Cite as Det. No. 15-0185, 35 WTD 159 (2016)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Refund of	)	D E T E R M I N A T I O N
	)	
	)	No. 15-0185
	)	
. . .	)	Registration No. . . .
	)	

[1] RULE 111: B&O TAX – COLLECTION AGENT – INTERPRETER SERVICES. Amounts received by an interpreter referral service are not "advances" or "reimbursements" excludable from taxable gross income where the individual interpreters had no contractual relationship with the customers of the referral service.

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. – An interpreter . . . service (Taxpayer) protests the denial of its requests for refund for taxes it claims it overpaid by not properly reducing its reported gross income by amounts it paid to individual interpreters for interpreter services. Taxpayer claims that such amounts were not part of its income because Taxpayer served as agent for the individual interpreters in collecting payment from the various organizations. We deny Taxpayer's petition.[1]

ISSUE

Pursuant to the Washington Supreme Court's holding in *Washington Imaging Services, LLC. v. Dep't of Revenue,* 171Wn.2d 548, 252 P.3d 885 (2011), and WAC 458-20-111, may Taxpayer exclude amounts it pays out to individual interpreters from its gross income of the business under RCW 82.04.080?

FINDINGS OF FACT

[Taxpayer] is a Washington limited liability company that provides interpreter . . . services for various clients, including hospitals, school district[s], and other institution[s]. Taxpayer has contracted with various individual interpreters to provide interpreting and translating services to

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

the clients.[2] Taxpayer has historically reported its gross income of the business under the service and other activities business and occupation (B&O) tax classification.

On December 4, 2011, Taxpayer submitted two refund requests for claimed overpaid taxes. The first refund request was for overpaid taxes for the time period of January 1, 2004 through September 30, 2007.[3] The second refund request was for overpaid taxes for the time period of June 1, 2007 through September 30, 2011. Taxpayer claimed that it was entitled to these refunds because it should have reduced its gross income by the amounts of payments it made to individual interpreters before reporting its gross income. On August 22, 2014, the Department's Audit Division denied both of Taxpayer's refund requests. Taxpayer subsequently appealed those refund request denials.

On appeal, Taxpayer provided additional information regarding its business activity. To accomplish its business activity, Taxpayer enters into agreements with two categories of parties: (1) clients that are in need of interpreting services and (2) individual interpreters that do the actual interpreting for the clients. We discuss each of these types of agreements in turn.

1. Agreements with Clients

Taxpayer represented that it entered into written agreements with various clients for the purpose of referring interpreter services to those clients. Taxpayer further represented that the clients were the drafters of such agreements. The record contains three such sample client agreements.

The first agreement, entitled "Agency Agreement for Interpreting and Translation Services," is between Taxpayer and [Client A]. Under that agreement, Taxpayer agreed to the following terms:

- To "provide qualified interpreters/translators . . . to perform interpreting and translation services."
- To "ensure that [Taxpayer] Staff/contractors maintain" certain qualifications.
- To "ensure that each [interpreter/translator] has demonstrated satisfactory compliance with the background screening, immunization, and training requirements" as set forth in the agreement.
- To "maintain professional liability insurance to cover [interpreters/translators] in the performance of" the services under the agreement.

In exchange, Client A agreed to "compensate [Taxpayer] for [s]ervices satisfactorily performed hereunder" in accordance with an attachment, which was not provided in the record. In addition, the agreement indicates that it is "non-exclusive," meaning that both Taxpayer and Client A may enter into agreements with other parties "to perform the same or similar services."

[2] There is some dispute over whether the "clients" are clients of Taxpayer or clients of the individual interpreters. We use the term "clients" throughout this determination to describe generally the various institutions that sought interpreter services and received such services through Taxpayer.

[3] The Department denied Taxpayer's refund request as it pertained to the 2004 through 2006 tax years as untimely under RCW 82.32.060(1). Taxpayer did not dispute the denial of that time period. As such, for the purposes of this determination, we address only the time period from January 1, 2007 through September 30, 2011.

