

Cite as Det. No. 03-0251, 24 WTD 72 (2005)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
)	No. 03-0251
...)	
)	Registration No. ...
)	Docket No. ...
)	

RULE 111; RCW 82.04.290: SERVICE B&O TAX – EXCLUSION – ADVANCE OR REIMBURSEMENT – CLINICAL COORDINATION SERVICES. A clinical research coordinator is not entitled to exclude from its gross income under Rule 111 receipts from pharmaceutical companies, which the taxpayer uses to pay physicians for their role in the research, test subjects for their participation in the research, labs for tests necessary for the research, and other expenses where: 1) the payments were not customary reimbursements for advances made to procure a service for the client; 2) the payments involve services that the taxpayer could or did render; and 3) the taxpayer's liability for paying the expenses was not solely that of an agent.

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.

STATEMENT OF THE CASE

C. Pree, A.L.J -- The taxpayer, a clinical research coordinator, protests the assessment of service business and occupation (B&O) tax on its receipts from pharmaceutical companies. The taxpayer uses these receipts to pay 1) physicians for their role in the research, 2) test subjects for their participation in the research, 3) lab fees for tests necessary for the research, and 4) other expenses. The taxpayer argues these receipts are excludable from its gross income under WAC 458-20-111 (Rule 111). With limited exceptions, we conclude that the receipts are not excludable under Rule 111. ...¹

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

ISSUES²

1. Is the taxpayer, a clinical research coordinator, entitled to exclude from its gross income under Rule 111 receipts from pharmaceutical companies, which the taxpayer uses to pay physicians for their role in the research, test subjects for their participation in the research, labs for tests necessary for the research, and other expenses?

...

FINDINGS OF FACT

The Assessment. The Audit Division of the Department of Revenue audited the taxpayer's records for the period of January 1, 1992, through June 30, 1996. The audit resulted in the assessment of business and occupation ("B&O") tax under the service and other activities classification in the amount of \$. . . , use tax of \$. . . , and interest of \$ The assessment totaled \$ The taxpayer protests only the assessment of B&O tax and the related interest.

The taxpayer's activities during the audit period are described below.

Overview of the Taxpayer's Business. The taxpayer provides clinical coordinating services for clinical research studies for pharmaceutical and biotech companies ("the sponsors"). The studies are conducted in accordance with United States Food and Drug Administration (FDA) rules. The studies entail the application of a test drug to human test subjects, who are then monitored. The taxpayer summarizes the results of the study in a report for the sponsors.

Overview of Contractual Relationships. The studies generally entail three contracts. The first contract always involves the sponsor, because it is the contract in which a party obligates itself to perform the study for the sponsor. The contract can be between the sponsor and any of the following three parties: a) the physician and an institution, such as the taxpayer; b) the institution alone; or c) the physician alone. The second contract is between the physician and the institution, *i.e.*, the taxpayer. The third contract is between the physician and the test subjects.

Payments. Regardless of whether the sponsor contracts with the physician and taxpayer jointly, the taxpayer alone, or the physician alone, the sponsor remits the entire payment for the study to the taxpayer. The amount of this payment is determined based, in part, on the number of test subjects involved in the study. The payment is not broken out into the various services and expenses that make up the study. (These services and expenses will be discussed in detail, below.)

In furtherance of the study, the taxpayer pays four major types of expenses. First, the taxpayer pays the physician for the physician's role in the study. Second, the taxpayer pays the test subjects for their participation in the study. Third, the taxpayer pays for lab work and other procedures ordered by the physicians. Fourth, the taxpayer pays for advertising and other

² Nonprecedential portions of this determination have been deleted.

expenses. Although the sponsor must agree to the price for the study in its contract with the taxpayer and/or physician, the sponsor is not involved in determining the amount to be paid for these four types of expenses.

The Parties' Responsibilities.³

The sponsor's responsibilities. The sponsor takes responsibility for and initiates a clinical research study.⁴ The sponsor must select a qualified physician, known as a principal investigator (hereafter, "physician"), to conduct the study. The sponsor must also: 1) monitor the study; 2) ensure that the study is conducted in accordance with the study plan and protocols; and 3) ensure that the FDA and physician are informed of risks with respect to the drug. The sponsor must also obtain Form FDA 1572 (which will be discussed, below) from the physician. A sponsor who discovers that a physician is not complying with FDA requirements must either secure compliance or discontinue shipments of the drug to the physician. The sponsor is responsible for collecting and evaluating the results obtained.

