

Cite as Det No. 08-0067E, 27 WTD 194 (2008)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	EXECUTIVE LEVEL DETERMINATION
Assessment of)	
)	
)	No. 08-0067E
...)	
)	Registration No. . . .
)	Document No. . . .
)	Audit No. . . .
)	Docket No. . . .

- [1] RCW 82.04.050(3)(c): RETAIL SALES TAX---EMPLOYMENT SCREENING REPORTS. RCW 82.04.050(3)(c) provides that Credit Bureau Services are retail sales. Credit Service Bureau services relate to the credit history and credit worthiness of the potential customers. The information that Taxpayer buys and assembles to make an employee screening report help a customer make a hiring decision and are not used by the customer to make a credit worthiness decision. Employment screening reports is not a Credit Bureau Service and thus not a retail activity.
- [2] RCW 82.04.460: SERVICE & OTHER ACTIVITIES B&O TAX---EMPLOYMENT SCREENING SERVICES --- APPORTIONMENT. Income derived from selling Employment Screening Services is subject to the Service & Other Activities B&O tax classification. RCW 82.04.460(1) allows apportionment of service and other income received by persons who maintain places of business activities both within and without the state.
- [3] RCW 82.32A; ETA 419: TAX WAIVER ORAL INSTRUCTIONS. The Department lacks legal authority to waive tax based upon oral instructions.

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.

Lewis, A.L.J. – Taxpayer appeals the additional retailing business and occupation (“B&O”) and retail sales tax assessed on sales of custom background reports used to screen employee applicants. The Audit Division assessed the tax concluding that Taxpayer sold “credit bureau

services” and that retail sales occurred in Washington. We conclude that Taxpayer’s income is subject to the service and other activities B&O tax. Taxpayer is not providing “credit bureau services” because its reports are not provided for the customer to determine the creditworthiness of the applicant.¹

ISSUES:

1. Is the provision of employment screening reports a “credit bureau service” taxable as a retail sale under RCW 82.04.050(3)(c), or is it subject to the Service & Other Activities B&O tax classification set forth in RCW 82.04.290(2)?
2. If Taxpayer’s income is subject to the Service & Other Activities B&O tax classification, may Taxpayer apportion its income under RCW 82.04.460?
3. Is the Department estopped from collecting tax based on alleged oral conversations with employees of the Department?

FINDINGS OF FACT:

Taxpayer provides prospective employers with custom background reports used to screen employee applicants. Taxpayer’s main business location is in Washington, with sales offices located [out of state].

Taxpayer offers its customers a wide choice of information: criminal history searches, education and employment verification, motor vehicle accident reports, civil litigation reports, drug testing, federal records searches, international searches, workers compensation history, and skills/behavior assessments. Taxpayer’s customers can order the reports individually, in a discounted package, or customized for specific needs. Customers most frequently order and receive the information through the internet.

Taxpayer presents the information to its customer in a specially designed format that makes the information more useful and understandable. . . . The summary reports also highlight pertinent information such as discrepancies [in information on resumes and facts uncovered by taxpayer]; and uses a comments field where [taxpayer provides supplemental information, shares observations, or makes recommendations].

A major source of information used in the employment screening reports comes from credit reports obtained from . . . credit bureaus, , , . A credit report lists past employment information and current and previous addresses, which aid in conducting a comprehensive criminal search. Taxpayer, as an employment screening business, receives a special credit report, which does not contain all the information contained in a credit report that is used to make a creditworthiness decision. The credit

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

reports that Taxpayer obtains from the . . . credit bureaus contain addresses, social security number, and a listing of accounts, as well as, judgments/liens. However, the reports do not include credit scores, birthdates, spousal name, dependent information, marital status, or account numbers.

When Taxpayer purchases a credit report, the credit bureau's [policy] binds Taxpayer and its customer. One of the permissible uses of the information contained in a credit reports is for purposes of employment screening.

[Taxpayer may provide an employment screening report with a credit report, or without a credit report]. In both instances, whether Taxpayer's customer purchases an employment screening report that includes a credit report or not, Taxpayer's customer is required to sign an agreement stating that the information is solely being used for purposes of evaluating an individual for employment, promotion, reassignment, or retention.

Taxpayer has provided declarations from four of its customers. The declarations echo the substance of the Agreements signed by Taxpayer and its customer that the reports are only used to determine the reliability and suitability of an applicant for employment, and not to determine credit worthiness.

