Cite as Det. No. 00-038, 19 WTD 732 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment and Refund of	)	D E T E R M I N A T I O N
	)	No. 00-038
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

[1] RULE 111; RCW 82.04.394: B & O TAX – PROPERTY MANAGEMENT COMPANY – EMPLOYEE COMPENSATION – RETROACTIVE. Whether or not RCW 82.04.394 is retroactive is irrelevant if the property management company did not utilize a property trust account under RCW 18.85.310 or specify in its written property management agreement that the company was liable only as agent of the property owner.

[2] RULE 111; RPM 90-1: B & O TAX – PERVASIVE CONTROL – EMPLOYEES. An employer who furnishes employees tools, may not exclude the receipts for the employees under the authority of RPM 90-1.

[3] RULE 111: COMMON PAYMASTER – MERE CONDUIT. Under Det. No. 88-9, 4 WTD 433 (1987), a common paymaster must act as a conduit only, and not provide other services.

[4] RULE 182; RCW 82.04.050; F.O.B. #18: JANITORIAL MAINTENANCE. A property management company's employees who changed light bulbs, furnace filters and belts; adjusted temperature; and cleaned buildings and fixtures; were performing janitorial services.

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 property management company protests the reclassification of payroll costs for on-site personnel.[1]

FACTS:

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

M. Pree, A.L.J. -- . . . (taxpayer) managed commercial property in Washington owned by affiliated entities.[2] The taxpayer negotiated leases, provided financial services, and performed clerical services for property owners. Each entity paid the taxpayer, and the taxpayer reported those receipts under the service and other activities business and occupation (B&O) tax classification.

The Department of Revenue (Department) reviewed the taxpayer's books and records for the period from January 1, 1995 through June 30, 1998. On March 31, 1999, the Department's Audit Division issued the assessment referenced above. The taxpayer disputes the assessment and requests a refund.

The disputed assessment involved the reclassification of receipts for the work of two of the taxpayer's employees who performed maintenance on the properties. The Audit Division reclassified receipts pertaining to their services from the services and other activities B&O classification to the retailing classification and assessed retail sales tax. The taxpayer contends their wages were reimbursed. If the wages qualify as reimbursements, the B&O tax paid by taxpayer should be refunded.

According to the taxpayer, in the Spring of 1994, the taxpayer's CPA made a request for a ruling from the Department's Taxpayer Information and Education (TI&E) section without naming the taxpayer. The CPA had requested TI&E to advise it on the taxability of receipts from property management services, as well as receipts from "task order" work, where modifications were made to the buildings. On May 12, 1994, TI&E wrote to the CPA that the property management receipts were taxable under the service and other activities classification, while charges for the building modifications were taxable under the retailing classification, and subject to retail sales tax. Reimbursement for costs incurred strictly as agent could be deducted. The CPA placed the letter in the taxpayer's file.

When the auditor reviewed the taxpayer's records, according to the taxpayer, the auditor noticed the letter and may have presumed the two employees were making modifications to the buildings. During the hearing, the taxpayer explained subcontractors made the modifications, to whom the taxpayer paid retail sales tax. The employees performed routine services, which they itemized on time cards in three categories: HVAC, building, and grounds. The taxpayer states a fourth category appearing on the cards, task orders, which were contracted out to third parties. Therefore, the disputed wages did not involve task orders. After the hearing, the taxpayer elaborated on the services performed by the two employees as:

<u>HVAC</u>

- Air handler periodic filter replacement
- Air handler periodic belt replacement
- Temperature control adjustments for tenants
- Air flow adjustments for tenants

[2] The owner of the taxpayer is a partner in the partnerships that own the properties.

- Air handler coil cleaning
- Humidifier cleaning

Building
- Light tube replacement
- Door hinge and latch adjustments
- Ceiling tile replacement
- Smoke alarm system monitoring
- Roof drain cleaning
- Fire control sprinkler system testing
- Drinking fountain maintenance
- Exterior surface cleaning
- Non-flushing water closet obstruction removal

Grounds
- Sprinkler system timing adjustments
- Some occasional sidewalk salt applications for ice
- Parking lot light bulb replacement

The building owners paid the taxpayer an amount based upon the hours recorded by each employee at a particular building. At the end of each year the taxpayer reconciled the costs of employment with the amounts it received from each entity owning the buildings, so that the building owners collectively paid the entire cost associated with the two employees.

