

Cite as Det. No. 02-0213R, 23 WTD 50 (2004)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition For Correction of )	FINAL
Assessment of )	DETERMINATION
)	
)	No. 02-0213R <sup>1</sup>
)	
... )	Registration No. ...
)	Document No. ... /Audit No. ...
)	Docket No. ...

RCW 82.04.290: B&O TAX -- SALES PRIZES -- PROMOTIONAL SUPPLIES VS. REMUNERATION. Prizes a company awards to members of its sales force to motivate the sales force to work harder are a form of compensation, and are not excludable under the promotional supplies and materials exception in RCW 82.04.290. That incentive prizes may have a similar purpose to promotional supplies and materials -- increasing the company's sales, does not bring the prizes within the exception.

Prusia, A.L.J. – Taxpayer, a self-employed sales representative and a national sales director for a major . . . company, seeks reconsideration of portions of *Det. No. 02-0213*, specifically: . . the denial of Taxpayer's request to cancel the assessment of B&O tax on the value attributable to the use of [an automobile] awarded her by the company, and the value attributable to other prizes awarded Taxpayer by the company . . .<sup>2</sup>We find no mistakes of law or fact in *Det. No. 02-0213* that would necessitate reconsideration of the decision . . ., and therefore deny the petition for reconsideration . . .<sup>3</sup>

ISSUES

1. Did *Det. No. 02-0213* err in concluding that the value attributed to Taxpayer's use of a [Company] [automobile], and the value of other [Company] prizes, are not excludable from the measure of Taxpayer's B&O tax under RCW 82.04.290?

---

<sup>1</sup> The original determination, Det. No. 02-0213, is published at 23 WTD 32 (2004).

<sup>2</sup> Nonprecedential portions of this determination have been deleted.

<sup>3</sup> Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

...

## FINDINGS OF FACT

Taxpayer, . . . , is a self-employed sales representative . . . for [Company], and is also a [Company] director. Taxpayer works out of an office in her home in Washington State.

The facts are set out in *Det. No. 02-0213*. To the extent necessary to provide context for this decision, the facts are repeated in the following paragraphs. We also supplement the facts in *Det. No. 02-0213* with references to public sources that further explain how [Company] operates.

[Company's] sales force is not organized geographically, but rather into sales groups . . . consisting of a . . . “founder” and her . . . recruits plus their recruits, etc. A sales group may be scattered all over the nation. [Company] motivates its [sales representatives] to build a successful sales group by offering the opportunity to earn prizes and appointment to sales director position with the company. Appointment as a sales director requires outstanding sales achievements by the director’s sales group. A sales director receives commissions from [Company] on wholesale sales by [Company] to other [sales representatives] in the director’s sales group, in addition to prizes . . . . There are several levels of director. Appointment to the two highest levels entitles the individual to free use of . . . vehicles in addition to commission compensation and other incentive prizes and awards. . . .

...

A national director has contractual responsibilities to [Company] with respect to her own sales group, and with respect to the [Company] sales force nationally. A national director contractually agrees with [Company] to engage in ongoing . . . , assistance, . . . , sales promotion, . . . for other directors and [sales representatives] in her national sales group, and to . . . , speak, . . . at major [Company] events. [Company’s] national director job description and guidelines state that initial and continued appointment as a national director is dependent, in part, upon consistent attendance at national and regional company events, and participation in such events as a speaker or teacher. Attendees at major events come from sales groups all over the region or nation, and national directors are required to provide leadership and training for all participants. The taxpayer has been a retail seller of [Company] products since . . . . Her sales group consists of approximately . . . consultants, scattered all over the nation. About . . . are in Washington. [Company] has rewarded the taxpayer for her outstanding sales and team-building efforts by appointing her a national sales director, giving her free use of [automobile], and awarding her other prizes. Her cash commissions on [Company’s] wholesale sales to members of her sales group averaged about \$ . . . per year during the period 1996-2000.

The taxpayer entered into a national sales director agreement with [Company] in July . . . . Her contractual responsibilities and actual activities fit the above general description. Her incentive compensation is based on [Company’s] wholesale sales to members of her sales group. The taxpayer engages in ongoing training, . . . , and promotional activities for her sales group from

her home. She also engages in those activities at training seminars, . . . , and national conferences, where attendees are from many different sales groups.

Prior to 2000, neither [Company] nor Taxpayer reported or paid B&O taxes on Taxpayer's commissions, prizes, or awards. In October 2000, the Tax Account Administration Division (TAA) of the Department of Revenue (DOR) contacted Taxpayer, informing her she must submit information regarding commissions, awards, and prizes received in past periods. Taxpayer submitted some information to TAA, and engaged in extensive discussions with TAA regarding the tax treatment of the [automobile] and other prizes, placement of responsibility for any past delinquencies, and how to apportion her commissions and other director compensation between Washington and other states. TAA provided Taxpayer with an example of how to apportion her compensation using a cost of doing business methodology, but Taxpayer insisted on using an apportionment method of her own design. . . . In March 2001, TAA issued the above-numbered assessment against Taxpayer, for the period 1996-2000. The assessment included B&O tax on commissions paid by [Company] and prizes awarded by [Company], including on the value of the use of the [automobile]. The assessment stated DOR was not allowing apportionment of Taxpayer's commission or prize income because Taxpayer had not provided necessary records to apportion the income using a cost apportionment methodology.

