THIS DETERMINATION HAS BEEN WITHDRAWN EFFECTIVE OCTOBER 2, 2019, AND IS NO LONGER IN EFFECT. SEE ETA 3133.2019.

Cite as 9 WTD 293 (1990)

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

In the Matter of the Petition For Correction of Assessment of	FINAL DETERMINATION No. 88-311A
. . .	Registration No. . . . / . . . Audit No. . . .

[1] RULE 163: RCW 82.04.320 AND RCW 48.14.080 -- B&O TAX -- EXEMPTION -- INSURANCE BUSINESS. The gross premiums tax established by Title 48 RCW is in lieu of all other taxes on the insurance business, but not in lieu of B&O tax on income from business activities which are not functionally related to the insurance business.

[2] RULE 102 AND RULE 178: RCW 82.12.010(2) -- SALES TAX -- RESALE CERTIFICATE -- PURCHASES FOR A DUAL PURPOSE. A Taxpayer who purchases items for both resale and consumption and gave a resale certificate for all purchases is liable for deferred sales tax on items that were not resold, but delivered to taxpayer in Washington.

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: . . .
. . .

DEPARTMENT REPRESENTED BY: Garry G. Fujita, Former Assistant Director
Edward L. Faker, Former Sr. A.L.J.

DATE OF TELECONFERENCE: November 30, 1988

NATURE OF ACTION:

Faker, A.D.[1] -- The taxpayer appeals to the Director of the Department of Revenue ("Department") from the findings and conclusions of Determination No, 88-311, issued August 5, 1988. The operative facts, pertinent to the issues on appeal, are fully set forth in the original determination and will not be restated here.

ISSUES:

The issues presented on appeal are stated as follows:

1. Does RCW 48.14.080 preclude the assessment of business and occupation tax upon the gross receipts of an insurance company derived from services performed for affiliates?

2. Does the retail sales tax properly apply to purchases of tangible personal property in this state for incorporation into products for use outside the state?

TAXPAYER'S EXCEPTIONS:

As to the first issue, the taxpayer asserts its original position that the language of RCW 48.14.080 is plenary and preemptive in establishing that "as to insurers" the insurance premiums tax of Chapter 48.14 RCW is in lieu of all other taxes, with specific exclusions not relevant here. Thus, the taxpayer argues that the B&O tax may not be assessed upon any of its income even if the portions sought to be taxed are not subject to the insurance premiums tax. The taxpayer is aware of the express provisions of RCW 82.04.320 that the B&O tax does not apply in respect to insurance business upon which a tax based on gross premiums is paid. However, the taxpayer insists that the Insurance Code provision of RCW 48.14.080 addresses specific persons, i.e., "insurers;" and as to these persons it imposes the premiums tax "in lieu of all other taxes." According to the taxpayer, the "in lieu" provision is plenary in nature and it proscribes any other taxes upon insurance businesses. The taxpayer emphasizes that the "in lieu" provision is not an

[1] Administrative Law Judge, Robert Heller, also participated in the production of this Final Determination.

exemption or deduction provision covering only that portion of an insurer's business upon which the premium tax is actually due and paid. Instead, the taxpayer asserts it is a preemptive provision.

The taxpayer submitted a pamphlet which it produced which stresses that the gross premiums tax of Chapter 48.14 RCW is literally an "in lieu" tax which is intended to replace all other kinds of taxation (except property tax and some transaction taxes expressly excluded.) The taxpayer notes that of the 2.1% gross premiums tax, 2% goes to the general fund of this state and the remaining .1% funds the State Insurance Commissioner's Office as a dedicated fund.

Furthermore, the taxpayer reminds us that the Department of Revenue has ruled that income from the investment of premium dollars and the receipt of interest from investments, including interest received from loans against life insurance policies is excluded from B&O tax liability. This ruling presumably recognizes that the gross premiums tax is not imposed only upon certain portions of income (premiums), but has a broader scope. Thus, it argues the position taken by the Department in a subsequent Determination 88-186, 5 WTD 319 (1988) that the gross premiums tax is imposed upon "income", not "persons" (meaning insurers) is incorrect. Rather, RCW 48.14.020(4) clearly expresses the legislative characterization of the gross premiums tax as an "excise" on persons doing business as insurers. If not, then it must be an excise tax on gross premiums which would constitute an unconstitutional income tax.

The taxpayer asserts that its foregoing arguments demonstrate the need for an administrative policy ruling upon the issues in controversy. The taxpayer's activities subjected to the B&O tax in this case were simply related insurance activities of an insurer in an attempt to provide its insurance at the most efficient rates. The Department should not bifurcate these activities and isolate every insurance function which generates revenue in an attempt to distinguish that activity from the insurance business in order to subject that isolated activity to the B&O tax.

Finally on this issue, the taxpayer asserts that the Service B&O tax assessed upon income from affiliate companies for data processing, accounting, legal services, personnel, education and administration expenses allocated to such affiliates results

in taxing income which has already been subject to the gross premiums tax. It asserts that of the $396,200 assessed for Service B&O tax, $273,000 has been subjected to the gross premiums tax.

