

Cite as Det. No. 14-0307, 35 WTD 51 (2016)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter a Written Ruling Issued to)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 14-0307
)	
...)	Registration No. ...
)	

[1] RCW 82.04.050(5); RCW 82.04.065(27): B&O TAX – TELECOMMUNICATIONS SERVICE – NOTIFICATION/BROADCAST FAX – INTEGRATED DESKTOP MESSAGING –VS. DATA PROCESSING EXCLUSION. Notification/broadcast fax and integrated desktop messaging (IDM) services were properly classified as telecommunications services taxable under the retailing B&O and retail sales taxes, and were not data processing services excluded from the definition of “telecommunications service.”

[2] RCW 82.04.050(8); RCW 82.04.192(3)(a): B&O TAX – RETAIL SALES TAX – DIGITAL AUTOMATED SERVICES/NOTIFICATION/BROADCAST EMAIL/PRODUCTION EMAIL VS. DATA PROCESSING SERVICE. Because primary object of Taxpayer’s Notification/Broadcast Email and Production Email services is the customization, personalization, transmission, storage, and reporting of personalized emails, Taxpayer is not taxable under the service and other activities classification of the B&O tax for data processing services under Qualcomm. Because Taxpayer’s services all use one or more of Taxpayer’s software applications, that Taxpayer’s Notification/Broadcast Email and Production Email services come within the taxable definition of digital automated services, which activity is properly taxable under the retailing B&O and retail sales tax.

[3] Internet Tax Freedom Act (ITFA); 47 U.S.C. 151 note, §1105(5)(C)&(E): B&O TAX -- IFTA – MORATORIUM ON “INTERNET ACCESS” -- 2007 EXPANDED “INTERNET ACCESS” DEFINITION –EMAIL & STORAGE CAPACITY. “Internet access” definition for purpose of moratorium held to include only electronic mail and storage capacity for the personal use of individual consumers.

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.

Bauer, A.L.J. – A company that offers cloud-based services that automate the creation and delivery of customized outbound high volume faxes and emails for its customers, objects to a [Department of Revenue (Department)] ruling that its activities are taxable as telecommunications and digital automated services. Taxpayer contends that it is providing data processing services taxable under the service and activities classification of the business and occupation (B&O) tax, or, in the alternative, that its email activities are entirely exempt under the Internet Tax Freedom Act (ITFA). Taxpayer’s petition is denied.¹

ISSUES

1. Under RCW 82.04.050(5) and RCW 82.04.065(27), were Taxpayer’s [Fax] and [Messaging] services properly classified as telecommunications services taxable under the retailing B&O and retail sales taxes?
2. Under RCW 82.04.050(8) and RCW 82.04.192(3)(a), were Taxpayer’s [Email A] and [Email B] services properly classified as “digital automated services” taxable under the retailing B&O and retail sales taxes?
3. Does ITFA bar the application of Washington state taxes on Taxpayer’s services?

FINDINGS OF FACT

On July 18, 2013, [the Department’s Taxpayer Services Division’s Taxpayer Information and Education (TI&E)] advised Taxpayer that its activities were not data processing subject to the service and other activities classification of the B&O tax, but were telecommunications and digital automated services subject to retail sales tax. Taxpayer appealed that ruling to this office on September 18, 2013.²

Taxpayer is in the business of selling complete messaging solutions to business owners. Four of its products are:

1. [Fax]
2. [Messaging]
3. [Email A]
4. [Email B]

[Fax] is Taxpayer’s cloud-based solution that automates the creation and delivery of outbound high-volume messages (“faxes”) to a large number of recipients. Examples of such messages include notifications from electric companies warning of power interruptions, and promotional offers from travel companies. Taxpayer’s customers provide Taxpayer with a single message file, together with other text files. Taxpayer merges the files, thereby personalizing the messages, and delivers them to the recipients.

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

² Appropriate extensions for appeal were granted.

