Cite as Det. No. 00-206E, 21 WTD 66 (2002)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of	)	F I N A L
	)	E X E C U T I V E L E V E L
	)	D E T E R M I N A T I O N
	)	
. . .	)	No. 00-206E
	)	
	)	Registration No. . . .
	)	Docket No. . . .

[1] RULE 111; ETA 90-001: B&O TAX -- EMPLOYER-EMPLOYEE -- BUSINESSES PROVIDING TEMPORARY WORKERS. A business that recruits and provides day laborers and other temporary workers to other businesses and non-business customers, and which has pervasive control over the workers under the criteria set out in ETA 90-001, will be treated as the employer for state excise tax purposes, and may not exclude receipts representing worker wages and employment taxes from the measure of its B&O tax.

[2] RULE 111; ETA 90-001: B&O TAX; RETAIL SALES TAX -- BUSINESSES PROVIDING TEMPORARY WORKERS -- CLASSIFICATION OF REVENUES. A business that recruits and provides temporary workers to other businesses and non-business customers, and is considered the employer of the workers for excise tax purposes, shall classify gross receipts consistent with the procedures set out in ETA 90-001, and shall collect and report retail sales tax when appropriate.

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:

A business that recruits and provides temporary employees protests denial of its request for refund of Business and Occupation (B&O) tax it paid on amounts related to wages and employment taxes of temporary workers it placed with clients. The taxpayer contends it paid the B&O tax in error, arguing the portion of its receipts representing worker wages and employment

taxes were excludable pass-throughs under WAC 458-20-111 (Rule 111). The taxpayer also protests future reporting instructions requiring it to specifically classify services performed by the workers at client sites.[1]

FACTS:

Danyo, Policy & Operations Manager, and Prusia, A.L.J. – The taxpayer, . . . requests executive level reconsideration of Det. No. 00-206, which denied a request for refund of B&O tax in the amount of $ . . . for the period January 1, 1993 through September 30, 1997, and denied a request that the Department rescind future reporting instructions issued in April 1999. The Department granted executive level review on January 12, 2001. The Director appointed Jacqueline M. Danyo as his designee to hear the reconsideration petition.

The following facts are drawn from Det. No. 00-206.

The taxpayer is a Washington corporation headquartered in [Washington City]. Since . . . , the taxpayer has engaged in the temporary help business. The taxpayer provides temporary workers to various types of businesses through branch locations throughout the United States, including Washington.

The taxpayer has focused on the market niche of providing day laborers. It provides low to medium skilled workers on very short notice. It operates its business locations as dispatch halls. . . . . The taxpayer pays the temporary workers at the end of the work day, i.e., after they have completed the day's work. The taxpayer bills its clients after it has paid the workers. Its operating practices during the period at issue are described in detail below.

Between January 1993 and September 1997, the taxpayer paid B&O tax on its receipts from clients, including amounts related to the temporary workers' wages and employment taxes. On December 31, 1997, the taxpayer requested a refund of B&O taxes paid during the January 1993 through September 1997 period, claiming it had overpaid B&O taxes in the amount of $ . . . . The request contended the portion of its receipts related to the temporary workers' wages and employment taxes were excludable from the measure of its B&O tax, as "reimbursements" under Rule 111. The taxpayer asserts, it erroneously included the full amount it received from its clients when it reported its B&O taxable income, rather than deducting from its gross receipts the workers' wages and employment taxes. Therefore, the taxpayer requests a refund of B&O taxes it paid on that portion of its receipts.

The taxpayer asserted it acted as the agent of its clients in procuring and paying the temporary workers, rather than the employer of the workers, for B&O tax purposes. It argued it met all the requirements for exclusion of the receipts under Rule 111, as set out by the Washington Supreme Court in *Rho v. Dept. of Revenue,* 113 Wn.2d 561, 782 P.2d 986 (1989). It argued the

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

Department's Revenue Policy Memorandum (RPM) 90-001[2] required the Department to treat the taxpayer's clients as the employers of the temporary workers, and to treat the taxpayer only as a payroll agent.

The Department's Audit Division denied the refund request, in a letter dated April 12, 1999. The denial asserted that: the taxpayer is in the business of providing the services for which its clients pay; the temporary workers are the taxpayer's employees; the receipts do not meet the requirements for exclusion from gross income under Rule 111; and, the taxpayer's operating practices distinguish it from the taxpayer in *Rho.*

The Audit Division's denial of the refund request also included specific future reporting instructions, effective July 1, 1999, as follows:

> [Taxpayer] should (1) continue to include gross receipts in taxable income reported for business and occupation taxes and (2) calculate its tax liability by reporting receipts received from each type of business activity under the appropriate tax classification. As stated in ETA 90-001: "Businesses which are licensed or otherwise hold themselves out as providing specialized workers to perform business activities for others which are specifically tax classified in Chapter 82.04 RCW shall report gross receipts according to the appropriate section of law, i.e., according to the nature of the business performed. Such businesses shall collect and report retail sales tax when appropriate . . .". For example, gross receipts from labor performed for speculative builders is reportable under Retailing business and occupation tax and the retail sales tax is to be charged and collected from the customer. . . .