The second agreement, entitled "Agreement for Interpreting Services," is between Taxpayer and [Client B]. Under that agreement, Taxpayer agreed to the following terms:

- To "administer the coordination and referral of interpreting services" for Client B.
- To "obtain and keep in force liability insurance coverage with respect to the services provided by [Taxpayer] and its employees."

In exchange, Client B agreed to "pay [Taxpayer] the hourly rate of $ . . . for all interpreter services."

The third agreement, entitled "Agreement for Services," is between Taxpayer and [Client C]. Under that agreement, Taxpayer agreed to the following terms:

- To provide "Interpreter Services."
- To "require a record check through the Washington State Patrol criminal investigation system" on its "agents, employees, or applicants for employment" that may have unsupervised access to children.
- To "certify to [Client C] that [Taxpayer] is covered by industrial insurance."

In exchange, Client C agreed to pay Taxpayer a general hourly rate of $ . . . , with other special rates applicable to certain situations.

Taxpayer represented on appeal that its services to the clients were limited to referring individual interpreters, but did not extend to being responsible to the clients for the actual provision of the interpreting services.

2. Agreements with Individual Interpreters

Taxpayer also represented that it entered into a standard written agreement with each individual interpreter, called an "Interpreter Agreement," along with various other documents when Taxpayer engaged the individual interpreters. Taxpayer provided a sample Interpreter Agreement executed in 2013,[4] which states that Taxpayer agreed to provide the following services as the interpreter's "agent":

- "Locating translation and interpreting work" for the interpreter.
- "Billing and collection of fees on [the interpreter's] behalf."
- Advertising the interpreter's services to potential clients.
- Mailing a yearly statement of the interpreter's earnings in a Form 1099, Miscellaneous Income, unless such form is "filed by [the interpreter's] client."

[4] We note that this Interpreter Agreement was executed after the end of the time period at issue in this case. However, we further note that a substantially similar agreement is quoted in Determination No. 10-0215, which resolved a prior appeal filed by Taxpayer regarding the time period of January 1, 2004 through September 30, 2007. Thus, it appears that the same standard Interpreter Agreement has been in use by Taxpayer and its interpreters continuously since before the time period at issue here.

In exchange, the interpreter agreed to the following terms:

- The interpreter is "an independent contractor" for "[the interpreter's] clients."
- Taxpayer is the interpreter's "agent in dealing with [the interpreter's] clients."
- The interpreter is "working for those who request [the interpreter's] services."
- The interpreter has "the right and duty to refuse to undertake any project which [the interpreter] feels is beyond [his or her] capacity to translate, or simply unfeasible due to lack of time, interest or availability."
- The interpreter is "solely responsible for the accuracy of [his or her] translations."
- The interpreter is "liable for any damages resulting [from the interpreter's] errors or omissions.
- The interpreter will pay Taxpayer "a commission on any work referred to [the interpreter] by [Taxpayer]."
- The interpreter will invoice for services "in a timely fashion . . . as notified by [Taxpayer], or directly by client served."
- The interpreter appoints Taxpayer as the interpreter's "agent for billing and collecting [the interpreter's] fees for any work falling under the terms of this Agreement." The interpreter further authorizes Taxpayer "to deposit into its account any payments received on [the interpreter's] behalf, and to deduct its commission by payment from the account at the end of each month as a service to [the interpreter's] business operations and billing process."
- The interpreter agrees "to forward promptly to [Taxpayer] any payment received by [the interpreter] directly for work falling under" the Interpreter Agreement.

Individual interpreters also signed a separate untitled document in which they stated they were "freelance interpreters, not seeking steady employment with any client nor an exclusive relationship with any particular agency," and then made nine "assertions" emphasizing their independence from Taxpayer's business and the clients' businesses.

Additionally, according to the Interpreter Orientation manual, which is also signed by the individual interpreters, commission rates "are based on several factors and are updated periodically due to changes in procedures and recordkeeping requirements. Typically, this rate is between 28 and 36 percent." The Interpreter Orientation manual also provided client-specific information regarding rates that each client offers and procedural instructions for reporting time worked. In addition, according to the Interpreter Orientation manual, if an interpreter does not show for a scheduled appointment, in most cases, that interpreter will incur a fee that is deducted from that interpreter's monthly pay from Taxpayer. In one instance, this fee is called "liquidated damages" to Taxpayer's reputation.