Taxpayer appealed the assessment, raising numerous issues. *Det. No. 02-0213* denied the petition on most issues, including sustaining the assessment of B&O tax on the value of the use of the [automobile] and on . . . other prizes, and rejecting Taxpayer's proposed apportionment methodology. *Det. No. 02-0213* remanded the file to TAA to allow Taxpayer an opportunity to provide TAA with information TAA required to apportion Taxpayer's income using cost apportionment principles. . . .

The petition for reconsideration . . . asks us to reconsider *Det. No. 02-0213*'s conclusion on the [automobile]/prizes question, reasserting its contention that the value of those items should be excluded from the measure of Taxpayer's B&O tax as "advertising, demonstration, and promotional supplies and materials," under RCW 82.04.290. . . .

## ANALYSIS

Statutes and rules regarding the B&O tax, generally, and apportionment of income of Washington businesses that render services taxable under RCW 82.04.290, are set out in *Det. No. 02-0213*, and will not be repeated here, except to say that Taxpayer's commission and prize compensation is subject to the B&O tax under the "other business or service activities" classification. The measure of the tax is the gross income of the business. RCW 82.04.290. Gross income of the business is defined as "the value proceeding or accruing by reason of the transaction of the business engaged in . . . without any deduction on account of the cost [of doing business]." Under this definition, the value of the use of a vehicle and other prizes are part of the gross income of the business, unless some other statute excludes them.

### Excludability of value of use of [automobile] and value of other prizes

RCW 82.04.290 states, in pertinent part:

The value of advertising, demonstration, and promotional supplies and materials furnished to an agent by his principal or supplier to be used for informational, educational and promotional purposes shall not be considered a part of the agent's remuneration or commission and shall not be subject to taxation under this section.

*Det. No. 02-0213* concluded that the [automobile] and other prizes awarded Taxpayer by [Company] could **not** be excluded from the measure of Taxpayer's B&O tax under RCW 82.04.290 because [Company] awarded the items as a way of motivating members of its sales force and for compensating successful sales and team-building efforts.

Taxpayer argues, on reconsideration, that *Det. No. 02-0213*'s conclusion is merely a personal opinion of the determination's author, and not a fact. Taxpayer argues that the correct "fact" is that [Company] advertises by using [the prizes]. . . . Taxpayer further argues that TAA has recognized that use of the [automobile] is not compensation, in instructing [Company] directors to include their car expense as a cost of doing business in calculating cost apportionment.

*Det. No. 02-0213* acknowledged that the [prizes] have an advertising value to [Company]. However, there is no question that the [prizes] are a form of incentive compensation to the sales force. They are awarded based upon achievement. . . . The fact that [Company] now gives sales directors a choice of [prizes] further underscores that the [prizes] are compensation, not mere advertising or promotional supplies that [Company] provides its independent sales agents.

We find no merit in Taxpayer's argument that use of the [automobile] is different in substance from cash bonuses because TAA allows car expenses to be treated as a cost of doing business in performing apportionment calculations. The TAA apportionment example allows a [Company] director to treat actual transportation costs as costs of doing business. If Taxpayer were leasing a [automobile] for use in her business, her lease payments, as well as her fuel costs and insurance costs, would be costs of doing business, and therefore appropriately would go into the calculation. That has nothing to do with whether the value of the use of a vehicle provided to her free of charge is taxable compensation.

Taxpayer further argues that the value of . . . , and other . . . prizes [Company] awards its sales force falls within the RCW 82.04.290 exclusion because their real purpose is to increase [Company] retail product sales to the public. We find no merit in that argument. [Company] chooses to market its products door-to-door. That sales method requires a sales force. There will be no sales force unless the sellers are compensated. The purpose of incentive compensation is to motivate the sales force to work harder. All sales force compensation has as its purpose increasing the seller's sales. When compensation is given in the form of money, no one would characterize it as merely an advertising expense. When compensation is given in the form of valuable goods, those goods are still compensation. They are not merely supplies and materials to be used for promotional purposes.

RCW 82.04.290 allows an agent to exclude from the measure of B&O tax the value of items that are not compensation to the agent, but rather advertising or promotional tools of the principal or supplier. We do not interpret the statute as allowing exclusion of the value of items that are a significant form of compensation to the agent, even if public display of the items may have an additional advertising value to the principal. . . .

#### DECISION AND DISPOSITION

. . . *Det. No. 02-0213* is affirmed, and Taxpayer's petition for reconsideration is denied.

Dated this 20<sup>th</sup> day of May 2003