On May 11, 1999, the taxpayer petitioned for correction of the denial of the refund request, reasserting and amplifying the arguments it made in its petition for refund. The petition additionally requests that the Department rescind the future reporting instructions. With respect to the latter, the taxpayer contends it has no control or supervision over the workers at the client's job site, and is not aware of what the workers specifically do. Because the workers' jobs fall into different B&O classifications, the taxpayer would have no practical way to track their activities with the specificity required to satisfy the future reporting instruction.

The taxpayer's business model and practices[3]

The taxpayer's business model is summarized as follows. The taxpayer has focused on a market niche of providing temporary low to medium skilled workers on very short notice, even same day. It specializes in providing manual day laborers. The taxpayer principally recruits workers for clients in the construction, landscaping, freight handling, and light industry fields. Its clients

[2] Reissued July 1, 1998, as Excise Tax Advisory (ETA) 90-001.

[3] This determination describes the taxpayer's business model and practices during the refund period, i.e., through September 1997. It assumes the described business model and practices continued at least through the effective date of the future reporting instructions, July 1, 1999. However, whether the business practices have materially changed since September 1997 is subject to verification in a future audit.

tend to be engaged in businesses that are seasonal or subject to regular cyclic fluctuations in workflow. It is often financially advantageous for such businesses to hire temporary help through a business like the taxpayer's, rather than hire additional employees or work existing employees overtime.

The taxpayer operates its locations as dispatch halls. . . . . Interested laborers must complete an application for employment which identifies the taxpayer as the employer, identifies the laborer's work experience and trade skills, and sets out terms and conditions of employment, described below. Laborers interested in working on a particular day report to the dispatch hall early in the morning (the halls open at 5:30 a.m.) to wait for job assignments. The taxpayer posts available jobs and the offered wage on a bulletin board, and workers sign up for specific jobs. The location's dispatch manager, who is employed by the taxpayer, measures the qualifications of the available workers and assigns them to jobs for which they have signed up and for which the dispatch manager deems them competent. The dispatch manager provides the worker with a labor ticket that the worker must return, with the client's authorization for payment, in order for the worker to be paid.

The taxpayer pays the workers their wages and any applicable per diem and travel expenses. The taxpayer pays the workers the same day they work, and subsequently bills its clients, weekly. The taxpayer also withholds the appropriate federal income taxes from the workers' wages, and is responsible for reporting and paying withholding, FICA, FUTA, and state unemployment insurance contributions to the appropriate governmental agencies. The workers do not receive benefits such as vacation time, sick leave, or health insurance. Most of the workers are transient or in-between permanent jobs. Ninety hours is the average span of time an individual worker utilizes the taxpayer's day-to-day assignment process.

The Application for Employment the taxpayer requires workers to complete contains the following provisions, among others:

> It is our policy to seek and employ the best qualified personnel in all of our facilities and to provide equal opportunity for the advancement of employees . . . .
>
> . . .
>
> I understand that I am not required to work on any particular day and whether I report in to the [Taxpayer] dispatch hall is always my choice. Whenever I wish to register my availability to work, I will visit the dispatch hall and sign in. I know that [Taxpayer] is not required to find work for me and is not required to contact me in any way in order to make work available to me. If I do not report to the dispatch hall and sign in, [Taxpayer] may assume that I am not available for work on that day.
>
> I understand that after receiving a job assignment, I am free on my own time to leave the dispatch hall and do as I wish until the job assignment starts. I understand the importance of never being late for a job assignment.

> If I have a REPEAT TICKET (defined as a request to return to the same job at a later date), I know that I am required to report my availability to [Taxpayer] in the manner indicated by the dispatcher at least one (1) hour before the scheduled start time and if I do not, then [Taxpayer] may assume that I am not available to return to work.
>
> I understand that my employment with [Taxpayer] is on a day-to-day basis. That is, at the end of the work day, I will be deemed to have quit unless and until I request and receive a work assignment at a later date.
>
> . . .
>
> I understand that, as part of its regular employment policy, [Taxpayer] requires any employee who suffers a work-related injury or illness to be tested for the presence of drugs and/or alcohol. . . . I understand that if I refuse to submit to testing, it will be considered a refusal to comply with a reasonable request by my employer and will be cause for dismissal.
>
> . . .
>
> In consideration of my employment, I agree to conform to the rules and regulations of [Taxpayer] and I understand that my employment by [Taxpayer] may be terminated at any time by me or by [Taxpayer], with or without notice, for any reason. . . .

The application also requires the worker to certify he or she has read the taxpayer's training program regarding safety policies and procedures in specified areas, and to acknowledge that violation of the rules "may result in disciplinary action, including termination."

A prospective client notifies the taxpayer of positions to be filled and the number of hours for which the client needs a worker. When a client requests a worker, the taxpayer informs the client of the going rate for the type of work to be performed, using the prevailing rate[4] within the local area of the branch location, plus amounts necessary to cover FUTA, state unemployment compensation, the employer's portion of FICA, and a markup typically of 30%. The taxpayer will only post jobs for which prevailing wages are offered. In the taxpayer's market segment, workers generally have no power to negotiate wages, and generally there is no negotiation between a worker and the client regarding compensation. The taxpayer may negotiate a lower mark-up with larger clients. In appropriate cases, involving higher-skilled workers, the taxpayer may act as an intermediary in negotiating wages on behalf of the worker.

