

Cite as 10 WTD 381 (1990).

BEFORE THE INTERPRETATION AND  
APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition	)	<u>D E T E R M I N A T I O N</u>
For Correction of Assessment	)	
of	)	No. 91-011
	)	
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .
	)	. . ./Audit No. . . .
	)	

**[1] RULE 246 AND RULE 159:** SERVICE B&O TAX -- SALES COMMISSIONS -- SELLING AGENT -- DIRECT SELLER'S REPRESENTATIVE. Merely because Rule 246 explains that a "direct seller's representative" is subject to the Service B&O tax on commissions earned does not mean if a taxpayer is a selling agent who does not qualify as a direct seller's representative under the rule's definition that the taxpayer's sales commissions are exempt from the Service B&O tax. The taxpayer's earned sales commissions are Service B&O taxable under Rule 159. Accord: 8 WTD 7 (1989), Det. 89-286.

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.

TAXPAYER REPRESENTED BY: . . .

NATURE OF ACTION:

Petition protesting the assessment of Service business and occupation (B&O) tax on sales commissions earned by an out-of-state entity on the instate solicitation of orders for the sale of goods to purchasers.

FACTS AND ISSUES:

Krebs, A.L.J. -- [The taxpayer] is engaged in business as a selling agent for various consumer product companies who sell to the United States military resale system (post exchanges and commissaries). The taxpayer is headquartered in Connecticut and employs about ten full/part time salespersons who reside in Washington. These salespersons call upon customers in Washington to take orders upon which the taxpayer earns commissions as the selling agent.

The Department of Revenue (Department) examined the taxpayer's business records for the period from January 1, 1983 through December 31, 1989. As a result of this audit, the Department issued the above captioned tax assessments asserting excise tax liability in the combined total of \$ . . . , interest due in the combined total of \$ . . . and penalties due in the combined total of \$ . . . for a combined total sum of \$ . . . which remains due.

The Department's auditor assessed business and occupation (B&O) tax under the tax classification of Service and Other Business Activities pursuant to WAC 458-20-224 (Rule 224) upon the commission income earned by the taxpayer as a result of the business activities of its salespersons in Washington State. The taxpayer protests the assessment of the tax by referring to WAC 458-20-246 (Rule 246) as indicating that commissions of a "direct seller's representative" are subject to the Service B&O tax. Because the taxpayer does not buy consumer products on a buy-sell basis or a deposit-commission basis for resale by the buyer and does not sell or solicit in the home or in a permanent retail establishment, the taxpayer asserts that by the rule's definition of a "direct seller's representative" it is not a "direct seller's representative". Therefore, the taxpayer believes that the Service B&O tax was incorrectly assessed on its commission income.

The taxpayer registered with the Washington Employment Security Department in 1975 as having employees in Washington. The taxpayer did not register with the Department of Revenue. The Department's auditor registered the taxpayer for purposes of conducting the audit. The taxpayer asserts that it had not filed tax returns previously because it believed that it was not a "direct seller's representative" and, therefore, not taxable. The taxpayer contends that any assessment should only apply in the future, not prior periods, but only "if there is some other area of the statutes or court rulings that would apply" to its situation and can be clearly established.

#### DISCUSSION:

We agree with the taxpayer that it does not function as a "direct seller's representative" as defined in Rule 246. However, this does not mean that the commissions earned by it from its selling activities conducted in Washington State are exempt from the Service B&O tax. Rule 246 exempts the out-of-state seller from Wholesaling and Retailing B&O tax where its sales are made "to or through" a "direct seller's representative". But the rule goes on to declare:

SERVICE. The law provides no similar business and occupation tax exemption with regard to the compensation paid to the "direct seller's representative." Thus, the representative will remain subject to the business and occupation tax on all commissions or other compensation earned.

Obviously, the inclusion of the above paragraph in Rule 246 was to point out that there was no tax exemption for the representative on its earned commissions even though the out-of-state seller was tax exempt. The above paragraph does not mean, as asserted by the taxpayer, that only a "direct seller's representative" is subject to Service B&O tax to the exclusion of all other selling agents/representatives who earn commissions.

WAC 458-20-159 (Rule 159) is the administrative regulation that has a plenary discussion of selling agents. The rule has the full force and effect as the law itself. In pertinent part, the rule provides:

SERVICE AND OTHER BUSINESS ACTIVITIES. Every ... agent ... who makes a sale in the name of the actual owner, as agent of the actual owner, ... is taxable under the service and other business activities classification upon the gross income derived from such business.

"Gross income of the business" is defined to include compensation for the rendition of services and commissions. RCW 82.04.080.

Thus, all commissions earned by a selling agent, as the taxpayer is in this case, as well as a "direct seller's representative" are subject to the Service B&O tax where the soliciting of orders/selling activity takes place in this state. Accordingly, we conclude that the tax assessment in this case was proper.

We must reject the taxpayer's contention that any assessment should be applied only in the future because it believed that it was not a "direct seller's representative" and, therefore, not taxable. The statute, RCW 82.04.423, which exempts the out-of-state seller from Wholesaling and Retailing B&O tax where its sales are made "to or through" a "direct seller's representative", was enacted by the legislature in 1983 and made effective August 23, 1983. Rule 246, which implements the statute, was promulgated on November 30, 1984. Thus, prior to August 1983, there was no tax statute nor rule discussing a "direct seller's representative" which could have led the taxpayer incorrectly to not file tax returns and incorrectly to believe that sales commissions earned by a person other than a direct seller's representative were not taxable. On the other hand, Rule 159 which discusses the tax obligations of selling agents was promulgated as long ago as July 1, 1970.

Furthermore, it is the responsibility of each individual business to be aware of any implications resulting from activities conducted within this state. Department of Revenue personnel are available to answer any inquiries pertaining to such matters and information is readily available. The taxes imposed by the Revenue Act are of a self-assessing nature and the burden is placed upon a business to correctly inform itself of its obligations under the Act.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 16th day of January 1991.