

Cite as Det. No. 15-0060, 34 WTD 500 (2015)

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. 15-0060
)	
...)	Registration No. ...
)	

RULE 110, RULE 111; RCW 82.04.070, RCW 82.08.010: BUSINESS AND OCCUPATION TAX – RETAIL SALES TAX – GROSS PROCEEDS OF SALES – SALES PRICE – DEDUCTIONS – DELIVERY CHARGES - THIRD-PARTY SHIPPER – LIABILITY FOR PAYMENT – PRIMARY – SECONDARY. The Department determined that the taxpayer failed to show it had no primary or secondary liability for delivery charges the taxpayer paid to a third-party shipper then billed back to its customers. Thus, the Department determined that the assessment of B&O tax and retail sales tax at issue was warranted as the amounts taxed were properly included in the taxpayer's gross proceeds of sales.

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.

Valentine, A.L.J. – The taxpayer objects to the assessment of Retailing business and occupation (B&O) tax and retail sales tax for delivery charges it paid to third-party shippers and later billed back to buyers of its equipment. We determine that Taxpayer does not show it had no liability, either primarily or secondarily, for the delivery charges. Taxpayer's petition is denied.¹

ISSUE

Pursuant to RCW 82.04.070, RCW 82.08.010, WAC 458-20-110 (Rule 110), and WAC 458-20-111 (Rule 111), if a seller pays a third-party shipper for delivery charges and then bills its buyers for those same shipping charges after delivery, are the delivery charges deductible from the sales price and the seller's gross proceeds of sales for B&O tax and retail sales tax purposes?

FINDINGS OF FACT

[Taxpayer] is a foreign corporation registered to do business in Washington. During the audit period of . . . , Taxpayer's Washington business activities consisted of retail sales of . . . harvesting and handling equipment. There is no dispute in this case that Taxpayer's sales in

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

Washington constitute retail sales and that the sales proceeds are subject to Retailing B&O tax and retail sales tax.

As a result of the audit, the Department of Revenue (Department) assessed Taxpayer \$. . . for retail sales tax, Retailing B&O tax, and interest. The Department's Audit Division (Audit) found that Taxpayer did not include delivery charges in its gross proceeds of sales as reported on its excise tax returns. Audit issued the assessment on the unreported delivery charges accordingly.

During the hearing, Taxpayer explained its business model and how it handles delivery charges. Once Taxpayer receives an order from a customer, it builds the ordered machinery. Taxpayer then engages a third party to ship the equipment to the customer. Taxpayer and the shipper agree on freight charges prior to shipment.

After the equipment has been shipped and delivered, Taxpayer receives an invoice for shipping and delivery charges from the third-party shipper. Taxpayer pays the shipper for the freight charges. Taxpayer then bills its customer for the equipment sale and delivery charges in one bill.

Taxpayer considers its freight payments pass-through payments on behalf of its customers. Taxpayer contends that its customers are responsible for paying the freight/delivery charges. Thus, Taxpayer objects to having delivery charges included in its gross income, or gross proceeds of sales, for B&O tax and retail sales tax purposes.

ANALYSIS

Washington State imposes a B&O tax “for the act or privilege of engaging in business activities” in this state “measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be. RCW 82.04.220(1). The measure of the Retailing B&O tax is the “gross proceeds of sales.” RCW 82.04.250. Washington law defines the term “gross proceeds of sales” as “the value proceeding or accruing from the sale of tangible personal property . . . and/or for other services rendered.” RCW 82.04.070. No deduction from “gross proceeds of sales” is allowed for “the cost of property sold, the cost of materials used, labor costs, interest, discount paid, *delivery costs*, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.” *Id.* (Emphasis added.) (See also RCW 82.08.010(1)(a)(i), which instructs that these same costs cannot be deducted from the “sale price.”)

RCW 82.08.010(4) defines “delivery charges” to include “charges by the seller of personal property or services for preparation and delivery to a location designated by the purchaser of personal property or services including, but not limited to, *transportation, shipping*, postage, handling, crating, and packing.” (Emphasis added.)

Rule 110 is the Department's administrative regulation addressing delivery charges. It explains that freight and delivery costs charged to a buyer by a seller are generally part of the selling price. The Department bases this interpretation, in part, upon the definition of “gross proceeds of sales” at RCW 82.04.070. See Det. No. 00-094, 21 WTD 58 (2002).

Thus, pursuant to Washington State law and regulation, delivery charges paid by a buyer to a seller are included in the sale price of tangible personal property and in the seller's "gross proceeds of sales," all of which is subject to B&O tax. RCW 82.04.220. Also, because Taxpayer's sales are retail sales and delivery charges are included in the sale price, retail sales tax is due on amounts received for delivery charges, barring a specific exemption, in addition to Retailing B&O tax. RCW 82.08.020 and 82.04.050; Rule 110(3)(b).

There is one circumstance where delivery charges may be deducted from the selling price and a seller's "gross proceeds of sales." Pursuant to Rule 110(3)(d), "Delivery charges incurred after the buyer takes delivery of the goods are not part of the selling price *when the seller is not liable for payment of the delivery charges.*" (Emphasis added.) However, in order to exclude delivery charges from the "gross proceeds of sales" and the "selling price," the seller must document that the buyer alone is responsible to pay the third-party shipper for the delivery charges. Rule 110(3)(d).

