Cite as Det. No. 02-0127, 23 WTD 160 (2004)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of	)	D E T E R M I N A T I O N
	)	
	)	No. 02-0127
	)	
. . .	)	Registration No. . . . FY . . . /Audit No. . . .
	)	
	)	Docket No. . . .
	)	
	)	

[1] RCW 82.04.322: B&O TAX – BUSINESSES TAXABLE UNDER TITLE 48 RCW: A business that claims exemption from the B&O tax pursuant to RCW 82.04.322 must first show that it is a health maintenance organization, health care service contractor, or certified health plan to qualify.

[2] RCW 48.14.0201, RCW 82.04.322: B&O TAX – BUSINESSES TAXABLE UNDER TITLE 48 RCW. A business that claims it is subject to the tax imposed by RCW 48.14.0201 must show that it is a qualifying health care service contractor or health maintenance organization as defined in RCW 48.44.010.

[3] RAP 10.4(h): UNPUBLISHED APPELLATE DECISIONS – USE IN DEPARTMENT OF REVENUE DETERMINATIONS: Taxpayers may not cite, and the Department of Revenue will not consider, unpublished appellate decisions for use in the Department's tax determinations.

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 corporation seeks a refund of amounts paid pursuant to an audit, claiming that it is exempt from the business and occupation (B&O) tax pursuant to RCW 82.04.322.[1]

FACTS:

Gray, A.L.J. – The Department of Revenue (Department) audited the taxpayer for the period April 1, 1993 through September 30, 1996. The taxpayer did not appeal the tax assessment that included B&O tax on unreported income consisting of payments from an affiliate. Instead the taxpayer paid the assessment on April 9, 1998 and now seeks a refund of tax paid under the assessment for unreported income.

The taxpayer engages in business in Washington. The taxpayer described its business activities as processing medical claims for its clients and providing support services for its affiliate. The taxpayer described its affiliate as a "health care service contractor."[2] According to the taxpayer the primary difference between it and its affiliate is that the affiliate is an insurance company and the taxpayer is not, that is, the taxpayer "did not bear the economic risks of the subscribers to the plan." The taxpayer performed services under contract for its affiliate. Under the provisions of this contract, the taxpayer was entitled to monthly compensation from the affiliate in return for providing services. The contract enumerated those services as financial management, non-Medicare marketing support, Medicare marketing support, and the provision of equipment and supplies, administrative support, and office space. The taxpayer was entitled to payment based on a percentage of the affiliate's gross monthly premiums charged to its customers. The agreement contained a paragraph declaring that neither party was an agent of the other.

The taxpayer agreed to provide office space to the affiliate, but in practice (according to the taxpayer), the taxpayer shared its space with the affiliate. The taxpayer and the affiliate deemed it "convenient" for the taxpayer to pay for the shared costs, and to charge the costs to the affiliate. The Audit Division concluded that the taxpayer created a license to use real estate by the affiliate, and did not create a leasehold estate, therefore, the amounts received by the taxpayer for office space was subject to the B&O tax. The Audit Division also concluded that the amounts the taxpayer received for services it performed for the affiliate but did not report should have been reported under the B&O tax at the service and other activities classification rate. The Audit Division, therefore, assessed the service B&O tax on the unreported amounts. The tax assessed and paid on the affiliate's payments to the taxpayer is the subject of this appeal.

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.
[2] "Health care services contractor" is a term of art. *See*, RCW 48.44.010.

ISSUE:

Whether the taxpayer is entitled to a refund of B&O tax it paid on income received from its affiliate, an insurance company, because the receipts are exempt from the B&O tax pursuant to RCW 82.04.322?

DISCUSSION:

The taxpayer seeks a refund of B&O tax on its gross receipts from its affiliate, an insurance company. It urges the Department to conclude that the activities for which the taxpayer receives payment from the affiliate are "functionally related" to "health care services" and are therefore exempt from the B&O tax under RCW 82.04.322. The taxpayer relies on the dissenting opinion in *Factory Mutual Engineering Ass'n. v. Department of Rev.*, BTA Docket No. 36836 (1990) and on the unpublished Court of Appeals opinion in *Factory Mutual Engineering Association v. Department of Rev.*, C/A No. 15195-2-II to support its position that its receipts are exempt from the B&O tax pursuant to RCW 82.04.322 and subject to tax under RCW 48.14.0201.

RCW 82.04.322 provides:

> This chapter does not apply to any health maintenance organization, health care service contractor, or certified health plan in respect to premiums or prepayments that are taxable under RCW 48.14.0201.

The taxpayer claims that its activities are subject to tax under RCW 48.14.0201, "premiums and prepayment tax." That statute imposes tax on "health care service contractors" and "health maintenance organizations." A "health care service contractor," defined in RCW 48.44.010, means:

> (3) "Health care service contractor" means any corporation, cooperative group, or association, which is sponsored by or otherwise intimately connected with a provider or group of providers, who or which not otherwise being engaged in the insurance business, accepts prepayment for health care services from or for the benefit of persons or groups of persons as consideration for providing such persons with any health care services.