A sponsor may transfer responsibility for all or any of the obligations of an investigation to a contract research organization. Whenever a person assumes, as an independent contractor to the sponsor, an obligation of a sponsor, it is known as a contract research organization.

The taxpayer's responsibilities. Regardless of whether the taxpayer alone, the taxpayer and physician jointly, or the physician alone contracts with the sponsor, the taxpayer performs the following functions.

The taxpayer records the initial study budget and its actual financial transactions.⁵ The taxpayer also disburses funds to pay the four types of expenses set forth above. All invoices for expenses, including advertising, lab fees,⁶ hospital fees, stipends, and physician fees are sent to the taxpayer, in the taxpayer's name.

The taxpayer is also responsible for recruiting test subjects based on criteria established by the sponsor and the physician, screening the test subjects, and enrolling the subjects in the study. The taxpayer advertises in newspapers for test subjects in its own name (however, the physician's name and/or sponsor's name may also appear in the ad). In radio advertisements, the physician's name, rather than the taxpayer's, is generally given. Regardless of whether the taxpayer's or physician's name is given in advertisements, the taxpayer's phone number is given, and the test subjects contact the taxpayer to participate in the study. The taxpayer is responsible for approving the advertisements.

³ Much of the information in this section was obtained from 21 C.F.R. 50, 21 C.F.R. 56, and 21 C.F.R. 312 (food and drugs).

⁴ All of the pharmaceutical companies with which the taxpayer and/or physician contract are sponsors.

⁵ The taxpayer accounts for each study separately and puts the money it receives from the pharmaceutical company in a separate trust account for each study. However, the pharmaceutical company does not require the taxpayer to use trust accounts.

⁶ However, the test subjects' health insurance may not identify the taxpayer.

Once the test subjects are enrolled in the study, the taxpayer is responsible for following the test subjects' progress in the study. Specifically, according to the taxpayer's homepage, for each project, the taxpayer provides a study coordinator to conduct all patient visits and to [answer patient questions]. . . . The taxpayer's homepage also represents that the taxpayer provides test subjects with [excellent care].

The taxpayer is responsible for collecting all study-related data and submitting the study data to the sponsor. On its homepage, the taxpayer represents that it provides [reliable, high quality data] to sponsors. Further, the taxpayer represents that its benefits to the sponsors include its ability to [locate physicians and research sites and to simultaneously coordinate studies in different locations].

The taxpayer is also responsible for overseeing regulatory and administrative details and study close-out.

The taxpayer provides physicians with reliable, cost-effective assistance in carrying out study protocols. In addition, the taxpayer works directly with physicians to complete all administrative tasks associated with the study, including budget preparation and contract negotiations, submission of study documents to the sponsor and the Institutional Review Board (IRB), participant recruitment strategy and implementation, and adverse event reporting. Finally, through its contacts with pharmaceutical companies, the taxpayer is able to recruit studies appropriate to a given physician's practice.

The physician's responsibilities. A physician, acting as a "principal investigator," actually conducts the study, *i.e.*, the drug is administered to the subjects under the immediate direction of the physician. The FDA requires that such a physician be involved in the study, and the physician is responsible for the test subjects' safety. The physician monitors the test subjects and orders tests, in accordance with the study protocol, to be completed at hospitals and labs. Only physicians may order tests.

On the Form FDA 1572, which must be completed by the physician, the physician agrees to conduct the study consistent with the protocol and generally not to change the protocol without notifying the sponsor. The physician signing the form further agrees "to personally conduct or supervise" the investigation and is responsible for furnishing reports to the sponsor.

The physician must obtain the informed consent of test subjects and is responsible for preparing and monitoring case histories.

The contracts.

Sponsor contracts. As noted above, the sponsor may contract with the taxpayer alone, the taxpayer and physician jointly, or the physician alone.⁷

1. Contracts between the sponsor and taxpayer alone. Where the taxpayer alone contracts with the sponsor, the taxpayer performs the function of a contract research organization. Pursuant to the federal rules, when the taxpayer performs the function of a contract research organization, it assumes, as an independent contractor with the sponsor, one or more of the obligations of a sponsor, such as selection or monitoring of studies, evaluation of reports, and preparation of materials to be submitted to the FDA.

