

Cite as Det. No. 01-177, 21 WTD 258 (2002)

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>
Assessment of	)	
	)	No. 01-177
	)	
...	)	Registration No. . . .
	)	FY . . . /Audit No. . . .
	)	Docket No. . . .
	)	

- [1] RULE 140; RCW 82.04.250, RCW82.04.050, RCW 82.08.020: RETAIL SALES TAX – RETAILING B&O TAX -- RETAIL SALE – PHOTOGRAPHIC IMAGES The sale of an image on photographic paper is a retail sale (provided the buyer does not present a resale certificate) regardless of whether the taxpayer or its customer shoots the photograph.
- [2] RULE 194, RULE 140; RCW 82.04.290, RCW 82.04.250, RCW 82.04.050, RCW 82.08.020: RETAIL SALES TAX – RETAILING B&O TAX – SERVICE B&O TAX -- RETAIL SALE – SITTING OR SHOOTING FEES. Taking photographs for a fee, without developing or printing, is a professional and artistic service subject to service B&O tax and is not subject to the retailing B&O or retail sales tax. However, a shooting fee is subject to retailing B&O tax and retail sales tax when the shooting is directly related to subsequent printing services, is performed by the same person, and is performed under a single contract or invoice or concurrently executed contracts or invoices (provided the buyer does not present a resale certificate).
- [3] RULE 194; RCW 82.04.290, RCW 82.04.2907: SERVICE B&O TAX -- SALES OF RIGHTS TO PHOTOGRAPHS. Prior to July 1, 1998, income derived from a transfer or sale of a copyright or other intangible property interest is subject to service B&O tax. Effective July 1, 1998, RCW 82.04.2907 created a special classification for “income from royalties or charges in the nature of royalties for the granting of intangible rights, such as copyrights, licenses, patents, or franchise fees.”
- ...
- [5] RULE 140, RULE 142; RCW 82.08.020: RETAIL SALES TAX -- PURCHASES FOR RESALE -- PHOTOFINISHERS’ AND PHOTOGRAPHERS’ PURCHASES OF

SUPPLIES AND EQUIPMENT. Photofinishers' and photographers' purchases of photographic paper and chemicals used in making prints are purchases for resale and are not subject to retail sales tax. However, photographers' and photofinishers' purchases of materials and equipment used in processing, whenever such materials do not become a component part of the final photograph or are not chemicals used in processing, are subject to the retail sales tax, unless an exemption applies.

- [6] RULE 140, RULE 142; RCW 82.08.020, RCW 82.04.250, RCW 82.04.270: WHOLESALE SALE -- RETAIL SALE – SALES OF PHOTOGRAPHIC EQUIPMENT. Sales to consumers by photographers or photofinishers of pictures, frames, cameras, films, and other articles are subject to the retail sales tax and retailing B&O tax. However, if such items are sold by the photographer or photofinisher to a buyer who purchases the items for resale and presents a valid resale certificate, the sales are subject to wholesaling B&O tax, and no retail sales tax is due on the sales.

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:

Photography business protests the reclassification of its income from the service B&O tax classification to the retailing classification, as well as the assessment of retail sales tax.<sup>1</sup>

#### FACTS:

C. Pree, A.L.J. -- The Taxpayer Accounts Administration Division of the Department of Revenue (TAA) reviewed the taxpayer's tax returns for the period of January 1, 1997, through December 31, 2000.<sup>2</sup> As the result of this review, the taxpayer's income was reclassified from the service business and occupation (B&O) tax classification to the retailing classification, and retail sales tax and interest were assessed. The assessment totaled \$ . . . .

The taxpayer operates a photo lab in which it develops and prints photographs for others. The taxpayer also takes photographs, sometimes charging a separate sitting fee. In addition, the taxpayer sells photographs that are used by others in publishing magazines or brochures.

#### ISSUE:

What are the proper tax classifications for the taxpayer's income from its photography business?

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

<sup>2</sup> The assessment notes that the adjustments were limited in scope to the information the taxpayer provided and are subject to future field verification.

## DISCUSSION:

Based on our understanding of the taxpayer's business, we find the following transactions may occur and the proper tax classifications of the transactions are as follows.

[1] Sales of Photographic Prints.

RCW 82.04.050(1) defines a retail sale as generally including:

every sale of tangible personal property (including articles produced, fabricated, or imprinted) to all persons . . . other than a sale to a person who presents a resale certificate under RCW 82.04.470 [and who purchases the property for certain specified purposes] . . . .

Thus, the sale of an image on photographic paper is within the definition of a retail sale, provided the buyer does not present a resale certificate. Such a sale is within the definition of a retail sale, regardless of whether the taxpayer or the customer shoots the photographs. WAC 458-20-140 (Rule 140) ("Photographers who make negatives on special order and sell photographs to customers (other than dealers for resale) must collect the retail sales tax upon such sales. . . . Photofinishers developing films and selling to consumers the prints made therefrom are making taxable retail sales, and the retail sales tax must be collected upon the full charge made to the customer."); Det. No. 92-260, 12 WTD 425 (1992); Det. No. 93-261, 13 WTD 183 (1993). If the sale occurs in Washington, the sale is subject to retailing B&O tax, and the seller is required to collect retail sales tax from the buyer. See RCW 82.04.250; RCW 82.08.020.<sup>3</sup>

Sales of prints to persons other than consumers are sales for resale and not subject to the retail sales tax, provided the photofinisher or photographer takes a resale certificate from the customer. See Rule 140. Such sales are subject to wholesaling B&O tax. See RCW 82.04.270; Rule 140.

