Cite as 9 WTD 280-21

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

In the Matter of the Petition For Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 90-134
. . .	)	Registration No. . . .
	)	. . . /Audit No. . . .

[1] RULE 111: RHO -- AGENT -- SOLE LIABILITY. Advertising producer not entitled to reimbursement exclusion when not solely liable as agent for payments by advertisers for performers controlled by producer.

[2] RULE 228: INTEREST -- RELIANCE ON COMMUNICATION WITH DEPARTMENT -- WAIVER. Interest not waived where the late-payment of a tax assessment was found to be neither the direct result of written instructions given by the Department nor for the sole convenience of the Department.

Headnotes are provided as a convenience for the reader and are not in any way part of the decision or in any way to be used in construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: March 7, 1989

NATURE OF ACTION

The taxpayer petitions for the correction of assessment of service B&O tax on reuse income.

FACTS AND ISSUES

Pree, A.L.J. -- The taxpayer is a Corporation which produces music for records and commercial advertising. Under agreements with various performers, the taxpayer would record music for an advertiser. The advertiser would be billed for the service and the taxpayer would pay the performer according to the contract.

Occasionally, the advertiser would want to reuse the advertising for a period which was not covered by the original agreement. The taxpayer agreed to pay the performer from proceeds paid by the advertiser. These amounts were kept separate on its books. The advertiser would pay an additional commission to the taxpayer who would pay federal social security and unemployment taxes as well as paying for workman's compensation insurance.

The taxpayer only included the commission amount in its service B&O taxable amount. An audit for the period from . . . through . . . resulted in an assessment for service business and occupation tax on payments made to the taxpayer for reuse of commercials already produced by the taxpayer.

The taxpayer takes issue with the assessment, contending that the reuse payments were reimbursements for which it had no liability. In addition, the taxpayer objects to the assessment of interest on any assessment in this area since the law is unclear.

DISCUSSION:

[1] WAC 458-20-111 (Rule 111) allows an exclusion from the measure of tax amounts representing money or credits received by a taxpayer as reimbursement of an advance in accordance with the regular and usual custom of his business or profession. The rule states that 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.

In its Standard American Federation Of Musicians contracts with performers, the taxpayer is designated the employer. The contract goes on to state:

> The employer, in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby

> assumes liability for the amount stated herein, and, if applicable to the services to be rendered hereunder, acknowledges his liability to provide workman's compensation insurance and to pay social security and unemployment insurance taxes.

The contracts are signed by the taxpayer in its own capacity, not as agent or representative of the advertiser. The performer often is aware of who the advertiser is, but has no legal relationship with that advertiser other than through the taxpayer. After the contracts with the advertiser and the performer expire, the taxpayer is occasionally contacted by the advertisers to reuse the work of the performer. The taxpayer checks the standard fees and remits the amount to the performer informing the advertiser of the amount which the advertiser pays to the taxpayer. An additional 30-35% is paid to the taxpayer for handling the transaction. These amounts are entered separately on the taxpayer's books.

The issue turns on whether or not the taxpayer is liable solely as agent of the performers. In the recent case, Rho v. Department of Revenue, 113 Wn2d 561 (1989), the Supreme Court of Washington guides us in making that determination. Resolution of the sole liability issue requires analysis of the control over the performers by the taxpayer as compared with the party making payments through the taxpayer for the services of those performers. It must be determined whether the taxpayer's control over the performers was merely that of paymaster acting as agent for the advertisers. We must look beyond the contract language to factors of control such as hiring, compensation, work assignment, supervision, and termination.

The taxpayer's relationship exceeds that of mere paymaster of the advertiser to the performer-employee. The taxpayer is responsible for recording and producing the advertisements made by the performers. In that setting the taxpayer controls the performers. The taxpayer is responsible to the advertiser for the employee's advertisement. The advertiser does not have sufficient control over the performers to be deemed their employer. Therefore, since the taxpayer is obligated to the performers as their employer or director in the production of the advertisements, they are acting as more than merely a paymaster. Therefore, it is not liable solely as agent of the performers and is not entitled to the exclusion granted under Rule 111.

Nor is the taxpayer entitled to the exclusion on the reuse payments. The services required to produce the advertisement were directed and controlled by the taxpayer. After the advertisement was produced, neither the taxpayer nor the performers were providing services, only collecting payment for services that were performed under the direction of the taxpayer. Since the services which generated the payments were directed and controlled by the taxpayer, no exclusion is allowed.

[2] Rule 228 also lists the two situations under which interest may be waived. It states in part:

> 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.

The adjustment resulting in the assessment was not the direct result of written instructions given to the taxpayer by the Department. Any delay up to the time of the assessment was not for the sole convenience of the Department and the taxpayer is not entitled to the waiver of interest in that case. However, the delay in issuing this determination after the hearing was for the sole convenience of the Department and extension interest will be waived twelve months after the petition was received.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this the 27th day of March 1990.