In order to use [Fax], Taxpayer's customers receive user IDs and passwords to access Taxpayer's network via the web portal, Taxpayer receives the files from the customer under this secure portal. Customer uploads typically include a digital file(s) containing the message(s) to be sent and other text files with recipient fax numbers and any other information to be inserted into the message. Using their own telecommunication connectivity to submit data to the network, customers' systems connect with Taxpayer's network via the internet, virtual private network (VPN) or other secure channels, [or] [File Transfer Protocol (FTP)] or other methods, such as Message Queue (MQ).

Faxes are personalized according to the business rules provided by customers. Message data files and fields are merged with "csv" or unstructured text files, logos may be added, and other customizations can be performed before the fax is delivered to the recipient. The same fax broadcast or message can ultimately be delivered via internet/digital connectivity or via telephony communication services purchased from third party telecommunications service providers. Taxpayer's software processes the customer's uploaded files according to the business rules specified and delivers the output via third party communications services. Taxpayer then converts the merged and processed data files into "tiff" files that can be received and read by fax technology.

Taxpayer delivers faxes using communications channels provided by third party telecommunications carriers. Taxpayer routes the delivery file to the global server network nearest to the global geographic region of the recipient for the most efficient transmission to recipients in that region.

Taxpayer's customers may monitor [Fax] by receiving "delivery" and "attempted delivery" reports, and detailed management reports, and can receive a complete audit trail for all transactions. [Fax] services are priced on a per-page basis; cost per page varies based on the global location of the recipient.

[Messaging] enables a customer's employees (users) to receive and send digital fax documents (e-faxes) as electronic messages directly from their existing email accounts via their email application, at their convenience. This service is a cloud-based solution that eliminates the need for businesses to maintain servers, hardware, software, telecommunications lines, maintenance and related infrastructure associated with fax servers and traditional fax machines, i.e., equipment typically required to send or receive fax documents in the traditional hard-copy manner. It improves productivity, cycle times, and quality of customer service while efficiently managing and controlling high volume inbound and outbound communications.

[Messaging] provides secure communication, detailed management reports and analytics, and a complete service management dashboard for use by the customer's service administrator. The web portal available to customers, called " . . . ," may be customized specifically for the customer.

Taxpayer's network software accepts data files sent by its customer, converts the files to "tiff" or "pdf" format suitable for standardized viewing, and then provides personal customization as required. For example, Taxpayer's customer sends an email with a file attachment to Taxpayer's network using Simple Message Transfer Protocol (SMTP) as a default. Or customer uses a secure [VPN] or other file submission method, such as [FTP]. The file can typically be in any file format.

Most customers use their own email service to send and receive messages (e-fax). [. . . .] Customers may customize their coversheet, send and receive settings, and signature settings. Customer administrators have the ability to use the website to manage users and usage activity. Administrators and users may log on to the service website using their email address and password. The website includes a home page, the users' contact information, access to reports, the users' profile, and "Send" and "Receive" preferences.

Taxpayer's customer's administrators may add, modify, delete, group or organize users, all via csv or text file uploads. They may block certain fax numbers from users' accounts, and define which options are available to each user. Taxpayer [. . .] offers optional downloads to integrate with user applications. These include a virtual fax machine and a print driver that creates an image to send from within a native application.

Taxpayer's network software converts the file to a tiff image if the ultimate destination is a fax machine anywhere in the world. Taxpayer assigns an e-fax number to customers with Email Inbox receiving capability. An e-fax destined to that number is received on Taxpayer's network, converted into "tiff" or pdf format and then delivered to the recipient's Inbox via SMTP.

Most often, the document flows from one inbox to another. Documents may also be sent from a customer's email application to a traditional fax machine or sent from a traditional fax machine to an inbox. In all cases, the file formats and data are converted as required. A customer may search, edit, and have electronic signatures appended to inbound e-faxes using Taxpayer's optional PDF Editor feature.