A sample contract between the sponsor and taxpayer alone contains the following provisions. The taxpayer agrees to “conduct” the study according to the sponsor’s study protocol. In conducting the study, the taxpayer, is to “act[] through” a specified physician, identified as a staff member of the taxpayer, as principal investigator. The taxpayer is required to perform the study “by personnel assigned thereto by [the taxpayer], who shall work under the supervision and direction of [the physician].” The taxpayer is required to notify the sponsor if the physician can no longer serve the function of principal investigator, and the sponsor may, at its discretion, terminate the contract. The contract further provides that it “is not to be construed as creating any employment or agency relationship” between the physician and sponsor, and the physician and taxpayer “will be acting as independent contractors and not as employees or agents” of the sponsor. The sponsor agrees to pay the taxpayer a specified sum “[i]n support of the study.”

The contract is signed by the taxpayer and the sponsor. The physician also signed the contract under the phrase “acknowledged by.”

A letter from the sponsor, accepted by the physician, “confirm[s] that [sponsor] is considering engaging your services” as the principal investigator and obtains the physician’s agreement not to disclose confidential information that the sponsor provides to the physician to [assess the physician’s qualifications to act as an investigator, to allow the physician to determine if he or she wishes to serve as an investigator, and to allow the physician to participate in the formulation of a protocol for the study].

2. Contracts between the sponsor and both the taxpayer and physician. The physician agrees to conduct the study in accordance with the final protocol provided by the sponsor. The contract further provides that the physician acts “as an independent contractor, without the capacity to bind” the sponsor “and not as an agent or employee” of the sponsor.

3. Contracts between the sponsor and the physician alone.⁸ In the sample contract reviewed, the physician agrees to conduct the study, and it is to be performed “at and

⁷ The taxpayer demonstrated that the Audit Division classified some of the contracts as involving the incorrect parties, *e.g.*, contracts classified as between the sponsor and the taxpayer alone may have actually also included the physician. As noted in the decision section, we are remanding this case to the Audit Division to allow the taxpayer and Audit Division to address these classification issues.

under the auspices of the Center,” however the “Center” is not identified. The contract provides that the physician will perform services “only as an independent contractor, and not as an employee or agent” of the sponsor.

The sponsor agrees to pay the physician “a total amount not to exceed \$[X].” However, if the amounts sponsor pays exceeds \$[X], “the Center will refund all amounts in excess of \$[X].” In these cases, the grant is awarded to the physician, although payment may be made directly to the taxpayer.

Both the physician and taxpayer signed an agreement not to disclose the sponsor’s confidential information.

Physician – taxpayer contract. The contract⁹ between the taxpayer and physician provides that the taxpayer “will provide clinical research coordinating services on your behalf in relation to” the study. The contract further provides that the physician is appointing the taxpayer as his agent to perform these services. The taxpayer agrees to provide the following services in relation to the study: submit packet to Institutional Review Board (IRB) for review; prepare and negotiate the budget with the sponsor; complete and submit filing documents to the sponsor; coordinate clinical study procedures (laboratory); provide phlebotomy services; screen, enroll and follow study participants; report and follow-up adverse events; complete case report forms; provide financial accounting (receive and disburse funds); and, complete close-out procedures upon study termination. The contract provides that the physician is responsible for providing the taxpayer with work space and for supervising the taxpayer.

The contract further provides that the taxpayer will be paid for the services it performs pursuant to the study budget, and it will disburse funds on the physician’s behalf according to the study budget. Either party may terminate the agreement prior to completion of the study, and the taxpayer will be reimbursed for all services performed and reimbursed for out-of-pocket expenses up to the termination date.

Physician – test subject contracts.¹⁰ As noted above, physicians are responsible for having the test subjects sign an informed consent form. In addition to the physician’s name, the form reflects the name of the pharmaceutical company as the sponsor. Regarding the confidentiality of patient records, the form allows the sponsor, as well as the taxpayer, sometimes identified as “an agent for the study doctor,” to review the records. The form sets the amount the test subject will receive for participating in the study. The form informs the test subjects that the sponsor may terminate the test subject’s participation in the study at any time,

⁸ . . . The Audit Division did not include amounts received from these contracts in the assessment. (On its returns, the taxpayer paid tax on the amounts it retained as its fee.)

