Cite as Det. No. 17-0147, 36 WTD 588 (2017)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 17-0147
. . .	)	Registration No. . . .

RCW 82.04.480 AND WAC 458-20-159: PRESUMPTION OF SALES BEING RETAIL SALES. Consignees are presumed to be engaging in retail sales where the consignee has the power to sell personal property in the consignee's own name, and is actually selling the property in its own name; Consignors are presumed to be selling the consigned property to the consignees. To overcome this presumption to show that the consignee is acting as broker or agent on behalf of the consignor, the consignee must keep records in accordance with the Department's rule, WAC 458-20-159.

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.

Fisher, T.R.O. – A jewelry gallery protests an assessment of service and other business and occupation tax [(B&O)] on the gallery's commission income. The gallery argues it does not have to pay taxes on amounts received as commission for sales of goods sold on consignment. We conclude that Taxpayer has not overcome the presumption that it is selling goods in its own name, is subject to retailing [B&O] tax and retail sales tax on [the proceeds of the sales], and remand the assessment to the Operating Division to adjust it accordingly.[1]

ISSUE

Under RCW 82.04.480 and WAC 458-20-159, is Taxpayer . . . the "seller" of the goods at issue and . . . subject to retailing [B&O] tax and retail sales tax[, when Taxpayer is the consignee of the goods and has no agreement with the consignors or other records establishing a principal-agent relationship] . . . ?

FINDINGS OF FACT

. . . ("Taxpayer") sells jewelry and glass goods. Taxpayer sells goods that it owns as inventory in addition to selling goods on consignment. The majority of Taxpayer's business consists of inventory that is bought and sold in Taxpayer's own name. Taxpayer alleges that it uses its

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

consignment business as a way of "trying out" new artists to see if those artists' creations will sell in Taxpayer's store. There is no written agreement entered into between Taxpayer and the artists whose property will be sold on consignment. Taxpayer takes a commission (50% of the sales price) on the consignment sale. The majority of the consignment sales were "trunk shows" where the artist who owned the goods would be in store to promote the goods, which were ultimately sold by Taxpayer.

In reporting its excise taxes, Taxpayer reported all income it received (whether from sales of its own inventory or sales of consignment goods) under the retailing [B&O] tax classification; Taxpayer then deducted all of its income from its sales of consignment goods from its retailing B&O tax. Taxpayer also collected and remitted retail sales tax on the goods sold, whether from Taxpayer's inventory or on consignment.

The Department of Revenue . . . audited Taxpayer to confirm Taxpayer was properly reporting its tax obligations. Following a review of Taxpayer's records, the Department allowed the consignment goods deductions, assessed service and other B&O tax on the commission earned for consignment sales. In total, the Department assessed $ . . . in service and other B&O tax, $ . . . in retail sales tax,[2] and $ . . . in interest.

Taxpayer timely sought administrative review of the service and other [B&O] tax and interest, asserting it reported its tax obligations correctly. . . .

ANALYSIS

Washington's B&O tax scheme is intended to apply to "virtually all business activities carried on within the state, and to leave practically no business and commerce free of . . . tax." *Simpson Inv. v. Dep't of Revenue*, 141 Wn.2d 139, 149, 3 P.3d 741 (2000) (internal citations omitted). Retail sales tax and retailing B&O tax are levied upon every person engaging in the business of making retail sales. RCW 82.04.250; RCW 82.08.020. Retailing B&O tax and retail sales tax are assessed against the gross proceeds of sales, which means the "value proceeding or accruing from the sale of tangible personal property . . . without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of loses." RCW 82.04.070.

RCW 82.04.480 creates a presumption regarding selling personal property in the context of consignment:

> (a) Every consignee . . . having either actual or constructive possession of personal property . . . with power to sell such personal property in that person's own name and actually so selling, is deemed the seller of such personal property within the meaning of [the B&O tax]. Furthermore, the consignor . . . is deemed a seller of such property to the consignee . . . .

[2] Retail sales tax was assessed for a few internet sales, and is not being disputed by Taxpayer.

> (b) The burden is on the taxpayer in every case to establish the fact that the taxpayer is not engaged in the business of making retail sales or wholesale sales but is acting merely as broker or agent in promoting sales for a principal. Such claim will be allowed only when the taxpayer's accounting records are kept in such manner as required by rule by the department.

Thus, RCW 82.04.480 sets up a rebuttable presumption that consignees meeting the elements of subsection (1) are sellers, and must collect retail sales tax and pay retailing B&O tax on such transactions. A person may overcome this presumption under RCW 82.04.480(2) if the person (1) acts merely as an agent or broker for a principal, and not engaged in the business of selling the items, and (2) keeps records in accordance with the Department's rule, WAC 458-20-159. If the presumption is overcome that the consignee is the seller, then the consignee is liable for B&O tax under the service and other activities classification on its commission income.

An agent principal relationship "results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control." *Moss v. Vadman*, 77 Wn.2d 396, 402-3, 463 P.2d 159 (1969). Consent and control are the essential elements of agency. *Id.*; *see also Washington Imaging Services, LLC. v. Dep't of Revenue,* 171 Wn.2d 548, 562, 252 P.3d 885 (2011). The relationship is created by law, but if no facts exists to satisfy the both elements of control and consent, "then no agency exists despite the intent of either or both of the parties." *Moss*, 77 Wn.2d at 403.

WAC 458-20-159 [addresses] the kinds of records taxpayers must maintain to prove that the consignee is selling as the consignor's agent: (1) there is a contract or agreement between the alleged consignee and consignor that clearly establishes the relationship of principal and agent, (2) the books and records of the consignee show the transactions were made in the name of and account of the consignor, and show the name of the actual owner of the property for whom the sale was made; and (3) the books and records show the amount of gross sales, the amount of commissions, and any other incidental income derived by the consignee from such sales.

Here, Taxpayer does not have any contract or agreement between itself (the consignee) and the artists whose goods Taxpayer sold (the consignors) that clearly establishes the relationship of principal to agent. Taxpayer explained that it does consignment agreements with artists with handshakes, and uses consignment sales to test out whether an artist's goods will sell at Taxpayer's store. However, Taxpayer has not pointed to anything that indicates Taxpayer consented to the artists' control of how Taxpayer handled and sold the artists' goods. Because there are no facts establishing consent and control, there can be no agency relationship even if Taxpayer intended to enter into one. *Moss*, 77 Wn.2d at 403.

Because Taxpayer was not acting as agent for the artists while Taxpayer was selling those artists goods and did not maintain any of the required records under WAC 458-20-159, Taxpayer did not overcome the presumption in RCW 82.04.480(1) that Taxpayer is making retail sales. Accordingly, Taxpayer owed retail sales tax and retailing B&O tax on the entire amount of the transactions, and was not entitled to take any deduction. The Department erred when it assessed service and other B&O tax on the commission amount; instead the Department should have

disallowed Taxpayer's deduction for consignment sales and assessed retailing B&O tax on the sales price of the consignment goods because Taxpayer cannot overcome the presumption in RCW 82.04.480(1).

. . .

DECISION AND DISPOSITION

Taxpayer's petition is denied. We remand this case to the Department's Audit Division for adjustment consistent with this determination. The Audit Division will issue an adjusted assessment with a new due date.

Dated this 7th day of June 2017.