[2] Sitting or Shooting Fees

Taking photographs for a fee, without developing or printing, is a professional and artistic service and is not subject to the retailing B&O or retail sales tax. Det. No. 92-260. Such a fee is subject to service B&O tax. See RCW 82.04.290; WAC 458-20-194 (Rule 194). The undeveloped film is considered the tangible evidence of the service being provided.

However, RCW 82.04.050(2) includes within the definition of a retail sale the:

sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following:

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<sup>3</sup> There is no indication that the taxpayer makes out-of-state sales. Thus, this determination assumes that all sales occur within Washington. Out-of-state sales may be subject to different tax classifications or may be exempt from tax. See WAC 458-20-193 (Rule 193); Rule 140.

(a) The . . . imprinting . . . of tangible personal property of or for consumers . .

Accordingly, even though services when rendered by themselves may not be included within the definition of a retail sale, they are treated as a retail sale when rendered with respect to the imprinting or fabrication of tangible personal property for consumers. See Det. No. 92-260; Det. No. 93-261. In this regard, a shooting fee has been found to be subject to retailing B&O tax and retail sales tax when the shooting is directly related to subsequent printing services, is performed by the same person, and is performed under a single contract or invoice or concurrently executed contracts or invoices. Det. No. 92-260.

Thus, when the taxpayer sells a print, negative, or transparency to a consumer, and does not grant or transfer any copyright (see discussion, below), the total charge, including any shooting or other service fee, is subject to the retailing B&O and the retail sales tax, provided the sale occurs in Washington and the buyer does not present a resale certificate.

### [3] Sales of Rights

Det. No. 93-261 is instructive regarding the taxation of sales of rights by photographers:

[Photographic] works may take tangible form as prints, slides, or transparencies. Upon creation of such works, significant intangible rights are granted under the Copyright Act of 1976, 17 U.S.C. § 101, et seq., to the originators of such works. For example, the copyright holder has, for a limited period, the exclusive right to reproduce and distribute copies of the work. 17 U.S.C. § 106. Such intangible rights may have commercial value separate and apart from the tangible work.

(Footnote omitted.) Copyrights are generally considered to be intangible property. General Insurance Co. of America v. Chopot, 28 Wn. App. 383, 386 (1981); Det. No. 93-261. Ownership of a copyright is distinct from the ownership of the tangible item. Det. No. 93-261; 17 U.S.C. § 202. Transfer of a copy does not transfer the copyright, and the transfer of a copyright does not grant a property right in the physical object. Id.

For periods prior to July 1, 1998, income derived from a transfer or sale of a copyright or other intangible property interest is subject to service B&O tax. See Det. No. 93-261; 92-260. Effective July 1, 1998, RCW 82.04.2907 created a special classification for “income from royalties or charges in the nature of royalties for the granting of intangible rights, such as copyrights, licenses, patents, or franchise fees.”

Further, as we stated in Det. No. 93-261:

Obviously, a printer or publisher must have something to copy. That the printer or publisher may need to use a copy of the photograph does not change the outcome. In general, the use of a print solely for layout and printing--where the photographer retains the ownership of the

print or transparency--does not convert what is otherwise a nonretail sale into a retail sale. Such limited use of a tangible item is considered only incidental to the rights being granted.

...

[5] Purchases of Supplies, Equipment, Etc.

Rule 140 provides that photofinishers' purchases of paper upon which prints are made and of chemicals which are to be used in making the prints are purchases for resale and are not subject to retail sales tax. Rule 140 further provides that portrait or commercial photographers' purchases of the paper upon which photographs are printed are not subject to retail sales tax because such material becomes an ingredient of the final product sold for consumption. Sales of chemicals, such as developing agents, fixing solutions, etc., for use in such process are also nontaxable. See also WAC 458-20-142 (Rule 142).

However, photographers' and photofinishers' purchases of materials and equipment used in processing, whenever such materials do not become a component part of the final photograph or are not chemicals used in processing, are subject to the retail sales tax. See Rule 140; Rule 142. If the taxpayer retains ownership of negatives, film purchased by the taxpayer does not become a component part of the final product (photographs) being sold to the customer, and the purchase of film would also be subject to the retail sales tax. Det. No. 92-050, 12 WTD 101 (1993).

A retail sales tax and use tax credit may be available for certain purchases of machinery and equipment used in developing prints. See RCW 82.08.02565; RCW 82.12.02565; WAC 458-20-13601 (Rule 13601).

[6] Sales of Supplies, Etc.

Sales to consumers by photographers or photofinishers of pictures, frames, camera films and other articles are subject to the retail sales tax and retailing B&O tax. See RCW 82.08.020; RCW 82.04.250; Rule 140; Rule 142. As the seller, the taxpayer is liable for retail sales tax that it fails to collect and remit to the state. RCW 82.08.050. However, if such items are sold by the photographer or photofinisher to a buyer who purchases the items for resale and presents a valid resale certificate, the sales are subject to wholesaling B&O tax, and no retail sales tax is due on the sales. See RCW 82.04.270.

**DECISION AND DISPOSITION:**

This matter is remanded to the TAA Division for possible adjustment to the assessment based on records the taxpayer must provide by January 15, 2002.

Dated this 21<sup>st</sup> day of November, 2001.