For most placements, the taxpayer and the client do not enter into a written contract. They discuss and agree upon terms over the telephone. The taxpayer outlines the requirements for

[4 In this determination, the terms "prevailing rate" and "prevailing wage" are used in their ordinary sense of "usual," "common," or "going." They do not reference or incorporate Chapter 39.12 RCW's definition or use of those terms.]

hiring. The client must agree to an acceptable compensation. The client must agree not to allow workers to engage in unsafe practices. The taxpayer instructs clients not to entrust the workers with the care of unattended premises, custody or control of cash, valuables, etc.

The taxpayer requires the client to guarantee a minimum of four hours per job assignment. However, the client has the right to reject any worker the taxpayer sends to a job. If the client rejects a worker within the first two hours, the client owes nothing for the placement. One of the conditions of every referral, discussed prior to placement, is that the taxpayer will be responsible for paying the worker for the first four hours if the client rejects the worker within the first two hours.[5]

The taxpayer does enter into written contracts with some of its larger clients. Its standard "Supplier Agreement" sets out the taxpayer's responsibilities for paying the workers and withholding and paying all required taxes, FICA, and unemployment compensation. It provides that the taxpayer shall "Use its best efforts to furnish its temporary employees to be utilized as part of [client's] work force for the Project in the numbers and at the times and places requested by [client]." It limits the client's use of the workers to only the job classification specified on the work order. Regarding supervision of the workers, it provides:

> [Client] understands that [Taxpayer] will not be providing supervision services for its workers under this Agreement and that [Client] shall be responsible for supervising and directing the activities of [Taxpayer's] temporary employees. [Client] shall not allow the workers to engage in any unsafe practice and shall provide any safety equipment, clothing, or other devices necessary for the work to be performed. Without the prior agreement of [Taxpayer], [Client] will not entrust [Taxpayer's] employees with the care of unattended premises, custody or control of cash, negotiables, valuables or other similar property or authorize [Taxpayer's] employees to operate machinery, equipment or motor vehicles without prior written permission in each occasion.

Paragraph 9 of the Supplier Agreement provides:

> [Taxpayer] specifically agrees that it is an independent contractor and an employment unit subject as an employer to all applicable workers' compensation and unemployment compensation statutes so as to relieve the [client] of any responsibility or liability for treating [Taxpayer's] employees as employees of [Client]. Neither [Taxpayer] nor its employees are agents, servants or employees of [Client].

Among the miscellaneous provisions in the Supplier Agreement is the following:

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[5] At the time of the refund request, the taxpayer's internet homepage set out its guarantee to clients that if they were not satisfied with a worker, if they notified the taxpayer within the first two-hour period the taxpayer would assign a replacement worker at no charge. It further stated the taxpayer assumed the risk in hiring.

m) Non-Recruitment. [Taxpayer] spends a large amount of resources on advertising, recruiting and hiring its employees. Therefore, _____ agrees not to solicit any of our employees during the term of this contract.

While the worker is at the work site, the taxpayer's client controls and dictates the worker's job assignments and duties. The client supervises, directs, and controls the worker.

The taxpayer monitors workplace safety at sites to which it has sent workers, at random, to minimize its workers compensation liability.

Neither the taxpayer nor the client formally evaluates a worker's job performance.

Sometimes the worker provides some or all of the tools required for a job, sometimes the client provides tools, and sometimes the worker borrows tools from a stock the taxpayer has on hand. The taxpayer loans tools to workers because this practice is necessary in order to provide day laborers to clients in a timely manner. It is an industry standard, especially in construction, that a worker is expected to provide certain equipment, like a hardhat and hand tools.

The taxpayer added the following assertions on reconsideration.

The taxpayer argues that a number of temporary staffing businesses exclude their payroll and payroll taxes from the measure of their B&O tax under Rule 111 with the approval of the Department. According to the taxpayer, in the last decade, a number of temporary staffing companies have received refunds under Rule 111 with the approval of the Department's Audit Division; and, a number of taxpayers have received opinion letters from the Department's Taxpayer Information and Education Section (TI&E) approving exclusion of compensation and payroll taxes for B&O purposes. While the taxpayer asserted this information as evidence that the Department has been inconsistent in its administration of Rule 111, it could not and did not provide any supporting data to verify these statements other than to refer to Evergreen Staffing, a temporary staffing business whose state B&O tax refund is a matter of public record; *see, City of Tacoma v. The William Rogers Company, Inc.*, Superior Court of Pierce County, Washington, No. 98-2-05536-2, decided December 14, 2000.

Further, the taxpayer asserts that it has polled its peers and major competitors in the temporary staffing industry, and has found no other taxpayer that has either been required to, or does in fact, collect retail sales tax on gross receipts received for placement of personnel in construction activity. The taxpayer argues it is not responsible for performance of construction services, and its responsibility to its client is satisfied when the worker shows up at the site. It argues its responsibility for inspecting a work site is limited to determining that the worker is being used as contracted and for worker's compensation purposes.

