

Cite as Det. No. 21-0006, 41 WTD 313 (2022)

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. 21-0006
)	
...)	Registration No. . . .
)	

RCW 82.08.010(1)(a)(i); RCW 82.04.070; WAC 458-20-108: RETAIL SALES TAX – RETAILING B&O TAX – DEBIT CARD PROCESSING FEE – SERVICE FEE – SALES PRICE – POINT OF BANKING. Debit card processing fees associated with so-called Point of Banking are an expense of the seller and should be included as part of the sales price subject to retail sales tax. For purposes of the retailing B&O tax, the debit card processing fees are a cost of doing business that should be included in the seller’s gross proceeds of sales.

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.

LaMarche, T.R.O. – A business that sells cannabis and cannabis-related products disputes the assessment of retail sales tax and retailing business and occupation (B&O) tax on certain debit card processing fees, arguing that the fees are not part of the gross retail selling price. We deny the petition [in part and remand it in part].¹

ISSUE

Under RCW 82.08.010(1)(a)(i), RCW 82.04.070, and WAC 458-20-108 (Rule 108), is Taxpayer subject to retail sales tax and retailing B&O tax on certain point of banking debit card processing fees?

FINDINGS OF FACT

. . . (Taxpayer), sells cannabis and cannabis-related products in its stores located in Washington State.

The Department of Revenue’s (Department) Audit Division (Audit) audited Taxpayer’s business activities for the period from January 1, 2016, through September 30, 2018 (Audit Period). The auditor visited Taxpayer’s location in . . . Washington, and observed how transactions were made.

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

The auditor selected a product, and the clerk asked her how she would like to pay; she indicated she would use a debit card. A point of banking (POB) terminal was located at the cashier's station, and a sign posted near the terminal stated that \$4.00 would be charged to use the terminal. The sign made no reference to a third party.

The auditor inserted her debit card and entered her PIN as in a typical debt card transaction. She received a receipt for the amount of the purchase, \$50.00, which included taxes, but not the \$4.00 fee. Her bank statement for the period showed a single line item for \$54, and the description "ATM Withdrawal – EFT . . . – Card ending in [. . .]." The auditor noted that during the transaction, unlike a typical ATM transaction, she was not prompted on the screen to accept or decline a fee. At no point was the auditor advised there was a third party to the transaction.

Audit concluded that the POB transaction was not like that with a traditional ATM, where the vendor directly receives the fee from the ATM user and the merchant is subject only to service and other activities B&O tax on ATM commissions it may receive from the ATM vendor.

Audit determined that the \$4.00 fee (POB Fee) should instead be included in the retail selling price in transactions using Taxpayer's POB system. Audit treated the POB Fees as unreported retail income, and assessed retailing B&O tax and retail sales tax on the amount of the fees. Taxpayer did not provide records to establish the actual amount of fees, so the fees were estimated to be \$4.00 per [POB] sales transaction for the entire Audit Period.

On January 14, 2020, the Department issued an assessment, . . . , . . . Taxpayer timely filed a petition for review.²

In an email to the Tax Review Officer on April 24, 2017, Taxpayer stated in relevant part:

[T]he service we use is an ATM. We do not collect, remit, receive or have any control over the debit/ATM fees. The only payment we receive is the rebate of \$.25 per transaction paid the following month.^[3] We do not charge the fee, it is not part of the sales price, and should not be subject to sales tax.

POB Agreement. The POB Fee at issue relates to a debit card processing agreement Taxpayer entered into with . . . (Debit Card Processor) on . . . 2015 (POB Agreement). The agreement is entitled "Processing Agreement" and indicates that Debit Card Processor will provide a POB debit card processing system for Taxpayer's use. POB Agreement, at 1.

Under the heading "Convenience Fee Information," the agreement states, in relevant part, that the "Total Surcharge" will be \$2.00,⁴ and indicates that "Merchant Receives" a \$0.25 commission for

² We note that Taxpayer also disputed use tax assessed on certain ATM-related purchases. Audit indicates that this issue has been resolved.

