

Cite as 9 WTD 280-25

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

In the Matter of the Petition )	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u>
<u>N</u>	
For Correction of Assessment)	
of )	No. 90-135
)	
. . . )	Registration No. . . .
)	. . . /Audit No. . . .
)	
)	

**[1] RULE 111:** SERVICE B&O TAX -- COMMISSIONS. A photographer who receives commissions for its representative is not entitled to exclude those amounts which are a cost of doing business.

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: April 27, 1989

NATURE OF ACTION:

Taxpayer petitions for the correction of service B&O tax assessment.

FACTS AND ISSUES:

Pree, A.L.J. -- The taxpayer is a sole proprietorship engaged in the photography business. The taxpayer takes pictures for advertisers nationwide. Aside from his wife who handles many of the administrative matters, the taxpayer employs an assistant to help with props and developing. The taxpayer contracted with a representative to secure clients.

Under the terms of a sample contract submitted by the taxpayer, the representative would solicit photography work for the taxpayer with advertisers. The representatives would contact potential advertising clients, formulate and propose a plan, and negotiate a price. Under the terms of the agreement between the taxpayer and the agent, the agent would receive a percentage or flat fee based on the amount paid by an advertising client. Upon performance of a service for an advertiser, while the taxpayer is entitled to full payment from the advertiser, it is obligated to pay the agreed upon commission amount over to the representative. If the taxpayer receives no payment, it owes nothing to the representative.

The taxpayer did not include the gross amounts received in its taxable receipts, excluding the amounts received for its agents as representatives' commissions. The auditor assessed service business and occupation tax on those amounts.

#### DISCUSSION:

For the purposes of the service business and occupation tax, RCW 82.04.080 defines gross income of a business to include the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, fees, and other emoluments however designated, all without any deduction on account of the cost of property sold, materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense of the business.

An exclusion is allowed under WAC 458-20-111 (Rule 111). That Rule must be read carefully, not only for its technical application, but also to glean the intent regarding its possible applications. Rule 111 provides in part:

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, guest or client, the payment of money, either upon an obligation owing by the customer, guest or client to a third person, or in procuring a service for the customer, guest or client which the taxpayer does

not or cannot render and for which no liability attaches to the taxpayer. It does not apply to cases where the customer, guest or client makes advances to the taxpayer upon services to be rendered by the taxpayer or upon goods to be purchased by the taxpayer in carrying on the business in which the taxpayer engages.

In this case the customers (advertisers) contract for photography services of the taxpayer. Upon entering an agreement and receipt of payment, the taxpayer becomes liable for the commission to be paid the representative. Without an agreement for the taxpayer's services, there is no obligation of payment of commission to the representative.

We find that in such a case, the taxpayer is not undertaking an obligation of the customer, but rather upon the purchase of the taxpayer's service by a customer, the taxpayer incurs its own liability to the representative. It is a necessary cost of the taxpayer in carrying on its business.

There is no agreement with the customer that the taxpayer is collecting the commissions as agent for the representative. The fact is that the taxpayer is not collecting commissions as an agent of its customers, but is rather receiving payment for a cost of doing business that the taxpayer incurs.

We postponed deciding this case until the Washington Supreme Court decided Rho vs. Department of Rev., 113 Wn.2d 561 (1989). That case dealt with a question of who were employees actually contracting with when they went to work, the paymaster or a supervising company that controlled all their work. Rho basically released control once the employees started working. Here it is the taxpayer whose involvement is most important once the agreement is made. Unlike the taxpayer in Rho, the taxpayer is not providing a service incidental to the service sought by the customer. In Rho customers were seeking workers to do work Rho could not perform, while in this case, the customer seeks photographic services that is provided by the taxpayer, not the representatives.

We believe that in this case the customers are dealing with the taxpayer. The customers do not designate the taxpayer as their agent. The taxpayer does not become an instrumentality or constituent part of its customers. Therefore, for the purposes of the Rule 111 exclusion, the taxpayer is not acting as the agent of its customers.

To find otherwise would grant a deduction not intended by the Department in Rule 111 for anyone paid on a commission-only basis. The Rule does not apply to those cases. The cost of sales personnel is a normal cost of doing business which cannot be passed through to customers.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this the 27th of March 1990.