Finally, the taxpayer states that the temporary staffing industry is very competitive. There are over 150 businesses providing staff augmentation or temporary labor services to various kinds of industries and professions in the Puget Sound region alone. The temporary staffing industry is a

"low margin" business. For these reasons, different tax treatment for similarly-situated taxpayers would create a competitive advantage for some and prejudice others.

ISSUES:

1. Was the taxpayer entitled to exclude from the measure of its B&O tax a portion of amounts it received from its clients, related to wages and employment taxes of temporary workers the taxpayer placed with the clients?

2. Are the future reporting instructions correct in requiring the taxpayer to calculate its excise tax liability by reporting receipts according to the nature of the activities performed by the workers it assigned to its clients?

DISCUSSION:

On reconsideration, the taxpayer has shown no mistakes of fact or errors of law in Det. No. 00-206. The arguments submitted on reconsideration do not require different conclusions or setting aside Det. No. 00-206. Det. No. 00-206 therefore will be affirmed.

The discussion below is taken from Det. No. 00-206. After that discussion, we will briefly address the additional arguments made on reconsideration.

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 B&O tax measure and rate is determined by the type or nature of the business activity in which a person is engaged. "Business" is defined as including all activities "engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly." RCW 82.04.140. The measure of the B&O tax is the application of rates against "value of products, gross proceeds of sales, or gross income of the business, as the case may be." RCW 82.04.220.

The term "gross income of the business" is defined by RCW 82.04.080 as follows:

> "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.

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

> "Value proceeding or accruing" means the consideration, whether money, credits, rights, or other property expressed in terms of money, actually received or accrued. . . .

1. Excludability of Amounts Paid Workers

While a taxpayer generally may not deduct its costs of business from the measure of its B&O tax, the Department has recognized, by rule, that amounts received for certain pass-through expenses should not be included in determining a business' gross income for B&O tax purposes. The current Rule 111 (WAC 458-20-111), adopted in 1943, provides as follows, in relevant part:

> The word "advance" as used herein, means money or credits received by a taxpayer from a customer or client with which the taxpayer is to pay costs or fees for the customer or client.
>
> The word "reimbursement" as used herein, means money or credits received from a customer or client to repay the taxpayer for money or credits expended by the taxpayer in payment of costs or fees for the client.
>
> The words "advance" and "reimbursement" apply only when the customer or client alone is liable for the payment of the fees or costs and when the taxpayer making the payment has no personal liability therefor, either primarily or secondarily, other than as agent for the customer or client.
>
> There may be excluded from the measure of tax amounts representing money or credit received by a taxpayer as reimbursement of an advance in accordance with the regular and usual custom of his business or profession.
>
> The foregoing is limited to cases wherein the taxpayer, as an incident to the business, undertakes, on behalf of the customer, guest or client, the payment of money, either upon an obligation owing by the customer, guest or client to a third person, or in procuring a service for the customer, guest or client which the taxpayer does not or cannot render and for which no liability attaches to the taxpayer. It does not apply to cases where the customer, guest or client makes advances to the taxpayer upon services to be rendered by the taxpayer or upon goods to be purchased by the taxpayer in carrying on the business in which the taxpayer engages.

In applying Rule 111 to shared employee and temporary placement situations, the Department historically presumed that if the taxpayer was the employer for payroll purposes, it was the employer for excise tax purposes and, therefore, could not claim pass-through treatment for compensation it received for services its employees performed for third parties. *See Valley Cement Construction, Inc. v. Dept. of Revenue*, BTA Docket 71-70 (1973),[6] aff'd 14 Wn. App. 1040 (1976); Det. No. 98-008, 17 WTD 236 (1998).

[6] The BTA concluded:

> Persons carried on the payroll of the appellant and as to whom the appellant represented itself as the employer to various state and federal agencies for such purposes as industrial insurance, social security, withhold tax and unemployment compensation must be presumed to be employees of the appellant for purposes of the excise taxes imposed by Chapter 82.04 RCW. The appellant has failed to sustain the burden of proving otherwise.

In 1989, the Washington Supreme Court decided an appeal by a temporary employment agency, *Rho Company, Inc. v. Dept. of Revenue*, 113 Wn.2d 561, 782 P.2d 986 (1989). That decision held that determination of whether an employment agency is the employer of the workers for excise tax purposes, or the agent of its clients in procuring and paying the workers, requires an analysis of who controls the personnel.[7] The court stated: "Determination of an agency relationship is not controlled by the manner in which the parties contractually describe their relationship." *Rho*, 113 Wn.2d at 570.

The *Rho* court summarized the operation of Rule 111, as follows:

> [T]he rule allows an exclusion from income for a "pass-through" payment when the following three conditions are met: (1) the payments are "customary reimbursements for advances made to procure a service for the client"; (2) the payments "involve services that the taxpayer did not or could not render"; and (3) the taxpayer "is not liable for paying the associate firms except as the agent of the client." *Christensen, O'Connor, Garrison & Havelka v. Department of Rev.*, 97 Wn.2d 764, 769, 649 P.2d 839 (1982); *see Walthew, Warner, Keefe, Arron, Costello & Thompson v. Department of Rev.*, 103 Wn.2d 183, 186, 691 P.2d 559 (1984).