The same individual directed both employees. He served as the taxpayer's president. He also served as the general partner of the limited partnerships, which owned the buildings where the employees worked. Because the same individual was both general partner of each of the limited partnerships, and also the taxpayer's president, it is not clear under what capacity he directed the two employees. He had the general authority both as the taxpayer's president and general partner to direct the employees.

TAXPAYER'S EXCEPTIONS

The taxpayer contends it may exclude the receipts for the two employees as reimbursements. The taxpayer offers three distinct reasons to support this contention for exclusion of the employees' compensation. If taxable, the taxpayer questions the Audit Division's reclassification.

First, the taxpayer notes, "In 1998, the legislature recognized the need to clarify the tax treatment and exemption. Accordingly, the 'property managers' compensation – business and occupation tax exemption' was passed." Although the stated effective date was July 1, 1998, the taxpayer believes as property manager, it acted as a conduit for exempt transactions, and the new law, "was to eliminate any controversy regarding the tax treatment."

While RCW 82.04.394 allows property management companies to exclude receipts for on-site personnel, the taxpayer acknowledges during the audit period it failed to meet two specific requirements: First, it did not utilize a property trust account under RCW 18.85.310, and second, its written property management agreements did not specify it was liable only as agent of the property owner who approved all actions with respect to the on-site employees.

Second, the taxpayer contends it may exclude the payments under Revenue Policy Memorandum (RPM) 90-1. The taxpayer states the general partner of each of the owners exerted control over the two workers. Under the limited partnership agreements, the general partner has the general authority to enable him to control the workers. The taxpayer asserts the general partner, not the taxpayer, had the ultimate responsibility for each of the 10 control tests.

The Audit Division noted the individual general partner was also the president of the taxpayer. It was unclear under which capacity, general partner or president, he controlled the employees. Further, the taxpayer provided the tools, trucks and computers, necessary for the employees to perform their duties.

Third, the taxpayer contends it acted as a common paymaster for the property owners. As common paymaster, it was merely a conduit for payment of shared payroll costs. The Audit Division notes the employees look to the taxpayer to fulfill most of the property management responsibilities.

Finally, the taxpayer contends its employees did not perform the "task order" work associated with modifying the buildings. Outside contractors performed those services. Rather the two employees performed the services itemized above as HVAC, Building, and Grounds. The taxpayer asserts these services should be taxed under the service and other activities classification rather than as retailing.

ISSUES:

1. Will the Department apply RCW 82.04.394, effective July 1, 1998, . . . retroactively?

2. Under RPM 90-1, did the individual, as general partner of the property owners, and not as the taxpayer's president, exert pervasive control over the two employees with the taxpayer acting solely as agent of the partnerships?

3. Did the taxpayer act as a common paymaster for the property owners?

4. If not excludable, under which classification should the HVAC, Building, and Grounds receipts be taxed?

DISCUSSION:

[1] The taxpayer contends we should apply RCW 82.04.394 retroactively. Yet the taxpayer failed to meet two specific requirements of the new exemption. It did not utilize a property trust account under RCW 18.85.310; nor did its written property management agreements during the audit period specify the taxpayer was liable only as agent of the property owner.[3] Whether or not the new law is retroactive is irrelevant because during the audit period, the taxpayer failed to meet the statutory requirements.

[2] The taxpayer contends it may exclude the payments under RPM 90-1. RPM 90-1 allows businesses, which do not exert any of ten specific elements or factors of control over employees to be treated as payroll agents, rather than as employers performing the taxable services through their employees. Arguably, the taxpayer's president exerts control over the employees, which the taxpayer contends he does in his capacity as general partner. We need not determine whether the taxpayer can demonstrate he was acting solely in the capacity of partner and not directing them as the taxpayer's president.

All ten elements of RPM 90-1 must be met. There is no dispute the taxpayer provided the employees vehicles and computers used to perform their services. The taxpayer does not meet the ninth element under RPM 90-1 because it provides these tools to the employees. Therefore, the taxpayer may not exclude amounts received as a payroll agent for the two employees under RPM 90-1.

[3] In its petition, the taxpayer also contended it qualified as a common paymaster under Det. No. 88-9, 4 WTD 433 (1987). In that determination, the taxpayer was merely a checking account. It was created to pay expenses of the principal entities only. It did not perform any services, other than act as conduit.

Our circumstances differ from Det. No. 88-9. The taxpayer performs services other than acting as a mere conduit. It negotiates leases and arranges for other services. It charged 3.8% of rent for its services. Unlike Det. No. 88-9, the taxpayer is not a mere conduit because it performs other business activities.

