

Cite as Det. No. 01-045, 20 WTD 419 (2001)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

|   |   |                                  |
|---|---|----------------------------------|
| In the Matter of the Petition For Correction of | ) | <u>D E T E R M I N A T I O N</u> |
| Interpretation of                               | ) |                                  |
|   | ) | No. 01-045                       |
|   | ) |                                  |
| ...   | ) | Registration No. . . .           |
|   | ) | Docket No. . . .                 |

[1] RCW 23B.15.010, RCW 82.32.030: REGISTRATION WITH SECRETARY OF STATE – REGISTRATION WITH DEPARTMENT OF REVENUE – ABSENCE OF CONFLICT. RCW 23B.15.010 requires foreign corporations to obtain a certificate of authority from the Secretary of State before transacting business in Washington unless a specific exception applies. RCW 82.32.030 requires all persons who engage in business in Washington to obtain from the Department of Revenue a registration certificate. The two statutes serve different purposes and do not conflict.

[2] RULE 101; RCW 82.32.030: REGISTRATION WITH DEPARTMENT OF REVENUE – AMOUNT OF GROSS INCOME AS EXCEPTION TO DUTY TO REGISTER. If a taxpayer satisfied the requirements of RCW 82.32.030(2) and Rule 101(2)(a), the taxpayer may choose not to register with the Department. However, the taxpayer's decision not to register is subject to future audit verification through the Department of Revenue's Audit Division and Tax Discovery Officers.

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.

ADMINISTRATIVE LAW JUDGE: John M. Gray

NATURE OF ACTION:

A corporation appeals a written opinion issued by the Taxpayer Information & Education (TI&E) Section affirming a duty on the part of the corporation to register with the Department of Revenue (Department) because it engages in business in Washington.<sup>1</sup>

BACKGROUND:

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

The taxpayer wrote to the Department asking if it was required to be registered with the Department to do business in Washington. The Department's TI&E Section answered the taxpayer in a written opinion dated September 11, 1998, affirming the taxpayer's duty to register in Washington because it was engaged in business in Washington. The taxpayer appealed the TI&E written opinion to this division.

The taxpayer is a foreign corporation. Its principal office is [outside Washington], but it has an office in . . . , Washington. Its business consists of buying installment contracts from car dealers, entered into between car dealers and their customers. The customers tend to be bad credit risks. The taxpayer pays the dealers \$1 for each installment contract. If the taxpayer is successful collecting on the installment contract, the taxpayer pays a percentage of the amount collected to the car dealer from whom the taxpayer bought the installment contract. The percentage paid as a “performance bonus” varies between 70% and 85%, depending on the number of installment contracts offered each month by the car dealer to the taxpayer.

The taxpayer uses its [Washington] office as a site from which to make phone calls to collect on installment contracts. From this office, it also provides some customer services and receives some payments (estimated by the taxpayer at 5%).<sup>2</sup>

The taxpayer argues that RCW 23B.15.010(2)(g-h) (transaction of business by foreign corporations) conflicts with RCW 82.32.030 (registration certificates). The taxpayer states that the State of Washington does not require foreign corporations to register with the Secretary of State as a business transacting business in Washington under specific circumstances. The taxpayer argues it is one of those corporations described in RCW 23B.15.010(2)(g-h) and that the statute conflicts with the registration requirements in RCW 82.32.030. The taxpayer seeks a determination that it is not required to register with the Department.

The taxpayer also argues that it lacks sufficient nexus with Washington to establish B&O tax liability. The reason it lacks taxable nexus, according to the taxpayer, is that it buys installment contracts, an activity the taxpayer argues is not “transacting business” for corporate registration purposes. The taxpayer cites RCW 23B.15.010(2)(g-h)<sup>3</sup> to support its argument.

Alternatively, the taxpayer argues that its gross receipts are less than \$12,000 per year, and so it is not required to register pursuant to WAC 458-20-101 (Rule 101).

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<sup>2</sup> It is unclear whether the 5% refers to 5% of amounts collected in Washington or 5% of total amounts collected by the taxpayer regardless of location. However, the answer to this question is irrelevant to our decision.

<sup>3</sup> The language appears below in the Analysis section.

## ISSUES:

- (1) Whether RCW 82.32.030 conflicts with RCW 23B.15.010(2)(g-h); and
- (2) Whether the taxpayer engages in business in Washington so that it must register with the Department for excise tax purposes.