Rho, 113 Wn.2d at 567-68. In *Rho*, the parties had not disputed the applicability of the first two conditions, and the court's decision addressed only the third.

In response to the *Rho* decision, the Department announced "a change in the department's position on the taxability of businesses which recruit and procure employees to do work for other businesses." Revenue Policy Memorandum (RPM) 90-001 was issued April 26, 1990, and re-issued July 1, 1998, as Excise Tax Advisory (ETA) 90-001. ETA 90-001 describes the Department's former position, and its new position, as follows, in pertinent part:

> Formerly, the department has looked to the terms of the contracts between the respective businesses to determine if the workers were employees of the procuring company or employees of the company for whom the work is performed.
>
> In RHO Company, Inc. v. Department of Revenue, 113 Wn 2d 561 (1989), the Washington Supreme Court ruled that the determination of which company is to be regarded as the employer of the workers for taxation purposes will depend upon the degree of control which the business to whom the workers are supplied exercises over such persons. If the control by such business is so pervasive as to render the business supplying the workers little more than a paymaster, then the business to which the workers are provided will be regarded as their employer. The terms of any written contract between the businesses will still be a factor, but

[7] The court did not decide whether Rho was the employer or merely a payroll agent. It remanded the appeal to the Board of Tax Appeals for consideration of the parties' relationship, which would take into account the control factors discussed in the court's opinion.

will not alone be the determining factor in establishing the relationship between the parties. Such contract designations are to be weighed with all other factors in any case. Thus, for all periods after November 1, 1989, the department and taxpayers must examine the elements of control over the workers and the work performed in order to decide whether the business which procures the workers is a) their employer (thus taxable upon gross receipts from the business to whom the workers are provided) or b) only a worker procurement and placement business acting solely as a payrolling agent (thus taxable upon only the charges for finding, processing and payrolling employees). In the latter case, mere payrolling agents may deduct employee salaries and benefits paid to them by their client businesses and passed through to the workers. The payrolling agent is entitled to the deduction for advances and reimbursements with respect to the passed through amounts. (WAC 458-20-111).

STATEMENT OF POLICY

The following elements or factors will be considered by taxpayers and the department to determine who has pervasive control:

1. Ultimate decision as to hiring and firing the worker;
2. Ultimate decision as to duration of employment;
3. Setting the rate, amount, and other aspects of compensation;
4. Determining the worker's job assignments and instructions;
5. Exercising exclusive guidance and supervision over the work performed;
6. Evaluating the worker's performance;
7. Determining the days and hours of work performed;
8. Providing the office space or other controlled work premises;
9. Providing the tools and materials applied in the workplace;
10. Compensating workers for vacation time, sick leave, and insurance benefits;

When these elements of control exist only in behalf of the business to whom the workers are provided, that business will be treated as the employer and the business providing the workers will be treated only as a payrolling agent, notwithstanding terms in any contract between the businesses.

When one or more of these elements exist in behalf of the business providing the workers, and any contract between the parties designates this business as the "employer," then it will be treated as the employer for state tax purposes as well.

When there is no written contract between the businesses, the elements of control, to the extent that they are determinable, must exist exclusively in the business to whom the workers are provided such that the business providing the workers is acting solely as an agent in procuring and paying the workers.

PROCEDURES

> Effective November 1, 1989, businesses providing workers to others and who are found to be acting only as payrolling agents shall report gross receipts under the classification Service and Other Business Activities (RCW 82.04.290) and may deduct the amounts of employee payroll and benefits, including per diem and travel expenses (WAC 458.20.111).[8]

A notice at the top of ETA 90-001 describes its status as follows:

> Excise Tax Advisories (ETA) are interpretive statements issued by the Department of Revenue under authority of RCW 34.05.230. ETAs explain the Department's policy regarding how tax law applies to a specific issue or specific set of facts. They are advisory for taxpayers; however, the Department is bound by these advisories until superseded by Court action, Legislative action, rule adoption, or an amendment to or cancellation of the ETA.

[1] The taxpayer's standard written supplier contract clearly states that it, rather than the client, is the employer of the temporary workers. Therefore, under ETA 90-001, for placements in which the taxpayer used such a contract, the Department must treat the taxpayer as the employer for state tax purposes, and therefore ineligible for pass-through treatment, if any of the listed control elements existed in behalf of the taxpayer.

The taxpayer states it usually did not enter into a written contract with its clients. Under ETA 90-001, for such placements the elements of control, to the extent they are determinable, must have existed exclusively in the client, in order for the taxpayer to avoid being treated as the employer.

We find that several of the control factors listed in ETA 90-001 existed in the taxpayer. First, the ultimate decision as to hiring and firing the worker lay with the taxpayer. The taxpayer required the temporary workers to apply for employment with the taxpayer, and required the worker to acknowledge that he or she was a temporary employee of the taxpayer and not an employee of the taxpayer's client. The taxpayer did not simply refer workers to potential employers. The taxpayer required its client to engage a worker for a minimum of four hours, and assumed the liability for paying the worker for that time if the client timely rejected the placement. While the clients could reject a placement, it was the taxpayer who decided whether to send the workers on temporary job assignments, in which case it guaranteed them a minimum of four hours of pay, and it was the taxpayer who decided whether to send the worker on additional job assignments.