[4] By reclassifying the taxpayer's receipts for the services of the two employees, the Audit Division reduced the rate of B&O tax, but added retail sales tax in the assessment. The Audit Division found the charges at issue constituted "retail sales."
RCW 82.04.050 includes in the definition of "retail sale" charges for some services. It specifically includes in subsection (2), labor and services rendered in respect to repairing existing buildings (subsection (b)) as well as cleaning buildings (subsection (d)). However, it specifically excludes janitorial services, stating in subsection (2)(d):

> (d) The sale of or charge made for labor and services rendered in respect to the cleaning, fumigating, razing or moving of existing buildings or structures, but shall not include the charge made for janitorial services; and for purposes of this section the term

[3] The taxpayer provided a 1/1/99 contract, which provided it would be liable only as agent of the owner.

> "janitorial services" shall mean those cleaning and caretaking services ordinarily performed by commercial janitor service businesses including, but not limited to, wall and window washing, floor cleaning and waxing, and the cleaning in place of rugs, drapes and upholstery. The term "janitorial services" does not include painting, papering, repairing, furnace or septic tank cleaning, snow removal or sandblasting; . . . .

The Department recognizes in WAC 458-20-172 (Rule 172) charges for janitorial services are taxed under the service and other activities classification (RCW 82.04.290), and not subject to retail sales tax. We must determine whether or not the services of the two employees were "janitorial services."

The current statutory definition of "janitorial services" followed the decision of the Washington Supreme Court in *Pringle v. State*, 77 Wn.2d 569, 464 P. 2d 425 (1970). At that time the statute excepted janitorial services from the definition of retail sale without elaborating on what were "janitorial services." *See* Ch. 299, Laws of 1971 1st Ex. Sess. The taxpayer in *Pringle* was:

> . . . in the business of cleaning furnaces and chimneys in all types of buildings. In addition to using the usual brooms, steel brushes and scrapers, they employ a power vacuum cleaner mounted on a truck. The cleaning for customers is at infrequent intervals and is usually in addition to the routine care of the heating equipment by the customer himself.

Pringle at 570. The Court held the taxpayer's specialized services[4] constituted "janitorial services." *Id* at 571. The statute was then amended by adding the language:

> and for purposes of this section the term "janitorial services" shall mean those cleaning and caretaking services ordinarily performed by commercial janitor service businesses including, but not limited to, wall and window washing, floor cleaning and waxing, and the cleaning in place of rugs, drapes and upholstery. The term "janitorial services" does not include painting, papering, repairing, furnace or septic tank cleaning, snow removal or sandblasting; . . . .

Ch. 299, Laws of 1971, 1st Ex. Sess. The Governor signed the bill May 21, 1971. *Id.* On December 1, 1971, the Department issued Field Operation Bulletin (F.O.B.) #18 Revised, which discussed janitorial services. While F.O.B. #18 is not binding as precedent, it is indicative of the interpretation of the Department of the legislation, and we find it accurately reflects and implements the amendment. F.O.B. #18 distinguished normal, routine cleaning activities from, "Special clean-up jobs for a contractor or speculative builder after construction," which activities were considered part of the construction contract and taxed accordingly. The statute clearly excepts companies performing specialized repairs and cleaning services from the definition of "janitorial services."

[4] Note the Court's reference to routine care of heating equipment, similar to the taxpayer's activity, which was not at issue in *Pringle*.

However, F.O.B. #18 noted, "Light maintenance contracts and similar sales – the replacement of light bulbs, toilet paper, towels, etc. is a janitorial function."[5]

The activities, as described by the taxpayer, are routine light maintenance and cleaning. They are the type of services performed by janitors, and distinguishable from services, which would require electricians or the type of furnace specialists disputed in *Pringle*. Extensive, specialized cleaning or repair services are contracted out as "task orders." The taxpayer is charged, and pays, retail sales taxes on these "task order" services. We consider the services performed by the two employees comparable to the light maintenance contracts addressed in F.O.B. #18.

We find the services the taxpayer described as "HVAC, Building, and Grounds" are janitorial services. However, The Audit Division has not had an opportunity to verify the nature of these services. We will remand the assessment to the Audit Division for the purpose of reviewing the services actually performed by the two employees.

DECISION AND DISPOSITION:

We deny the taxpayer's petition for refund, but grant the taxpayer's petition for correction of assessment subject to verification. The file is remanded to the Audit Division for verification consistent with this determination.

Dated this 15th day of March, 2000.

[5] Because these are considered service activities rather than retail, sales or use tax must be paid on the light bulbs, filters, etc. F.O.B. #18.