Taxpayer's interaction with the Department began in the early 1990s. During the early 1990's the Department's Audit Division issued Taxpayer's sister corporation a large tax assessment for uncollected retail sales tax. That company operated a tenant screening business, but had not been charging its customers retail sales tax. The tenant screening business could not pay the assessment and ceased operation.

During the discussions with the Audit Division regarding the sister corporation's assessment, Taxpayer states that it was given reporting instructions by the Audit Division. Taxpayer maintains that the during the discussions, the Audit Division instructed Taxpayer to collect and pay retail sales tax only on employment screening reports received by customers in Washington.² Taxpayer maintains it was told that it need not pay B&O tax or collect retail sales tax on reports Taxpayer provided to out-of-state customers. Taxpayer reported its income in that manner.

The present appeal arose after the Audit Division audited Taxpayer's business records for the period January 1, 2001, through June 30, 2005. [In] 2006, the Department issued [an] assessment.³ Almost all of the tax arose from the assessment of retailing B&O tax and retail sales tax on income received from employee screening reports that Taxpayer provided to out-of-state customers. [In] 2007, Taxpayer filed a petition requesting correction of assessment. Taxpayer's petition made three arguments:

² While Taxpayer's president and accountant could recall whom they talked to and the substance of the discussions, Taxpayer was unable to provide either written instructions provided by the Department or a contemporaneously written memo memorializing the discussions.

³ The assessment consisted of \$. . . tax, \$. . . interest, and \$. . . assessment penalty.

First, Taxpayer argued it reported its income correctly, paying retailing B&O tax and collecting retail sales tax only on Washington sales, consistent with the instructions provided by the Audit Division.

Second, Taxpayer argued that their sale of employee screening reports was a service activity and not a retail activity, and therefore subject to service & other activities B&O tax.

Third, Taxpayer argued that even if it was determined that it had been reporting its income incorrectly, the Department should be estopped from collecting the additional tax because it reported in accordance with the tax reporting instructions provided by the Audit Division.

ANALYSIS:

[1] Taxpayer had been reporting and the Audit Division assessed additional tax based on a conclusion that the Taxpayer derived income from the sale of “credit bureau services.” RCW 82.04.050(3)(c)⁴ provides that “credit bureau services” are retail sales. While RCW 82.04.050 does not define the term “credit bureau services,” the Department has issued materials that give guidance. On January 1, 2001, the Department issued Interim Audit Guideline (“IAG”) 03.01. Then, on June 30, 2005, the Department issued ETA 2026.04.08 (“ETA 2026”), which replaced IAG 03.01. Both the IAG and the ETA were issued to “provide instructions on the taxability of credit bureau services and on the proper tax treatment of buyers of credit bureau services where the service provider has not collected retail sales tax.” ETA 2026.04.08 states:

Credit Bureau services are subject to the business and occupation tax under the retailing classification. Services defined as retail sales are also subject to the retail sales tax when the sale of the service occurs within the state. Persons who make sales of credit bureau services in this state are required to collect the retail sales tax on the selling price of the services. There is no sale-for-resale exemption from the retail sales tax applicable to sales of credit bureau services. Accordingly, all sales of credit bureau services in this state are retail sales. If the person who provides taxable credit bureau services fails to collect the retail sales tax, the Department may proceed directly against the buyer to collect any sale tax due. Credit bureau services are not subject to the use tax. Therefore, only the retail sales tax may be assessed against a buyer of credit bureau services.

Credit bureau services include the assembly or evaluation of information bearing on the credit worthiness of any person for the purpose of furnishing such information to third parties. Credit bureau services are not limited to assembly or evaluation of information provided for the purpose of extending credit. Credit bureau services also include the

⁴ RCW 82.04.050 provides:

(3) The term "sale at retail" or "retail sale" shall include the sale of or charge made for personal, business, or professional services including amounts designated as interest, rents, fees, admission, and other service emoluments however designated, received by persons engaging in the following business activities: . . .
(c) Credit bureau services

assembly or evaluation of information provided to third parties who use such information to decide whether to accept a check or other form of payment, enter into a lease transaction, or make any decision where credit worthiness is a consideration. For example, the Department has found check writer verification and tenant screening services to be credit bureau services. (Emphasis added.)

ETA 2026 states that while the substance of credit bureau services, is not limited “to assembly or evaluation of information provided for the purpose of extending credit,” but also includes “assembly or evaluation of information where credit worthiness is a consideration.” ETA 2026 expresses the Department’s position that was announced in an earlier published determination. Det No. 89-89R, 13 WTD 9 (1993) states:

It is the Department’s position that the credit bureau business consists of the rendition of fundamental services to clients, consisting of:

- Information gathering
- Information analysis
- Information formatting and explanation
- Information dissemination

These activities, however performed, together with collateral functions which may be performed from time to time, all relate to the credit history and credit worthiness of the potential customers of the credit bureau’s client. (Emphasis added.)