As to the second issue, the taxpayer argues that deferred sales/use tax was improperly assessed on materials (paper and ink) purchased in connection with printing insurance forms for use out of state.
The taxpayer asserts that it should not pay Washington use/deferred sales tax on the forms it ships out of state for its own use because it pays use tax in the destination state. The taxpayer asserts that tax may only be assessed in the state of first use.

DISCUSSION:

[1] B&O Tax on Expenses Allocated to Affiliates. All insurance companies doing business in Washington State are subject to a tax equal to 2.1% of their gross premium income. RCW 48.14.020. This "gross premiums" tax is collected and administered by the office of the Insurance Commissioner. According to RCW 48.14.080:

> As to insurers other than title insurers, the taxes imposed by this title shall be in lieu of all other taxes, except taxes on real and tangible personal property and excise taxes on the sale, purchase or use of such property.

The taxpayer argues that, as to insurers, this provision preempts all forms of taxation other than the gross premium tax and those imposed on the sale, purchase or use of property. As an insurer, the taxpayer asserts that no other tax is payable by it on any other business activity it conducts.

Chapter 82.04 RCW contains a separate statute that addresses the taxation of insurance business. RCW 82.04.320 provides as follows:

> This chapter shall not apply to any person in respect to insurance business upon which a tax based on gross premiums is paid to the state . . . . (Emphasis supplied.)

Since the gross premium tax only applies to insurers, it is clear that insurers are the only taxpayers entitled to the

benefit of this exemption. Although RCW 82.04.320 and RCW 48.14.080 both address the issue of taxing insurers, the revenue code provision differs in its reference to a particular type of business activity exempt from tax. The words "in respect to insurance business" refer to a specific business activity undertaken by insurers. The taxpayer's argument that RCW 82.04.320 exempts insurers from the B&O tax on all business activities ignores the legislature's specific reference to a person's "insurance business." If the legislature intended to extend the exemption beyond insurance business, it could have done so.

If, as the taxpayer suggests, RCW 48.14.080 completely preempts other forms of taxation on all activities of insurance companies, the "in respect to insurance business" language of RCW 82.04.320 would be rendered meaningless. Statutes "in pari materia" are those which relate to the same person or thing and must be construed together. State v. Houck, 32 Wn.2d 681 (1949). The rules of statutory construction require that statutes concerning the same subject matter be interpreted to give meaning and effect to each. Henderson V. McCullough, 59 Wn.2d 601 (1962). In light of the language contained in RCW 82.04.320, we find it unreasonable to conclude that the legislature intended to allow an insurance company to escape taxation on business which is unrelated to its insurance business.

Moreover, substantial weight is to be accorded to an agency's interpretation of a statute over which it has administrative authority. Cosro, Inc. v. Liquor Control Board, 107 Wn.2d 754 (1987). WAC 458-20-163 ("Rule 163") is the administrative regulation which governs the taxation of insurers. In enacting Rule 163, the Department has taken the position that the exemption contained in RCW 82.04.320 "does not apply to any business engaged in by an insurance company other than its insurance business." As Rule 163 has been duly adopted by the Department, is consistent with the statute, and has not been declared invalid by a court of record, it has the same force and effect as the law itself. See RCW 82.32.300.

In our opinion, Determination 88-311 correctly sets out the position of the Department as required by all relevant statutes and regulations insofar as it concludes that RCW 82.04.320 does not apply to any business of the taxpayer other than its insurance business. However, we believe that Determination 88-

311 unduly restricts the term "insurance business" and that further guidance is warranted.

For purposes of RCW 82.04.320, the insurance business includes not only those activities specifically regulated under Title 48 RCW, but those which are functionally related as well. Revenue generating activities which are functionally related to the taxpayer's conduct of its insurance business are not subject to the excise tax (except for the sale, purchase or use of property). Revenue generating activities which are considered functionally related to a taxpayer's insurance business are those activities incidental to accomplishing the insurance function.

Whether a particular revenue generating activity is functionally related to the insurance business is a question of fact to be resolved on a case by case basis. In the case of the performance of services, the relationship of the taxpayer to the recipient of the services is relevant. Services provided by a corporation to an affiliate may be considered functionally related to the insurance business while the same services provided to an unrelated entity may not. Where the taxpayer performs services for an unrelated entity and receives payment, other than premiums paid under a contract of insurance, the activity will not be considered functionally related to the insurance business.

Services performed for an affiliate will be considered functionally related, provided they are rendered in the regular course of the taxpayer's insurance business and relate exclusively to the affiliate's insurance business.[2] General administrative services such as accounting, personnel and data processing are considered functionally related when performed for an affiliate's insurance business. Legal services provided to an affiliate that relate to its insurance business are also considered functionally related.
If the affiliate is engaged in one or more business activities not related to the insurance business, services rendered to the affiliate are taxable to the extent they relate to other business activities. For example, accounting and data processing services provided to an affiliate whose sole activity

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[2] For this purpose affiliates are members of a group of companies majority owned or controlled by the same parent or owner.

is providing financial counseling to individuals would not be considered functionally related to the insurance business.

