

Cite as Det. No. 99-112, 19 WTD 799 (2000)

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. 99-112
)	
...)	Registration No. . . .
)	FY. . . /Audit No. . . .
)	
...)	Registration No. . . .
)	FY. . . /Audit No. . . .

[1] ...¹

[2] RULE 159: RCW 82.04.480 – B&O TAX – SALES TAX – CONSIGNMENT SALES – ANTIQUE MALL. The operator of an antique mall who makes sales on behalf of her or his tenants will be deemed as making consignment sales when it is established that there is an agency agreement to that effect and the agent’s records show on whose behalf the sales are made, in what amount, and the commissions derived by the operator.

[3] RULE 248: B&O TAX – SALES TAX – SILVER CERTIFICATES – EXEMPTION. Precious metal bullion and monetized bullion are exempt from B&O and retail sales taxes per RCW 82.04.062. Silver certificates are neither precious metal nor monetized bullion.

[4] MISCELLANEOUS: ATTORNEY FEES. Title 82 RCW, the Revenue Act, contains no provision for attorney fees.

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:

Antique mall claims it . . . sells merchandise as agent for tenants.²

FACTS:

¹ Nonprecedential portions of this determination have been redacted.

² Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

Dressel, A.L.J. -- . . . (taxpayer) is an antique mall. Its books and records were examined by the Department of Revenue (Department) for the period March 1, 1991 through December 31, 1992. As a result a tax assessment, identified by the above-captioned numbers, was issued for \$. . . . The taxpayer appeals.

At the beginning of 1993, . . . incorporated their business as . . . (taxpayer). Its books and records were also examined by the Department, but for the period January 1, 1993 through June 30, 1995. As a result a tax assessment, identified by the above-captioned numbers, was issued for \$. . . . This taxpayer also appeals.

. . . There are, approximately, 100 exhibitors, or lessees, in the mall.³ Each has her/his own area or space. Most of the spaces are marked with numbers. . . .

Each space is stocked by the lessee. The lessees, however, do not make sales. Those are accomplished by employees of the taxpayers. When a customer finds an item (s) he wishes to buy, the customer summons a taxpayer employee. That person collects the money for the item, including the retail sales tax. The taxpayer employee also completes a sales slip that identifies the item sold, the space from which it came,⁴ the date, the price, the sales tax, and the total charge. The heading on the sales slip reflects the taxpayers' name and the name of their mall.

Per written agreements with each lessee, the taxpayers keep track of all sales made for each lessee in a particular month. On the 10th day of the following month, the taxpayers present to each lessee an accounting of the previous month's activity. Generally, with that accounting will be a check to the lessee for the sales of the previous month, less 12% of that total as the taxpayers' fee for their selling and accounting assistance. Additionally, there is a monthly "rental" charge assessed by the taxpayers for the space used by the lessee. The larger the space, the larger the charge. This fee is also, generally, deducted from a lessee's monthly sales amount. If sales for a lessee in a particular month are less than the rental amount owed plus the 12%, the lessee may owe the lessor, instead of vice-versa. Sales tax collected by the lessor is paid directly to the Department on behalf of the lessee.

. . .

In the subject audits the Department . . . acknowledged that the taxpayers might have been incorrectly instructed by other Department personnel to report those as commission sales. That is, the taxpayers paid B&O tax only on the 12% commission amount they retained from those sales. The Department said it would allow that for the audit periods but, in the future, the taxpayers would be expected to pay Retailing or Wholesaling B&O tax on 100% of total sales, primarily, because the merchandise was sold in the taxpayers' own name.

³ For the sake of convenience and because some of the written agreements identified them as such, we will refer to taxpayers as "lessors" and the persons to whom they granted use of space in the malls as "lessees."

⁴ By its designated number.

In objecting to the tax assessments, the taxpayers . . . argue that they are making consignment sales of the lessee's merchandise and that, therefore, they should only be B&O taxed on the 12% commission they receive for that service.

Also taxed in the audit were sales of some silver certificates. The taxpayers claim these sales should be exempt of tax as well, as sales of precious metal or monetized bullion. The Department assessed Retailing B&O and retail sales taxes on these sales because the taxpayers did not have certificates showing that the sales were for resale. Also, the Department cited *Rhyne v. Dept. of Revenue*, Board of Tax Appeals (BTA) Docket No. 81-5, for the proposition that, to determine the proper taxation of the sale of coins,⁵ one must look to the use of the coin and the purpose of the purchase. The Department concluded the silver certificates were sold, not as a medium of exchange, but to be added to a personal collection.

Lastly, the taxpayers ask "for relief of attorney fees incurred by the Antique Malls to defend their position in this case (if needed), at a rate of \$175.00 per hour".

