

Cite as 9 WTD 286-35

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

In the Matter of the Petition) <u>N</u> For Correction of Assessment) of) . . .)))))	<u>D E T E R M I N A T I O</u> No. 90-160 Registration No. /Audit No. . . .
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[1] RCW 82.04.040: B&O TAX -- SALE -- GUARANTOR OF PAYMENT. A party who paid for the gasoline resold by a convenience store acted as a payment guarantor for the store and did not make a wholesale sale to the store. The subject party had neither possession, title nor ownership of the gasoline.

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: January 13, 1988

NATURE OF ACTION:

Petition to delete B&O tax assessed on money alleged to have only passed through the taxpayer's books.

FACTS AND ISSUES:

Dressel, A.L.J. -- [The Taxpayer] is a partnership. Previous to the audit period it owned a grocery store which it sold to [A]. They operate the store and continue to do business as . . . Market. The taxpayer sold everything but the gas pumps to [A]. These it rented to [A] for so many cents per gallon of gasoline sold.

It developed that [A] had some difficulty paying their supplier of gasoline. Apparently, several checks bounced. Knowing that the taxpayer still had some interest in the business, the supplier asked the taxpayer to guarantee payment.¹ The taxpayer agreed. A payment arrangement was instituted by which [A] would pass the supplier's invoices along with their check made out to the taxpayer. The taxpayer then wrote its own check to the supplier.

The Department of Revenue (Department) examined the books and records of the taxpayer for the period . . . through As a result a tax assessment, identified by the above-captioned numbers, was issued for \$ In looking at the taxpayer's books, the auditor picked up entries which reflected the gasoline payment arrangement described in the previous paragraph. His construction of the arrangement was that the taxpayer purchased the gasoline from the supplier and resold it to [A] which sale he characterized as wholesale. On this basis he subjected the payments received by the taxpayer from [A] to Wholesaling B&O tax.

The taxpayer objects. Among other things, it contends that it did not engage in a sale. It states that the assessment is based on "a mere bookkeeping activity to keep tract of a possible contingent liability." It points out that it charges no mark-up to [A]. No profit or valuable consideration passes to the taxpayer as a result of the activity in question. It says that ownership of the fuel passes directly to [A] from the oil supplier. The arrangement at issue is to simply guarantee payment to that supplier. The reason the taxpayer keeps a record of these transactions is really to reconcile any NSF checks [A] may pass to the taxpayer.

The issue is whether the payment by a convenience store to a third party who pays for the store's gasoline is B&O taxable income to the third party.

DISCUSSION:

[1] "Sale" is defined at RCW 82.04.040 as ". . . any transfer of the ownership of, title to, or possession of property for a valuable consideration. . . ." Here, clearly, the taxpayer never has "possession" of the gasoline. Neither, do we think,

¹ There was some evidence presented that the guarantee arrangement may have been put in place immediately after the business was sold by the taxpayer to [B & C].

does it have "ownership of" or "title to." In this regard we are particularly persuaded by a letter from the supplier of the gasoline, In it the supplier indicates several times that it considers that it has been selling gasoline to [A]. It regarded the partnership taxpayer as "Guarantors of the account." To us this indicates that neither the taxpayer nor the supplier considered that the taxpayer had "ownership of" or "title to" the gasoline. We suspect that, if queried, [A]'s impression would be similar. No other evidence has been presented that the taxpayer had possession, ownership, or title. We officially find those elements lacking vis-a-vis the taxpayer. Without them, according to the statutory definition, there is no sale by the taxpayer. Without a sale, there can be no Wholesaling B&O tax. See RCW 82.04.270 (1). The wholesale sale is from the oil supplier to [A]. The payment for same just happened to take a more circuitous route than in most such sales.

We would suggest that the taxpayer change the title of its record of these transactions We can certainly understand why the auditor taxed them as such. Fortunately, for the taxpayer, the other evidence presented will prevent the taxpayer from being hung by its own label.

DECISION AND DISPOSITION:

The taxpayer's petition is granted. The assessment is canceled.

DATED this 12th day of April 1990.