agent, broker, and surplus line broker. It seeks reconsideration of Det. No. 99-064, which affirmed the assessment of B&O tax on the taxpayer's insurance commissions. The primary issues are whether the taxpayer is subject to B&O tax on commission income that is retained by retail brokers when the taxpayer is acting as a wholesale broker, and whether the taxpayer is exempt from B&O tax on its commission income from surplus line business.[1]

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

FACTS:

Prusia, A.L.J. -- The taxpayer is engaged in business in Washington as an insurance agent and insurance broker.

The taxpayer has four licenses issued by the State Insurance Commissioner: an agent's license issued under chapter 48.17 RCW; a broker's license issued under chapter 48.17 RCW; a general agent's license issued under RCW 48.05.310; and a surplus line broker's license issued under chapter 48.15 RCW.

When performing as an agent or general agent, the taxpayer is appointed by an insurer to solicit applications on its behalf. When performing as a broker, the taxpayer is not an agent or representative of an insurer, but rather procures coverage from an insurer on behalf of the insured. The taxpayer generally performs as a wholesale broker, procuring coverage requested by a retail broker who represents the insured.

Performing as a wholesale broker, the taxpayer enters into agreements with both the insurance companies and the retail brokers with whom it deals. The typical agreement with an insurance company sets out the independent contractor status and authority of the taxpayer. It provides that the insurance company will "pay" the taxpayer a specified premium on each policy written and paid for under the agreement.[2] It provides that the taxpayer is to collect the gross premium and to withhold its commission prior to remitting the balance.

Under the taxpayer's arrangements with retail brokers, the taxpayer and the retail broker share the sales commission. Billing and payment for coverage are handled as follows. The retail broker bills and collects from its policyholder. Upon payment by the policyholder, the retail broker takes out its share of the commission and remits the balance to the taxpayer.

The retail brokers have no contractual relationship with the insurers.

The taxpayer generally follows the common industry practice of splitting the commission equally between itself and the retail broker. The insurance companies with which the taxpayer deals do not attempt to direct how the taxpayer may split its commissions, and the taxpayer does not have to account to the companies for its handling of the commissions.

A majority of the taxpayer's business is in surplus line coverage. Surplus line insurance exists for unique and/or unusual risks for which coverage is unavailable from insurance companies that are authorized by the State Insurance Commissioner to solicit and transact business in

[2] For example, an agreement between the taxpayer and [Insurance Co.] provides: ". . . shall pay the Broker, as a commission, a percentage rate of the premium on each policy (or endorsement) written and paid for under this Agreement at the rate stipulated by [Insurance Co.]." An agreement between the taxpayer and [Intermediary] provides: "The INTERMEDIARY shall pay the BROKER as commission, a percentage rate of the premium on each policy written and paid for under this Agreement at the rate of commission agreed from time to time . . . ."

Washington. When coverage is not readily available from authorized insurers, state law allows persons to procure coverage from insurance companies that are not authorized to solicit or transact business in this state. In this way, risk is exported from the state to companies not licensed in the state. By statute, only a person licensed by the Insurance Commissioner as a surplus line broker may procure surplus line coverage. As a licensed surplus line broker, the taxpayer procures surplus line coverage at the request of retail brokers who represent the insured.[3]

The surplus line business is taxed differently than the insurance industry generally. Washington imposes a tax on gross premiums collected on all insurance issued, which must be paid to the State Insurance Commissioner annually. Generally, insurance companies are required to pay the tax. However, in the case of surplus line insurance, the surplus line broker is required to pay the tax. The billings to surplus line customers itemize the premium, premium tax, and an examination fee that is paid to the Surplus Line Association (a liaison with the Insurance Commissioner). The retail brokers remit the premium tax to the taxpayer, and it annually remits the gross premiums tax on surplus line coverage it has procured.