Second, the ultimate decision as to duration of employment lay with the taxpayer. The taxpayer's Application for Employment required the worker to agree that employment was on a day-to-day basis. The taxpayer decided whether to refer a worker on subsequent days.

[8] The ETA goes on to address the issue of the proper classification of an employment placement business' gross receipts. That portion of the ETA is set out later in this determination.

Third, the taxpayer set the rate, amount, and other aspects of compensation. The taxpayer advised clients of the prevailing rate for the services they wanted, and would not post a job opening unless the client agreed to pay the prevailing wage and other amounts the taxpayer required. While, theoretically, a client could offer to pay more, and thereby take control of the compensation element, the taxpayer presented no evidence that its clients commonly did so, and it is highly unlikely they would have done so in the taxpayer's market niche.

Fourth, the taxpayer determined the days of work performed, and to an extent determined the hours of work performed. The taxpayer determined whether to send a worker on a temporary assignment on any given day. Because it employed the workers only day to day, the clients could only request that the worker return after the first day. The client determined when the work would start and, assuming the work was acceptable, when it would end on a particular day, but control of that factor did not rest exclusively in the client. The taxpayer required clients to guarantee a minimum of four hours' work per placement, and assumed liability for paying the worker for the minimum period if the client timely rejected the placement.

Finally, with respect to some placements, the taxpayer provided tools applied in the workplace.

Under the policy set out in ETA 90-001, for state tax purposes the Department must treat the taxpayer as the employer of the workers it temporarily placed during the refund period. Therefore, the taxpayer did not meet the third condition for pass-through treatment under Rule 111. *Rho, supra.*

The third Rule 111 condition further requires that, even if a temporary employment agency acts as its clients' agent in paying the temporary workers, the taxpayer's liability to the personnel must be solely that of an agent. *Rho,* 113 Wn.2d at 571, 573. The taxpayer would not meet that requirement, even if it did otherwise meet the third condition. The taxpayer obligated itself to pay the temporary workers at the end of each workday, regardless of whether its clients paid their billings. It also obligated itself to pay workers for a minimum of four hours on each temporary assignment, even if the client timely rejected the placement.

While ETA 90-001 addresses only the third Rule 111 condition, all three conditions must be met for a receipt to qualify for pass-through treatment. *See Christensen and Rho, supra.* Therefore, the taxpayer's failure to meet the third condition makes it unnecessary for us to address the first and second Rule 111 conditions.

The taxpayer argues that the fact that several control factors lie with it is due solely to the unique market niche it occupies, and argues it would be unfair to strictly apply the ETA conditions to it, when its competitors who serve more upscale niches can avoid assuming any control elements. That the taxpayer must become the employer of the temporary workers because of the niche it serves does not change the fact it is the employer, or the tax consequences that flow from that fact.

The taxpayer's representative states it represents a number of businesses that recruit and place temporary workers, and all of them have been allowed the Rule 111 pass-through. The representative states the Department audited several of its clients within the last few years, and found all of them eligible to exclude employee wages and payroll taxes from their gross income. It states it is aware of unpublished Department decisions that have found its competitors eligible for the exclusion. It states the taxpayer is concerned the Audit Division has singled it out because of the nature of the workers it serves. It also is concerned the Audit Division's decision to deny its refund request may represent a change in Department policy that is being applied for the first time to taxpayer, placing it at a competitive disadvantage.

These are legitimate concerns, and we will briefly address them. We cannot discuss other taxpayers, however, because of confidentiality requirements. For the same reason, we cannot discuss unpublished Department decisions.

It is certainly possible for taxpayers who provide the same general category of services to be taxed differently because of their business model or practices. The taxpayer concedes that its business practices differ from its competitors because of the special market niche it serves. It has explained that it must pay the workers daily, limit the period of employment, promise to pay the worker if the client rejects the assigned worker, provide tools, and take on other elements of control because it serves the day-labor market niche. The Department has to base its decisions on the particular taxpayer's situation. Not all temporary employment businesses operate alike. Some limit their business to recruiting candidates and referring them to potential employers. The taxpayer is at or near the opposite extreme. Equal application of the same rules and interpretations may affect employment agencies differently because the market segments they serve require them to structure their activities differently. That does not amount to singling out some for unfair treatment.

Rules require interpretation and application by individuals. Certainly, errors are sometimes made. Court decisions interpreting the agency's statutes and rules may create a degree of uncertainty that can result in inconsistencies in treatment while agency personnel struggle to understand and apply the decision. The *Rho* decision, for example, left many questions unanswered, and reasonable minds can differ as to its meaning and application. If the taxpayer believes the Department's past application of Rule 111 to some of the taxpayer's competitors was inconsistent with the Audit Division's treatment of the taxpayer's refund request, it may inform the Department of the names of the competitors, and the Department will look into the matter. Even if the taxpayer's concern should prove to be correct, that does not mean the Department must perpetuate past errors by repeating them with respect to other taxpayers. We should emphasize that our examination of published Department determinations indicates their approach to Rule 111 is consistent with the interpretation applied in the taxpayer's case. *See, e.g.* Det. No. 98-008, 17 WTD 236 (1998); Det. No. 98-035, 17 WTD 174 (1998); Det. No. 98-203, 18 WTD 412 (1999).