Customers may have both inbound and outbound messaging capabilities, inbound only or outbound only. If a user has inbound capabilities, that user is assigned an e-fax number that maps to the user's email address. If a user has outbound only services, that user does not need an e-fax number associated with its email address, because the e-fax number is for receiving purposes only.

Taxpayer obtains use of numbers from third party telecommunications carriers. The numbers are allocated or assigned to customers based on how many the customers require for their inbound messaging users. The number is mapped to the user's email address.

Customers may port/transfer their existing traditional fax number to their [Messaging] account. Taxpayer's network of servers is fully redundant, and multiple global instances run in parallel to ensure service is never interrupted. Taxpayer charges a one-time set-up fee. Customers are then charged a monthly subscription fee plus a transaction-based fee based on number of pages sent or received.

[Email A] is a cloud-based notifications solution that automates the creation and delivery of customers' customized outbound high volume emails. Typical applications for this service include subscription related information, outage/service impairment notifications . . . and other high-volume communications that must be output and/or customized to each of Taxpayer's customers.

[Email A] allows Taxpayer's customer to enter a [web] portal called “. . .” and to upload data via the internet and deliver the processed data via email, SMS, fax and voice, according to the business rules specified by the customer. The service provides customized “From” domains, unique internet URLs, the ability to insert trackable links to other websites, add attachments and schedule the timing of the message release to the recipient. It also provides file storage so that recipients may retrieve files from Taxpayer's servers. Business rules, including personalization rules and logos, are also stored on Taxpayer's servers and merged with uploaded files.

Taxpayer's servers accept various forms of data from customers' systems. Emails are then personalized according to the business rules provided by the customer; data fields may be merged, logos may be added; and other customizations can be performed before the email is delivered to the recipient. Acceptable customer data submission formats include [SMTP], [FTP], Application Programming Interface (API), web portal.

Taxpayer's customers may manage and upload their messages via multiple methods – SMTP, API, web portal, FTP, or other methods. Customer uploads typically include the message(s) to be sent with the destination email address or a text file of recipients' email addresses and other information to be inserted into the message. Customers then use their own telecommunication connectivity to submit data to Taxpayer's network via the internet, [VPN] or other secure channels, FTP or other methods, such as [MQ].

A message may be delivered via email, SMS text, fax, or voice, according to the customer's specifications. Taxpayer's software processes the customer's uploaded email files according to the business rules specified and delivers the output in the specified communication format. The same message can be delivered to multiple addresses, or customized documents/messages can be delivered to multiple users. The “From” address, domains and subdomains can be customized as required by the customer for an additional charge. The service includes parsing of uploaded data, where required. (Parsing is customized code created by Taxpayer to meet customer's data requirements.)

Customers may store files on Taxpayer's servers and add unique internet URL's and trackable links to documents and files stored on Taxpayer's network for retrieval by their recipients. Links to websites may be added to email messages, and recipients who access those links may be tracked. Additionally, where a file is too large to attach, a link can be added and the recipient can pull / retrieve the file from Taxpayer's servers.

Taxpayer's customers can schedule the timing of the email notification release and receive detailed reports of successful and unsuccessful deliveries based on standard email delivery conditions. Taxpayer provides Sent Messages status reports and various other detailed management reports that allow customers to monitor service usage and provide a complete audit trail for all transactions.

Taxpayer's network of servers is fully redundant. Multiple global instances run in parallel to ensure service is never interrupted. Email services are priced on a transaction basis, e.g. per email; there is a charge for each delivery or attempted and re-attempted delivery. Taxpayer may receive additional revenues when a recipient clicks on a third-party link.

[Email B] is a cloud-based solution that automates the creation and delivery of customers' customized outbound emails. Typical applications for this service are trade confirmations, letters of credit, customer statements, business reports, and other high-volume communications that must be output and customized to each client.