The Audit Division of the Department of Revenue examined the taxpayer's books and records for the period January 1, 1993 through March 31, 1997. The Audit Division found additional taxes and interest owing in the amount of $. . ., on the portion of the commissions that retail brokers had retained before remitting premium payments to the taxpayer. The taxpayer had not included the amount of the retail broker-retained commissions in the measure of its B&O tax. The Department assessed the additional taxes under the insurance agents and brokers B&O tax classification. The Audit Division also denied the taxpayer's request for a credit for all B&O taxes the taxpayer had paid on commissions from its surplus line business, rejecting the taxpayer's contention that surplus line commissions are exempt from B&O tax under RCW 82.04.320. On December 5, 1997, the Department issued Assessment No. . . . in the amount of taxes and interest found due. The assessment remains unpaid.

The taxpayer timely petitioned for correction of the assessment. Det. No. 99-064 denied the taxpayer's petition. Further, it instructed the Audit Division to re-determine the tax on surplus line commissions using the service B&O rate (RCW 82.04.290) rather than the rate applicable to insurance brokers (RCW 82.04.260).

In requesting reconsideration of Det. No. 99-064, the taxpayer contends it was not subject to tax on the portion of commissions retail brokers retained, because it neither received, nor was entitled to receive, any of the retail broker's commission income. It alleges several errors in the rationale by which Det. No. 99-064 upheld the assessment. The taxpayer also reasserts its contention that surplus line brokers are exempt from the B&O tax under RCW 82.04.320.

[3] Examples of the kinds of risk covered by surplus line coverage are general liability coverage that insurance companies do not want to write, such as painting logos on airplanes (errors can be extremely costly), certain fire policies, special terms not available in the general liability market, and special risks, such as product liability.

Finally, the taxpayer contends Det. No. 99-064 erroneously determined the taxpayer's surplus line commissions, if taxable, are taxable at the service B&O rate.

ISSUES:

1. When the taxpayer acts as a wholesale broker, is it taxable on the full amount of the commission paid on insurance it markets?

2. Is a licensed surplus line broker exempt from the B&O tax on income from its surplus line business?

3. If a licensed surplus line broker is not exempt from the B&O tax, what B&O rate applies to its surplus line activities?

DISCUSSION:

The statutory framework -- RCW Titles 48 and 82

Insurance companies, brokers, and agents are regulated by the State Insurance Commissioner under Title 48 RCW. Several chapters of Title 48 are relevant to the issues presented. Chapter 48.05 sets out the general provisions and requirements applicable to insurers, and provides for the licensing of general agents. Chapter 48.14 sets out the fees to be paid for various types of licenses, and imposes premium taxes on gross premiums. Chapter 48.15 sets out requirements applicable to unauthorized insurers, and the licensing and operations of surplus line brokers. Chapter 48.17 sets out requirements for the licensing of insurance agents, brokers, solicitors, and adjusters.

RCW 48.14.120 imposes an annual tax on gross insurance premiums collected or received during the previous calendar year, to be paid through the Insurance Commissioner's office. The statute imposes the tax upon each authorized insurer on the gross premiums it collected or received. For insurance issued by an unauthorized insurer, RCW 48.15.120 provides that the surplus line broker must pay the Insurance Commissioner the annual tax on gross premiums from the surplus line insurance, "at the same rate as is applicable to the premiums of authorized foreign insurers under this Code."

The State Insurance Commissioner has the power and duty of effectuating the provisions of Title 48 RCW. RCW 48.02.060. Pursuant to that authority, the State Insurance Commissioner has adopted regulations, codified in Chapter 284 WAC.

The activities of insurance agents and brokers are taxed under Title 82 RCW, which is administered by the Department of Revenue. Washington imposes a B&O tax "for the act or privilege of engaging in business" in the State of Washington. RCW 82.04.220. The legislature has classified most business activities under specific classifications. Chapter 82.04 RCW. Any

activity that has not been specifically classified nor exempted from B&O taxation is subject to B&O tax at the other business or service classification rate. RCW 82.04.290.