3. Process for Providing Services to Clients

With the agreements discussed above in place, the process for providing interpreter services to clients followed one typical path. Generally, a client submitted a written request to Taxpayer for interpreter services. Sometimes the request included the name of a specific interpreter. The specific request was honored if the specific interpreter was willing and able to do the work requested; otherwise, Taxpayer determined an appropriate interpreter based on the client's

request. Also, clients occasionally contacted individual interpreters directly to do work. If that happened, the interpreter reported the work assignment to Taxpayer.

Once an individual interpreter agreed to do the work, and completed the work as requested, the individual interpreter completed a "voucher" documenting the work assignment, which the interpreter then submitted to Taxpayer for processing and ultimate payment. If information was missing on the voucher, Taxpayer represented that the voucher was returned to the interpreter, who then worked with the client to complete the missing information and resubmit the voucher to Taxpayer. Taxpayer then compiled all work done for a particular client, submitted a monthly invoice to that client, and awaited payment. Once the client submitted payment, Taxpayer then paid the individual interpreter for the work after subtracting Taxpayer's commission fee.

Taxpayer represented, and provided affidavits from individual interpreters that also represented, that clients sometimes paid interpreters directly. In such case, the interpreter then was required to pay from those proceeds Taxpayer's commission fee.

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. "Gross income of the business" similarly is broadly defined 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, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

RCW 82.04.080(1). The "value proceeding or accruing," in turn, is defined as "the consideration, whether money, credits, rights, or other property expressed in terms of money, actually received or accrued." RCW 82.04.090.

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)). Further, 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*, 81 Wn.2d 171, 172, 500 P.2d 764 (1972). In short, the B&O tax provisions "leave practically no business and commerce free of the business and occupation tax." *Id.* at 175.

RCW 82.04.080(1) makes clear that there are no deductions from "gross income of the business" of expenses, including specifically, "labor costs." *See also* Det. No. 99-223, 20 WTD 1 (2001). Accordingly, Taxpayer cannot exclude any costs of doing business, unless there is some specific exclusion that is applicable.

We further 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).

Here, Taxpayer's argument implicates two possible exclusions, both having their basis in Taxpayer's assertion that it acted merely as an agent in collecting certain payments that did not constitute its own gross income of the business.

1. "Collection Agent" for Interpreters

Taxpayer argues in its appeal petition that it "acts as a booking and collection agent for the interpreters." The Washington Supreme Court has addressed the tax implications of being a "collection agent" in *Washington Imaging Services, LLC v. Dep't of Revenue,* 171 Wn.2d 548, 252 P.3d 885 (2011). In that case, Washington Imaging, a medical imaging company, had retained Overlake to provide interpretive reports [from radiologists] to go along with the medical images generated by Washington Imaging ordered by its patients. *Id.* at 551. Thus, the resulting product for each patient contained the medical image generated by Washington Imaging and the interpretive report generated by Overlake. *Id.* at 553. The patients that ordered this service were not specifically made aware of the arrangement between Washington Imaging and Overlake, and were not otherwise informed that they had any obligation to pay Overlake for its service component. *Id*. Instead, patients signed "an agreement to be financial responsible to Washington Imaging." *Id.* The Court considered whether Washington Imaging was a "collection agent" for Overlake, articulating the following:

> For Washington Imaging to prevail on the argument that it acted only as a collection agent of Overlake, it must have collected money *owed to Overlake*. But the patients contracted solely with Washington Imaging to pay for medical imaging services and have no separate obligation to Overlake.

