

Cite as Det. No. 02-0144, 22 WTD 182 (2003)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

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| In the Matter of the Petition For Correction of |) | <u>D E T E R M I N A T I O N</u> |
| Interpretation of |) | |
| |) | No. 02-0144 |
| |) | |
| ... |) | Registration No. . . . |
| |) | TI&E March 13, 2002 letter |
| |) | Docket No. . . . |
| |) | |

- [1] NEXUS: B&O TAX -- SALES TAX -- EMPLOYEES -- CONSULTING. Employees who regularly visit Washington customers to sell software and provide consulting services, which enable the customers to access the taxpayer's web-site, provide nexus for Washington to tax the web-site access charges.
- [2] RULE 155; RCW 82.04.0297(3), RCW 82.04.065: RETAIL SALES TAX -- INTERNET SERVICE -- WEB-SITE. Fees to access the taxpayer's web-site for retrieval of information are for internet services, which are not telephone services subject to retail sales tax.
- [3] RULE 155, RULE 194; RCW 82.04.290: SERVICE B&O TAX -- INTERNET SERVICES -- APPORTIONMENT. Charges taxable under the other business or service activities classification for internet services provided from locations in Washington as well as places of business outside the state may be apportioned.

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.

NATURE OF ACTION:

An out-of-state software and internet service company protests a TI&E ruling regarding the taxability of transaction fees it received to access its system through its internet web-site.¹

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

FACTS:

M. Pree, A.L.J. -- . . . (taxpayer) is an out-of-state corporation, which sells software and provides consulting services to financial institutions (lenders) in Washington. The taxpayer sells software to Washington lenders. The taxpayer does not dispute that its software sales are subject to Washington's retail sales tax. The taxpayer also sends employees to Washington who provide lenders consulting services. In its petition, the taxpayer does not dispute that the fees it charges for these services are subject to Washington's business and occupation (B&O) tax.

In addition to these activities, the taxpayer also provides access to information through its web-site for which it charges the users a fee. The taxpayer charges lenders transaction fees to use the taxpayer's web-site to link them to independent appraisers. The lenders may obtain information from the appraisers regarding the value of real estate offered as collateral for loans the lenders make to borrowers. For this service, lenders pay the taxpayer a transaction fee. (Some contracts include a base license fee for a minimum number of transactions plus an additional transaction fee if the lender exceeds the minimum). The Department's Taxpayer Education and Information Section (TI&E) advised the taxpayer to collect and remit retail sales tax on its transaction fee receipts. The taxpayer appeals TI&E's ruling regarding its transaction fees.

According to testimony and contracts provided by the taxpayer, the taxpayer does not acquire, resell, or in any way take responsibility for the content of the information provided by the appraisers. The taxpayer does not originate, inspect, or alter the information provided by the appraisers in any manner. The taxpayer does not collect the appraisers' fees or manage their business dealings with the lenders.

The taxpayer states it provides a secure internet interchange between the lenders and appraisers throughout the country. The software sold by the taxpayer allows lenders to use their internet connection to access the taxpayer's secure web-site, which the taxpayer maintains at two out-of-state locations.

According to the taxpayer it does not provide initial access to the internet similar to an internet service provider (ISP), and states it does not charge a subscription fee like an ISP. The taxpayer does not lease or otherwise provide a phone line to lenders. The taxpayer separately charges for the software and consulting services offered by its employees in Washington, which enable the lenders to access the taxpayer's website.

ISSUES:

1. Does Washington have jurisdiction to tax the taxpayer's transaction fees?
2. Are the transaction fees charged by the taxpayer subject to retail sales tax?

3. Are the transaction fees charged by the taxpayer subject to business and occupation (B&O) tax?

DISCUSSION:

[1] We will first consider Washington's jurisdiction or nexus to tax the transaction fees received from Washington lenders who access the taxpayer's web-site maintained at out-of-state locations. The taxpayer's employees come to Washington to sell its software and provide consulting services. Both the software and consulting services enable the lenders to access the taxpayer's web-site, generating the fees at issue. We have held in prior published determinations that "if the in-state activity is economically meritorious for a taxpayer (if it is worth spending budget dollars to do it), then the activity is market driven and it generally establishes nexus with the state of Washington." Det. No. 87-286, 4 WTD 51 (1987).

Under this reasoning, the Department has held infrequent visits to Washington customers by nonresident employees constituted sufficient nexus to allow the taxation of sales even though the employees were not salespersons. Det. No. 88-368, 6 WTD 417 (1988). Where employees provided advice to customers regarding the safe handling of a product, such activity was also found to be important in maintaining sales into the state. Det. No. 91-213, 11 WTD 239 (1991). *See also Standard Pressed Steel Co. v. Washington Revenue Dept.*, 419 U.S. 560 (1975), where nexus was established through the presence of a resident employee engineer who was not involved in sales, but only consulted with the customer regarding the customer's product needs.

The activity of the taxpayer's employees establishes the ability of customers to use the taxpayer's services. This activity provides nexus necessary for Washington to tax the transaction fees.²

[2] Retail sales tax is levied upon retail sales in Washington. RCW 82.08.020. The sale of telephone service to consumers is a retail sale. RCW 82.04.050(5). Telephone service includes providing access to local telephone service as well as interstate service if the charge for the service is billed to a person in this state, but telephone service does not include internet service. RCW 82.04.065. In contrast, the provision of internet services is subject to B&O tax under RCW 82.04.290(2) as other business or service activities and is not subject to retail sales tax.

RCW 82.04.297(3) defines internet service:

(3) "Internet service" means a service that includes computer processing applications, provides the user with additional or restructured information, or permits the user to interact with stored information through the internet or a proprietary subscriber network. "Internet

² In its petition, the taxpayer also mentioned the Internet Tax Discrimination Act, 47 U.S.C.A. §151, which prohibits taxing specific internet activities only. The taxes at issue are not specific to internet activities. The Internet Tax Discrimination Act is not applicable to the taxes at issue.

service" includes provision of internet electronic mail, access to the internet for information retrieval, and hosting of information for retrieval over the internet or the graphical subnetwork called the world wide web.

The taxpayer provides internet services. The transaction fees at issue are for retrieval of information provided through the taxpayer's web-site, i.e., it provides "access to the internet for information retrieval." The taxpayer states it does not provide transmission lines and is not an internet service provider (ISP). The taxpayer charges lenders the transaction fees for access to appraisers' information through the taxpayer's secure internet exchange web-site. The fees are not retail sales because they are for the internet services the taxpayer provides lenders.

[3] The taxpayer's transaction fees are for use of its systems to access information through the internet. Therefore, the fees are for internet services and are subject to service B&O tax under RCW 82.04.290. Persons rendering services taxable under RCW 82.04.290 who maintain places of business outside the state, which contribute to the service, may apportion their income under RCW 82.04.460 and WAC 458-20-194 (Rule 194).

The taxpayer provides many of these services related to its transaction fees from its out-of-state office locations. It may apportion its transaction fees for internet services under RCW 82.04.460 and Rule 194. Apportionment is a fact-intensive and complex issue depending upon the taxpayer's activities and accounting records. We recommend the taxpayer write TI&E or contact the Department's Audit Division to determine the appropriate method of apportionment.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part. The taxpayer is subject to Washington excise taxes. The taxpayer's transaction fees are not subject to retail sales tax, but are subject to business and occupation taxes as internet services under RCW 82.04.290(2). The taxpayer may apportion to determine the measure of B&O tax.

Dated this 29th day of August 2002.