[Email B] allows customers to provide a single message file in the form of a template with accompanying unstructured text files that contain the custom and personalized data for each recipient. [Email B] populates the template with personalized data for each recipient as specified by the business rules and output needs provided by the customer. Emails are customized to customers' business rules and output needs.

Taxpayer's servers accept various forms of data from customers' back-end systems. Emails are personalized according to the business rules provided by the customer, data fields are merged, logos are added, and other customizations are performed before the email is delivered to the recipient. Acceptable data submission formats include [SMTP], [FTP], Extensible Markup Language (XML), [and] [API].

Customers may manage and upload their messages via multiple methods – SMTP, API, FTP, or other methods of the customer's choosing. Customer uploads typically include the message(s) to be sent with the destination email address or a text file of recipients' email addresses, and other information to be inserted into the message.

Customers use their own telecommunication connectivity to submit data to the network. Customers' systems may connect with Taxpayer's network via the internet, [VPN] or other secure channels, FTP or other methods, such as [MQ]. The same message can be delivered to

multiple addresses, or customized documents/messages can be delivered to multiple users. However, [Email B] usually represents one message to one recipient. [Email B] includes parsing of uploaded data, where required (parsing being a customized code created by Taxpayer to meet customer's data requirements).

Customers may store files and business rules on Company's servers. Taxpayer provides customers with detailed reports of successful and unsuccessful deliveries, a "Sent Messages" status report, and various other detailed management reports that allow customers to monitor service usage and provide a complete audit trail for all transactions.

Taxpayer's network of servers is fully redundant. Multiple global instances run in parallel to ensure service is never interrupted. Email services are priced on a transaction basis, e.g. per email; there is a charge for each delivery and there may also be a charge for attempted and re-attempted delivery. Taxpayer optionally may receive revenue when a recipient clicks on a link contained in the email to access the file/data intended for them.

ANALYSIS

1. Taxability of [Fax] and [Messaging].

Washington includes within the taxable definition of retail sale, the sale of telecommunications services. RCW 82.04.050(5). The term telecommunications is defined by RCW 82.04.065(27) as follows:

Telecommunications service" means the electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points. "Telecommunications service" includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether such service is referred to as voice over internet protocol services or is classified by the federal communications commission as enhanced or value added.

Taxpayer performs its services, in part, by delivering faxes through communications channels provided by third party communications providers. Faxing services have long been held to constitute telecommunications. Det. No. 93-321, 14 WTD 072 (1994).

Taxpayer's [Fax] and [Messaging] services are a broadcast faxing activity subject to retail sales tax as a telecommunications service. Faxing services are *not* excluded from the sales taxable definition of telecommunications as information services or data processing services. RCW 82.04.065(27)(a). In Det. No. 92-321, 14 WTD 072 (1994), we held that the term "telephone service" is broadly defined to include the providing of access or transmission for hire through a telephone network by any person, and that term is not limited to services provided by the owner of the telephone network.

RCW 82.04.065(27) provides:

"Telecommunications service" does not include:

(a) Data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser where such purchaser's primary purpose for the underlying transaction is the processed data or information;

(Emphasis added.) Taxpayer argues that its [Fax] and [Messaging] services are data processing services and, therefore, excluded from the definition of "telecommunications services."

In support of this position, Taxpayer cites the Washington Supreme Court decision, *Qualcomm, Inc. v. Dept. of Revenue*, 171 Wn.2d 125, 249 P.3d 167 (2011) (*Qualcomm*). In that case, the court held that when a service involves both telecommunications and information processing, the primary purpose of the purchaser test applies to determine the applicable tax rate. In that case, *Qualcomm* sold its service to trucking companies in which it collected and manipulated data and transmitted it to the trucking company customer. The data collected was information concerning ongoing vehicle and driver performance, such as locations, routes traveled, and the operation of the trucks themselves (miles per gallon, rapid acceleration and deceleration, and operating temperatures). Mobile terminals permitted company drivers to create, send, and receive messages. Various data transmitted from the trucks and drivers were processed and stored and used by the trucking companies to monitor the performance and locations of their trucks and drivers and to create invoices.

