

Cite as Det. No. 99-299, 19 WTD 312 (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. 99-299
)	
...)	Registration No. . . .
)	FY. . . /Audit No. . . .
)	

[1] RULE 258; RCW 82.04.070, RCW 82.04.090: SERVICE B&O TAX – TOUR OPERATOR – TRAVEL AGENT COMMISSIONS. The gross receipts of a tour operator are taxable as service B&O without any deductions except for pass-through expenses. Commissions paid to travel agents are not pass-through expenses. Therefore, a tour operator must include commissions paid to travel agents when reporting its gross receipts for service B&O tax purposes.

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:

Petition for correction of assessment protesting the inclusion of travel agents' commissions in a tour operator's gross receipts.¹

FACTS:

S. Thomas, A.L.J. -- The taxpayer, . . . is engaged in business as a tour operator. The Department of Revenue (Department), Audit Division examined the taxpayer's books and records for the period January 1, 1994 through March 31, 1998.

As a result of this audit, the Audit Division issued Document No. FY. . . . The taxpayer reported its income as travel agent commission. When the taxpayer filed its excise tax returns, it did not report commissions paid to travel agents. The Audit Division reclassified the taxpayer's income as attributable to a tour operator business.² The Audit Division disallowed deductions taken by

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

² In 1996, the Washington State Legislature passed SHB 2590, effective April 1, 1996 which reclassifies the income of tour operators to the same B&O tax rate as travel agents. See RCW 82.04.260. For the years 1994 and 1995,

the taxpayer for commissions paid to travel agents. The taxpayer does not contest the reclassification to a tour operator business. The taxpayer protests . . . Service/Other B&O tax, the tax assessed on the disallowed travel agent commissions.

The taxpayer protests the Audit Division's adding the ten-percent (10%) travel agent commission to its income derived from the sale of tour packages. The taxpayer contends it does not deduct the commissions from its gross receipts. It claims the commissions were never properly included in its gross receipts. The taxpayer explains it was never entitled to receive the travel agent's commission, therefore, it does not include the commission in its income. The taxpayer in its petition argues:

its situation is analogous to a wholesaler who sells to a retailer for a price which is 10% less than the retail price at which the retailer sells to the consumer. There is no support in the RCW which would permit taxation of a wholesalers gross income at the retailer's selling price. The 10% reduction in brochure or retail selling price is standard in the travel industry and is granted to all retail travel agents without regard to the level of service or benefit to be provided by them to either the taxpayer or the retail customer.

[Emphasis original.] During the teleconference, the taxpayer's representative reiterated the above argument. The representative explained the taxpayer is not protesting classification as a tour operator for the purposes of B&O tax, the taxpayer merely protests the inclusion of the travel agent's commissions in its gross receipts.

The taxpayer, the tour operator, publishes a brochure advertising the tour packages. The price listed in the brochure includes the ten-percent (10%) mark up for the travel agent's commission. The taxpayer does not itemize the various charges included in the tour package. When the taxpayer bills the travel agent, it reduces the package total (total cost plus tax) by the agent's commission that is 10% of the total cost. A sample invoice provided by the taxpayer shows that it bills the travel agent as follows:

Total cost	\$4,294.00
Tax	<u>\$ 150.00</u>
Package total	\$4,444.00
Agents Commission	<u>\$ (429.40)</u>
Deposit	<u>(\$4,014.60)</u>
Balance Due	\$ 0.00

ISSUE:

tour operators were taxed at a higher Service/Other B&O rate. WAC 458-20-258 (Rule 258) has not been amended to reflect the statutory changes. However, the sections of Rule 258 discussed in this determination are unchanged by RCW 82.04.260.

Whether a tour operator may exclude a mark up for the travel agent's commission from its measure of tax?

DISCUSSION:

RCW 82.04.220 imposes B&O tax "for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be." WAC 458-20-258 (Rule 258), explains:

if the activity is that of a tour operator business, receipts are B&O taxable in the service classification without any deduction for the cost of materials used, labor costs, interest, discount, delivery cost, taxes, losses, or any other expense; EXCEPT, receipts attributable to pass-through expenses are not included as part of the gross income of the business.

The taxpayer is protesting commissions added to its gross receipts resulting from the sale of tour packages. RCW 82.04.070 defines gross proceeds of sales as:

the value proceeding or accruing from the sale of tangible personal property and/or for services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

The "value proceeding or accruing" is defined in RCW 82.04.090 as "the consideration, whether money, credits, rights, or other property expressed in terms of money, actually received or accrued."

The issue is whether the taxpayer was entitled to receive the commission, not whether the taxpayer actually did receive the commission when it received payment for its tour packages. See Det. No. 90-84, 9 WTD 157 (1990) (fees taken directly from investment fund by investment manager received by the fund manager even when fund manager did not actually receive the fees).

The taxpayer's brochures advertise the tour packages at an amount including the commission the travel agent will receive upon selling a tour package. The taxpayer does not sell the tour packages directly to the general public; instead it relies upon the travel agent to make sales. Therefore, without the travel agents the taxpayer would not sell any tour packages. The taxpayer is not selling a package to the travel agent who in turn resells the package to the retail customer. The taxpayer advertises the tour packages at a cost, which includes the travel agent's commission. The travel agent sells the tour packages and remits payment to the taxpayer after deducting from the total amount due, its 10% commission. The taxpayer's invoice shows it charges the travel agent the full amount of the tour packages and deducts from the amount due the travel agent's 10% commission. Thus, the taxpayer is entitled to receive the commissions.

The taxpayer chooses to conform to industry standards allowing the travel agent to deduct its commission from the amount the travel agent receives from the consumer before remitting payment for the tour to the taxpayer. This professional courtesy however, does not relieve the taxpayer of its statutory duty to pay B&O tax on the gross receipts of its sales for the full-advertised price.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

Dated this 29th day of October, 1999.