Finally, the taxpayer argues that, for sound economic reasons, the Department should tax only the taxpayer's gross receipts, excluding payroll and payroll taxes, at the Service and Other B&O

rate. It provided evidence that its profit margins are more like those of retailers than service businesses, and its effective B&O tax rate is approximately 46%. It argues its profit margin is low because it is not providing the actual service, but only laborers. That is an argument the taxpayer must address to the Legislature. B&O rates are set by the Legislature. As an administrative body, the Department does not have the discretion to rewrite the law.

2. Challenge to Future Reporting Instructions

The taxpayer requests cancellation of the future reporting instruction that it calculate its tax liability "by reporting receipts received from each type of business activity under the appropriate tax classification."

The classification issue is addressed in ETA 90-001. It states:

> Businesses found to be providing their own employees to generally perform the work of others shall report gross receipts under the Service and Other Business Activities classification with no deductions for amounts of any employee payroll or benefits.
>
> Businesses which are licensed **or otherwise hold themselves out as providing specialized workers** to perform business activities for others **which are specifically tax classified** in Chapter 82.04 RCW shall report gross receipts according to the appropriate section of law, i.e., according to the nature of the business **performed**. (Emphasis added).
>
> Such businesses shall collect and report retail sales tax when appropriate; e.g., construction prime contractors, plumbing contractors, paint contractors, etc.

[2] Thus, ETA 90-001 requires that if the taxpayer holds itself out as providing specialized workers, it must report gross revenues from activities that are specifically tax classified according to the tax classification of the workers' activities.[9] It further requires that if the services are classified as retail sales, the taxpayer must collect retail sales tax from its customer.

The logic of this position is evident if we consider the classification issue from the perspective of what the taxpayer's customer is receiving, and tax the customer is liable for. In Washington, retail sales tax is to be paid by the buyer to the seller, and the seller is to collect the tax from the buyer. RCW 82.08.050. When the taxpayer's customer receives services that are classified as retail sales, the customer is liable for retail sales tax, and the taxpayer is responsible for collecting the tax. It would create an incongruity if the Department were to classify the

[9] This may not always have been the Department's position on the classification issue. In 1973, in *Valley Cement, supra*, the Department apparently took the position that if a provider of construction workers had no direct responsibility for performance of the work, its revenues were properly classified under the "catch all" classification of Service and Other Activities. However, since April 26, 1990, the Department's position has been that the revenues are to be classified according to the nature of the work performed.

taxpayer's receipts from retailing-classified activities as Service and Other, when the same activities are classified as retail sales from the customer's perspective. It also likely would result in retail sales tax going unpaid.

The taxpayer contends it is neither licensed, nor otherwise holds itself out, as providing specialized workers to perform business activities that are specifically tax classified. It also contends that it would be impractical for it to report its receipts according to the activities the workers perform. It argues, in its Supplemental Appeal:

> First, [Taxpayer] has no control or supervision over the workers once they arrive on the client's job site. Other than in the most general terms, [Taxpayer] does not know what activities its workers are performing. As a practical matter, [Taxpayer] cannot under its current business relationships know with precision the status of their clients, *e.g.,* contractor, speculative builder, nor does [Taxpayer] know the capacity in which the worker is performing for the client, *e.g.,* completing tasks for the client itself or providing services to the public on behalf of the client. Second, [Taxpayer] is not "licensed" nor does it "hold itself out as" a contractor or service provider which is specifically "tax classified in RCW 82.04 RCW," as required under ETA 90-001.

We note the challenged future reporting instructions are not based on an audit of the taxpayer, and the Audit Division did not determine that the taxpayer had been licensed or had held itself out as providing specialized workers to perform specifically-classified activities. The instructions, issued in April 1999, related to the future (effective July 1, 1999), and simply required the taxpayer to follow ETA 90-001, to the extent it applied to the taxpayer's future situation. From an examination of some internet sites, it appears the taxpayer has, at least since the instructions were issued, held itself out as providing specialized workers. When we looked at the taxpayer's internet site on November 13, 2000, it was holding itself out to employers as being able to match their staffing needs with workers "with all types of skills." Its Company Info page stated it provides labor to the construction industry, including serving the following SIC codes: 1761 (Roofing, siding, & sheet metal), 1731 (Electrical work), 1522 (Residential construction NEC), 1771 (Concrete work), 1751 (Carpentry work), 4212 (Painting and paper hanging). . . . . Charges for labor and services rendered in respect to constructing and improving buildings for consumers are specifically classified as retail sales. RCW 82.04.050(2). They are subject to Retailing B&O tax and retail sales tax. WAC 458-20-170 (Rule 170). Many other services the taxpayer may or might provide are specifically tax-classified as other than "Service and Other." *See, e.g.,* RCW 82.04.050(3).

