

Cite as Det. No. 15-0184, 35 WTD 149 (2016)

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. 15-0184
)	
...)	Registration No. . . .
)	

[1] RULE 189; RCW 82.04.419: B&O TAX – ENTERPRISE ACTIVITY – EXCLUSIVELY GOVERNMENTAL – SOLID WASTE COLLECTION. A political subdivision of Washington was engaged in an “enterprise activity” where it participated in the operation of a solid waste collection facility, which was not an exclusively governmental activity.

[2] RULE 111: B&O TAX – ADVANCES – EXPORTING SOLID WASTE. A political subdivision of Washington may not exclude certain payments it made to export solid waste because it had contracted directly with the exporter, which had no contractual relationship with the third-party operator of the solid waste collection facility, or with the individual customers using that facility.

[3] RCW 82.32A.020: B&O TAX – RIGHT TO RELY ON WRITTEN ADVICE – SILENCE TO AN ISSUE IN PREVIOUS AUDIT FINDINGS. A taxpayer may not rely on the absence of an issue or explanation in previous audit findings as a form of written advice from the Department.

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.

Yonker, A.L.J. – A political subdivision of the State of Washington (Taxpayer) protests a tax assessment, in which Taxpayer was assessed service and other business and occupation (B&O) tax on “tip fees” collected from individuals that paid the fee to deposit their solid waste at a central transfer station owned and operated by a third party, but leased by Taxpayer. Taxpayer argues that its activity in relation to the central transfer station was an “exclusively governmental activity” and, therefore, exempt from B&O tax. We conclude that the activity at issue is an “enterprise activity” subject to B&O tax. Accordingly, we deny Taxpayer’s petition.¹

ISSUES

1. Are “tip fees” that were collected from individuals that paid such fees to deposit solid waste at a central transfer station leased by Taxpayer subject to B&O tax because such fees are

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

derived from an “enterprise activity,” and, therefore, not exempt from B&O tax under RCW 82.04.419 and WAC 458-20-189?

2. May “tip fees” be treated as “reimbursements” or “advances” under WAC 458-20-111 so that such fees may be excluded from Taxpayer’s measure of B&O tax?
3. May Taxpayer rely on a prior audit under RCW 82.32A.020(2) to preclude the Department from now including income from “tip fees” in Taxpayer’s measure of B&O tax?

FINDINGS OF FACT

[Taxpayer] is a political subdivision of the State of Washington. Taxpayer provides various services to the population of . . . County, including the collection and disposal of solid waste.

In 2013, the Department’s Audit Division conducted an audit of Taxpayer’s books and records for the period of January 1, 2009 through December 31, 2012 (audit period). During the course of that review, the Audit Division found that Taxpayer received income from “tip fees” collected from customers who disposed of their solid waste at a Central Transfer Station. The Audit Division also found that Taxpayer did not report any of the income from the “tip fees” during the audit period. While Taxpayer explained that it did not report that income because it believed the income was from an exclusively governmental activity, the Audit Division, instead, found that the income was the result of an enterprise activity. The Audit Division assessed service and other activities business and occupation (B&O) tax on the full amount of the “tip fees” that were collected at the Central Transfer Station during the audit period.

On July 28, 2014, as a result of the Audit Division’s findings, the Department issued a tax assessment for \$. . . , which included \$. . . in service and other activities business and occupation (B&O) tax, a \$. . . five-percent assessment penalty, and \$. . . in interest. Taxpayer subsequently appealed the full amount of the tax assessment.

1. Historical Background

In 1972, Taxpayer executed its initial Comprehensive Solid Waste Management Plan (Plan) to address the collection and disposal of solid waste within the area of Taxpayer’s political jurisdiction. As part of the original Plan, Taxpayer owned and operated five “open dumps” at various locations throughout the county. Sometime in the 1970s, Taxpayer expanded residential solid waste collection service into rural areas and the need for the “open dumps” decreased. In 1978, Taxpayer converted the five “open dumps” into “transfer stations,” where residents could deposit their solid waste into containers at the five locations, and the containers and their solid waste contents would be trucked by Taxpayer to a central landfill that was owned and operated by [Waste Company]. Taxpayer’s solid waste collection service also trucked the collected solid waste to [Waste Company’s] central landfill. As such, Taxpayer’s Plan was dependent on the availability of [Waste Company’s] central landfill to dispose of all solid waste in the County.

