

Cite as Det. No. 15-0202, 35 WTD 198 (2016)

BEFORE THE APPEALS 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. 15-0202
	)	
...	)	Registration No.. . .
	)	

[1] RCW 82.04.067: ECONOMIC NEXUS – PAYROLL THRESHOLD – INDEPENDENT CONTRACTORS. Hiring independent contractors to perform services in Washington constitutes payroll for calculating the payroll threshold for substantial nexus purposes under RCW 82.04.067.

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.

Sattelberg, A.L.J. – An out-of-state company (“the taxpayer”) that hires audio and visual independent contractor technicians to perform services for clients on a temporary basis in Washington protests the Department of Revenue’s (“Department”) assessment of business and occupation (“B&O”) tax claiming it lacks sufficient contacts with Washington to be subject to B&O tax. We deny the petition.<sup>1</sup>

### ISSUE

Did the taxpayer’s hiring of audio and visual independent contractor technicians to perform services at temporary events for the taxpayer’s customers in Washington constitute payroll for calculating the payroll threshold for substantial nexus purposes under RCW 82.04.067?

### FINDINGS OF FACT

The taxpayer is [an out of state] company that hires audio and visual independent contractor technicians to perform services at other companies’ temporary events. The taxpayer has office locations in multiple states and does business nationwide. The taxpayer receives invoices from the independent contractors for the services they perform and, in turn, invoices [its] Washington-based customers. The taxpayer does not have an office, employees, or property in Washington.

In 2014, the Department’s Audit Division (“Audit”) selected the taxpayer for a qualified correspondence examination covering the period November 1, 2011 through December 31, 2013. Audit sent the taxpayer a Washington Business Activity Questionnaire, which the taxpayer

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

completed and returned in January of 2014. The taxpayer provided its sales and independent contractor payments information for 2011 through 2013 to Audit, as follows:

	1/1/11 – 12/31/11 <sup>2</sup>	1/1/12 – 12/31/12	1/1/13 – 12/31/13
Sales	\$ . . .	\$ . . .	\$ . . .
Independent Contractor Payments	\$ . . .	\$ . . .	\$ . . .

Based on this information, Audit found that the taxpayer had economic nexus with Washington in 2013 because it exceeded the payroll threshold of \$ . . . . On July 1, 2014, Audit issued the taxpayer an assessment of \$ . . . , asserting service & other activities B&O tax on its gross income from Washington clients.<sup>3</sup>

The taxpayer timely appealed, arguing “[The taxpayer] is not located in Washington and has minimal contacts with or within the State. From its office [out of state], [the taxpayer] acts purely as a middleman, matching Washington vendors with technicians, on a limited basis.”<sup>4</sup>

### ANALYSIS

[Effective June 1, 2010, Washington adopted minimum nexus thresholds for determining if a business has substantial nexus with the state.] RCW 82.04.220. The B&O tax measure and rate are determined by the type or nature of the business activity in which a person is engaged. Chapter 82.04 RCW. Unless specifically enumerated elsewhere in chapter 82.04 RCW, business activities are subject to the B&O tax under the service & other activities classification. RCW 82.04.290(2).

Effective June 1, 2010, substantial nexus is determined under RCW 82.04.067. Laws of 2010, ch. 23, § 1709. Sections 1 through 5 outline Washington’s economic nexus standard, which applies to activities taxable under the service & other activities B&O tax classification, and certain other B&O tax classifications.<sup>5</sup> Section 6 applies to all B&O tax classifications not covered in sections 1 through 5, such as the retailing and wholesaling classifications. Here, the taxpayer hires independent contractors to provide audio and visual technician services to its customers in Washington, services which are taxable under the service & other activities B&O tax classification.<sup>6</sup>

<sup>2</sup> While the audit period starts as of November 1, 2011, the taxpayer provided sales data for all of 2011.

<sup>3</sup> The assessment consisted of \$ . . . in service & other activities business and occupation tax (“B&O”) tax, a small business tax credit of \$ . . . , a \$ . . . delinquent penalty, a \$ . . . substantial underpayment penalty, and \$ . . . in interest.

<sup>4</sup> Appeal Petition of the taxpayer dated July 31, 2014.

<sup>5</sup> [The taxpayer is not making a constitutional challenge in this case. An administrative body does not have the authority to determine the constitutionality of the law it administers; only the courts that have that power. *Bare v. Gorton*, 84 Wn.2d 380, 383 (1974).]