³ The \$0.25 commissions were separately paid to Taxpayer by Debit Card Processor, based on the number of POB transactions. Taxpayer correctly reported these commissions under the service and other activities B&O tax classification, and they are not in dispute.

⁴ During the Audit Period, the \$2.00 POB Fee was increased to \$4.00, but Taxpayer's commission from Debit Card Processor of \$0.25 per transaction did not change.

each transaction.⁵ *Id.* Although the form has provisions for monthly maintenance fees or other charges to the seller, these amounts are listed as \$0 on the POB Agreement. *Id.* Attached to the agreement is a document entitled “ACH Authorization Release,” which indicates that Taxpayer authorizes “EFT Services” to initiate ACH transfer entries for debits, credits, transaction settlement, and adjustments, but shows the “surcharge” category crossed out. *Id.* at 2.

POB Merchant Statement. Attached to Audit’s response to the petition is a merchant statement (POB Merchant Statement) provided to Taxpayer from a [third-party] entity named The statement lists the POB terminal number, model, close time, active status, and lists “Surcharge” as “400.” POB Merchant Statement, at 1.

The POB Merchant Statement lists the gross amount of the POB transactions, inclusive of the \$4.00 POB Fee. The statement breaks down transactions for the POB system for the month of January 2018. The statement lists the transaction date, the transaction count, the surcharged count, total surcharged, amount dispensed, and the merchant rebate. The amount listed as “Total Surcharged” is equal to the number of POB transactions multiplied by \$4.00. *Id.*

The amount listed under “Merchant Rebate” is equal to the number of transactions multiplied by \$0.25, and appears to refer to the commission amounts addressed in the POB Agreement. *Id.* At the bottom of the statement, under the description “Income To You,” is the total of all merchant rebates/commissions for the month. *Id.* Taxpayer indicates that Debit Card Processor makes the electronic deposits into its bank account. The deposits to Taxpayer’s bank account correlate with the non-surcharge amounts on the POB Merchant Statement.

Taxpayer provided a cash register report for January 1, 2018, that shows the number of POB transactions for that day, which corresponds to the number of transactions listed on the POB Merchant Statement for that day. The settlement amounts for that day match as well. Taxpayer’s bank statement for January 2018 shows deposits and settlement amounts that correlate to the amounts listed on the POB Merchant Statement.

Audit notes that the POB Fee in the POB Agreement was originally \$2.00, and may have changed to \$4.00 at some point in the Audit Period, in which case the estimate may be overstated. Audit agrees to a remand solely for the purpose of allowing Taxpayer the opportunity to show whether the fee was only \$2.00 during part of the Audit Period, and if so, how much should be adjusted.

ANALYSIS

Washington imposes the B&O tax under RCW 82.04.220 for the act or privilege of engaging in business activities in this state. Retailing B&O tax is imposed on “gross proceeds of sales” from retail activity in this state. RCW 82.04.250. “Gross proceeds of sales” is defined in RCW 82.04.070 in relevant part to mean:

[T]he value proceeding or accruing from the sale of tangible personal property, . . . without any deduction on account of the cost of property sold, . . . or any other

⁵ See note 3.

expense whatsoever paid or accrued and without any deduction on account of losses.

(Emphasis added.)

Retail sales tax is also imposed on retail sales in this state, based on the selling price. “Selling price” is defined by RCW 82.08.010(1)(a)(i) to include, in relevant part:

[T]he total amount of consideration, . . . including cash, credit, property, and services, for which tangible personal property [is sold] . . . whether received in money or otherwise. 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; . . .

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

At issue here is whether the \$4 fees related to the POB transactions should be included in the Taxpayer’s sales price to its customers who use the POB machine. If the fees are part of the selling price, they are subject to retail sales tax under RCW 82.08.020 and retailing B&O tax under RCW 82.04.250.

