

Cite as 9 WTD 051 (1990)

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 Refund of)
) No. 90-5
)
. . .) Registration No. . . .
) . . . /Audit No. . . .
)

- [1] RULE 155: RETAIL SALES TAX -- INFORMATION SERVICES -- LIST MAINTENANCE. Charges for "list maintenance" or the imputing, storing, and processing of names into a client's computer data base constitutes "data processing" within the meaning of WAC 458-20-155 (Rule 155). If these services are separately billed, they are not subject to retail sales tax.
- [2] RULE 155: B&O & RETAIL SALES TAXES -- COMPUTER SERVICES -- MAILING LABELS & BULK LETTERS. Charges for sheets of imprinted labels, or bulk customized form letters are sales of tangible personal property, and are properly subject to Retailing B&O and retail sales tax.
- [3] RULE 228 -- INTEREST -- WAIVER -- ORAL MISINFORMATION. The Department is unable to waive interest assessed in an audit report on the basis of a taxpayer's recollection of oral instructions given by an agent of the Department.

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 TELEPHONE CONFERENCE: August 3, 1989

NATURE OF ACTION:

A taxpayer protests the imposition of retail sales taxes and interest assessed in an audit report.

FACTS AND ISSUES:

Okimoto, A.L.J. -- . . . , (taxpayer) operate a computer information services business in . . . , Washington. The Department of Revenue (Department) examined the taxpayer's books and records for the period August 1, 1985 through June 30, 1988. As a result of the examination additional taxes and interest of \$. . . were found to be owing and Assessment # . . . was issued in that amount on September 18, 1988. The taxpayer has paid the assessment and now petitions for a refund.

The taxpayer described his business activity in the telephone conference as follows:

1. List maintenance - The taxpayer receives a list of names from a client and inputs the list into a data base. Periodically, the client will submit additional names, names to be deleted, or other corrections and the taxpayer will make the appropriate changes in the data base. The data base is considered property of the client. The taxpayer does not make a separate charge for list maintenance, but only makes a charge when a specific product is desired.
2. Mailing labels - When the client wants to send out a mailing to its members, the taxpayer will retrieve the requested information from the data base, print out the requested names on sheets of mailing labels, and charge the client \$XX per label.
3. Personalized letters - When the client wants to send out a mailing of personalized letters (letters with the same message, but with a different name and address), the taxpayer will again retrieve the information from the data base and print a batch of personalized letters for a fixed charge per letter.

The taxpayer protests the reclassification of its charges from Service to the Retailing and Retail Sales tax classifications. If the reclassification is correct, the taxpayer argues that he should not be assessed interest on the uncollected taxes because he was given incorrect advice by the Department in 1986. The taxpayer stated in the telephone conference that he formally registered with the Department in 1986 at the Department's [local] office. At that time, he described his

business on his registration form as "Computer services - mailing labels, personal letters, data storage, solutions" and was allegedly given oral instructions from a named Departmental employee that the activity he was engaged in was not subject to retail sales tax. He was also given copies of WAC 458-20-141, 144, and 155 at that time.

DISCUSSION:

[1] WAC 458-20-155 states in part:

Liability for sales tax or use tax depends upon whether the subject of the sale is a product or a service. If information services, computer services or data processing services are performed, such that the only tangible personal property in the transaction is the paper or medium on which the information is printed or carried, the activity constitutes the rendering of professional services, similar to those rendered by a public accountant, architect, lawyer, etc., and the retail sales tax or use tax is not applicable to such charges....

If, on the other hand, the sale, lease, or licensing of the computer program is a sale or lease of a product, even though produced through a computer system or process, it is taxable as a retail sale. Standard, prewritten software programs do not constitute professional services rendered to meet the particular needs of specific customers, but rather, are essentially sales of articles of tangible personal property. Articles of this type are no different from a usual inventory of tangible personal property held for sale or lease and, irrespective of any incidental modifications to the program medium or its environment (e.g., adaptation to computer room configuration) to meet a particular customer's needs, the sale or lease of such standard software is a sale at retail subject to retail sales tax or use tax.