In this case, we conclude that Taxpayer has not shown that its buyers were responsible alone for payment of third-party shipping and delivery charges. As outlined above, the facts in this case are as follows: Taxpayer arranges for shipment and delivery of the equipment it sells, negotiates the shipping/delivery price, receives the delivery invoices directly from shippers, and pays the invoices directly to the shippers. There is no evidence in the record that Taxpayer's buyers have any direct involvement with the shippers, other than the receipt of goods. The buyers pay Taxpayer for delivery charges when they receive invoices from Taxpayer for purchases of equipment plus delivery charges.

We conclude from these facts that Taxpayer has not established that its buyers have sole responsibility for paying third-party shippers for delivery charges. Thus, we determine that the shipping charges Taxpayer pays directly to the third-party shippers cannot be deducted from the sale price of the equipment it sells or the subsequent "gross proceeds of sales" it reports.

We note that Taxpayer asserts its payments to third-party shippers, during the audit period, were on behalf of its buyers, and that the payments amounted to "pass-through payments." Rule 458-20-111 (Rule 111) is the Department's administrative regulation that excludes from the measure of tax amounts received as "advances" and "reimbursements."

Rule 111, reads, in pertinent part:

The words "advance" and "reimbursement" apply only *when the customer or client alone is liable for the payment of the fees or costs and when the taxpayer making the payment has no personal liability therefor, either primarily or secondarily*, other than as agent for the customer or client.

There may be excluded from the measure of tax amounts representing money or credit received by a taxpayer as reimbursement of an advance in accordance with the regular and usual custom of his business or profession.

The foregoing is limited to cases wherein the taxpayer, as an incident to the business, undertakes, on behalf of the customer . . . the payment of money . . . in procuring a service for the customer . . . *which the taxpayer does not or cannot render and for which no liability attaches to the taxpayer.*

(Emphasis added.)

Det. No. 13-0336, 33 WTD 160 (2014) includes an in-depth discussion of Rule 111, the agency relationship, and what is required for Rule 111 to apply to a particular transaction. It reads, in pertinent part:

Rule 111 requires the existence of a true agency relationship between the client and the taxpayer. *See Washington Imaging Services, LLC v. Dep't. of Revenue*, 171 Wn.2d 548, 562, 252 P.3d 885 (2011). Agency requires a factual determination that both parties consented to the agency relationship and that the principal exercised control over the agent. *Id.*; *see also Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 941, 835 P.2d 1331 (1993); Det. No. 05-0206E, 25 WTD 72 (2006); Det. No. 03-0128, 24 WTD 168 (2005); Restatement (Third) of Agency § 1.01 (2006). The *Washington Imaging* court emphasized that, "The proper focus is on the facts and whether they show a true agency relationship that requires payment to a third party on behalf of the recipient (e.g., client or patient) paying for the goods or services." *Washington Imaging*, 171 Wn.2d at 565, 252 P.3d 885.

Once an agency relationship has been established, an inquiry must be made into whether the taxpayer's liability to pay constituted "solely agent liability." *City of Tacoma v. Wm. Rogers Co.*, 148 Wn.2d 169, 178, 60 P.3d 79, 83 (2002). The *Wm. Rogers* court explained that if a taxpayer assumes any liability beyond that of an agent, payments made to such liability are not excludable under Rule 111. *Id.*

Det. No. 13-0334, 33 WTD 414 (2014) also includes a discussion of Rule 111:

Under WAC 458-20-111 ("Rule 111"), a taxpayer may exclude [certain] receipts from the calculation of gross income. Specifically, taxpayers may exclude advances and reimbursements received from a customer or client when the taxpayer holds the money or credit to make a payment on behalf of the customer or client. Rule 111. If the taxpayer making the payment has no personal liability, primarily or secondarily, to the recipient of the funds, then the advance or reimbursement is [not included in taxable gross income]. *Id.*

The concept is that amounts provided to a business solely in its capacity as an agent for a client cannot be attributed to the business activities of the agent and therefore are not taxable. *Washington Imaging Services, LLC v. Dep't of Revenue*, 171 Wn.2d 548, 560, 252 P.3d 885 (2011); *City of Tacoma v. William Rogers Co.*, 148 Wn.2d 169, 175, 60 P.3d 79 (2003).

We note that taxpayers have the burden of proof when contesting tax assessments. RCW 82.32.160 and .180; *Budget Rent-A-Car of Washington-Oregon, Inc. v. Dep't of Revenue*, 81

Wn.2d 171, 500 P.2d 764 (1972). The burden of proof is on the taxpayer to prove that a tax assessment should be modified or cancelled. *Group Health Co-op v. Tax Comm'n*, 72 Wn.2d 422, 429, 433 P.2d 201 (1967).

As stated above, Taxpayer offers no evidence that it had no liability, either primarily or secondarily, to pay the shipping charges billed to it by third-party shippers. Taxpayer offers no evidence that it was acting merely as an agent for its customers when it paid for shipping costs and later billed its customers for these same shipping charges. Taxpayer negotiated the shipping and delivery costs, and was billed directly by the shippers. These facts do not support a finding that Taxpayer was acting merely as an agent for its buyers regarding shipping and delivery charges. We conclude, therefore, that Rule 111 is not applicable to Taxpayer's sales.

Thus, we find no legal basis to grant relief. We sustain Audit's assessment.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 6th day of March, 2015.