Addressing the taxpayer's contention that it would be impractical for it to know what the workers are doing, and in what capacity, we again emphasize that the instructions were future instructions. In describing its process, the taxpayer stated it obtains from its client a description of the work to be performed, and posts descriptions of available jobs in its dispatch halls. It obtains the job descriptions in order to establish the compensation rate, and in order to match the work to be performed with a worker having the necessary skills. It also requires its workers to return to its local office with a client authorization for payment in order to be paid. The work

order/assignment process provides information on the nature of the client's business and the work to be performed. The payment authorization procedure gives the taxpayer the opportunity to require that the client state the nature of the work performed, whether the client is a business or a non-business consumer, and whether the client is a prime contractor, subcontractor, etc. It also gives the taxpayer the opportunity to verify that information by querying the worker, before the taxpayer invoices the client. Verifying the nature of the work activity does not appear to be impractical.

We conclude the future reporting instructions under appeal properly instruct the taxpayer. For purposes of clarity, we add that gross receipts from labor performed for construction prime contractors are reportable under the wholesaling B&O classification, and the taxpayer is not required to charge retail sales tax, when the customer provides a resale certificate. *See* Rule 170.

3. Taxpayer's additional arguments on reconsideration

On reconsideration, the taxpayer emphasized and amplified equal treatment arguments made in the initial appeal. It argued that the Department has treated the taxpayer differently for pass-through purposes than it has treated similarly-situated taxpayers. It cited the *William Rogers Company* (Evergreen Staffing) case, and "a stack" of unnamed temporary staffing agencies it claimed it knows received B&O tax refunds or favorable TI&E letters from the Department, allowing Rule 111 pass through treatment of worker wages and employment taxes. It contended these other businesses are substantially similar to the taxpayer. It argued the Department's treatment of the taxpayer's refund request is unfair, and represents a 180-degree flip from the position the Department took with respect to the other businesses.

We believe Det. No. 00-206 adequately and correctly addressed these arguments. On reconsideration, we have looked further into the allegations that the Department's treatment of the taxpayer is inconsistent with its treatment of temporary staffing businesses generally and represents a 180-degree turn from previous Department practice. We find the Department's treatment of the taxpayer is consistent with long-standing Department policy and practice. The Department bases its decisions on application of ETA 90-001 to the facts set out in the refund request or found in an audit investigation. It should be kept in mind that refund requests are granted or denied based upon facts the taxpayer sets out in the request, and refunds are subject to verification by future field audit.

On reconsideration the taxpayer made several new arguments. First, it argued ETA 90-001 is inconsistent with *Rho* and is beyond the authority of law. It argued every company in the temporary staffing industry would fail the ETA's tests. We disagree. ETA 90-001 is an interpretive statement issued by the Department under authority of RCW 34.05.230. The Department believes ETA 90-001 provides appropriate tests for determining which company is to be regarded as the employer of workers for taxation purposes. The Department is bound by ETAs until such time as they are superseded by court action, legislative action, rule adoption, or amendment to or cancellation of the ETA. Moreover, ETA 90-001 was originally issued (as an RPM) in April 1990, and the taxpayer's assertion that other temporary staffing companies have

been allowed Rule 111 pass-through treatment in the past decade seriously undercuts the taxpayer's own contention that no company in the temporary staffing industry could qualify under the ETA.

Second the taxpayer argued Det. No. 00-206 incorrectly interprets the third prong or condition of *Rho*, in concluding that a temporary staffing company fails the third *Rho* prong if it obligates itself to pay the workers at the end of the day, or for a minimum period, regardless of whether the company's clients pay their billings. The taxpayer asserted the Rho Company itself would not have qualified for a Rule 111 pass through under that interpretation. It argued the Supreme Court would have resolved *Rho* on that basis, rather than remanding the case on the agency issue, if Det. No. 00-206's interpretation of the third prong were correct. We believe Det. No. 00-206 correctly interpreted the third prong of *Rho*. The *Rho* court did not find the fact the taxpayer asserts. We will not speculate as to the Rho Court's reasons for deciding as it did.

Third, the taxpayer argued Det. No. 00-206 incorrectly classifies the taxpayer as a provider of retail services in the construction area. It argued the facts show it provides a placement service, and its job is over when the worker reports to the work site. It is not responsible for the performance of the construction service. We believe Det. No. 00-206 adequately and correctly addressed this issue.

Finally, on reconsideration the taxpayer argued the Department should rescind the future reporting instructions upheld in Det. No. 00-206, and undertake a proceeding to establish uniform and consistent collection and reporting requirements for the entire industry. Otherwise, it argued, the taxpayer will be seriously disadvantaged in competition with other placement companies, none of which are charging their clients retail sales tax on services in respect to constructing. Again, we disagree. The future reporting instructions are set out in ETA 90-001. Those collection and reporting requirements were originally issued (as an RPM) in April 1990. They are uniform, consistent, and have been in effect for more than a decade.

In sum, none of the taxpayer's additional or restated arguments persuade us that Det. No. 00-206 made mistakes in law or fact that necessitate reconsideration of the decision. Accordingly, the relief requested in the executive level petition for reconsideration is denied.

DECISION AND DISPOSITION:

The taxpayer's petition for reconsideration is denied.

Dated this 14th day of January, 2002.