## ANALYSIS:

Washington's excise tax system requires registration of all persons engaged in business here. The registration system serves several purposes, such as tracking tax reporting and payments, allowing tracking for audit and compliance purposes, identifying taxpayers for refunds, and generally administering the excise taxes contained in Title 82 RCW.

The duty to register as a person engaged in business in Washington is imposed by RCW 82.32.030(1):

Except as provided in subsection (2) of this section, if any person engages in any business or performs any act upon which a tax is imposed by the preceding chapters, he or she shall, under such rules as the department of revenue shall prescribe, apply for and obtain from the department a registration certificate.

The statute cited by the taxpayer, RCW 23B.15.010 states, in part:

(1) Unless it is otherwise authorized to transact business pursuant to a state or federal statute, a foreign corporation may not transact business in this state until it obtains a certificate of authority from the secretary of state.

(2) The following activities, among others, do not constitute transacting business within the meaning of subsection (1) of this section:

. . .

(g) Making loans or creating or acquiring evidences of debt, mortgages, or liens on real or personal property, or recording same;

(h) Securing or collecting debts or enforcing mortgages and security interests in property securing the debts;

The taxpayer argues these two statutes conflict with each other. The taxpayer claims because it engages in activities such as securing or collecting debts that do not constitute transacting business under RCW 23B.15.010(2)(g-h), it is excluded from the requirement to register with Washington state and to acquire a certificate of authority to do transact in this state. The taxpayer argues therefore that it is also not required to register with the Department of Revenue and is not subject to this state's taxes. The taxpayer argues that to require it to register with the

Department conflicts with RCW 23B.15.010(2)(g-h). We disagree. These two statutes serve different purposes.

Corporations are creatures of the state. They are created by and controlled by state law. In Washington, statutes pertaining to for-profit corporations are found in Title 23B RCW. Chapter 23B.15 RCW is the State of Washington's law and policy regarding how corporations, incorporated under the laws of states other than Washington or countries other than the United States of America, may transact business in Washington. RCW 23B.15.050 describes the effect of a certificate of authority granted specifically to a foreign corporation:

(1) A certificate of authority authorizes the foreign corporation to which it is issued to transact business in this state subject, however, to the right of the state to revoke the certificate as provided in this title.

(2) A foreign corporation holding a valid certificate of authority shall have no greater rights and privileges than a domestic corporation of like character. Except as otherwise provided by this title, a foreign corporation is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on a domestic corporation of like character.

(3) Except as otherwise provided in \*chapter 23B.19 RCW, this title does not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state.<sup>4</sup>

In contrast, the B&O tax is part of the state's power to tax. The B&O tax is intended to tax virtually all business activity in Washington. Impecoven v. Department of Rev., 120 Wn.2d 357, 363, 841 P.2d 752 (1992). The B&O tax is levied upon all persons engaged in business in Washington, regardless of the form of the business. If the person engaged in business is a corporation, it does not matter if it is a domestic or a foreign corporation. To put it differently, if a foreign corporation failed to comply with the regulatory requirements in Title 23B, that failure would not eliminate its state excise tax liability. The corporation would, however, face additional difficulties. See, e.g., RCW 23B.15.020.

RCW 82.04.140 defines business to include “all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly.” Then, RCW 82.04.150 defines “engaging in business” to mean “commencing, conducting, or continuing in business and also the exercise of corporate or franchise powers as well as liquidating a business when the liquidators thereof hold themselves out to the public as conducting such business.” RCW 82.04.200 defines “in this state” and “within this state” to include “all federal areas lying within the exterior boundaries of the state.”

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<sup>4</sup> A Code Reviser's Note appears at the asterisk in subsection 3: “The reference to ‘sections 202 through 205 of this act’ has been translated to ‘chapter 23B.19 RCW,’ dealing with significant business transactions.” A literal translation would be “RCW 23B.900.010 through 23B.900.040” which appears to be erroneous.

RCW 82.04.080 defines the term “gross income of the business:”

“Gross income of the business” means the 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.

Used within RCW 82.04.090 is the phrase “value proceeding or accruing,” which is itself defined in RCW 82.04.090. It is defined, in pertinent part, to mean “the consideration, whether money, credits, rights, or other property expressed in terms of money, actually received or accrued.”