Id. at 557 (emphasis in original). Thus, in order for a taxpayer to be deemed a "collection agent," and, thereby, be able to reduce its gross income by the amount that taxpayer "collected" as an agent, the amounts collected must be actually owed to the principals by the clients from whom the amounts were collected by the taxpayer. The Court ultimately concluded that "the patients contracted solely with Washington Imaging to pay for medical imaging services and have no separate obligation to Overlake." *Id.*

Here, the facts are quite similar to those in *Washington Imaging.* Taxpayer contracted with interpreters to provide interpreting services for clients, and collected money from such clients and paid the interpreters with the proceeds paid by clients. However, as the *Washington Imaging* Court declared, for Taxpayer to prevail under this theory, "it must have collected money owed to" the individual interpreters by the clients. *Id.* The evidence here does not support such a conclusion. Instead, the evidence is clear that the clients here – like the patients in *Washington Imaging* – only contracted with Taxpayer, and had no contractual relationship with the individual interpreters that legally obligated the clients to pay the interpreters. Indeed, all of the sample client agreements in the record indicate that the clients agreed to pay Taxpayer – not the individual interpreters directly – for the interpreting service. There is simply no term in the sample client agreements indicating that the clients agreed to obligate themselves to pay the individual interpreters as opposed to Taxpayer.

Taxpayer maintains that the records indicate that individual interpreters were sometimes requested by name by the client, and that the clients sometimes contacted the individual interpreter directly to set up an interpreting job. Taxpayer argues that these contacts were evidence of a contractual agreement between the clients and the individual interpreters. We disagree. While that may have been a practice among these parties, we have no evidence before us that the clients intended to contractually obligate themselves directly to the individual interpreters for payment of the interpreting service. In fact, during the appeal process, we specifically requested Taxpayer to identify any documentation of a contract directly between any client and any individual interpreter. Taxpayer did not identify any such documentation in the record. We conclude that any requests for specific interpreters made by clients do not rise to the level of a contractual agreement between such clients and individual interpreters. As such, we conclude that Taxpayer has failed to prove that the amounts collected by Taxpayer were "owed to" the individual interpreters by the clients. Accordingly, we conclude that Taxpayer is not permitted to reduce its gross income by the amounts it paid to the individual interpreters under this theory.

2. [WAC 458-20-111 (Rule 111)]

In *Washington Imaging,* after the Court concluded that the taxpayer in that case did not act solely as a "collection agent," it went on to state, "unless Rule 111 applies, the Department is correct that Washington Imaging is liable for B & O tax on the total payments that it receives from patients." *Id.* at 559.

While a taxpayer generally may not deduct its costs of business from the measure of its B&O tax, Rule 111 permits an exclusion from gross income for certain "advances" and "reimbursements" that a taxpayer receives solely in its capacity as an agent. Rule 111 provides, in part:

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

> . . .
>
> The foregoing is limited to cases wherein the taxpayer, as an incident to the business, undertakes, **on behalf of** the customer, guest or client, the payment of money, either upon an obligation owing by the customer, guest or client to a third person, or in procuring a service for the customer, guest or client 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, guest or client 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.)

Rule 111 defines "advance" as "money or credits received by a taxpayer from a customer or client with whom the taxpayer is **to pay costs or fees** for the customer or client." (Emphasis added). Similarly, Rule 111 defines "reimbursement" as "money or credits received from a customer or client to repay the taxpayer for money or credits expended by the taxpayer **in payment of costs or fees** for the client." (Emphasis added). The clear language of both definitions requires that, for Rule 111 to apply, [a taxpayer] must be a client's or customer's agent for the purpose of *payment* to third parties; the only difference in Rule 111 between an "advance" and a "reimbursement" is the timing of the money received from the client for such payment.

Rule 111 requires the existence of a true agency relationship between the client and the taxpayer. *Washington Imaging*, 171 Wn.2d at 548. Agency requires a factual determination that both parties consented to the agency relationship and that the principal exercised control over the agent. *Id.*; *see also Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 941, 835 P.2d 1331 (1993); Det. No. 05-0206E, 25 WTD 72 (2006); Det. No. 03-0128, 24 WTD 168 (2005). The *Washington Imaging* court emphasized that "The proper focus is on the facts and whether they show a true agency relationship that requires payment to a third party on behalf of the recipient (e.g., client or patient) paying for the goods or services." *Washington Imaging*, 171 Wn.2d at 565.

