

\$. . .	Retail Sales Taxes
. . .	Retailing B&O Tax
. . .	Wholesaling B&O Tax
. . .	Use Tax/Deferred Sales Tax
. . .	Total Debit
. . .	Audit Interest
. . .	Total Assessed
. . .	Additional Interest (10/2/12 – 7/30/14)
\$. . .	Total Due

Taxpayer appealed the assessment, which has not been paid, on July 30, 2013.

At Taxpayer's request, we remanded the matter back to Audit on February 28, 2014 so that Taxpayer could provide more information and arguments to that division. After interaction between Taxpayer and Audit, Audit notified Taxpayer by letter dated May 21, 2014, that it was not persuaded that the short payments by customers' retail lending companies constituted "discounts," and would not be amending the assessment. The retail sales tax assessed, when added to the retail sales taxes that Taxpayer had already remitted, equaled the retail sales taxes charged to customers. A hearing was held in the matter on June 23, 2014.

Taxpayer's business is headquartered in . . . Washington. Taxpayer's business activities during the audit period included the installation of heating, ventilation, and air conditioning systems (HVAC) in homes for contractors (wholesale) and consumers (retail) in Washington and [out of state]. Taxpayer also provided repair parts and service for HVAC systems.

During the audit period, Taxpayer met with customers to evaluate their heating/cooling needs. Taxpayer worked with customers to design, price, and select the desired systems.

Taxpayer did not extend financing to its customers. If customers did not have or want to use their own resources –cash, credit card, or a loan from their own banks, credit unions, or local public utilities – they could enter into a retail installment contract with certain other retail financing companies with whom Taxpayer worked. . . . Customers could arrange loans equal to the purchase price (including retail sales taxes) of Taxpayer's heating/cooling systems. Under these contracts, customers borrowed and were required to repay the full purchase price amounts, plus interest. The finance companies generally did UCC filings to secure their interests.

Taxpayer invoiced the finance companies for the full cost (including retail taxes) of customers' systems. These invoices designated customers and their addresses under the "service at" designation of the invoice. The Department and Taxpayer agree that, even though Taxpayer invoiced the finance companies, the finance companies were not the actual buyers of the systems.

PAA #2 was essentially the same as PAA #1 except for additional extension interest through its date of issuance on June 30, 2014.

Even though customers remained fully liable for the amounts they borrowed from the finance companies, the finance companies short paid Taxpayer's invoices.³ Taxpayer accepted these amounts as "paid in full," and booked the short paid amounts in bookkeeping accounts labeled "Finance Company Buydowns" and "Coupons and Discounts." The short paid amounts by [finance companies] were designated as either "fees" or "buydowns" and were booked into the "Finance Company Buydowns" account.⁴ Taxpayer designated shortfalls by [a credit union] as "UCC filing fee," "financing fee," or "CU fees," and these were placed into the "Coupons and Discounts" account.⁵

Taxpayer treated all short paid amounts booked into the "Finance Company Buydowns" and "Coupons and Discounts" accounts as "discounts." Taxpayer then used the amount it actually received from the finance companies as the taxable measure of both the B&O tax and the retail sales tax.⁶

Taxpayer provided a declaration by Taxpayer's owner that there are "no documents" reflecting an agreement between Taxpayer and the finance companies. Taxpayer's accountant stated:

In my professional opinion there are no contractual links between the taxpayer and financing companies, and, in all instances, the discount involved only the customer. Further, in all instances, the discount was applied solely against the customer's receivable.

Taxpayer provided completed rebate applications for its customers for the equipment or systems purchased. Taxpayer also provided warranty registration information for customers. For both purposes, Taxpayer used the entire invoiced price.

ANALYSIS

The sale and installation of heating and/or cooling equipment in the home of a consumer is a retail sale. RCW 82.04.050(2)(b). For B&O tax purposes, the taxable measure of a retail sale is the "gross proceeds of sales." RCW 82.04.250. "Gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property . . . and/or for other services rendered, without any deduction on account . . . discount paid" RCW 82.04.070.

For retail sales tax purposes, the taxable measure is the "selling price." RCW 82.08.020(1). "Selling price" is generally defined as "the total amount of consideration . . . under which tangible personal property . . . or anything else defined as a retail sale under RCW 82.04.050 are sold"

³ From the limited number of invoices provided, the short paid amount was usually around 5% of the borrowed amount.

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⁵ . . .

⁶ Taxpayer's excise tax returns reported total "gross proceeds of sales" (for B&O tax purposes) and "selling prices" (for retail sales tax purposes), and then calculated and took deductions for discounts/allowances. Audit did not reconcile what the taxpayer deducted with what was allowable, but instead determined the net retailing and retail sales amounts after allowing bona fide discounts and compared them to the net amounts reported by Taxpayer.