In the 1980s, concerns were raised about the long-term feasibility of [Waste Company’s] central landfill. In 1984, the Department of Ecology found that the central landfill “continued to

experience leachate and stormwater control problems,” and ordered [Waste Company] to develop a plan to address the issues. Following negotiations, [Waste Company] agreed that it would close its central landfill by 1993.

In 1991, the Plan was updated, and Taxpayer found that with the imminent closure of [Waste Company’s] central landfill in two years, it must decide whether to (1) develop a new central landfill for the disposal of solid waste or (2) implement a “waste export” program in which solid waste was transported from a central transfer station to a landfill outside of the county. Sometime between 1991 and 1992, Taxpayer chose the second option.

2. 1993 Contract Regarding Solid Waste Export Services

On June 7, 1993, Taxpayer’s commissioners authorized Taxpayer to enter into a Contract Regarding Solid Waste Export Services (Export Contract) with [Exporter] for the purpose of exporting solid waste from within Taxpayer’s political jurisdiction to a disposal site outside of that jurisdiction.

As part of the Export Contract, Exporter agreed to the following responsibilities: acceptance, storage, handling, unloading, transportation, and disposal of solid waste. (Section 6.1(a).) Exporter also agreed to be responsible for the ownership, operation and/or leasing of disposal sites for the exported solid waste, and other related facilities. (Section 6.1(b).)

Also as part of the Export Contract, Taxpayer agreed to the following responsibilities:

- Payment of a “service fee” to Exporter for exporting and disposing of the solid waste. (Section 7.1(a).)
- Ownership and/or operation of at least one transfer station. (Section 7.1(b).)
- Delivery of solid waste to Exporter in trailers according to certain specification. (Section 7.1(c).)
- Provision, operation, and maintenance of all facilities necessary for the operation of the transfer station. (Section 7.1(d).)

Exporter agreed to provide Taxpayer with a monthly invoice, complete with supporting documentation. (Section 8.5(a).) Taxpayer, in turn, agreed to pay Exporter within 45 days of receiving the invoice. *Id.* The Export Contract identifies no other party as being responsible or liable for payment of the “service fee” to the Exporter.

The Export Contract continued to be in effect through the current audit period. Under the Export Contract, Exporter has transported most categories of solid waste from the Central Transfer Station located near . . . , Washington, to . . . , Washington, where the solid waste is then placed on trains and transported to . . . County, Washington, for final disposal.

3. 1994 Transfer Station Development and Services Agreement

On December 19, 1994, Taxpayer’s commissioners authorized Taxpayer to enter into a Transfer Station Development and Services Agreement (Agreement) with [Operator], in which Operator

agreed to “design, construct, own and operate” a Central Transfer Station and to operate the five existing rural transfer stations.

As part of the Agreement, Operator agreed to the following terms:

- Sole responsibility for the “development, construction and operation of the Central Transfer Station” and ensuring that the design, construction and operation meet all technical specifications. (Section 6.7(a).)
- Operation of the Central Transfer Station scales and gatehouse, and the collection of “tip fees” from individuals using the Central Transfer Station, and the responsibility of remitting such fees to Taxpayer. (Section 6.7(g).)
- Taxpayer reserved the right to take over operations of the scales and gatehouse at the Central Transfer Station and to directly collect “tip fees” at any time. *Id.*
- Operator shall collect “tip fees” “as agent for” Taxpayer. (Section 9.1(a).)
- Operator “shall have no liability or responsibility” for the transport or disposal of solid waste from the Central Transfer Station. (Section 7.1(c).)²
- Operator shall execute a lease of the Central Transfer Station to Taxpayer, the lessee, concurrently with the execution of the Agreement. (Section 10.1.) The stated purpose of such lease “is to provide additional security and control over the Central Transfer Station” to Taxpayer “in the event of a default” by Operator, and “not for the purpose of operation.”
- On a monthly basis, Operator shall retain portions of the collected “tip fees” for the “lease payment” and the “service fee” that Taxpayer is required to pay to Operator for its services, and remit the remaining balance to Taxpayer monthly. (Section 9.2(e).)