Once an agency relationship has been established, an inquiry must be made into whether the taxpayer's liability to pay constituted "solely agent liability." *City of Tacoma v. William Rogers Co.*, 148 Wn.2d 169, 178, 60 P.3d 79, 83 (2002). If a taxpayer assumes any liability beyond that of an agent, payments made pursuant to such liability are not excludable under Rule 111. *Id.*

At issue here are Taxpayer's payments to individual interpreters for their interpreting services. Based on the definitions of "advance" and "reimbursement" under Rule 111, the only way that rule applies to Taxpayer is if it can prove two elements: (1) Taxpayer had an agency relationship with the various clients, and, if that first element is satisfied, then (2) Taxpayer's liability to pay the individual interpreters was solely in Taxpayer's capacity as the clients' agent.[5]

[5] To the extent that Taxpayer argues that it was the agent of the individual interpreters, as opposed to the various clients, we addressed that argument in Section 1, where we discussed "collection agents," since Rule 111 applies only to agents that make payments on behalf of their principals.

We conclude that Taxpayer has failed to prove either element to entitle it to reduce its gross income for B&O tax purposes by the amount of payments it made to individual interpreters under Rule 111. First, the sample of client agreements do not contain any term under which Taxpayer agrees to pay the individual interpreters on behalf of the respective client. To the contrary, each of the sample client agreements only mentions the payment that each client agreed to make to Taxpayer for its own services.[6] While at least one of the sample agreements refers to Taxpayer as an "agency" generally, there are no other terms in any of the sample client agreements that support a conclusion that a principal-agent relationship was established under the agreements for the purpose of Taxpayer to make payments to third party interpreters "on behalf of" the respective clients.[7]

As in *Washington Imaging*, where the Court found that the taxpayer in that case could not prove that the patients in that case had agreed to pay Overlake, here, Taxpayer has failed to show that the clients here agreed to be liable to pay the individual interpreters. *Washington Imaging,* 171 Wn.2d at 563. The *Washington Imaging* Court, instead, concluded that the patients had agreed to pay only the taxpayer for the services at issue there. *Id.* So too, here, we conclude that the evidence indicates that the clients only agreed to pay Taxpayer for the interpreting services. The Court in *Washington Imaging* concluded that the lack of such evidence indicated there was no principal-agent relationship regarding the payments at issue in that case. *Id.* We similarly conclude that in the absence of any agreement by a client to be directly responsible for payments to individual interpreters, no principal-agent relationship related to this issue can exist between the clients, as principals, and Taxpayer, as the agent for such payments. As such, Taxpayer has failed to prove the first element required under Rule 111.

While Taxpayer's failure to prove the first element required under Rule 111 is fatal to Taxpayer's argument, we, nevertheless, address the second element, which, we conclude, Taxpayer also failed to prove. Again, *Washington Imaging* is instructive here. In that case, the Court concluded the following:

> Moreover, Washington Imaging certainly cannot establish that its obligations to pay Overlake were "solely agent liability." Instead, Washington Imaging's obligation to pay Overlake was a contractual obligation as a result of agreements between Washington Imaging and Overlake, and the patients have nothing to do with this contractual arrangement . . .

Id. at 567. So too, here, Taxpayer's obligation to pay the individual interpreters was a contractual obligation as a result of agreements between it and the individual interpreters. Like the patients in *Washington Imaging*, the clients "have nothing to do with this contractual arrangement." As we stated earlier, while individual interpreters' names may be included in either a client's request for interpreting services or on invoices issued by Taxpayer to the

[6] In the client agreement with the Client A states that Client A "shall compensate [Taxpayer] for Services satisfactorily performed." Likewise, the agreement with Client B states that it "will pay [Taxpayer] the hourly rate of $ . . . for all interpreter services." The agreement with Client C states that it "agrees to pay [Taxpayer]" for "Interpreter Services."

[7] We note that it is not the terms used in the agreements at issue, but the "facts and circumstances of the particular case" that governs our analysis. *Washington Imaging,* 171 Wn.2d at 563.

individual clients, such inclusion of individuals' names does not, alone, rise to the level of an obligation for the clients to pay the individual interpreters – as opposed to Taxpayer – for the interpreting services. Thus, Taxpayer has also failed to prove its obligation to make payments to individual interpreters was based "solely agent liability." Accordingly, we conclude Taxpayer is not entitled to reduce its gross income under Rule 111 by amounts it paid to individual interpreters.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 16th day of July, 2015.