⁹ . . . The contracts between the taxpayer and physician were similar, regardless of whether the taxpayer alone, the taxpayer and physician jointly, or the physician alone signed the contract with the pharmaceutical company.

¹⁰ . . . The contracts between the physician and test subjects are similar, regardless of whether the taxpayer alone, the taxpayer and physician jointly, or the physician alone signed the contract with the pharmaceutical company.

without the test subject's consent. If the test subject experiences a medical emergency or has questions, the subject is instructed to contact the physician.

The Taxpayer's Excise Tax Reporting and the Audit Division's Conclusions Regarding the Taxpayer's Rule 111 Exclusions. In reporting its Washington B&O tax liability, the taxpayer excluded from its gross income under Rule 111 all of its payments for: 1) physicians for their role in the research, 2) test subjects for their participation in the research, 3) lab fees for tests necessary for the research, and 4) other expenses.

The taxpayer recorded a portion of its receipts from the sponsor as compensation for its services. The taxpayer paid B&O tax on these amounts, and these amounts are not in dispute. However, the Audit Division disallowed the taxpayer's claimed Rule 111 exclusion for all of the payments set forth aboveThe taxpayer protests the Audit Division's assessment of tax on the remaining receipts the taxpayer excluded under Rule 111. . . .

ANALYSIS

Overview of Washington's B&O Tax System. The B&O tax is "extensive and is intended to impose . . . tax upon virtually all business activities carried on in the State." *Analytical Methods, Inc. v. Department of Rev.*, 84 Wn. App. 236, 241, 928 P.2d 1123 (1996), *quoting*, *Palmer v. Department of Rev.*, 82 Wn. App. 367, 371, 917 P.2d 1120 (1996). For purposes of the B&O tax, "business" is broadly defined to include "all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly." RCW 82.04.140.

RCW 82.04.220, in turn, provides, "There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities." Persons engaged in a service business in Washington are required to pay B&O tax measured by the "gross income of the business." *See* RCW 82.04.290.

The term "gross income of the business" is broadly defined by RCW 82.04.080 as:

. . . the value proceeding or accruing by reason of the transaction of the business engaged in and includes . . . compensation for the rendition of services . . . fees, . . . and other emoluments however designated, all without any deduction on account of . . . labor costs . . . or any other expense whatsoever paid or accrued

(Emphasis added.) Under this broad definition, a service provider may not deduct any of its own costs of doing business, including its labor costs, from its gross income. *Pilcher v. Department of Rev.*, 112 Wn. App. 428, 49 P.3d 947 (2002), *citing*, *Rho Co. v. Department of Rev.*, 113 Wn.2d 561, 566-67, 782 P.2d 986 (1989).

The taxpayer is engaged in business in Washington because it performs the clinical research coordination services "with the object of gain." *See* RCW 82.04.140. This activity is properly

classified as a service business. *See* RCW 82.04.290, WAC 458-20-194 (Rule 194). Thus, unless a specific exclusion, exemption, or deduction applies, the taxpayer's gross income, *i.e.*, 100% of its receipts from the sponsor, is subject to service B&O tax without any deduction on account of labor costs or any other expense paid or accrued. *See* RCW 82.04.080, .220.

In determining whether the taxpayer is entitled to an exclusion, exemption, or deduction for any portion of the amounts received from the sponsors, we must narrowly construe the exclusion, exemption and deduction statutes. *See Lacey Nursing Center, Inc. v. Department of Rev.*, 128 Wn.2d 40, 49, 905 P.2d 338 (1995); *Analytical Methods*, 84 Wn. App. at 241. However, as we observed in Det. No. 99-13, 20 WTD 471 (2001):

Not all amounts a business receives are consideration for services it provided. Rule 111 articulates the Department's recognition that sometimes a business'[s] receipts can include amounts a customer (the principal) advances or reimburses the business (the agent) for paying a third-party (the provider) for the service. These "advances or reimbursements" from a customer for procuring property or services which the business could not provide itself are excluded from the measure of the B&O tax, provided the business was not primarily nor secondarily liable for the payment to the third-party. In those instances, the business is said to have been acting as the client's agent and, as such, has no liability other than that of the agent of the principal on whose behalf it acted in procuring services from third-parties.