Also as part of the Agreement, Taxpayer agreed to the following terms:

- Responsibility for making “all necessary arrangements and payments, and entering into agreements for the transportation and disposal” of solid waste from the Central Transfer Station. (Section 7.1(c).)
- Payment of a “service fee” to Operator for the operation of the Central Transfer Station. (Section 7.2.) Such payment “shall constitute full compensation” to Operator “for all services rendered under this Agreement, including all costs incurred in providing solid waste handling services under the Agreement,” but does not include the “lease payment.” (Section 9.2(a).)
- Taxpayer shall allow Operator to credit Taxpayer for monthly lease payments by retaining a portion of collected “tip fees” equal to the amount of the lease payments agreed to in the concurrently-executed lease agreement. (Section 10.2.)

Also on December 19, 1994, Taxpayer’s Commissioners authorized Taxpayer to enter into a Central Transfer Station Lease and Easement Agreement (Lease Agreement) with Operator. Specifically, Operator, as lessor, leased to Taxpayer, as lessee, the Central Transfer Station, including “vehicular and pedestrian access and travel” over the land. In exchange, Taxpayer agreed to make monthly payments based on an agreed-upon “rent schedule,” which is based on

² With the exception of asbestos. *Id.*

certain “bond payments” received by Taxpayer. Under the terms of the Lease Agreement, Operator also agreed to grant Taxpayer an option to purchase the Central Transfer Station from Operator at any time during the term of that agreement upon proper notice.

The Agreement continued to be in effect through the current audit period. Operator continues to own and operate the Central Transfer Station, and Taxpayer has never exercised its option to purchase the Central Transfer Station. The five rural transfer stations that Operator took over in 1994 have all subsequently been closed.³ Taxpayer represented that the Central Transfer Station is funded over fifty percent by the “tip fees” that are collected from individuals using the Central Transfer Station.

4. 1996 Audit Results

On April 9, 1996, the Audit Division completed a review of Taxpayer’s books and records for the period of January 1, 1992 through June 30, 1995 (prior audit period). As part of that prior review, the Audit Division found that Taxpayer had failed to include “income from refuse collection” in its measure of tax for B&O tax purposes. As a result, the Audit Division assessed service and other activities B&O tax on Taxpayer’s “income from refuse collection” during the majority of the prior audit period. Specifically, the Audit Division determined that Taxpayer had income from such activity between 1992 and 1994, but no such income during 1995.

The available records from that earlier audit contain no statement or other indication of how the Audit Division determined that Taxpayer had no “income from refuse collection” during 1995. Likewise, Taxpayer has not provided any further evidence of an explanation from the Audit Division regarding this finding during the prior audit period.

ANALYSIS

RCW 82.04.220(1) imposes the B&O tax as follows:

There is levied and collected from every person that has a substantial nexus with this state a tax for the act or privilege of engaging in business activities. The tax is measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

The legislature intended the B&O to be imposed on “virtually all business activities carried on within the state” and to leave practically no business free of tax. *Time Oil Co. v. State*, 79 Wn.2d 143, 146, 483 P.2d 628 (1971); *Budget Rent-A-Car of Washington-Oregon, Inc. v. Dep’t of Revenue*, 81 Wn.2d 171, 175, 500 P.2d 764 (1972); *Simpson Inv. Co. v. Dept. of Revenue*, 141 Wn.2d 139, 149, 3 P.3d 741, 746 (2000). The broad tax imposing statute and definitions, read together with the exemptions in RCW 82.04, evidences the legislative intent to impose the B&O tax upon essentially all business activities carried on within the state, unless a specific exemption applies. *Budget Rent-A-Car*, 81 Wn.2d at 175.