The B&O tax is imposed on the "gross income of the business." RCW 82.04.220. Gross income of the business is defined in RCW 82.04.080 as:

> [T]he value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

The "value proceeding or accruing" is defined in RCW 82.04.090 as:

> [T]he consideration, whether money, credits, rights, or other property expressed in terms of money, actually received or accrued. The term shall be applied, in each case, on a cash receipts or accrual basis according to which method of accounting is regularly employed in keeping the books of the taxpayer.

WAC 458-20-164 (Rule 164) is the administrative rule that deals with the B&O tax liability of insurance agents, brokers, and solicitors. Rule 164 provides in relevant part:

> (2) **Definition.** The words "agent," "broker," and "solicitor" mean a person licensed as such under the provisions of chapter 48.17 RCW.
>
> (3) **Business and occupation tax.** Every person engaging in business as an insurance agent, broker, or solicitor is taxable under the insurance agents and brokers classification upon the gross income of the business.
>
> Every person acting in the capacity of agent, broker, or solicitor is presumed to be engaging in business and is taxable under the insurance agents and brokers classification upon the gross income of the business.
>
> (a) The gross income of the business is determined by the amount of gross commissions received, not by the gross premiums paid by the insured. The term "gross income of the business" includes gross receipts from commissions, fees or other amounts which the agent, broker, or solicitor receives or becomes entitled to receive. The gross income of the business does not include amounts held in trust for the insurer or the client. (see also WAC 458-20-111, Advances and reimbursements.)
>
> No deduction is allowed for commissions, fees, or salaries paid to other agents, brokers, or solicitors nor for other expenses of doing business.

B&O tax rates are set out in several sections of Chapter 82.04 RCW. RCW 82.04.260(14) sets out the rate of the B&O tax on "every person engaging within this state as an insurance agent, insurance broker, or insurance solicitor licensed under chapter 48.17 RCW." RCW 82.04.280 sets out the rate of the B&O tax on every person engaging in the business of "representing and

performing services for fire or casualty insurance companies as an independent resident managing general agent licensed under the provisions of RCW 48.05.310." RCW 82.04.290 sets out the B&O rate for taxpayers other than those enumerated elsewhere in Chapter 82.04 RCW.

Two statutes provide exemptions from the B&O tax for certain taxpayers who are subject to the gross premiums tax. RCW 48.14.080 provides:

> As to insurers, other than title insurers and taxpayers under RCW 48.14.0201, the taxes imposed by this title shall be in lieu of all other taxes, except taxes on real and tangible personal property, and the tax imposed in . . . .

The other statute, RCW 82.04.320, exempts the following persons from the B&O tax:

> any person in respect to insurance business upon which a tax based on gross premiums is paid to the state: PROVIDED, That the provisions of this section shall not exempt any person engaging in the business of representing any insurance company, whether as general or local agent, or acting as broker for such companies: . . . .

Issue 1-- may the taxpayer deduct or exclude the retail brokers' commissions?

The taxpayer's argument that it was not taxable on commissions retained by retail brokers is as follows. Under Rule 164, insurance brokers are taxed on "gross commissions received." The taxpayer did not receive the retail brokers' commissions. Therefore, it is not taxable on them.

The taxpayer argues Det. No. 99-064 erroneously viewed the retail agents as subagents of the taxpayer, and relied upon prior Department decisions that held insurance brokers taxable on the commissions earned by insurance agents the brokers employed as employees or affiliated independent contractors. The taxpayer argues the retail brokers with whom it deals are in no sense its agents, and the decisions upon which Det. 99-064 relied are readily distinguishable on that basis. It states that unlike general agents in the life and health insurance industry, property casualty brokers generally do not have a sales force of subagents. The retail brokers with whom the taxpayer deals have no on-going relationship with the taxpayer at all. The taxpayer argues: "In these circumstances, the taxpayer is, if anything, the 'sub-agent' of the retail broker, retained to complete a transaction that the retail broker has identified, and sharing in the commission that the retail broker receives from its customer. . . . Since the retail broker receives the full commission, it should be subject to tax on the full amount received, if anyone should."

