

Cite as Det. No. 05-0172, 25 WTD 138 (2006)

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. 05-0172
)	
...)	
)	Registration No. . . .
)	Doc. No. . . .
)	Docket No. . . .
)	

RULE 180, RULE 182; RCW 82.04.280(4), RCW 82.16.020(1): WAREHOUSING B&O TAX – PUBLIC UTILITY TAX – STORAGE – MOTOR TRANSPORTATION. Gross income from the taxpayer's primary activity of operating a storage warehouse holding documents is subject to warehousing B&O tax, but separate charges to deliver those documents to and from the warehouse is subject to motor transportation PUT because motor transportation services are not incidental to the storage warehouse business.

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.

De Luca, A.L.J. – A storage facility operator protests the assessment of motor transportation public utility tax (PUT) on income it received for transporting its customers' business records to and from its storage facilities. It also protests a late payment of assessment penalty. We sustain the assessment and deny the petition for correction of the assessment.

ISSUES

1. Are charges by a business records storage facility operator for transporting documents to and from its storage facility for its storage customers subject to motor transportation PUT, or are the charges incidental to the storage service and therefore subject to warehousing business and occupation (B&O) tax?¹

2. May we cancel or waive a penalty for failure to timely pay an assessment?

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

FINDINGS OF FACT

The taxpayer is a foreign corporation that, among other activities, operates storage facilities nationwide, including one in the state of Washington. In particular, the taxpayer stores business records for its customers for a fee. The taxpayer uses its motor vehicles to pick up the business records at its customers' places of business and transport them to its storage facility. In addition to the storage charge, the taxpayer separately charges its storage customers for the service of transporting the records to its storage facilities. The taxpayer will charge an additional charge to return records from its storage facilities to a customer if the customer requests the service. The taxpayer explains that the charges for what it calls a "courier" service basically cover its costs of providing that service. The taxpayer also explains that it has authority from the U.S. Department of Transportation (USDOT) as a "private carrier" to provide this service to its customers.²

The Audit Division of the Department of Revenue (DOR) audited the taxpayer [and issued an assessment]. . . . The taxpayer missed the payment and failed to file its petition for correction of assessment by the due date, which resulted in a ten percent late payment penalty Subsequently, the taxpayer paid \$. . . of the assessment, which it does not protest. The taxpayer does protest . . . motor transportation PUT on the transportation charges. It also protests the late payment of assessment penalty.

ANALYSIS

The taxpayer contends the transportation charges are incidental to its storage charges and should be reported under warehousing B&O tax and not motor transportation PUT. It cites Det. No. 90-280, 10 WTD 79 (1990), in support of its argument.

The taxpayer's gross income from its business records storage service is subject to warehousing B&O tax. RCW 82.04.280(4) ("operating a cold storage warehouse or storage warehouse.") See also WAC 458-20-182(2)(a) (Rule 182), which is DOR's rule pertaining to the warehouse business:

Persons engaged in operating any "storage warehouse" or "cold storage warehouse," as defined herein, are subject to tax under the warehousing classification, measured by the gross income of the business. (See RCW 82.04.280.)

"Gross income of the business" for B&O tax purposes is defined in part as:

the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services...all without any deduction on account of the cost of tangible property sold, the cost of

² The taxpayer does not have authority from USDOT to operate as a common or contract carrier serving the public by operating to or from points other than its storage facilities.

materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

RCW 82.04.080.

Whereas, gross incomes of persons providing motor or urban transportation service are subject to PUT, not B&O tax. RCW 82.16.020(1)(f). See also WAC 458-20-180 (Rule 180), which is DOR's rule for motor transportation and urban transportation businesses. "Gross income" for PUT purposes is defined as:

the value proceeding or accruing from the performance of the particular public service or transportation business involved, including operations incidental thereto, but without any deduction on account of the cost of the commodity furnished or sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

RCW 82.12.010(12) (emphasis added). Thus, a difference between the B&O tax definition of "gross income" and the one for PUT is the PUT definition includes "operations incidental" to the particular public service or transportation service involved. Consequently, gross income from operations incidental to motor transportation service is also subject to PUT.

RCW 82.16.010(8) and Rule 180 define "motor transportation business" as

the business (except urban transportation business) of operating any motor propelled vehicle by which persons or property of others are conveyed for hire, and includes, but is not limited to the operation of any motor propelled vehicle as an auto transportation company (except urban transportation business), common carrier or contract carrier as defined by RCW 81.68.010 and 81.80.010.