The court held that the data transmission service *Qualcomm* provided to trucking companies, which service involved both telecommunications and information processing components, was subject to the "information service" tax rate rather than the "network telephone service" tax rate because the primary goal of the trucking company customers was to acquire specific useful information and location data about their trucks on the road. Therefore, the manipulation of the raw data obtained was the integral and necessary part of the service the truck companies purchased.

Taxpayer's customers do not primarily contract with Taxpayer to extract or process data. Taxpayer's customers' primary goal is to generate and send personalized transmissions to their own customers or intended recipients. If certain data must be extracted or processed, it is for the sole purpose of including such information in transmissions to others. Unlike in *Qualcomm*, the manipulation of raw data was not the integral and necessary part of the service that Taxpayer's customers are purchasing.

We agree with TI&E that Taxpayer's [Fax] and [Messaging] solutions are telecommunications services subject to retailing B&O and retail sales taxes, and not data processing services. Taxpayer's petition is denied as to this issue.

2. Taxability of [Email A] and [Email B].

Washington includes “digital automated services” within the definition of retail sale. RCW 82.04.050(8). The term digital automated service is defined by RCW 82.04.192(3)(a):

"Digital automated service," except as provided in (b) of this subsection (3), means any service transferred electronically that uses one or more software applications.

While Taxpayer’s [Email A] and [Email B] services have elements that include the transmission or routing of emails as described by RCW 82.04.065(27),³ the core of Taxpayer’s [Email A] and [Email B] services is an email-related service that involves the customization, personalization, merging, addition of logos, storage, reporting, etc., of emails sent.

Taxpayer, however, argues that it is not performing a “digital automated service” because it is instead performing a “data processing service.” RCW 82.04.192(3)(b)(xv) provides:

(b) "Digital automated service" does not include: . . . (xv) Data processing services. For purposes of this subsection (3)(b)(xv), "data processing service" means a primarily automated service provided to a business or other organization where the primary object of the service is the systematic performance of operations by the service provider on data supplied in whole or in part by the customer to extract the required information in an appropriate form or to convert the data to usable information. Data processing services include check processing, image processing, form processing, survey processing, payroll processing, claim processing, and similar

(Emphasis added.) WAC 458-20-15503(303)(o) further explains the concept of “data processing service”:

(o) Data processing services means a primarily automated service provided to a business or other organization where the primary object of the service is the systematic performance of operations by the service provider on data supplied in whole or in part by the customer to: (i) Extract the required information in an appropriate form, or (ii) to convert the data to usable information. Data processing services include check processing, image processing, form processing, survey processing, payroll processing, claim processing, and similar activities. Data processing does not include remote access prewritten software used by the customer to process their own data.

(Emphasis added.) Businesses do not hire Taxpayer for the sole or primary purpose of extracting and reformatting their own data. Taxpayer’s business customers instead hire Taxpayer to provide an email or fax . . . service by which they can communicate data, if any, with their customers. Thus, if Taxpayer customers’ data must be extracted or converted into usable information, it is so that data might be included in Taxpayer’s customers’ fax or email transmissions to their own customers.

³ We note that telecommunications and ancillary services are excluded from the definition of “digital automated service.” RCW 82.04.050(8)(b)(vi).

Therefore, because the primary object of Taxpayer's [Email A] and [Email B] services is the customization, personalization, transmission, storage, and reporting of personalized emails, Taxpayer is not taxable under the service and other activities classification of the B&O tax for data processing services under *Qualcomm*. Because Taxpayer's services all use one or more of Taxpayer's software applications, we agree with TI&E that Taxpayer's [Email A] and [Email B] services come within the taxable definition of digital automated services, which activity is properly taxable under the retailing B&O and retail sales tax.

Taxpayer's petition as to this issue is denied.