<sup>6</sup> WAC 458-20-224(2) provides that taxpayers providing personal or professional services are subject to tax under the service and other activity classification of the B&O tax:

Persons engaged in any business activity, other than or in addition to those for which a specific rate is provided in the statute, are taxable under a classification known as service and other business activities, and

RCW 82.04.067(1) provides, in relevant part:

A person engaging in business is deemed to have substantial nexus with this state if the person is:

- (a) An individual and is a resident or domiciliary of this state;
- (b) A business entity and is organized or commercially domiciled in this state; or
- (c) A nonresident individual or a business entity that is organized or commercially domiciled outside this state, and in any tax year the person has:

- (i) More than fifty thousand dollars of property in this state;
- (ii) More than fifty thousand dollars of payroll in this state;
- (iii) More than two hundred fifty thousand dollars of receipts from this state;
- or
- (iv) At least twenty-five percent of the person's total property, total payroll, or total receipts in this state.

(Emphasis added.) This threshold was updated to \$53,000 starting in 2013 per RCW 82.04.067(5). See Excise Tax Advisory 3195.2015. RCW 82.04.067(3)(a) provides guidance on the application of the payroll threshold to independent contractors:

Payroll counting toward the thresholds in subsection (1)(c)(ii) and (iv) of this section is the total amount paid by the taxpayer for compensation in this state during the tax year plus nonemployee compensation paid to representative third parties in this state. Nonemployee compensation paid to representative third parties includes the gross amount paid to nonemployees who represent the taxpayer in interactions with the taxpayer's clients and includes sales commissions.

(Emphasis added.) See also WAC 458-20-19401(5);<sup>7</sup> *Scripto v. Carson*, 362 U.S. 207 (1960) (holding that independent contractors can create nexus).

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so designated upon return forms. In general, it includes persons rendering professional or personal services to persons (as distinguished from services rendered to personal property of persons) such as accountants, aerial surveyors and map makers, agents, ambulances, appraisers, architects, assayers, attorneys, automobile brokers, barbers, baseball clubs, beauty shop owners, brokers, chemists, chiropractors, collection agents, community television antenna owners, court reporters, dentists, detectives, employment agents, engineers, financiers, funeral directors, refuse collectors, hospital owners, janitors, kennel operators, laboratory operators, landscape architects, lawyers, loan agents, music teachers, oculists, orchestra or band leaders contracting to provide musical services, osteopathic physicians, physicians, real estate agents, school bus operators, school operators, sewer services other than collection, stenographers, warehouse operators who are not subject to other specific statutory tax classifications, teachers, theater operators, undertakers, veterinarians, and numerous other persons.

The audio and visual technician services provided here are equivalent or analogous to the professional services enumerated in WAC 458-20-224(2)

<sup>7</sup> “**Payroll threshold.** “Payroll” is the total compensation defined as gross income under 26 U.S.C. Sec. 61 (section 61 of the Internal Revenue Code of 1986), as of June 1, 2010, paid during the calendar year to employees and to third-party representatives who represent the taxpayer in interactions with the taxpayer's clients and includes sales commissions.” WAC 458-20-19401(5).

Here, the taxpayer hires audio and visual technician independent contractors to perform services at the events of the taxpayer's Washington customers. These independent contractors, by directly providing services to taxpayer's clients, are representing the taxpayer in interactions with its clients. *See* Det. No. 11-0292, 31 WTD 73 (2012). Therefore, amounts the taxpayer pays to the independent contractors count toward Washington's economic nexus payroll threshold. This threshold was \$53,000 in 2013, which the taxpayer exceeded by making \$ . . . in independent contractor payments in 2013. Since the taxpayer exceeded the payroll threshold, it has substantial nexus with Washington under RCW 82.04.067(1). Audit correctly asserted B&O tax under the service & other activities classification on the taxpayer's 2013 apportioned gross sales.<sup>8</sup>

#### DECISION AND DISPOSITION

The taxpayer's petition is denied.

Dated this 31st day of July, 2015.

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. . .

(b) Third-party representatives receive payroll compensation in this state if the service(s) performed occurs entirely or primarily within this state.

<sup>8</sup> The "gross income of the business" is the measure of the B&O tax. RCW 82.04.290(2).