WAC 458-20-108 (Rule 108) addresses “selling price,” and in the context of credit card service fees, provides the following:

Credit card service fees. When a seller allows a buyer to charge purchases on a credit card, the institution that issued the credit card charges a service fee to the seller. The service fee charge is a part of the seller's cost of doing business. Because the service fee is a cost of doing business, the seller may not deduct the fee when determining its B&O tax and retail sales tax liabilities. RCW 82.04.070 and 82.08.010.

Rule 108(5) (bold emphasis in original). Although Rule 108(5) specifically discusses credit card service fees, the concept is the same in this case, that is, Debit Card Processor provides POB services and charges a service fee. In addition to the treatment of credit card service fees, Rule 108(2) also addresses “selling price” generally and mirrors the definition of that term in RCW 82.08.010(1)(a)(i), which includes “any other expense of the seller.” Therefore, Rule 108 applies here.

We agree with Audit’s conclusion that the POB transactions here were not like those with a traditional ATM, where the ATM user pays the vendor directly for the benefit of the service the ATM *user* receives, and the taxpayer is subject only to service and other activities B&O tax on any ATM commissions it may receive from the ATM vendor for each ATM transaction.

Here, the POB Agreement between Taxpayer and Debit Card Processor specifically addresses the \$2.00 (later \$4.00) POB Fee as part of the agreement between Taxpayer and Debit Card Processor. Although the template POB agreement form allows for parties to list monthly service charges and other fees to be directly charged to the merchant, in this case, the POB Agreement indicates that Debit Card Processor will be compensated for its services to Taxpayer by virtue of the POB Fee Taxpayer collects from its customers. Thus, the POB Fees are service fees Debit Card Processor charges to Taxpayer, and it is Taxpayer, not the POB user, who benefits from Debit Card Processor's POB services.

The auditor's investigation shows that Taxpayer collects the POB Fee addressed in the POB Agreement, which is remitted to Debit Card Processor out of the total sale proceeds. The auditor indicates that when she used her debit card for a \$50 transaction, the entire amount of \$54 was posted in a single transaction to her account with Taxpayer's identifier. Also, the auditor was given no indication that a third party was involved with regard to the POB Fee and was never prompted on the POB screen if she agreed to pay a fee for use of the POB system. These facts support that Debit Card Processor was not paid directly by Taxpayer's customer in a separate transaction.

Further, the POB Merchant Statement indicates that Debit Card Processor's accounting service tracks the *entire* gross sales amount, and splits out the POB Fee separately as a surcharge, with the remainder going to Taxpayer. This also indicates that Debit Card Processor is paid out the gross proceeds of the sale, rather than being paid in a separate transaction with Taxpayer's customer.

Based on the foregoing, we conclude that the POB Fee is a service fee Debit Card Processor charges Taxpayer, which is analogous to credit card fees in POS transactions, such as those addressed in Rule 108(5). The POB fee constitutes an expense of Taxpayer that cannot be deducted from the selling price under RCW 82.08.010(1)(a)(i) and Rule 108(2), and should be included in the retail selling price in transactions using Taxpayer's POB system. For purposes of retailing B&O tax, the POB Fees are a cost of doing business that should be included in Taxpayer's gross proceeds of sales. RCW 82.04.070; Rule 108(5). Accordingly, we must deny the petition.

We note that the POB Fee may have been only \$2.00 during a portion of the Audit Period, in which case the estimate of \$4.00 throughout the Audit Period would overstate the amount of taxable income. Under RCW 82.32.070 and WAC 458-20-254, taxpayers have the duty to keep, for five years, complete and adequate records by which to determine their tax liability, and to provide those records to the Department upon request. Audit agrees to a remand solely to allow Taxpayer the opportunity to prove through suitable records whether the amount of the fees changed during the Audit Period, and if so, the total amount of POB Fees that should be adjusted.

DECISION AND DISPOSITION

We are remanding the case to the Audit Division (Operating Division) solely to allow Taxpayer the opportunity to provide proof to support an adjustment to the amount of POB Fees underlying the assessment.

Dated this 12th day of January 2021.