

Cite as Det No. 10-0192, 30 WTD 5 (2011)

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. 10-0192
...	)	
	)	Registration No. . . .
	)	Document No. . . . /Audit No. . . .
	)	Docket No. . . .
	)	

[1] RCW 82.04.260: INSURANCE PRODUCER B&O TAX – SURETY BAIL BONDS. RCW 48.11.080 defines “surety insurance” as including bail bond insurance. Therefore, if a bail bond company is licensed as an insurance producer under Chapter 48.17 RCW, the gross income of the business earned by Taxpayer as a result of its issuance of surety bail bond insurance is taxable at the insurance producers B&O rate.

[2] RULE 164; RCW 82.04.060: INSURANCE PRODUCERS – EXCLUSIONS FROM GROSS INCOME - AMOUNTS HELD FOR THE INSURER. When a licensed bail bond company is required by law to put a percentage of its premium income in a trust account and only pays itself its commission income after first paying the premium payments to the insurer, the bail bond company is permitted to deduct those premium payments from its gross commission income.

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.

Weaver, A.L.J. – A bail bond company that is licensed as an insurance agent authorized to solicit and execute surety bail bonds as an agent for a national surety bond insurer on behalf of criminal defendants petitions for correction of a business and occupation (B&O) tax assessment. The bail bond company’s position is that its gross income derived from its surety bail bond business should be taxed at the insurance producers B&O tax rate and that its taxable gross income should not include the amounts held in trust for the national surety bond insurer. Taxpayer’s petition is granted.<sup>1</sup>

<sup>1</sup> Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410. Nonprecedential portions of this determination have been deleted.

## ISSUES

1. Whether revenues received in exchange for the issuance of surety bail bonds are taxable under RCW 82.04.260, the insurance producers B&O tax rate, or RCW 82.04.290, the service and other activities B&O tax rate.<sup>2</sup>
2. Whether the percentage of revenues received by a bail bond company in exchange for the issuance of surety bail bonds that are held in a separate account and paid over to the insurance company are excludable from the bail bond company's tax measure as an advancement or reimbursement under WAC 458-20-164(3)(a).

## FINDINGS OF FACT

[Taxpayer] was audited by the Audit Division of the Department of Revenue (Department) for the period of January 1, 2005, through December 31, 2008. Taxpayer's business activities include operation of a bail bonding agency located in . . . Washington. As a result of the audit, on May 7, 2009, the Department issued an assessment . . . totaling \$ . . . including \$ . . . in service and other business and occupation (B&O) tax, \$ . . . in use tax, and \$ . . . in interest. Taxpayer filed a timely appeal.

Procedurally, in a criminal proceeding, after the court sets bail, criminal defendants contact Taxpayer to assist them in securing their release from jail. Taxpayer's customers pay Taxpayer a fee of ten percent (10%) of the bail amount set by the court in return for a bond that guarantees the full bail amount set by the court. Washington Superior Courts administer their own procedures for accepting bonds posted by bail bond companies.<sup>3</sup>

As is required by its . . . Superior Court bail bond justification, Taxpayer offers two bail bond options to their customers. The first are property bonds. Taxpayer offers property bonds for bail amounts under \$10,000.00, which are guaranteed by Taxpayer's own funds. At the appeals hearing, Taxpayer stated that its preference is to write property bonds, because Taxpayer has greater ability to set its own compensation, making property bonds more profitable.<sup>4</sup>

Taxpayer also offers surety bail bonds. Surety bail bonds are bonds solicited and executed by bail bond companies on behalf of criminal defendants that are underwritten by national surety bail bond insurance companies. According to the justification requirements set by Washington

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<sup>2</sup> Prior to July 2009, the tax imposed by RCW 82.04.260(9) was identified as the "Insurance Agents" B&O tax. Chapter 117, Laws of 2007, among other changes to Chapter 48.17 RCW, replaced the words "agent" and "broker" with "producer." In 2008, the Legislature amended RCW 82.04.260(9) to conform to the new terminology. See Section 1, Chapter 217, Laws of 2008. As of July 2009, the tax imposed by RCW 82.04.260(9) has been identified as the "Insurance Producers" B&O tax.

<sup>3</sup> See, e.g., Superior Court . . . Justification of Bail Bond Companies and Sureties . . .

<sup>4</sup> The proper B&O taxation of property bonds is not at issue in this determination.

Courts, local bail bond companies are often required to issue surety bail bonds.<sup>5</sup> At the hearing, Taxpayer stated that, according to its particular order of justification from . . . Superior Court, it is required to issue surety bail bonds on bail amounts set over \$10,000.00.

In order for a bail bond company to solicit and execute surety bail bonds, it must be licensed by the Office of the Insurance Commissioner.<sup>6</sup> At the hearing, Taxpayer provided its “Agent License” issued by the Office of the Insurance Commissioner. It states the following:

Effective: . . .

Expires: . . .

The licensee is authorized to sell the following lines of insurance:

Surety

Taxpayer also provided an accompanying “Agent License” for Taxpayer’s individual “insurance representative.”

Taxpayer’s surety bail bonds are underwritten by [an Insurer]. Taxpayer charges its customers ten percent (10%) of the surety bail bond deposited with the Court to satisfy the court-set bail amount. Taxpayer is contractually required to send twelve percent (12%) of any premiums collected from its customers directly to the Insurer.