Independent entrepreneurial activities which involve the active and direct conduct of a trade or business and result in sales of services to unrelated parties are not functionally related. This includes services rendered to employees. For instance, the operation of a company sponsored cafeteria where meals are purchased by employees is an activity not functionally related to the insurance business. Charges for legal services provided to employees of either the taxpayer or an affiliate for advice on matters of a personal nature are also not functionally related to the insurance business. Whether an activity is operated at a profit is irrelevant.

The assessment in question involves expense allocations to affiliates for services performed by the taxpayer's home and divisional offices. These services include data processing, accounting, legal, personnel, education and administration rendered to the taxpayer's affiliates in the course of its insurance business. Each of the taxpayer's affiliates is engaged in the insurance business to which these services are functionally related. Because we find the services at issue to be functionally related to the taxpayer's insurance business, we do not reach the taxpayer's other arguments on this issue. The assessment of B&O tax on expense allocations to affiliates is reversed.

[2] Printshop/Deferred Sales Tax. According to the express provisions of RCW 48.14.080, excise taxes may be imposed upon the sale, purchase or use of tangible personal property by insurers. Here, the Department has assessed deferred sales/use tax on the taxpayer's purchases of printing materials.

The sales tax applies to each retail sale within this state. RCW 82.08.020. A "retail sale" is defined in RCW 82.04.050 as:

> . . . every sale of tangible personal property (including articles produced, fabricated, or imprinted) to all persons irrespective of the nature of their business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers other than a sale to a person who . . . purchases for the purpose of consuming the property purchased

> in producing for sale a new article of tangible personal property or substance . . ..

WAC 458-20-103 ("Rule 103") is the administrative regulation governing where a sale takes place. Rule 103 provides in pertinent part as follows:

> For the purpose of determining tax liability of persons selling tangible personal property, a sale takes place in this state when the goods sold are delivered to the buyer in this state, irrespective of whether title to the goods passes to the buyer at a point within or without this state.

WAC 459-20-193A ("Rule 193A") governs sales of goods where delivery is made in Washington. According to Rule 193A, the retail sales tax applies to sales of goods delivered in Washington "irrespective of the fact that the purchaser may use the property elsewhere."

WAC 458-20-102 ("Rule 102") is the administrative regulation governing the issuance of resale certificates. This rule states in part:

> PURCHASES FOR DUAL PURPOSE. It may happen that a buyer normally is engaged in both consuming and reselling certain types of articles of tangible personal property and is not able to determine at the time of purchase whether the particular property acquired will be consumed or resold. In such cases, the buyer should purchase according to the general nature of his business; that is, if principally, he consumes the articles in question, he should not give a resale certificate for any portion thereof, but if, on the other hand, he principally resells such articles, he may sign a resale certificate for the whole amount of his purchases.
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> If the buyer gives a resale certificate for all purchases and thereafter consumes some of the articles purchased, he must set up in his books of account the value thereof and remit to the department of revenue the deferred sales tax payable thereon. (Emphasis supplied.)

Rule 102 sets forth a method whereby persons, such as the taxpayer, may purchase items without paying sales tax on the initial transaction because they are not sure whether the item will be resold or used. Referring to the tax assessed as

"deferred sales tax," simply means the payment of the sales tax is "deferred" until it can be determined whether the property is resold. The sales tax is a transaction tax and does not depend on use in Washington. If delivery takes place in Washington and the items are not purchased for resale, or are otherwise exempt from sales tax, the retail sales tax is due.

Here, the materials purchased by the taxpayer are used in printing insurance forms for its own use and for sale to its affiliates. The taxpayer furnishes a resale certificate to the seller of the materials and does not pay retail sales tax on the materials purchased. At the time the materials are purchased, it does not know how much of the materials will be used to produce forms for sale to its affiliates and how much will be used for its own forms. Later, when the taxpayer ships forms out of state for its use there the amount of materials subject to the retail sales tax has been determined.

Accordingly, sales tax was not due at the time the printing materials were purchased by the taxpayer and used in the printing of insurance forms. Sales tax is due, however, on the materials which were not resold. To the extent that the taxpayer pays a use tax on the forms which it uses out of state, it should be entitled to a credit for the Washington sales tax paid on the materials used to print those forms. The taxpayer's appeal on this issue is denied.

DECISION AND DISPOSITION:

The taxpayer's appeal is granted as to the assessment of the B&O tax on services rendered to affiliates (Audit Schedules V and VI). The appeal is denied as to the assessment of deferred sales/use tax on printing materials. The file is to be remanded to the Audit Section for adjustments consistent with this determination. Because the delay in issuing this Determination was at the sole convenience of the Department, interest will not be assessed after September 6, 1988, a date six months after the filing of the taxpayer's original petition.

DATED this 30th day of May, 1990.