The taxpayer argues Det. No. 99-064 erroneously found that the taxpayer is legally liable to the retail broker for payment of its commission. It argues that unlike situations involving sub-agents, the taxpayer has no legal responsibility for any commission to which the retail broker may be entitled. It argues that the retail broker's customer is liable for the full commission, the retail broker collects the full commission from the customer, and the retail broker is liable to the taxpayer for remitting to the taxpayer the taxpayer's share of the commission.

Finally, the taxpayer states that state law requires a broker or agent receiving premium payments to deposit the full amount into an escrow account, and to pay them only to the persons entitled to them, and Rule 164 excludes from gross income amounts held in trust for the insurer or the client. It argues there is "no basis for applying a different rule in the case of amounts held in trust for an unaffiliated agent." We are not persuaded by the taxpayer's arguments.

[1] The taxpayer is in the business of selling insurance policies as an agent or a broker. A commission is an amount agreed upon between the insurer and the agent or broker to compensate the agent or broker for selling an insurance policy. It is a cost of doing business for insurance companies. See Det. No. 86-299, 2 WTD 35 (1987); Armstrong v. State, 61 Wn.2d 116, 377 P.2d 409 (1962); Laws of 1991, ch. 275, § 1 (statement of intent). The taxpayer's agreements with the insurance companies expressly recite that the insurers agree to "pay" the taxpayer a commission.

The taxpayer earns the agreed-upon commission when the policyholder pays the premium. At that point, the insurance company owes the taxpayer the full amount of the agreed-upon commission. Under its agreement with the person who is paying the commission, the taxpayer is "entitled to receive" the full amount of the commission. The full commission is taxable gross income of the taxpayer's business. Rule 164.

The insurance company does not owe any portion of the commission to anyone else. Its only contractual relationship is with the taxpayer. That the taxpayer may have agreed with a third party to split the commission, and has worked out a payment arrangement with the third party that results in less than the full commission flowing into the taxpayer's hands, does not reduce what the taxpayer has earned under its agreement with the insurer.

Although the taxpayer does not actually receive the retail broker's share of the commission, the policyholder's payment of that amount, as part of the gross premium, results in consideration flowing to the taxpayer, because the payment relieves the taxpayer of liability for its debt to the retail broker. See Det. No. 93-166, 14 WTD 22 (1995); John Davis & Co. v. Cedar Glen # Four, Inc., 75 Wn.2d 214, 450 P.2d 166 (1969).

The taxpayer's argument would have us view the commission as an amount the policyholder owes the retail broker for services performed for the policyholder. That view does not reflect the relationships and obligations in the insurance context. A policyholder does not negotiate a fee with an insurance agent for arranging insurance coverage. The policyholder may not even know how much the agent is earning on the transaction. The only activity that is compensated is the service performed for the insurance company.

It is the taxpayer who is obligated to compensate the retail broker for the retail broker's service, not the policyholder. The taxpayer owes the retail broker the amount of the agreed-upon share of the commission when the policy is placed and the gross premium paid.

The retail brokers with whom the taxpayer deals are not taxable on the full commission, even though the full commission passes into their hands. They are entitled to compensation only by virtue of their agreement with the taxpayer. They earn only the portion of the commission agreed upon with

the taxpayer. They are never "entitled to receive" any greater amount, and merely pass through the taxpayer's portion and the net premium.

Although Det. No. 88-370, 7 WTD 5 (1988), and Det. No. 88-383, 7 WTD 11 (1988), which Det. No. 99-064 cited, involved sub-agents, and the flow of money was the reverse of that here, we believe the principles stated therein are equally applicable here. When the insurance company has a contractual relationship only with the taxpayer, the taxpayer is entitled to the full commission under its contract with the insurer, and the retail agents are entitled to a commission only by virtue of their agreement with the taxpayer, the taxpayer is taxable on the full commission. As we stated in language adopted in Det. No. 88-370:

> We find that the insuring companies have no contractual relationship with the soliciting agents and irrespective that the solicitor retains his commission from the premium collected prior to turning the balance over to the taxpayer, the taxpayer is entitled to the full commission forthcoming from the insuring company with whom it has a contractual relationship to represent the insurers business interests. Clearly, under RCW 82.04.080, the taxpayer's tax liability is measured by values proceeding or accruing by the reason of the transaction of the business engaged in which included commissions without deduction for expense.
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> We recognize in this instance that factually the soliciting agents retain their commissions and forward the balance of the premium collected to the taxpayer; however, such agents have a right only to receive commissions from the taxpayer, and the taxpayer has the right to receive the entire premium. . .
>
> Under WAC 458-20-164, the tax assessment on brokerage commissions must be upheld since the taxpayer either received or was entitled to receive the commissions retained by such sub-agents. Rule 164 specifically provides that there is no deduction for commissions paid to other agents.

The Department distinguishes cases where the insurance company contracts directly with the retail brokers to pay them the commissions. In such cases, the retail broker's commissions are not considered gross income to the taxpayer. See Det. No. 88-383, 7 WTD 11 (1988).[4]

The amount retained by the retail broker is simply a "cost of doing business" for the taxpayer, and is not deductible. RCW 82.04.080; Rule 164.

[4] In such cases, even if the wholesale broker receives the commissions, the Department has held that the wholesale broker can deduct the commission income that only the retail brokers have the right to retain. This position is consistent with the Department's position with other businesses, like contractors or service providers. Only "reimbursements or advancements" are excludable. See WAC 458-20-111; Rule 164.

Regarding the taxpayer's argument that the retail agent's commission is excludable from its income as an amount "held in trust," we do not believe the Rule 164 exclusion applies to the commission income the taxpayer has agreed the retail brokers may retain. The taxpayer is not required to hold the commissions in trust. It is required only to hold in trust funds that belong to or should be paid to the insurer or the policyholder, i.e., the net premium the insurer requires be remitted to it, and return premiums the taxpayer is required to remit to the policyholder. See RCW 48.17.480(2) and (3). Moreover, the taxpayer does not in fact hold the retail brokers' commission income in trust. It allows them to deduct their share from the policyholder's payment.

Finally, the taxpayer requests that, in the event the Department decides this issue against it, the Department provide the taxpayer with guidance on future reporting. The guidance we can provide is that the Department recognizes a split of commissions in the insurance field only when the insurance company contracts directly with the retail brokers to pay them their commissions. See Det. No. 88-363, 7 WTD 11 (1988).

Issues 2 and 3 -- Is a surplus line broker exempt from the B&O tax on its surplus line business? If not, what B&O rate applies?

The taxpayer argued during the audit investigation, and argues on appeal, that surplus line brokers are exempt from the B&O tax. Its argument is as follows. RCW 82.04.320 provides that "any person in respect to insurance business upon which a tax based on gross premiums is paid to the state" is exempt from the B&O tax on such business. The taxpayer is such a person. It pays the premium tax. Consequently, it is the insurance company for purposes of that tax, and under the statute is exempt from B&O tax.

The taxpayer argues that as a surplus line broker, it is engaged in a single business activity. It performs the functions of a specialized category of brokerage, subject to specific rules and requirements. It has no authority to act other than as a surplus line broker with respect to matters that are referred to it in that capacity. The Department is taxing the taxpayer as if it were performing two independent functions, that of a local broker and that of a surplus line broker, when in fact it is performing, and legally can only perform, a single function with respect to the transaction. The Department is improperly taxing it twice on the same business activity, both as an insurance company and as a broker.

The taxpayer contends its interpretation is supported by the language of the B&O rate statutes and the Department's Rule 164. It argues as follows. RCW 82.04.260(14) sets the B&O rates applicable to agents and brokers "licensed under chapter 48.17 RCW." RCW 82.04.280 sets the rates applicable to persons appointed as resident general agents of an insurer and licensed "under the provisions of RCW 48.05.310." The taxpayer is licensed as a surplus line broker under chapter 48.15 RCW, and therefore neither 82.04.260(14) nor RCW 82.04.280 applies to it. Similarly, Rule 164, which explains who is taxable under the insurance agents and brokers B&O classification, expressly limits the definitions of the words "agent" and "broker" to persons "licensed as such under chapter 48.17 RCW."