3. ITFA.

Finally, Taxpayer argues that ITFA prevents the Department from taxing its revenues.

Congress enacted the [ITFA] in 1998, providing a three-year moratorium against states and local governments levying "taxes on internet access." 47 U.S.C. 151 note, §1101(a)(1). Congress extended this moratorium in 2001 and 2004. Congress amended the act again in 2007, which further extended the moratorium until November 1, 2014, when it is due to expire.⁴

In addition to extending the moratorium, the 2007 amendment expanded the definition of "internet access." The following subsections were added to 47 U.S.C. 151 note, §1105(5):

(C) [internet access] includes services that are incidental to the provision of the service described in subparagraph (A) [that enables users to connect to the internet to access content, information, or other services offered over the Internet] when furnished to users as part of such service, such as a home page, electronic mail and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips, and personal electronic storage capacity . . .

(E) [internet access] includes a homepage, electronic mail and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips, and personal electronic storage capacity, that are provided independently or not packaged with Internet access.

(Emphasis added.) Taxpayer argues that even though it may not be a provider of a service that enables customers to connect to the internet as required by subsection (C), it "independently" provides "electronic mail" and "storage capacity." Thus, Taxpayer reasons that its services are nontaxable "internet access" as described under subsection (E).

We disagree. Taxpayer does not supply "electronic mail":

Electronic mail, most commonly referred to as email or e-mail since ca. 1993, . . . is a method of exchanging digital messages from an author to one or more recipients. Modern email operates across the Internet or other computer networks. Some early email systems required that the author and the recipient both be online at the same time, in

⁴ [President Obama signed the Continuing Appropriations Act of 2016, which includes provisions extending the Internet Tax Freedom Act (ITFA) through December 11, 2015.]

common with instant messaging. Today's email systems are based on a store-and-forward model. Email servers accept, forward, deliver, and store messages. Neither the users nor their computers are required to be online simultaneously; they need connect only briefly, typically to a mail server, for as long as it takes to send or receive messages. Historically, the term electronic mail was used generically for any electronic document transmission. For example, several writers in the early 1970s used the term to describe fax document transmission. . . . As a result, it is difficult to find the first citation for the use of the term with the more specific meaning it has today.⁵

Email. Short for electronic mail, the transmission of messages over communications networks. The messages can be notes entered from the keyboard or electronic files stored on disk. Most mainframes, minicomputers, and computer networks have an e-mail system. . . .⁶

. . .

Taxpayer does not offer electronic mail, but an email service . . . that is a service that merely uses email provided by third parties.

As to “storage capacity,” subsection (E) requires “storage capacity” to be “personal storage capacity.” Although the phrase term “personal storage capacity” is not defined by ITFA, it has been described to mean “storage purchased by individual consumers for personal use” (emphasis ours).⁷ Taxpayer’s email services are not sold to individual consumers, and the storage capacity that is part of Taxpayer’s service is likewise not for personal use.

Thus, we hold that the 2007 amendment that broadened the definition of “internet access” in 47 U.S.C. 151 note, §1105(5)(E) does not provide Taxpayer with an exemption from Washington’s tax under ITFA. Taxpayer’s petition as to this issued is therefore denied.

DECISION AND DISPOSITION

Taxpayer’s petition is denied.

Dated this 23rd day of September, 2014.

⁵ See *Email*, Wikipedia, <http://en.wikipedia.org/wiki/Email> (last visited September 22, 2014).

⁶ See *Email*, Webopedia, http://webopedia.com/TERM/E/e_mail.html (last visited September 22, 2014).

⁷ See TaxAnalyst Special Report (Dec. 12, 2011), Carolyn Iafrate Kranz and Iris Kitamura, *Taxing Software and Cloud Computing: Yesterday’s Law, Today’s Technology*, <http://www.industrysalestax.com/docs/taxingsoftwarecloudcomputing.pdf> (last visited September 22, 2014).