

Cite as Det. No. 15-0215, 34 WTD 553 (2015)

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. 15-0215
)	
...)	Registration No. . . .
)	

[1] RCW 82.32A.020(2); ETA 3065.2009: WAIVER OF ASSESSMENT – ORAL INSTRUCTIONS. The Department lacks authority to waive assessment of taxes, penalties, and interest, based on oral instructions. RCW 82.32A.020 only provides authority to waive taxes based upon reliance on specific, official written advice or written reporting instructions from the Department.

[2] RULE 195; RCW 82.08.150; RCW 82.08.010(1)(a)(i); RCW 66.24.630(4)(a): SPIRITS SALES TAX – 17% LICENSE ISSUANCE FEE. The license issuance fee imposed on the seller is an expense of the seller and cannot be deducted from the measure of spirits sales tax.

[3] RCW 82.08.150(10); RCW 66.04.010(41): SPIRITS SALES TAX – ALCOHOL CONTENT. Beverages are not excluded from spirits sales tax on grounds that the beverages have less than 37% alcohol.

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.

Margolis, A.L.J. – A seller of liquor and wine (Taxpayer) appeals the assessment of service and other activities business and occupation (B&O) tax on grounds that it relied on advice from the Department of Revenue (Department) in not reporting its commission income. Taxpayer also appeals the assessment of spirits sales tax on grounds that [the Department’s Audit Division (Audit)] erred by not deducting the 17 percent Liquor Control Board (LCB) fee from the measure of the tax and assessing the tax on beverages with less than 37% alcohol content. We deny the petition.¹

ISSUES

1. Whether, under RCW 82.32A.020, reliance on purported incorrect advice from a Department representative provides a basis for waiving the assessment of B&O tax on commission income.

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

2. Whether, under RCW 82.08.010, the measure of spirits sales tax can be reduced by the LCB fee.
3. Whether, under RCW 66.04.010(41), “spirits” includes beverages with less than 37% alcohol content.

FINDINGS OF FACT

Taxpayer operates a liquor and wine store in . . . , Washington. [Audit] examined Taxpayer’s account for the period January 1, 2010 through December 31, 2012, and on July 10, 2014, issued two assessments against Taxpayer. In Document No. . . . , Audit assessed Taxpayer \$ The assessment is comprised of \$. . . in small business credit adjustment, and \$. . . in service and other activities B&O tax. In Document No. . . . , Audit assessed Taxpayer \$ The assessment is comprised of \$. . . in retail sales tax, \$. . . in retailing B&O tax, \$. . . in wholesaling B&O tax, \$. . . in spirits sales tax on sales to on-premises licensees, \$. . . in spirits liter sales tax on sales to on-premises licensees, \$. . . in spirits liter sales tax on sales to consumers, \$. . . in a 5% delinquent penalty, \$. . . in interest, \$. . . in a 5% assessment penalty, and a credit for \$. . . in overpaid spirits sales tax on sales to consumers.

In Document No. . . . , Audit assessed Taxpayer on income that Taxpayer received from commissions on liquor sales under the service and other B&O tax classification using Taxpayer’s bank statements. Taxpayer asserts that on October 12, 2009, he contacted the Department via telephone and was told that B&O tax was not due on commissions. Taxpayer also asserts that “[a]n email was generated stating that determination and forwarded to [Taxpayer].” Taxpayer’s Petition, dated August 5, 2014. Taxpayer explains that he tried to secure a copy of the email via a public records request, but the Department had no archived copies of such email, and he also requested a copy from his Internet service provider. Taxpayer’s Letter Requesting Postponement of Hearing, dated January 27, 2015. To date, Taxpayer has provided no evidence of oral or written instructions from the Department that these receipts are exempt.

In Document No. . . . , Audit assessed Taxpayer on spirits sales by reconciling income that Taxpayer reported on its excise tax returns with Taxpayer’s sales data, reports, and bank statements. Taxpayer asserts that Audit erred by including the 17% LCB fee in the measure of spirits sales tax because the fee is a tax as allegedly determined by Washington courts, and asserts that Audit erred by assessing spirits tax on products with less than 37% alcohol content.

ANALYSIS

Washington’s B&O tax is imposed on every person “for the act or privilege of engaging in business activities” and applies to the gross income of the business. RCW 82.04.220. “Business” for B&O tax purposes includes “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.