The taxpayer argues it is equitable and appropriate that it be exempt from B&O tax on its income from its surplus line business. It argues that a gross premiums tax is collected from one taxpayer, either the certificated insurer or (when a nonauthorized insurer issues the policy) by the surplus line broker. A second taxpayer, the selling agent or broker, pays a B&O tax on commission income. No insurance agent, broker, or solicitor licensed under chapter 48.17 pays a gross premiums tax. This logical structure is upset when the Department imposes the gross premiums tax and the B&O tax on the same taxpayer.

[2] We conclude the taxpayer does not qualify for the exemption from B&O tax in RCW 82.04.320. The exemption applies only to persons "in respect to insurance business upon which a tax based on gross premiums is paid to the state." The insurance business upon which the tax is paid is the business engaged in by the insurer. It is the business for which the premiums are paid, i.e., the business of undertaking to indemnify another or pay a specified amount upon determinable contingencies. See RCW 48.01.040 and .050. The tax is not paid on the business engaged in by insurance brokers. The taxpayer also falls within a specific exception to the exemption. The taxpayer is acting as a broker for the insurance company in procuring surplus line coverage. RCW 82.04.320 does not limit the exception to brokers licensed under chapter 48.17.

Our interpretation of RCW 82.04.320 is consistent with the language of RCW 48.14.040, which provides that premium taxes are taxes on insurers, and RCW 48.14.080, which clearly provides that payment of the gross premiums tax exempts only insurers from other taxes. The courts have developed rules of statutory construction to deal with statutes enacted by the Legislature that deal with the same subject in different ways. These rules provide that the court will try to avoid any conflict between the statutes by harmonizing them, giving effect and meaning to both. Int'l Paper v. Dept. of Revenue, 92 Wash. 2d 277, 595 P.2d 1310 (1979).

We disagree with the taxpayer's argument that the Department's assessment of B&O tax results in double taxation of the same activity. In the case of surplus line insurance, the activity that is subject to the gross premiums tax under Title 48, and the activity that is subject to B&O tax, are different activities. The activity that is subject to the gross premiums tax is the business activity of the insurer, the insuring of risks. The business activity of the surplus line broker is acting as a broker in procuring insurance from unauthorized insurers. Although the surplus line broker collects and remits the gross premium tax, it remains a tax upon the business engaged in by the insurer, not a tax upon the broker's activity. The gross premiums tax is calculated on the insurer's gross receipts, not the surplus line broker's. The premium is income to the insurance company, not the surplus line broker. The surplus line broker is merely the party held responsible for the tax reaching the state treasury when the insurance company is not certificated by the state.

We disagree with the taxpayer's argument that excluding its surplus line business from liability for B&O taxes is logical. As with regular lines of insurance, the gross premiums tax on surplus line insurance is paid on the business activity of the insurer, and the B&O tax is paid on the

activity of the broker. The taxpayer's interpretation would allow the business activity of the broker to go untaxed in the case of surplus line coverage. That would be illogical.

With respect to the appropriate B&O rate, we modify Det. No. 99-064, and sustain the Audit Division's determination that the taxpayer's receipts from its surplus line business are taxable at the rate applicable to agents and brokers licensed under chapter 48.17 RCW, i.e., the rate set out in RCW 82.04.260(14). The Insurance Commissioner, who is responsible for effectuating Title 48, has interpreted chapter 48.17 as applying to surplus line brokers. See, e.g., WAC 284-12-080(1) and (5)(c). The Department has taxed surplus line brokers the same as other insurance agents and brokers, consistent with that interpretation.

DECISION AND DISPOSITION:

The taxpayer's petition for reconsideration is denied, except as to the rate to be applied to surplus line activity. The Audit Division properly included selling agents' retained commissions in the measure of the taxpayer's B&O tax, properly included commission income from surplus line activity in the measure of the tax, and applied the correct rate to the income from surplus line activity.

Dated this 7th day of January 2000.