³ One closed in 2007, a second closed in 2009, and the final three all closed in 2013. Any income received from the operation of the five rural transfer stations is not at issue in this appeal.

The term “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. The term “business” includes activities that are not engaged in for profit, and the benefit need not be monetary. *City of Seattle v. Washington*, 59 Wn.2d 150, 367 P.2d 123 (1961).

Business activities other than those that are specifically taxable elsewhere in Chapter 82.04 RCW are subject to the service and other activities B&O tax classification. RCW 82.04.290(2). Taxpayer does not dispute that if the income at issue is taxable, it should be taxed under the service and other activities B&O tax classification. However, Taxpayer argues that the income at issue is exempt from all B&O taxation.

1. “Enterprise Activity” under Rule 189

Pursuant to RCW 82.04.419, the B&O tax “shall not apply to any county, city, town, school district, or fire district activity, regardless of how financed, other than a utility or enterprise activity . . .” The term “enterprise activity” is not defined in statute. However, WAC 458-20-189 (Rule 189), the Department’s administrative rule implementing RCW 82.04.419, provides the following definition of “enterprise activity”:

“Enterprise activity” means an activity financed and operated in a manner similar to a private business enterprise. The term includes those activities which are generally in competition with private business enterprises and which are over fifty percent funded by user fees. The term does not include activities which are exclusively governmental.

Rule 189(2)(d). As such, if an activity is (1) “generally in competition with private business enterprises” and (2) over fifty percent funded by “user fees,” the activity is an “enterprise activity.”⁴ Here, Taxpayer concedes that the Transfer Station is funded over fifty percent by user fees. As such, we need only determine if the activity is one that is “generally in competition with private business enterprises.”

Here, Taxpayer provides solid waste services by contracting with Operator to operate the Central Transfer Station for use by county residents. We consider this activity to be participating in the operation of the Central Transfer Station. [W]e recognize that the operation of the Central Transfer Station is done by Operator pursuant to the Agreement. Certainly, private businesses may engage in various aspects of operating such a facility. *See* RCW 70.95.170 ; *see generally* Chapter 173-350 WAC. Moreover, private businesses actually do engage in such activities.⁵ So

⁴ Taxpayer argued that, in order to qualify as an “enterprise activity,” the activity must additionally be “financed and operated in a manner similar to a private business enterprise.” While we recognized that Rule 189(2)(d) includes such language, we conclude that the second sentence of that subsection . . . clearly states that activities demonstrating both of the elements in that sentence qualify as an “enterprise activity” regardless of the language contained in the first sentence.

⁵ The Washington Refuse & Recycling Association (WRRRA) is a trade association that represents the interests of Washington’s “companies” that are involved in the “diverse and multifaceted solid waste handling industry.” The existence of such a trade organization indicates that solid waste handling is an industry that includes private companies, and, presumably, the possibility of competition between such companies. In addition, the Department of Ecology maintains information, including a publicly-available spreadsheet of all transfer stations and landfills, some

long as the activity at issue is one that may be accomplished by a private entity, and private entities actually do engage in such activity, we conclude that the activity is “generally in competition with private business enterprises.”

Our conclusion regarding Taxpayer’s activity is consistent with WAC 458-20-250(8), which states that “[s]olid waste collection is an ‘enterprise activity,’ when funded over fifty percent by user fees. **Amounts derived from this activity by a local governmental entity are subject to service and other activities B&O tax.**” (Emphasis added). Similarly, Taxpayer, a governmental entity, derives income – the tip fees – from the collection of solid waste at the Central Transfer Station. As such, we conclude that Taxpayer’s income from the Central Transfer Station qualifies as an “enterprise activity,” and is, therefore, generally subject to the B&O tax.

