

Cite as Det. No. 94-023, 14 WTD 191 (1995).

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	<u>D E T E R M I N A T I O N</u>
For Correction of Assessment of)	
)	No. 94-023
. . .)	
)	Registration No. . . .
)	FY. . ./Audit No. . . .

RULE 194, RULE 155; RCW 82.04.460: SERVICE B&O TAX -- APPORTIONMENT -- COMPUTER SERVICES. Out-of-state corporation may apportion monthly fees it receives from Washington subscribers who pay for the right to access its out-of-state computer facilities in case of failures of the subscribers' own computer systems. The apportionment of gross income is to occur between Washington and other states where it has places of business which contribute to the performance of services rendered in Washington.

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:

The out-of-state taxpayer protests the assessment of service and other activities business and occupation (B&O) taxes on monthly fees it charges Washington customers who subscribe to it for access to emergency computer services.¹

FACTS:

De Luca, A.L.J. -- The Department of Revenue audited the taxpayer for the period July 1, 1991 through December 31, 1992 and assessed B&O taxes and interest. The taxpayer protests service

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

B&O tax plus related interest in Schedule II. Apparently, it does not protest the retailing B&O tax assessed in Schedule III. The Department did not assess retail sales tax because the taxpayer previously paid it.

The facts are not in dispute. The taxpayer is a foreign corporation with its headquarters located outside the state of Washington. It does maintain an office in Washington with a resident sales representative. The taxpayer provides substitute computer systems for large computer dependent organizations. Its subscribers have access to its out-of-state computer facilities if they experience unplanned computer system failures. The taxpayer charges each subscriber a monthly "stand-by" fee for this access right. Subscribers must pay additional fees for actual use of the back-up facilities, other than for occasional testing. Such additional fees for actual use are not at issue in this appeal.

The taxpayer has several back-up computer facilities. None of them are located in Washington. Each facility has a fully operational computer system, a specially prepared site to immediately install a subscriber's computer system, and office space. The taxpayer also has personnel at each facility who perform the initial steps in getting a subscriber on line with the taxpayer's back-up system when the need arises. One step includes periodic testing at the taxpayer's facilities. Other steps include in some cases providing network telecommunications service between subscribers' locations and the taxpayer's back-up facilities to implement the actual service if needed. The network consists of technical equipment such as modems, data lines, matrix switches, consoles and multiplexers. Finally, the taxpayer is ready at all times to provide the emergency service when needed.

The Department of Revenue assessed service B&O tax on the gross monthly stand-by fees received from Washington subscribers.

ISSUE:

Should these monthly stand-by fees be allocated for tax purposes solely to Washington as the assessment determined, or should they be apportioned between Washington and other states?

DECISION AND DISPOSITION:

The taxpayer does not dispute that service B&O tax is the appropriate tax to assess the subject income per RCW 82.04.290. Instead, it argues such income should be apportioned under RCW 82.04.460 and WAC 458-20-194 (Rule 194). RCW 82.04.460 declares:

(1) Any person rendering services taxable under RCW 82.04.290 and maintaining places of business both within and without this state which contribute to the rendition of such services shall, for the purpose of computing tax liability under RCW 82.04.290, apportion to this state that portion of his gross income which is derived from services rendered within this state. Where such apportionment cannot be accurately made by separate accounting methods, the taxpayer shall apportion to this state that proportion of his total income which the cost of doing business within the state bears to the total cost of doing business both within and without the state.

The taxpayer meets the criteria of the apportionment statute and Rule 194. It is rendering services taxable under RCW 82.04.290 and maintains places of business both within and without Washington which contribute to the rendition of such services in this state. The taxpayer provides out-of-state offices, personnel and back-up computers while linking its Washington subscribers by telecommunication equipment to its out-of-state facilities. The taxpayer also has an in-state office and a resident sales person which contribute to its services performed in this state. Det. No. 89-509, 8 WTD 345 (1989); Det. No. 90-132, 9 WTD 280-15 (1990).

RCW 82.04.460 and Rule 194 clearly prefer that the taxpayer apportion its income by separate accounting methods where it is accurate and practical to use such methods. However, the statute and rule provide that where separate accounting is not practical or accurate the taxpayer shall apportion its income by using the cost-of-doing-business basis. The taxpayer contends it does not keep separate books and records which capture the costs of providing services to Washington subscribers. Therefore, it argues that it appears impractical to apportion by separate accounting methods, and requests that the cost basis be used in determining its liability.

DECISION AND DISPOSITION:

The taxpayer's petition is granted. It is entitled to apportion its income from the monthly stand-by fees between Washington and other states where it maintains places of business which contribute to the performance of the subject services in this state. The taxpayer shall apportion to Washington only that portion of gross income derived from the services it renders in this state. We remand the matter to Audit to allow the auditor and the taxpayer to determine whether the apportionment should be done by separate accounting methods or by the cost-of-doing-business basis. That decision will need to be made depending on

whether it is practical and accurate to use separate accounting methods.

DATED this 31st day of January, 1994.