ISSUES:

1. . . .
2. Consistent with a consignment sale, may the operators of an antique mall deduct from their measure of tax those amounts they pay over to their "tenants"?
3. Are sales of silver certificates exempt of B&O and retail sales taxes?
4. May the Department award attorney fees to appealing taxpayers?

DISCUSSION:

. . .

Second of the issues is consignment sales. RCW 82.04.480 states:

Sales in own name--Sales as agent. Every consignee, bailee, factor, or auctioneer having either actual or constructive possession of tangible personal property, or having possession of the documents of title thereto, with power to sell such tangible personal property in his or its own name and actually so selling, shall be deemed the seller of such tangible personal property within the meaning of this chapter; and further, the consignor, bailor, principal, or owner shall be deemed a seller of such property to the consignee, bailee, factor, or auctioneer.

⁵ The money at issue in the cited case was the Krugerrand.

The burden shall be upon the taxpayer in every case to establish the fact that he is not engaged in the business of selling tangible personal property but is acting merely as broker or agent in promoting sales for a principal. Such claim will be allowed only when the taxpayer's accounting records are kept in such manner, as the department of revenue shall by general regulation provide.

By general regulation the Department has so provided in WAC 458-20-159 (Rule 159). It states, in part:

AGENTS AND BROKERS. Any person who claims to be acting merely as agent or broker in promoting sales for a principal or in making purchases for a buyer, will have such claim recognized only when the contract or agreement between such persons clearly establishes the relationship of principal and agent and when the following conditions are complied with:

(1) The books and records of the broker or agent show the transactions were made in the name and for the account of the principal, and show the name of the actual owner of the property for whom the sale was made, or the actual buyer for whom the purchase was made.

(2) The books and records show the amount of gross sales, the amount of commissions and any other incidental income derived by the broker or agent from such sales.

[2] The contract or agreement between the lessors and the lessees clearly establishes the relationship of principal and agent. In it the lessor, or agent, agrees to sell, for the lessees, the merchandise they have displayed in their spaces. They further agree to turn over the proceeds of said sales, less the 12% commission agreed to in the contract. As far as the books and records of the taxpayers (lessors) are concerned, they testified that they have complete files on each lessee, which files include all sales and commissions and any other records required by Rule 159 to establish an agency relationship. The taxpayer's testimony in this regard is not disputed by the Department. Consequently, we find that the taxpayers are (were) acting as consignment agents and are, thus, Service B&O taxable only on the 12% commission amounts. Not only was such reporting of taxes appropriate for the audit periods, but also it is to be done prospectively as well, provided the taxpayers' relationship with the lessees does not materially change.

On the second issue, consignment sales, the taxpayers' petition is granted.

The third issue is the sale of silver certificates. The taxpayers sold one and five dollar silver certificates for amounts in excess of their face value. The taxpayers contend that such sales should be exempt of B&O and sales tax by virtue of WAC 458-20-248 (Rule 248). The statute that Rule 248 implements is RCW 82.04.062, which reads, in part:

"Sale at wholesale," "sale at retail" excludes sale of precious metal bullion and monetized bullion--Computation of tax. (1) For purposes of this chapter, "wholesale

sale," "sale at wholesale," "retail sale," and "sale at retail" do not include the sale of precious metal bullion or monetized bullion.

...

(3) For purposes of this section, "precious metal bullion" means any precious metal which has been put through a process of smelting or refining, including, but not limited to, gold, silver, platinum, rhodium, and palladium, and which is in such state or condition that its value depends upon its contents and not upon its form. For purposes of this section, "monetized bullion" means coins or other forms of money manufactured from gold, silver, or other metals and heretofore, now, or hereafter used as a medium of exchange under the laws of this state, the United States, or any foreign nation, but does not include coins or money sold to be manufactured into jewelry or works of art.

[3] Entailed in the transactions at issue is the sale of *paper* silver certificates. These are, clearly, not *metal* bullion. Further, according to the Department whose statement is unchallenged by the taxpayers, silver certificates have not been redeemable for silver in this country since 1968. To qualify, then, as exempt under RCW 82.04.062 and Rule 248, they must be *monetized bullion*. According to the above-quoted definition of same, though, monetized bullion must be "manufactured from gold, silver, or other metals". *Paper* silver certificates, even though they may represent silver, are not "manufactured" from silver or any other metal. Therefore, they do not qualify as "monetized bullion".

On the third issue, silver certificates, the taxpayers' petition is denied.

[4] Last of the issues is attorney fees. There is no provision in the Revenue Act⁶ that authorizes attorney fees. The taxpayers' petition is denied on this issue.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in large part and denied in small part.

Dated this 29th day of April, 1999.

⁶ Title 82 RCW.