Overview of Rule 111. Rule 111 provides in pertinent part:

The words "advance" and "reimbursement" apply only when the customer . . . 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

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 . . . , the payment of money, either upon an obligation owing by the customer . . . to a third person, or in procuring a service for the customer . . . 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 . . . 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.

(Emphasis added.) In *Rho*, the Court summarized three criteria of Rule 111 as follows:

This court has summarized the operation of Rule 111 by stating that the rule allows an exclusion from income for a “pass through” payment when the following three conditions are met: (1) the payments are “customary reimbursements for advances made to procure a service for the client”; (2) the payments “involve services that the taxpayer did not or could not render”; and (3) the taxpayer “is not liable for paying the associate firms except as the agent of the client.” *Christensen, O’Connor, Garrison & Havelka v. Department of Rev.*, 97 Wn.2d 764, 769, 649 P.2d 839 (1982); see *Walthew, Warner, Keefe, Arron, Costello & Thompson v. Department of Rev.*, 103 Wn.2d 183, 186, 691 P.2d 559 (1984).

113 Wn.2d at 567-8. More recently, the Washington Supreme Court and Washington Court of Appeals each addressed Rule 111 in *City of Tacoma v. William Rogers Co.*, 148 Wn.2d 169, 60 P.3d 379 (2002), and *Pilcher*, 112 Wn. App. 428, respectively. In *Rogers*, the Supreme Court held that a temporary staffing service “functioned as the actual employer” of its temporary workers and was thus not entitled to exclude amounts it received from clients with which it paid the workers’ wages.

The *Rogers* Court clarified its holding in *Rho* and focused its analysis on the third factor set forth in *Rho*, i.e., whether the taxpayer had liability beyond liability as agent for the client. The court explained:

In *Rho* we explained that the taxpayer had to prove that the advance in question was made pursuant to an agency relationship. The existence of that agency relationship is not controlled by how the parties described themselves in their contract documents, and standard agency definitions should be used in analyzing the existence of the agency relationship.

When a taxpayer meets its burden and establishes the existence of an agency relationship, a second question must be asked: whether the taxpayer’s liability to pay the advance “constituted solely agent liability.” If a taxpayer assumes any liability beyond that of an agent, the payments it receives are not “pass through” payments, even if the taxpayer uses the payments to pay costs related to the services it provided to its client.

148 Wn.2d at 177-78 (emphasis added; citations omitted). Thus, as *Rogers* emphasizes, if the taxpayer assumes any liability beyond that of an agent, for the payments to the physicians, test subjects, laboratories, and other service providers, the payments it receives are not pass through payments, even if the taxpayer uses the payments to pay costs related to the service provided to the sponsors.

As noted above, *Rogers* involved an analysis of the relationship among a temporary staffing service, its clients, and its workers. Accordingly, its analysis focused on who was the actual employer of the workers. *Pilcher*, on the other hand, involved an analysis of the relationship among a hospital, Dr. Pilcher (a physician who contracted with the hospital to serve as Medical Director and as the providing physician for the hospital’s emergency department), and the physicians Dr. Pilcher hired to help him perform those services. Because the facts in this determination are more closely analogous to those in *Pilcher* than those in *Rogers*, our analysis

of the application of Rule 111 to this case will primarily focus on the court's analysis in *Pilcher*.

The hospital for which Dr. Pilcher performed services wanted to ensure accountability by having Dr. Pilcher be solely responsible for emergency physician services. Dr. Pilcher's contract with the hospital provided that he and his agents or employees were independent contractors to the hospital and not employees. Although the hospital agreed that Dr. Pilcher could hire other physicians to assist him in fulfilling his obligations to the hospital, the hospital did not contract with the other physicians and did not believe that Dr. Pilcher was representing other parties in entering the contract with the hospital.

Dr. Pilcher contracted with other physicians to work in the hospital's emergency department. Their contracts with Dr. Pilcher provided that they were independent contractors to Dr. Pilcher, and he could terminate the physicians as he saw fit. The hospital was not involved in determining the amount Dr. Pilcher paid the physicians.