Admittedly, Taxpayer’s employment screening reports include information obtained from credit reports received from. . . credit bureaus. However, the Taxpayer orders the credit reports for information they contain which may help its customer make a hiring decision. The employment screening reports assembled by Taxpayer from the credit reports and other sources are not used by the customer to make a creditworthiness decision.

In fact, the credit reports provided by the . . . credit bureaus to Taxpayer for employee screening purposes do not contain sufficient information with which to make a creditworthiness decision. Moreover, Taxpayer’s agreements with its customers prohibit them from using the information contained in the reports from being used for purposes other than evaluation of individuals for employment, promotion, reassignment, or retention as an employee. We conclude that Taxpayer’s employment screening reports are not used to determine creditworthiness. Thus, the income from the sale of the employment screening reports is not derived from providing credit bureau services, a retail activity.

Having concluded that the sale of employment screening reports is not a retail activity the next concern is what is the correct tax reporting classification. Generally, service businesses, and business activities that are not otherwise classified, are taxed under the Service & Other Activity B&O tax classification. RCW 82.04.290(2); WAC 458-20-224 (Rule 224). Persons engaged in the business of rendering personal services to others, such as engineers, architects, and attorneys, generally are taxable under that classification. WAC 458-20-138 (Rule 138). It is common for

such personal service providers to issue a report or make some writing that is a physical representation of their service. In such instances, the report is considered the mere tangible representation of the professional services, which were provided to the customer. The service provider is not considered to have made the sale of tangible personal property when the report is intended to be part of the professional service. Likewise, Taxpayer is engaged in providing a service that is not otherwise classified for B&O tax purposes, and the employment screening reports are merely the tangible representation of that service. Thus, we conclude that Taxpayer's income from producing employment screening reports is subject to the Service & Other Activities B&O tax classification.

[2] The next issue is whether all of Taxpayer's employment screening income is taxable to Washington State. Taxpayers who provide services both within and without the state may, under certain circumstances, apportion their gross income between Washington and outside Washington. RCW 82.04.460; Det. No. 92-262E, 12 WTD 431 (1992). Washington then taxes only the Washington portion.

RCW 82.04.460(1) specifically addresses apportionment of service income of persons who maintain places of business both within and without this state. It states:

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.

If Taxpayer has any documentation to support apportionment it must be presented to the Audit Division; otherwise, Taxpayer must report all its income under the Service and Other Activities B&O tax classification.

[3] Finally, Taxpayer argued that it should not be required to pay additional tax based on the fact it reported according to the oral reporting instructions given by an audit supervisor many years ago. RCW 82.32A.020 provides that Washington State taxpayers have "[t]he right to rely on specific, official written advice and written tax reporting instructions from the department of revenue to the taxpayer, and to have . . . tax deficiency assessments waived where the taxpayer has so relied to their proven detriment." RCW 82.32A.020(2). In the present case, Taxpayer did not receive written advice from the Department regarding its method of reporting its income. The advice relied upon by Taxpayer was verbal advice, not written.

Excise Tax Advisory 419.32.99 ("ETA 419") explains the Department's position concerning oral instructions to taxpayers regarding their tax liability. That ETA provides that the Department "cannot authorize, nor does the law permit, the abatement of tax . . . on the basis of a taxpayer's recollection of oral instructions by an agent of the department." That advisory goes on to explain

that the Department will give consideration where the “failure of a taxpayer to report correctly was due to written instructions from the department or any of its authorized agents.” There are three reasons for this policy:

- (1) There is no record of the facts which might have been presented to the agent for his consideration.
- (2) There is no record of instructions or information imparted by the agent, which may have been erroneous or incomplete.
- (3) There is no evidence that such instructions were completely understood or followed by the taxpayer.

In this case, the Department cannot accept Taxpayer’s income as reported and cancel the assessment because Taxpayer did not rely on written instructions from the Audit Division in reporting its tax liability incorrectly.

DECISION AND DISPOSITION:

The matter is remanded to the Audit Division for an adjustment consistent with this decision. The Audit Division will reclassify Taxpayer’s income from the retailing B&O tax classification to the service and other activities B&O tax classification.

Dated this 20th day of March, 2008.