Taxpayer deposits surety bail bond premiums collected from its customers into a separate trust account. Taxpayer then pays the Insurer its 12% fee directly from Taxpayer’s trust account. After paying the Insurer, Taxpayer transfers the remainder to its own general account as commission income.

Surety bail bonds are filed with the court and reference the particular case name and case number for which the bond is written. The Insurer guarantees that the “above named defendant” will appear in the “above named court” on the date set in the bond to answer criminal charges and “will at all times hold him/herself amenable to the orders and process of the court, and if convicted, will appear for the pronouncement of the judgment or grant of probation.” In the event the defendant does not appear, the Insurer will pay to the State of Washington a sum certain, as set forth in the surety bail bond. The Court can order forfeiture of the bond and can enter judgment against the Insurer for the amount set forth in the surety bond. Taxpayer is authorized by the Insurer to solicit and execute surety bail bonds in the name of the Insurer and must present a Power of Attorney for the Insurer for each surety bail bond Taxpayer files with the court.<sup>[7]</sup>

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<sup>5</sup> See, e.g., [Superior Court Justification of Bail Bond Companies, *supra* note 4.]

<sup>6</sup> See RCW 48.17.010(5), .060; RCW 48.11.080.

<sup>7</sup> WAC 308-19-030 defines “bail bond” as “the contract between the defendant, the surety and/or the court to insure the appearance of the accused before the court(s) at such time as the court may direct.” In this case the surety is the Insurer.

It is the insurance premiums generated by the surety bail bonds that give rise to this appeal. Taxpayer excluded the 12% fee it paid to the Insurer from its gross income when calculating its B&O tax on surety bail bond revenues, and paid insurance producers B&O tax on the remainder. The Department of Revenue's Audit Division determined that Taxpayer should pay service and other activities B&O tax on the entire amount received from criminal defendants purchasing a surety bail bond. The Audit Division reconciled Taxpayer's income by including the amounts Taxpayer paid to the Insurer in Taxpayer's B&O tax base and assessed service and other activities B&O tax on the entire amount, giving credit for the insurance producers B&O tax previously paid. Taxpayer petitions for correction of the assessment.

### ANALYSIS

[1] Taxpayer's first issue on appeal is that the income it receives from the issuance of its surety bonds should be taxed at the insurance producer B&O tax rate, instead of the service and other activities B&O rate. RCW 82.04.260(9) states the following:

(9) Upon every person engaging within this state as an insurance producer or title insurance agent licensed under chapter [48.17](#) RCW or a surplus line broker licensed under chapter [48.15](#) RCW; as to such persons, the amount of the tax with respect to such licensed activities shall be equal to the gross income of such business multiplied by the rate of 0.484 percent.

An "insurance producer" is defined, by statute, as:

(5) "Insurance producer" means a person required to be licensed under the laws of this state to sell, solicit, or negotiate insurance. "Insurance producer" does not include title insurance agents as defined in subsection (15) of this section or surplus line brokers licensed under [48.15](#) RCW.

RCW 48.17.010(5). The term "insurance" means "a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies." RCW 48.01.040. "Surety insurance" includes . . . (2) Bail bond insurance . . . ." RCW 48.11.080.

Because Taxpayer is licensed as an insurance producer under [48.17](#) RCW, we conclude that the gross income of the business earned by Taxpayer as a result of its issuance of surety bail bond insurance is taxable at the insurance producers B&O rate. RCW 82.04.260.

[2] Taxpayer also argues that is entitled to [exclude] the amounts paid to the Insurer from its [taxable gross income]. WAC 458-20-164 (Rule 164) provides the following:

(a) The gross income of the business is determined by the amount of gross commissions received, not by the gross premiums paid by the insured. The term "gross income of the business" includes gross receipts from commissions, fees or other amounts which the

agent, broker, or solicitor receives or becomes entitled to receive. The gross income of the business does not include amounts held in trust for the insurer or the client.

Rule 164(3)(a). Taxpayer is required by law to deposit the upfront fees collected from criminal defendants for surety bail bonds into a separate trust account. RCW 48.17.600. The 10% fee collected from criminal defendants constitutes an insurance “premium” paid for surety bail bond insurance. Taxpayer then pays the Insurer 12% of the insurance premiums collected from criminal defendants and deposited into the trust account. After paying the Insurer, Taxpayer transfers the remaining amount of the upfront fees to its own operating account as commission income. Taxpayer’s disbursement practices follow the requirements for insurance producers to maintain a separate account for premiums collected. *See* WAC 284-12-080.

Taxpayer’s “gross commissions received” on its surety bail bond business are the upfront fees it collects from criminal defendants less the 12% it pays to the Insurer. Rule 164(3)(a). Rule 164(3)(a) specifically [excludes from gross income] “amounts held in trust for the insurer” from the gross income of the business for determining an insurance agent’s B&O tax base. *Id.* Pursuant to both the legal obligations of RCW 48.17.600 and WAC 284-12-080, as well as its contract with the Insurer, Taxpayer keeps a separate account for premiums collected from criminal defendants and pays the Insurer 12% of those collected premiums directly from that separate trust account. For these reasons, and under the authority of Rule 164(3)(a), we conclude that Taxpayer is entitled to [exclude] any amounts paid to the Insurer from its trust account in calculating the gross income of its surety bail bond business subject to the insurance producers B&O tax rate.

#### DECISION AND DISPOSITION

Taxpayer’s petition is granted.

Dated this 17th day of June 2010.