

Cite as Det. No. 18-0293, 39 WTD 215 (2020)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS 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. 18-0293
)	
)	
... )	Registration No. ...
)	

RCW 82.04.220: COMMISSION INCOME – JOINT VENTURE. A taxpayer that contracts to receive commissions as an independent contractor and fails to prove that it is a joint venture partner is subject to business and occupation (B&O) tax on commission income.

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, T.R.O. – An operator of mobile snack stands protests the assessment of service and other activities business and occupation (B&O) tax on grounds that it was engaged in a retailing joint venture that paid the appropriate retailing B&O tax and retail sales tax, and the measure of tax assessed includes Taxpayer’s share of joint venture profits in error. We deny the petition.<sup>1</sup>

ISSUE

Whether, under RCW 82.04.220, Taxpayer is subject to business and occupation (B&O) tax on commission income.

FINDINGS OF FACT

Taxpayer was engaged in the business of ... operating a coffee shop and mobile snack stands. The Department of Revenue’s Audit Division (Audit) examined Taxpayer’s account for the period January 1, 2013, through December 31, 2016, and on September 8, 2017, assessed Taxpayer \$ . . . . The assessment [consists] of \$ . . . in retail sales tax, \$ . . . in retailing B&O tax, \$ . . . in service and other activities B&O tax, \$ . . . in use/deferred sales tax, \$ . . . in manufacturing B&O tax, a \$ . . . multiple activities tax credit, \$ . . . in litter tax, and \$ . . . in interest.

Audit found that Taxpayer failed to report commission income that it earned as a subcontractor for two concession management companies, and assessed Taxpayer B&O tax on this income. Audit examined invoices and bank deposits, and determined that Taxpayer earned \$ . . . in commissions

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

from [Company A] on sales . . . , and \$ . . . in commissions from [Company B] on [other] sales . . . . This resulted in \$ . . . of income subject to \$ . . . in service and other activities B&O tax.

Taxpayer petitions for correction of the [assessment of service and other activities B&O tax] plus interest, arguing that it was engaged in joint ventures with the concession management companies, the joint ventures paid applicable taxes, and the amounts at issue constitute its share of joint venture profits not subject to tax. Taxpayer avers that the concession management companies provided locations, Taxpayer sold the products (its own products as well as the concession management companies' products), sales receipts from the "joint undertakings" were transferred to the concession management companies, which paid the tax, and [a percentage] of net profits were distributed to Taxpayer. Taxpayer recognizes that no joint venture was registered with the Department, but nevertheless asserts that the receipts at issue were Taxpayer's split of net profits from a joint venture, where the joint venture already paid applicable taxes, rather than commission income that Taxpayer earned as a subcontractor.

With its petition for adjustment, Taxpayer provided two substantially similar contracts with concession management companies [as] evidence of the nature of the receipts at issue. The contract titled "Subcontractor Concession Agreement," dated June 18, 2014, between [Company B], the concession management company, and Taxpayer, reads as follows (in pertinent part):

**WHEREAS**, [Company B] and [Taxpayer] desire that [Taxpayer] enter into this Agreement pursuant to which [Taxpayer] shall be granted the right to provide certain services in the Facility in accordance with the terms and conditions set forth below . . .

#### **ARTICLE 1: [Taxpayer] RIGHTS**

1.1 Sale of Products: Concession Locations. [Company B] grants to [Taxpayer] the right to conduct the sale of only those of [Taxpayer's] products identified on Exhibit "A" . . . from locations at the Facility to be designated by [Company B] . . . [Company B] has the right, in [its] sole discretion, to locate and re-locate the Concession Locations at any time during the Term. . .

1.2 Pricing, Packaging & Size. . . [Company B] shall meet and mutually agree on pricing, size offerings and packaging of all Products. . . .

1.3 Equipment; Signage. . . . The style, size, form, content, materials and location of all signs and advertising used by [Taxpayer] at the Facility shall be subject to the prior written approval of [Company B] . . .

#### **ARTICLE 5: PERSONNEL; INDEPENDENT CONTRACTOR**

5.1 [Taxpayer's] Personnel. [Taxpayer] will maintain a staff . . . consistent with the operating standards required by [Company B]. Neither [Taxpayer] nor its employees are [Company B] employees . . . [Taxpayer] agrees that it will comply with all of [concession management company's] and the Client's work rules, policies and procedures. . . .

5.2 Independent Contractors. [Taxpayer] shall be an independent contractor of [Company B] and not a joint venturer, partner, agent or employee of [Company B] . . . . [Taxpayer] shall indemnify [Company B] and Client . . . against any and all liability which may be asserted against them in connection with this Agreement and [Taxpayer's] performance hereunder. . . .

## ARTICLE 7: FINANCIAL ARRANGEMENTS

7.1 Commissions. [Company B] shall issue [Taxpayer] a check for commissions equivalent to Food and Beverage . . . and Alcohol beverage . . . percent of the total Product inventory Net Sales, less (A) inventory shortages, which shortages shall be charged at retail prices, and less (B) the cost of inventoried Products issued or sold by [Company B] and accepted by [Taxpayer] on net sales (the "Commissions"). "Net Sales" shall mean all receipts received by [Taxpayer] from sales of the Products at the Facility, less only retail sales taxes and other direct taxes imposed upon receipts collected from consumers by [Taxpayer] at the Facility. . . .