The taxpayer has not provided any evidence that it qualifies as a health care service contractor, as defined. From the facts, it appears the taxpayer provides administrative services to its affiliate and for which it receives compensation. However, the taxpayer argues that Det. No. 88-311A, 9 WTD 293 (1990) supports its position. The taxpayer in Det. No. 88-311 and 311A was an insurance company. One of the two issues in Det. No. 88-311A was whether RCW 48.14.080 precludes the assessment of business and occupation tax upon an insurance company's gross receipts derived from services performed for affiliates. We held that:

> For purposes of RCW 82.04.320, the insurance business includes not only those activities specifically regulated under Title 48 RCW, but those which are functionally related as well. Revenue generating activities which are functionally related to the taxpayer's conduct of its insurance business are not subject to the excise tax (except for the sale, purchase or use of property). Revenue generating activities which are considered functionally related to a taxpayer's insurance business are those activities incidental to accomplishing the insurance function.

Det. No. 88-311A, 9 WTD at 298 (1990). But the taxpayer here is not an insurance business and, therefore, cannot show how its activities are functionally related to its insurance business and how those activities are incidental to accomplishing the insurance function.

The taxpayer would have us ignore the fact that it is not an insurance business. It states:

> While the determination [Det. No. 88-311A] limited the exemption to bona fide insurance companies, it is well known and well established in the local insurance community that the "insurance company" requirement no longer prevails. Enclosed is a copy of the Factory Mutual II decision. It is consistent with the dissenting opinion of Richard A. Virant in Factory Mutual I . . . .

The taxpayer urges the Department not to rely on the majority decision in the BTA case, but instead to rely on the same case in an unreported Court of Appeals decision. Factory Mutual sought to avoid payment of B&O tax altogether by claiming that its business was "functionally related" to that of its parent company, which was an insurer. Insurance companies do not pay B&O tax if they pay the premiums tax imposed on insurers in RCW 48.14.080. Correspondingly, RCW 48.14.080 provides:

> As to insurers, other than title insurers and taxpayers under RCW 48.14.0201, the taxes imposed by this title shall be in lieu of all other taxes, except taxes on real and tangible personal property, excise taxes on the sale, purchase or use of such property, and the tax imposed in RCW 82.04.260(12).

The BTA found that Factory Mutual was a separate entity from its parent company (an insurance company). Therefore, Factory Mutual could not be an insurer and consequently was not exempt from the B&O tax. The BTA said:

> Ultimately, we find Factory Mutual to be an organization run largely on the reimbursement method of doing business. . . . There is no denying that money is being transferred. It is more than the parent Companies taking it out of one pocket and putting it into another; they are taking it out of their pocket and putting it into Factory Mutual's pocket.

Factory Mutual, BTA Docket No. 36836 at p. 8. Like Factory Mutual, the taxpayer is a separate business. Ultimately, *Factory Mutual* reached the Court of Appeals. The Court of Appeals issued an opinion but directed that it not be published.

The taxpayer urges us to consider the unpublished Court of Appeals decision for seven reasons: (1), the decision is res judicata as to the Department; (2) other insurance companies have the text of the unpublished decision anyway; (3) even though unpublished, the Court of Appeals decision overturned the BTA decision and the Department knows it; (4) the Department is not bound by rules of court and has a duty to consider all facts and legal authorities, including unpublished authorities; (5) the Department has a history of correcting its policies as a result of unpublished rulings; (6) the Department has repeatedly considered unpublished authorities presented by taxpayers to the Appeals Division; and (7) the Department has a duty to adopt policies to provide equal protection to similar taxpayers. There are several fatal objections to the taxpayer's position.

First, we will not consider unpublished Court of Appeals decisions. Rule of Appellate Procedure (RAP) 10.4(h) prohibits us from citing unpublished decisions. That court rule provides:

> A party may not cite as an authority an unpublished opinion of the Court of Appeals. Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports.

Unpublished opinions have no precedential value. *State v. Sanchez*, 74 Wn. App. 763; 875 P.2d 712 (1994). We realize, of course, that the RAP apply to proceedings in the Supreme Court and the Court of Appeals. RAP 1.1(a). However, it makes no sense for the Department and the taxpayer to cite an unpublished Court of Appeals decision at this level but then find themselves barred from referring to it if this case goes higher. In any event, the taxpayer has not cited any authority that would allow us to rely on an unpublished Court of Appeals decision.

Most of the taxpayer's arguments simply have no merit; for example, "other persons have copies of the unpublished opinion" and "the Department is not bound by the RAP." The taxpayer's only debatable reason is that the *Factory Mutual* decision is res judicata as to the Department. The taxpayer, however, does not address any of the elements of the doctrine of res judicata or explain how res judicata applies in this tax appeal.

Second, a dissenting (BTA) decision is not legal authority. Third, in Det. No. 88-311A the taxpayer was an insurer. The taxpayer here is not. The issue in Det. No. 88-311A was whether the insurer/taxpayer was exempt from payment of the B&O tax because it owed tax under RCW 48.14.080. The issue in this case is whether a non-insurer is entitled to a refund because it claims it owes tax under RCW 48.14.0201. The taxpayer has the burden to prove it is entitled to a refund. It has not met that burden. It has not shown that it is a "health care service organization" or a "health maintenance organization." It has not even shown that it pays tax under RCW 48.14.0201. We deny the petition.

DECISION AND DISPOSITION:

The petition for refund is denied.

Dated this 31st day of July, 2002