From these statutes, we find that the taxpayer conducts activities that will directly benefit itself. It buys installment contracts between car dealers and their customers. Some of the taxpayer's activities occur within Washington. The taxpayer receives value from the business activities it conducts within Washington. The value received is between 15% and 30% of the amounts it collects from the parties obligated under the installment contracts. That value is the taxpayer's gross income of the business, and is the subject of the B&O tax.

A review of other provisions of RCW 23B.15.010 reveals other activities for which a certificate of authority is not required, but which plainly subject a corporation to excise tax liability. For example, if a foreign corporation sold its goods or services through independent contractors, that would not be a transaction of business requiring the foreign corporation to obtain a certificate of authority from the Secretary of State. RCW 23B.15.010(2)(e) (“selling through independent contractors”). However, the sale of goods or services through independent contractors subjects a foreign corporation to B&O tax liability here. Tyler Pipe Industries, Inc. v. Department of Rev., 483 U.S. 232, 250, 107 S. Ct. 2810, 97 L. Ed.2d 199 (1987), held that an independent contractor acting on behalf of a principal established taxable nexus just as effectively as did an employee of the principal.

For another example, if a foreign corporation transacts business in interstate commerce, that would not be a transaction of business requiring the foreign corporation to obtain a certificate of authority from the Secretary of State. RCW 23B.15.010(2)(k) (“transacting business in interstate commerce”). Nonetheless, transacting business in interstate commerce is subject to state taxation, subject to the requirements found in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed.2d 326 (1977).

We conclude there is no conflict between RCW 23B.15.010(2)(g-h) and RCW 82.32.030. We also conclude that the TI&E written opinion was correct when it said the taxpayer's B&O tax liability was limited to the percentage of the contract amount retained.<sup>5</sup>

Finally, the taxpayer asks if it is required to register if its annual gross income of the business is less than \$12,000 per year. The taxpayer is correct, although it should note the statutory and administrative restrictions set out here. RCW 82.32.030(1) requires registration with the Department by "any person [who] engages in any business or performs any act upon which a tax is imposed by the preceding chapters." RCW 82.32.030(2) provides an exception to this general requirement. That subsection says:

2. Unless the person is a dealer as defined in RCW 9.41.010, registration under this section is not required if the following conditions are met:
  - (a) A person's value of products, gross proceeds of sales, or gross income of the business, from all business activities taxable under chapter 82.04 RCW, is less than twelve thousand dollars per year;
  - (b) The person's gross income of the business from all activities taxable under chapter 82.16 RCW is less than twelve thousand dollars per year;
  - (c) The person is not required to collect or pay to the department of revenue any other tax or fee which the department is authorized to collect; and
  - (d) The person is not otherwise required to obtain a license subject to the master application procedure provided in chapter 19.02 RCW.

The Department's rule on registration requirements is found in Rule 101. Rule 101(2)(a) addresses the exemption found in RCW 82.32.030(2), and provides guidance on the exemption:

- (a) Registration under this section is not required if all of the following conditions are met:
  - (i) The person's value of products, gross proceeds of sales, or gross income of the business, from all business activities taxable under chapter 82.04 RCW (business and occupation tax), is less than twelve thousand dollars per year;
  - (ii) A person's gross income from all business activities taxable under chapter 82.16 RCW (public utility tax), is less than twelve thousand dollars per year;
  - (iii) The person is not required to collect or pay to the department of revenue retail sales tax or any other tax or fee which the department is authorized to administer and/or collect; and

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<sup>5</sup> The TI&E written opinion said "15%," but the actual percentage could vary, according to the contract documents supplied by the taxpayer.

(iv) The person is not otherwise required to obtain a license or registration subject to the master application procedure provided in chapter 19.02 RCW. For the purposes of this section, the term “license or registration” means any agency permit, license, certificate, approval, registration, charter, or any form or permission required by law, including agency rule, to engage in any activity.

The taxpayer may choose not to register if it believes it is exempt from registration under the statute and rule, but should know that its decision is subject to future audit verification through the Department's Audit Division and Tax Discovery Officers.

DECISION AND DISPOSITION:

The petition is denied in part and granted in part.

Dated this 30<sup>th</sup> day of March, 2001.