“Selling price” does not include bona fide discounts taken by purchasers. RCW 82.04.160⁷, and RCW 82.08.010(1)(b).⁸

WAC 458-20-108 therefore provides:

(5) Discounts. The selling price of a service or of an article of tangible personal property does not include the amount of bona fide discounts actually taken by the buyer and the amount of such discount may be deducted from gross proceeds of sales providing such amount has been included in the gross amount reported.

(a) Discounts are not deductible under the retail sales tax when such tax is collected upon the selling price before the discount is taken and no portion of the tax is refunded to the buyer.

As Det. No. 88-208, 5 WTD 403 (1988) explains: “[T]he Department has recognized that bona fide discounts may be granted for reasons other than simply timely payment by the buyer.” In Det. No. 05-0142, 26 WTD 256 (2007) the Department explained what qualifies as a bona fide discount under Rule 108(5), stating:

The Department recognizes that “discounts” qualify as bona fide when they are merely “reduced prices,” i.e., the seller's selling price was merely reduced before the sale is made and there is no requirement for the purchaser to do anything in return. Det. No. 88-208, 5 WTD 403 (1988).

In this case, Taxpayer argues that the short paid amounts were bona fide discounts actually taken by Taxpayer’s customers. Taxpayer reasons that these “discounts” were taken by its customers because the finance companies were the customers’ agents. Taxpayer further reasons that its customers actually received the benefit of these “discounts” because it accepted the short paid amounts as payments in full and did not sue its customers for the difference.

The essential elements of an agency relationship are mutual consent between a principal and agent, and control of the agent by the principal. *See, e.g., Nordstrom Credit, Inc. v. Dep’t of Revenue*, 120 Wn.2d 935, 941, 845 P.2d 1331 (1993); *Rho [Co. v Dep’t of Revenue*, 113 Wn.2d at 561, 570, 782, P.2d986 (1989)]. Agency must be proven; it cannot be presumed. *Stockdale v. Horlacher*, 189 Wash. 264, 267, 64 P.2d 1015 (1937); *Blodgett v. Olympic Sav. & Loan Ass’n.*, 32 Wn. App. 116, 128, 646 P.2d 139 (1982). The burden of establishing an agency relationship is on the party asserting its existence. *Hewson Constr., Inc. v. Reintree Corp.*, 101 Wn.2d 819, 823, 685 P.2d 1062 (1984); *Bergin v. Thomas*, 30 Wn. App. 967, 970, 638 P.2d 621 (1981).

. . . Although Excise Tax Advisory No. 2016.04.111 (First Revision, issued on January 4, 2005)⁹ (ETA 2016) concerns staffing companies, it discusses agency in some detail:

⁷ RCW 82.04.4283 provides: “In computing tax there may be deducted from the measure of tax the amount of cash discount actually taken by the purchaser. . . .” RCW 82.04.160 provides: ““Cash discount” means a deduction from the invoice price of goods or charge for services which is allowed if the bill is paid on or before a specified date.”

⁸ RCW 82.08.010(1)(b) provides: “‘Selling price’ or ‘sales price’ does not include: ‘Discounts . . . that are allowed by a seller and taken by a purchaser on a sale . . .’”

The existence of an agency relationship is not controlled by the labels the parties use to describe themselves in their contract documents. Rather, standard common law agency principles are used in analyzing whether an agency relationship exists. The essential elements of common law agency are mutual consent to the relationship between a principal and an agent, and the right of control over the agent by the principal. If these elements are not satisfied, there is no agency relationship.

. . . Taxpayer, who has the burden of proving an agency relationship, has provided no evidence to establish that its customers and their finance companies mutually consented to a principal/agent relationship. Taxpayer has, further, provided no evidence that customers even knew (or should have known) that their finance companies were not paying Taxpayer's invoices for customer's purchases in full with the money that they had borrowed.

We hold that the finance companies were not the agents of Taxpayer's customers, and that when they short paid Taxpayer's invoices, the amounts that Taxpayer forgave were not "discounts" taken by Taxpayer's customers. This is so regardless of the purpose of the short pays (UCC filings, fees, etc), and regardless of the agreement or understanding (or non-agreement) between Taxpayer and the finance companies. The short pays, and Taxpayer's acceptance of them as payments in full of customer invoices, were a matter strictly between Taxpayer and the finance companies. They were not bona fide discounts actually taken by the Taxpayer's customer; therefore, they are not excludable from the B&O or retail sales tax measure under RCW 82.08.010(1)(b) and WAC 458-20-108.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 29th day of July 2014.

⁹ The Department promulgated this revision after the issuance of *City of Tacoma v. The William Rogers Co.*, 148 Wn.2d 169, 60 P.3d 79 (2002).