Emergency department patients were not informed of the nature of the relationships among the hospital, Dr. Pilcher, and the physicians.

Each month, Dr. Pilcher and his retained physicians submitted their emergency services fees to the hospital, and the hospital billed its patients. Each month, the hospital paid Dr. Pilcher the charges he and his retained physicians had submitted to the hospital (less an overhead charge) regardless of whether the hospital had received payment for the services from the emergency department's patients or their insurers.

Dr. Pilcher's contract with the hospital provided that he was solely responsible for paying the physicians he retained. The physicians likewise acknowledged in their contracts with Dr. Pilcher that he was exclusively responsible for paying them.

Dr. Pilcher protested the assessment of B&O tax on the portion of his gross receipts from the hospital that he used to pay the physicians he hired. The court concluded Dr. Pilcher was not entitled to exclude these amounts under Rule 111. The court reasoned:

Dr. Pilcher was in the business of providing services to [the hospital]: his management services and the services of the physicians he hired as his independent contractors to help staff the emergency room. He was not entitled to deduct his labor costs or any other expenses related to his business before paying the B&O tax on the gross income he received from the Hospital as compensation for his services.

. . . Dr. Pilcher was *not* acting solely as an agent for the physicians he hired to staff the Hospital's emergency room Dr. Pilcher was not acting solely as a pass-through for payments from the Hospital to the physicians; rather, under their contracts, Dr. Pilcher could pay the physicians any amount they agreed upon, independent of what the Hospital paid him.

112 Wn. App. at 436-7 (emphasis original). As will be discussed in detail, below, we reach a similar conclusion here.

The Taxpayer is Generally Not Entitled to Exclude Under Rule 111 Amounts Received from the Sponsors

1. The payments were not “customary reimbursements for advances made to procure a service for the client.” With respect to the first *Rho* factor, *i.e.*, whether the payments are “customary reimbursements for advances made to procure a service for the client,” the *Pilcher* court stated:

[T]he Hospital made these payments exclusively to Dr. Pilcher for providing medical coverage and management for the Hospital’s emergency department.

. . . The Hospital’s only legal obligation was to Dr. Pilcher. The Hospital had no separate contract with the physicians Dr. Pilcher retained. Dr. Pilcher had no authority to enter into contracts on the Hospital’s behalf. . . . In effect, the Hospital was purchasing physician services and management from Dr. Pilcher.

112 Wn. App. at 439. In those cases where the sponsors contract solely with the taxpayer, the facts in the taxpayer’s case parallel those in *Pilcher*. The sponsors made these payments exclusively to the taxpayer for providing clinical research studies. The sponsors’ only legal obligations were to the taxpayer. The sponsors had no separate contract with the physicians, test subjects, or other service providers. In effect, the sponsors were purchasing clinical research studies from the taxpayer. Accordingly, as did the court in *Pilcher*, we conclude that these payments were not “customary reimbursements for advances made to procure a service” for the sponsors.

In those cases where the sponsor contracts with both the taxpayer and the physician, we reach a similar conclusion.¹¹ Although the grants were in both the taxpayer’s and the physician’s names, the sponsors made these payments exclusively to the taxpayer for providing clinical research studies. The sponsors had no separate contract with the test subjects or service providers. In effect, the sponsors were purchasing clinical research studies from the taxpayer and physician. Accordingly, as did the court in *Pilcher*, we conclude that these payments were not “customary reimbursements for advances made to procure a service” for the sponsors.

2. The payments did not “involve services that the taxpayer did not or could not render.” With respect to the second *Rho* factor, *i.e.*, whether the payments “involve services that the taxpayer did not or could not render,” the *Pilcher* court concluded that the trial court did not err in finding that the services for which the hospital paid Dr. Pilcher were for services Dr. Pilcher could and did provide. The trial court reasoned that Dr. Pilcher rendered the professional services required

¹¹ However, because the taxpayer’s exclusion of amounts paid to the physicians under these contracts is not in dispute, we do not make any ruling with respect to the application of the Rule 111 to these amounts.

by the hospital contract either personally or through his physician subcontractors. Similarly, we conclude that the services for which the sponsors paid the taxpayer were for services the taxpayer could and did provide. The taxpayer rendered the services required by the sponsors through its employees and its physician subcontractors.