Taxpayer makes much of the fact that it does not meet the requirements of a “solid waste collection business” under RCW 82.18.010. Apparently, Taxpayer’s position is that if it does not meet the requirements of such a business, it is not engaged in any activity that might qualify as an “enterprise activity.” We disagree. An enterprise activity can be any “activity” so long as it meets the two requirements we discussed earlier. We decline to make any ruling on whether Taxpayer is a “solid waste collection business” under RCW 82.18.010 because such a conclusion is not necessary here since we have already concluded that Taxpayer’s activity related to the Central Transfer Station is an “enterprise activity” under RCW 82.04.419 and Rule 189.

2. “Exclusively Governmental” Activity under Rule 189

Under Rule 189(2)(d), even if an activity otherwise meets the requirements of an “enterprise activity,” if that activity is an “exclusively governmental” activity, it is exempt from B&O taxation. Taxpayer argues that the income from the tip fees collected from the Transfer Station are the result of “exclusively governmental” activity for two reasons. First, Taxpayer argues that it is mandated under RCW 70.95.080 to develop and administer a solid waste management plan. Taxpayer maintains that the development and administration of such a plan is an “exclusively governmental” activity, and, therefore, not subject to B&O tax. Taxpayer’s argument follows that because the operation of the Transfer Station is part of the solid waste management plan, the income from the Transfer Station must also not be subject to B&O tax.

While RCW 70.95.080(1) requires each county to “prepare a coordinated, comprehensive solid waste management plan,” that statute does not require Taxpayer to include the specific activity of operating a transfer station in such a plan. From our reading of RCW 70.95.080, political subdivisions of Washington have wide latitude to develop specific aspects of a plan, so long as certain issues are addressed in that plan. Further, defining the activity at issue here as developing a solid waste management plan is too broad. The actual activity at issue is participating in the operation of the Transfer Station for the purpose of collecting tip fees, which we have already concluded is an activity generally in competition with private business enterprises, and not exclusively governmental in nature. *See* Det. No. 98-208, 19 WTD 332 (2000) (holding that a political subdivision of Washington could not rely on its obligation under the Growth

of which appear to be privately owned or operated. Found at <http://www.ecy.wa.gov/programs/swfa/facilities/>, last visited on June 4, 2015.

Management Act, Chapter 36.70A RCW, to do “comprehensive planning” for adequate public facilities for storm and sanitary sewer systems to show that user fees it collected for sewerage collection were the result of an “exclusively governmental” activity).

Second, Taxpayer argues that because the tip fees collected from the Central Transfer Station and remitted to Taxpayer are used to pay “the necessary governmental expenditures of salaries and Plan administrative and operating expenses,” Taxpayer’s income from the Central Transfer Station activity should be considered “exclusively governmental,” and, therefore, exempt from B&O tax. Again, we disagree. Rule 189(2)(d) clearly states that enterprise activity “does not include **activities** which are exclusively governmental.” (Emphasis added.) Thus, designating something as an enterprise activity does not depend on how the income from that activity is spent, but on the nature of the activity generating the income. Here, the activity generating the income is, again, the operation of the Central Transfer Station. The fact that Taxpayer chooses to use the income from the tip fees to pay administrative and operating expenses that may be exclusively governmental does not change the nature of the activity itself from an enterprise activity. As such, we conclude that Taxpayer has failed to prove that the income from the collection of tip fees at the Central Transfer Station is the result of an “exclusively governmental” activity.

3. Rule 111

WAC 458-20-111 (Rule 111) recognizes that a business can receive certain “advances” or “reimbursements” solely in the business’s capacity as an agent for the business’s customer or client. Specifically, Rule 111 states that qualifying advances and reimbursements are not attributed to the business activities of the taxpayer and may be excluded from the measure of the tax when the taxpayer’s 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.” See *Washington Imaging Services, LLC v. Dep’t of Revenue*, 171 Wn.2d 548, 561-62, 252 P.3d 885 (2011); *Rho Co. v. Dep’t of Revenue*, 113 Wn.2d 561, 782 P.2d 986 (1989); *City of Tacoma v. Wm. Rogers Co.*, 148 Wn.2d 169, 60 P.3d 79 (2002) (“in a traditional ‘pass through’ scenario, the client has sole liability for an expense paid on its behalf and is responsible for advancing the cost to the taxpayer or reimbursing the taxpayer”).