In Det. No. 90-280, cited by the present taxpayer, a business was engaged in the urban and motor transportation of freight. That taxpayer also provided the following services and made the following charges:

. . . interim storage of goods where the customer cannot take delivery immediately upon the goods' arrival; charges for delayed return of containers in such cases; charges for seeing the goods through the customs office located on taxpayer's premises; and other charges for handling the goods of customers who have hired taxpayer to haul them.

10 WTD at 82. DOR assessed that taxpayer service and other activities B&O tax on those charges. But we found that those activities, when performed during and in conjunction with the primary activity of transporting goods for hire, were taxable under the same public utility tax classifications as the transporting activity itself, either motor or urban. Thus, Det. No. 90-280 clarified that Rule 180 limits taxes for a motor or urban transportation business under the service B&O tax classification to gross income earned from a separately taxable business activity offered to non-cartage customers, or activities offered to cartage customers that are not incidental to the completion

of a cartage customer's haul. Det. No. 90-280 likewise limits taxes for a motor or urban transportation business under the warehousing B&O tax classification to activities that consist of using its building as a warehouse for non-transportation customers and where its books clearly reflect that income was from its warehousing business and not from its transportation business.

Thus, Det. No. 90-280 recognizes that under RCW 82.16.010(12) and Rule 180 interim storage is an incidental part of the cartage business where goods are customarily transferred or held at freight terminals for shippers or consignees. But in the present matter the taxpayer is not primarily engaged in the motor or urban transportation business. Instead, it is primarily in the storage business. Unlike the motor or urban transportation business where interim storage is incidental, we do not find that the present taxpayer's transportation service is necessarily incidental to its storage business. We note again that, unlike the PUT, the definition of gross income for B&O tax purposes does not include "incidental operations." Thus, the definition of gross income for B&O tax purposes does not assist the present taxpayer as the PUT definition of gross income aided the taxpayer in Det. No. 90-280.

Rule 182(3) does list the activities that make up the gross income of the business of operating a warehouse, which "includes all income from the storing, handling, sorting, weighing, measuring, and loading or unloading for storage of tangible personal property." The terms cartage, courier service, motor transportation, urban transportation, and other transportation services are not listed among warehousing activities. Thus, we do not find the taxpayer's transportation service to be an incidental part of the storage business as the taxpayer asserts.

We do note that, in general, DOR does not allow a single billing or contract to be segregated or bifurcated unless there is a reasonable basis to allow it. Det. No. 98-012, 17 WTD 247 (1998); Det. No. 02-0134, 24 WTD 129 (2005). Accordingly, DOR has taxed business activities separately where the taxpayers' contracts, which were negotiated before the work was performed, provided a reasonable basis for determining the value of the various activities performed. *See* Det. No. 89-433A, 11 WTD 313, 316 (1992) and Det. No. 02-0134. Thus, the Audit Division assessed the present taxpayer warehousing B&O tax and motor transportation PUT because there was a reasonable basis for doing so. In short, the taxpayer operates motor vehicles for hire by charging its storage customers a separate fee for its transportation service pursuant to contracts that it negotiated with the customers before performing the service, and which fees are in addition to the storage charges that are subject to warehousing B&O tax.

We add that Rule 182 provides that persons engaged in the business of both urban and motor transportation are taxable under the motor transportation classification upon gross income, unless a proper segregation of such revenue is shown by the books of account of such persons. The Audit Division assessed the taxpayer motor transportation PUT. But if the taxpayer can show that its books and records clearly demonstrate that some of the taxpayer's transportation services are subject to the lower rate of urban transportation classification it can seek a refund and/or report accordingly. The taxpayer should review Det. No. 96-134, 16 WTD 102 (1996), for an explanation of the differences between the two classifications.

The next issue is the ten percent penalty that DOR assessed because the taxpayer did not pay the assessment or file an appeal by the due date stated on the assessment. The taxpayer explains it had no intent to circumvent any laws and has been filing returns on a timely basis. DOR assessed the late payment penalty as required by RCW 82.32.090(2). The legislature does permit the waiver or cancellation of penalties when certain circumstances are beyond a taxpayer's control. RCW 82.32.105(1). But we find no circumstances beyond the taxpayer's control that caused the late payment of the assessment, as that term is defined in WAC 458-20-228(9)(a).

RCW 82.32.105(2) provides for the waiver or cancellation of a late payment penalty imposed under RCW 82.32.090(1) if the taxpayer has timely filed and remitted payment on all tax returns for a period of twenty-four months immediately preceding the period covered by the return for which the waiver is being requested. This provision is inapplicable to the present matter because it pertains only to the waiver of penalties assessed for the late payment of tax returns, not late payment of tax assessments. Det. No. 00-053, 19 WTD 981 (2000).

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 16th day of August, 2005.

STATE OF WASHINGTON DEPARTMENT OF REVENUE