3. The taxpayer had liability for paying the physicians, test subjects, labs, and other service providers beyond that of an agent of the sponsor. With respect to the third *Rho* factor, *i.e.*, the taxpayer “is not liable for paying the associate firms except as the agent of the client,” the *Pilcher* court concluded that Dr. Pilcher was solely responsible for paying the physicians he retained, regardless of whether the hospital paid him or whether the patients paid the hospital. Similarly, the *Rogers* court explained:

Compensation is one of the most significant factors in determining the relationship between a principal and an agent. Regardless of whether it receives reimbursement from its clients, [the temporary staffing service] is responsible for paying the workers. . . . [W]here a client is for any reason unable or unwilling to pay the worker, [the temporary staffing service] is liable for making the payment. If [the temporary staffing service] had only agency liability, it would not be making payments that were unauthorized by the principal. . . .

146 Wn.2d at 179-80 (citations omitted).

The taxpayer argues it paid the physician on behalf of the pharmaceutical companies and paid the test subjects and other study-related lab or procedure expenses on behalf of the physician. The taxpayer argues that because only physicians can order tests, and it is not a physician, it cannot be held liable to the hospitals and labs for payment. Further, the taxpayer argues, the test subjects’ contracts are with the physician.

We disagree. We conclude that the taxpayer, like the temporary staffing agency in *Rogers* and Dr. Pilcher in *Pilcher*, was solely responsible for paying the physicians it retained to perform the studies, the labs that assisted in performing tests for the studies, the test subjects who participated in the studies, and the other service providers.¹² Regardless of whether it received payment from the sponsor, the taxpayer was liable for making these payments. If the taxpayer had only agency liability, it would not be making payments that were unauthorized by the principal. . . .

The *Rogers* court also considered the temporary staffing service’s control over hiring in determining that it had more than agent liability. The court reasoned:

[The temporary staffing service] also exerts considerable control over hiring. [The

¹²As noted above, the Audit Division did not assess tax on the taxpayer’s receipts it used to pay the physicians where both the taxpayer and physician contracted with the sponsor; nor did the Audit Division assess tax where only the physician contracted with the sponsor. Because treatment of these receipts is not in dispute, we do not make any ruling with respect to application of the Rule 111 exclusion to these receipts.

temporary staffing service] advertises for workers, requires them to complete employment applications, and tests their skills before deciding whether to hire them. [The temporary staffing service] then places the workers on an “available for assignment” list. When a client requests a worker, [the temporary staffing service] determines the job skills required and then selects one or more suitable candidates from its pool of workers available for assignment. While the client makes the final decision whether to accept the worker, the ultimate control over work assignments lies with [the temporary staffing service], which is responsible for determining which workers to make available for interview and in some instances will select the worker to fill the positions.

Similarly, in *Pilcher*, Dr. Pilcher controlled the hiring of the physicians to staff the emergency department. Similarly, we conclude that the taxpayer exerted considerable control over hiring. The taxpayer advertised for test subjects, and the test subjects contact the taxpayer to participate in the study. The taxpayer also selected the physicians who would perform the studies based on which physician’s skills were best suited to the study. Finally, the taxpayer selected the other service providers.¹³ In short, to fulfill its obligations to the sponsor the taxpayer hired qualified physicians, selected and qualified the test subjects and selected other service providers capable of giving the taxpayer the data and services it needed to complete the studies.

In summary, we conclude that the taxpayer has failed to prove its entitlement to the Rule 111 exclusion because: 1) the payments were not customary reimbursements for advances made to procure a service for the client; 2) the payments did not involve services that the taxpayer did not or could not render; and 3) the taxpayer had liability for the payments, beyond that of an agent of the sponsor.

...

CONCLUSIONS OF LAW AND DISPOSITION:

The taxpayer demonstrated that the Audit Division misclassified some of its contracts. This matter is remanded to the Audit Division for possible adjustment to the assessment based on records the taxpayer must provide by August 29, 2003.

Dated this 30th day of July, 2003

¹³ We do not have evidence regarding which party selected the labs to perform the work necessary for the studies.