The Legislature “intended to impose the business and occupation tax upon virtually all business activities carried on within the state.” *Simpson Inv. Co. v. Dep’t of Revenue*, 141 Wn.2d 139,

149, 3 P.3d 741 (2000) (quoting *Time Oil Co. v. State*, 79 Wn.2d 143, 146, 483 P.2d 628 (1971)). Unlike the federal income tax, the B&O tax is not a tax on profit, net gain, capital gain, or sales “but a tax on the total money or money’s worth received in the course of doing business.” *Budget Rent-A-Car of Wash.-Oregon v. Dep’t of Revenue*, 81 Wn.2d 171, 173, 500 P.2d 764 (1972). The B&O tax provisions “leave practically no business and commerce free of the business and occupation tax.” *Id.* at 175.

The B&O tax rate varies according to the nature, or classification, of the business activity. *See generally*, ch. 82.04 RCW. Business activities other than those classified elsewhere in Chapter 82.04 RCW fall under the catch-all service and other activities B&O tax classification. RCW 82.04.290(2). The activities generating commission income are not classified elsewhere in Chapter 82.04 RCW, and thus, absent exception or exemption, and without deduction for expenses, are subject to service and other activities B&O tax.

Taxpayer asserts that the Department is estopped from assessing service and other activities B&O tax on commission income because the Department instructed Taxpayer, both via telephone and in writing, that Taxpayer is not subject to the tax.

As persons doing business in Washington, taxpayers have certain responsibilities, some of which are outlined in RCW 82.32A.030, including the responsibility to “[k]now their tax reporting obligations, and when they are uncertain about their obligations, seek instructions from the department of revenue.” RCW 82.32A.030(2). In addition to the responsibilities listed in RCW 82.32A.030, certain taxpayer rights are stated in RCW 82.32A.020, including:

(2) The right to rely on specific, official written advice and written tax reporting instructions from the department of revenue to that taxpayer, and to have interest, penalties, and in some instances, tax deficiency assessments waived where the taxpayer has so relied to their proven detriment;

...

(Emphasis added.) This right does not include the right to rely on oral advice. The Department has issued an advisory statement that explains the Department’s position regarding oral instructions. Excise Tax Advisory 3065.2009 states, in part:

The Department of Revenue gives consideration, to the extent of discretion vested in it by law, where it can be shown that failure of a taxpayer to report correctly was due to written instructions from the department or any of its authorized agents. The Department cannot give consideration to claimed misinformation resulting from telephone conversations or personal consultations with a Department employee.

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.

...

Because Taxpayer has shown no evidence of advice, whether written or otherwise, that he need not report commission income, we have no basis to waive the assessment, and sustain the assessment of B&O tax on commission income.

RCW 82.08.150 imposes spirits sales tax on the “selling price” of sales of certain spirits. RCW 82.08.010 defines the term “selling price” for purposes of chapter 82.08 RCW, and states as follows (in pertinent part):

No deduction from the total amount of consideration is allowed for the following: (A) The seller’s cost of the property sold; (B) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller; (C) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges; (D) delivery charges; and (E) installation charges.

RCW 82.08.010(1)(a)(i) (emphasis added).

Accordingly, no deduction is allowed for taxes or license fees imposed on the seller. In this case, RCW 66.24.630(4)(a), imposes a 17% license fee, as follows: that spirits retail licensees “must pay to the board . . . a license issuance fee equivalent to seventeen percent of all spirits sales revenues under the license.” Because the fee paid by Taxpayer is imposed on the seller and is an expense of the seller, we conclude that Audit was correct in not deducting the fee from the measure of spirits sales tax.² See also WAC 458-20-195 (state imposed alcoholic beverage license fee under chapter 66.24 RCW is not deductible).

RCW 82.08.150(10) states that the term “spirits” has the same meaning as provided in chapter 66.04 RCW. RCW 66.04.010(41) defines “spirits” as “any beverage which contains alcohol obtained by distillation, except flavored malt beverages, but including wines exceeding twenty-four percent of alcohol by volume.” Taxpayer has provided no statute, rule, or precedent indicating that Washington’s spirits sales tax does not apply to products with less than 37% alcohol, so we conclude that such products are subject to spirits sales tax.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 6th day of August, 2015.

² Taxpayer asserts that Washington courts have determined that the LCB fee is a tax (citing to a Cowlitz County docket number in its appeal petition, and citing to “Thurston County Superior Court” in its January 27, 2015 letter) and thus the 17% should be deducted from the measure of sales. Taxpayer’s references to apparently unpublished Superior Court cases are insufficient to establish that the LCB fee, even if a tax, is a deductible tax from the retail selling price.