We note that Taxpayer has the burden of establishing its entitlement to any deduction or exemption from tax liability. See *Budget Rent-A-Car, Inc. v. Dep’t of Revenue*, 81 Wn.2d 171, 174-75, 500 P.2d 764 (1972) (“Exemptions to the tax law must be narrowly construed. Taxation is the rule and exemption is the exception. Anyone claiming a benefit or deduction from a taxable category has the burden of showing that he qualifies for it”); see also *Lacey Nursing v. Dep’t of Revenue*, 128 Wn.2d 40, 905 P.2d 338 (1995); *Port of Seattle v. State*, 101 Wn. App. 106, 1 P.3d 607 (2000); Det. No. 13-0279, 33 WTD 75 (2014). Thus, in order for a taxpayer to be entitled to exclude its payroll expenses from its gross income under Rule 111, that taxpayer has the burden of proving that it is not personally liable for the expenses at issue.

Here, Taxpayer argues that funds it pays to a third party to export waste from the Transfer Station are “advances” that satisfy the requirements of Rule 111, and, thus, should be excluded

from the measure of tax. As discussed earlier, Operator collects tip fees from individuals at the Central Transfer Station as an agent for the Taxpayer when such individuals deposit waste. Operator then remits to Taxpayer the tip fees less Operator's contractual fees for operating the Central Transfer Station. Taxpayer then remits payment to Exporter to pay for the expense of hauling away the waste from the Central Transfer Station.

In order to prevail on this argument, Taxpayer must prove that the obligation to pay Exporter belonged to Taxpayer's client or customer and Taxpayer had no liability to make such payments except as the client's agent. At the hearing, Taxpayer asserted that it remitted such payments as an agent for Operator, or alternatively, as an agent of the individuals depositing waste at the Central Transfer Station. However, the evidence shows that, according to the Export Contract, Taxpayer is responsible to pay Exporter a service fee for "[a]cceptance, storage, handling, unloading, [t]ransportation and [d]isposal of" the waste collected at the Central Transfer Station. There is no mention of any other party having any liability to pay Exporter for its services. Instead, the plain language of the Export Contract places the liability squarely on Taxpayer. As such, we conclude that Taxpayer was primarily liable for the payments to Exporter, and, therefore, may not exclude such payments from its gross income under Rule 111.

4. Reliance on 1996 Audit Findings

RCW 82.32A.020(2) provides that taxpayers have 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."

Using this statutory language as its basis, Taxpayer claims it relied on the findings of a previous audit issued in 1996 to Taxpayer. Specifically, Taxpayer points out that in that previous audit, the Department assessed service and other activities B&O tax on Taxpayer's income from tip fees paid at all transfer stations up through 1994, but did not assess such tax on income from any tip fees during 1995. The significance of this time period is that in April 1994, Taxpayer signed its original contract with Operator, which took over operations at the transfer stations later that year as a result of that original contract. Taxpayer claims this shows that the previous auditor knew all transfer station operations had been transferred to Operator in 1994 and did not assess B&O tax against Taxpayer in 1995 for that reason. Taxpayer acknowledges that the previous auditor did not explain in writing why he did not assess B&O tax on the tip fees in 1995, but argues, nevertheless, that it relied on that B&O tax treatment in relation to the tip fees since that time.

We conclude that despite Taxpayer's argument, the absence of an explanation in the previous audit findings does not constitute "specific, official written advice and written tax reporting instructions." In other words, silence on an issue in a writing from the Department cannot serve as a basis for a taxpayer's reliance under RCW 82.32A.020(2). *See* Det. No. 99-283, 20 WTD 25 (2001) (holding that a Special Notice that was silent on an issue did amount to an admission, statement or act that could give rise to a taxpayer's right to claim equitable estoppel). Here, there is simply nothing "written" on this issue in the previous audit findings, and, therefore, there is nothing specific on which Taxpayer may properly rely.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 15th day of July, 2015.