

Cite as 9 WTD 039 (1989)

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition) D E T E R M I N A T I O N
For Correction of Assessment)
of) No. 89-553
)
 . . .) Registration No. . . .
) Audit No. . . .

RULE 194: OUT-OF-STATE SERVICES -- APPORTIONMENT.
A taxpayer who does not maintain a place of business outside the state is entitled to apportion service income when the out-of-state services performed are more than incidental.

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.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: July 18, 1989

NATURE OF ACTION:

The taxpayer petitions for the correction of assessment of B&O taxes to allow for apportionment of out of state activities.

FACTS AND ISSUES:

Pree, A.L.J. -- The taxpayer is a partnership formed by two residents of Washington. The taxpayer's office is located in the State of Washington. The taxpayer provides construction management services to an organization which builds and then operates retirement homes. During the audit period, the construction sites were all outside of the state of Washington.

The taxpayer enters an agreement with the owner/builder for each project whereby the taxpayer agrees to provide the following services:

1. preliminary market and financial feasibility studies,
2. preliminary plans,
3. financial consulting,
4. cost estimates of construction and equipment,
5. procuring construction permits,
6. architectural plans with specifications and services,

The taxpayer indicates that its primary service for which it is paid is to oversee the building construction at the various sites throughout the United States. To accomplish that goal, it has two construction superintendents that it has lined up to work on site for the owner/builder on a daily business. These superintendents are paid a set salary every two weeks directly by the owner/builder as part of the construction cost. In addition, one of the two partners is required to visit the project at least once every three weeks. They estimate that about 50% of their time is spent performing this function.

The same superintendents are continually working with the taxpayer at various sites for the same builder/owner. Although they are paid primarily by the owner/builder, the taxpayer indicates that they are also paid for their services by the taxpayer. The reason the owner/builder is designated as the employer is to avoid having the taxpayer be licensed as the contractor at each site.

The taxpayer has an office in Washington, but none of the construction is performed here. The taxpayer is entitled under its contract with the owner/builders to be provided with an office on the job sites. The offices are provided together with telephones. These are the mobile-home-type offices which are towed from site to site.

The auditor, relying on Rule 194, allocated all of the taxpayer's service income to Washington and denied any apportionment since the taxpayer maintained no offices outside the state. The taxpayer contends that it is entitled to apportion its income since the out--of-state services it performs are more than incidental.

DISCUSSION:

The taxpayers have been denied apportionment on the various out-of-state services based on a finding that they did not maintain a place of business where the services were being performed. In so finding, we did not consider whether or not the out-of-state services were more than incidental. WAC 458-20-194 (Rule 194), discusses the requirements for apportionment of service income as well as the methods used to determine the income, stating in part:

Persons domiciled in and having a place of business in this state, who (1) sell or lease personal property to buyers or lessees outside this state, or (2) perform construction or installation contracts outside this state, or (3) render services to others outside this state, are doing business both inside and outside this state. Whether or not such persons are subject to business tax under the law depends upon the kind of business and the manner in which it is transacted. The following general principles govern in determining tax liability or tax immunity.

. . . .

When the business involves a transaction taxable under the classification service and other business activities, the tax does not apply upon any part of the gross income received for services incidentally rendered to persons in this state by a person who does not maintain a place of business in this state and who is not domiciled herein. However, the tax applies upon the income received for services incidentally rendered to persons outside this state by a person domiciled herein who does not maintain a place of business within the jurisdiction of the place of domicile of the person to whom the service is rendered. (Emphasis added.)

The Rule emphasizes the necessity of maintaining an out-of-state place of business (a nexus contact) only when the services rendered out-of-state might otherwise be deemed "incidental," such that they do not provide taxing nexus to the out-of-state jurisdiction. After reviewing the situation discussed above, we believe the taxpayer's services performed out-of-state were more than "incidental," thus entitling the taxpayer to apportion the out-of-state income. If the benefits derived by the customer were the direct result of out-of-state services performed by the taxpayer, those

services are more than incidental and are subject to apportionment.

Here the primary service of the taxpayer, overseeing the construction on-site, was necessarily performed out-of-state. The benefits derived by the contractor were a direct result of those services which could only be performed out-of-state. Therefore, the out-of-state services were more than incidental and the taxpayer is entitled to apportion its service income.

DECISION AND DISPOSITION:

The taxpayer's petition is granted. The audit section will apportion the taxpayer's income and issue a post audit assessment.

DATED this 21st day of December 1989.