## ARTICLE 11: TERM; TERMINATION

. . .

2. Early Termination. [Company B] may, in its sole discretion, terminate this Agreement prior to the expiration of the Term by giving five (5) days' advance written notice to [Taxpayer]. [Company B] may terminate this agreement for no reason or any reason . . . If [Company B] determines that any aspect of [Taxpayer's] services do not meet [Company B's] quality or service standards, [Company B] shall be entitled to immediately terminate this Agreement.

Subcontractor Concession Agreement (emphasis in bold added).

Taxpayer also provided substantially similar affidavits by [employees of Company A and Company B], that, to the best of their knowledge: Taxpayer and the concession management company operated concession stands for economic and tax purposes as a joint venture; they shared a common purpose of maximizing sales; they shared a community interest in benefit from maximizing sales; they shared equal rights in the management and conduct of the stands; they shared profits . . . ; the disclaimer of joint venture was only intended to address liability between them; and the concession management company remitted B&O tax and sales tax on all sales made by the joint venture.

## ANALYSIS

RCW 82.04.220(1) provides that B&O tax is levied "for the act or privilege of engaging in business activities," and its measure includes the "gross income of the business." The term "business" 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. RCW 82.04.080(1) defines "gross income of the business" as follows:

[T]he value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, . . . interest, . . . and other emoluments however designated.

The B&O tax applies broadly, as evidenced by the Legislature's intent to impose the tax "upon virtually all business activities carried on within the state" *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 149, P.3d 741 (2000) (quoting *Time Oil 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.

RCW 82.04.030 defines "person" as:

[A]ny individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, political subdivision of the state of Washington, corporation, limited liability company, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise and the United States or any instrumentality thereof.

Based on this definition, Washington Courts have respected the different persons engaging in business in Washington State. *See, e.g., Impehoven v. Dep't of Revenue*, 120 Wn.2d 357, 841 P.2d 752 (1992) (independent contractor insurance agents affiliated with broker are not one "person" for B&O tax purposes and not "group of individuals acting as a unit" under RCW 82.04.030); *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 845 P.2d 1331 (1993) (subsidiary formed by parent to finance parent's accounts receivable engaged in arms-length transaction with parent and was a separate "person" for B&O tax purposes); *American Sign & Indicator Corp. v. State*, 93 Wn.2d 427, 429, 610 P.2d 353 (1980) ("The tax liability of a corporation must be considered without regard to its relationship to a parent or subsidiary company or to the existence of common officers, employees, facilities, or stock ownership."). Washington law treats affiliated entities as different persons, each subject to B&O tax on their taxable activities. *See* RCW 82.04.220. [Unless Taxpayer demonstrates that it performed the activity at issue as part of a joint venture, Taxpayer is treated as a person subject to B&O tax on its own commission income separately from the concession management companies' taxable business activity.]

The form of Taxpayer's business activity is evidenced by the contracts under which Taxpayer acts as a subcontractor that earns commissions on sales. The contracts, both titled "Subcontractor

Concession Agreement,” explicitly identify Taxpayer as an independent contractor with certain rights and responsibilities, and seek to indemnify the prime contractor from liability rather than establish a joint venture. Indeed, the contracts *explicitly disclaim* a joint venture, and describe the receipts at issue as Taxpayer’s commissions rather than a share of joint venture profits. Taxpayer and the concessions management company did not register with the Department as a joint venture, and there is no evidence that Taxpayer and the concession management company engaged with third parties as a joint venture. [The affidavits provided by Taxpayer claiming Taxpayer and the concession management company acted as a joint venture do not overcome the binding contractual language disclaiming the alleged joint venture.]

Taxpayer asserts that, in substance, Taxpayer is a joint venture partner such that commissions should be characterized as non-taxable profit sharing. The four essential elements for joint ventures are: (1) a contract, (2) a common purpose, (3) a community of interest, and (4) an equal right to a voice, accompanied by an equal right to control of the agencies used in the performance. *Carboneau v. Peterson*, 1 Wn.2d 347, 374, 95 P.2d 1043 (1939). The courts have generally included an additional requirement that joint ventures share profits and losses. *Knisely v. Burke Contract Accessories, Inc.*, 2 Wn. App. 533, 468 P.2d 717 (1970). Taxpayer argues that it satisfies the essential elements of a joint venture, and the provision stating that Taxpayer is not a joint venture “is not intended to specify that parties’ joint undertaking will not be regarded as a joint venture for tax purposes.” Taxpayer’s Petition, Page 6.

The doctrine of substance over form is generally not available to a taxpayer to eliminate the tax consequences of the transaction. *See Washington Sav-Mor Oil Co. v. State Tax Comm’n*, 58 Wn.2d 518, 521, 364 P.2d 440 (1961); Det. No. 16-0089, 35 WTD 549 (2016). The form of the transactions and the tax consequences in this matter are clear. Taxpayer contracted with concession management companies as a subcontractor, not as a joint venture partner, and earned commission income under those agreements. This income is subject to service and other activities B&O tax. [We conclude that Taxpayer has not satisfied its burden of proving that it was a joint venture partner for the purposes of determining the taxation of the business activity at issue.]

#### DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 1st day of November 2018.