BUSINESS AND OCCUPATION TAX

The terms "sale" (RCW 82.04.040) and "retail sale" (RCW 82.04.050) include any transfer of possession of tangible personal property for a consideration. This includes transfers of computer hardware and standard, prewritten software for a charge,

regardless that outright ownership or title may not pass to the user, and regardless of any express or implied restrictions upon the user.

RETAILING: All sales, leases, rentals, and licenses to use tangible personal property, including computer systems and all hardware and standard, prewritten software, to users, are subject to the retailing classification of business and occupation tax measured by the gross proceeds of sales derived therefrom. (See RCW 82.04.070.)

WHOLESALE: When such transfers of tangible personal property as described in the previous paragraph, are for resale by the customer or client in the regular course of business, without intervening use by such persons, they are subject to wholesaling business and occupation tax measured by gross proceeds of sales.

SERVICE: Persons who charge for providing information services or computer services (other than retailing or wholesaling as defined above) are subject to the service and other activities classification of business and occupation tax measured by the gross income of such business. This includes charges for custom program development, charges for on-line information and data, and charges in the nature of royalties for the reproduction, use, and reuse of patented systems and technological components of hardware or software, whether tangible or intangible.

We believe that the activity of "list maintenance" constitutes data processing within the meaning of Rule 155. Although Rule 155 does not define "Data processing" The American Heritage Dictionary, Second College Edition defines it as "The storing or processing of raw data by a computer." In the taxpayer's case, it is clear that by imputing names into a computer data base and maintaining it in a list form, it is processing and storing raw data on behalf of its client. Accordingly, if the taxpayer has separately charged for list maintenance, or for reports listing only the contents of the data base such charges would be taxable under the Service and Other Activities tax classification. The taxpayer's petition is sustained on this issue.

[2] Once the list maintenance activity has been completed, however, we believe that charges for the retrieval of information from that data base for the production and sale of

an imprinted product are essentially charges for the sale of tangible personal property. As such, the charges for sheets of imprinted labels, or bulk customized form letters are retail sales and must be reported under the Retailing and retail sales tax classifications. In those instances where the taxpayer has failed to segregate those charges that are subject to Service B&O from those charges that are subject to Retailing and retail sales tax, the entire amount will be presumed attributable to the sale of a product. The taxpayer's petition is essentially denied on this issue.

[3] In regards to the waiver of interest imposed in an audit assessment, WAC 458-20-228 (Rule 228) states in part:

...The department will waive or cancel the penalties imposed under RCW 82.32.090 and interest imposed under RCW 82.32.050 upon finding that the failure of a taxpayer to pay any tax by the due date was due to circumstances beyond the control of the taxpayer. The department has no authority to cancel penalties or interest for any other reason....

The following situations will constitute circumstances under which a waiver or cancellation of interest upon assessments pursuant to RCW 82.32.050 will be considered by the department:

1. The failure to pay the tax prior to issuance of the assessment was the direct result of written instructions given the taxpayer by the department.
2. Extension of the due date for payment of an assessment was not at the request of the taxpayer and was for the sole convenience of the department.
(Emphasis ours.)

It is the Department's well settled position that it is unable to waive interest assessed in an audit report on the basis of a taxpayer's recollection of oral instructions given by an agent of the Department. The reasoning for this policy is well stated in ETB 419.32.99. It states in part:

There are three reasons for this ruling:

- (1) There is no record of the facts which might have been presented to the agent for his consideration.

(2) There is no record of instructions or information imparted by the agent, which may have been erroneous or incomplete.

(3) There is no evidence that such instructions were completely understood or followed by the taxpayer.

In addition, we have talked to the above named Departmental employee and she is unable to confirm the taxpayer's recollections. Accordingly, we must deny the taxpayer's petition on this issue.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part. This matter will be remanded to the audit section for the appropriate adjustments consistent with this determination. The taxpayer is instructed to locate all invoices for which it believes an adjustment is required, and to contact and provide those invoices to the auditor by February 15, 1990. If the taxpayer fails to contact the auditor by that date, the Department will presume either that there are no invoices to be adjusted, or that any such adjustment is immaterial.

DATED this 9th day of January 1990.