Cite as 10 WTD 139

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

In the Matter of the Petition	)	D E T E R M I N A T I O N
For Correction of Assessment of	)	
	)	No. 90-360
	)	
. . .	)	Registration No. . . .
	)	/Audit No. . . .
	)	

[1] RULE 128: B&O TAX -- REAL ESTATE COMMISSIONS -- WHAT CONSTITUTES. Real estate commissions are subject to B&O tax on the full amount of the commission at the time of receipt by the brokerage office. Where broker is entitled to a nonrefundable monthly payment from agents regardless of whether commissions are earned by the agents, the income is subject to B&O tax. Such a nonrefundable payment is not a portion of a commission received for a particular transaction. Crescent Realty, Inc. v. Department of Rev. distinguished.

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: . . .
. . .
. . .

DATE OF TELEPHONE CONFERENCE: . . .

NATURE OF ACTION:

Taxpayer petitions for correction of assessment of Service B&O tax on income received from its real estate agents. Both sides agree that B&O tax is being paid on the full amount of the commissions earned by the office, and the only issue in this case is whether "associate's deposits" are payments subject to service B&O tax.

FACTS AND ISSUES:

Adler, A.L.J. -- Taxpayer is a real estate broker. In one of its offices, it has altered its method of operation as an incentive to high-producing agents. It states the change was necessary to prevent the high producers from leaving the company. The method, referred to as either a "100%" or "high-split" commission arrangement worked as follows: the agent retains virtually all of commissions from his or her sales. Instead of the traditional split with the broker, the agent is responsible for his or her expenses and pays a monthly "deposit" to the taxpayer. The contracts states the

> Associate [sales agent] shall pay to the Broker [Taxpayer] a non-refundable deposit (the "Associate's Deposit") in the amount of $750 per month, which shall be payable on the first day each month during the term of the Agreement. If Associate's Deposit is not paid in full by the seventh day of the month, it is agreed that the commission sharing on Associate's next transaction to close and settle shall be an equal division, fifty percent to Associate and fifty percent to Broker. (Brackets supplied.)

Taxpayer contends the Associate's Deposit is not taxable, because it is a commission-splitting arrangement. The entire commission received is taxed once at the broker level, prior to being split between broker and agent. As such, it is not subject to B&O tax either when the split occurs or when the agent pays the broker the portion of the commission called the Associate's Deposit.

Taxpayer's agents are all high producers whose track records qualified them for sales positions with the high-split office. They virtually always have sales closing and commissions coming in. Taxpayer states that, during the audit period, no particular agent failed to generate commission income significantly greater than the amount of the deposit called for in the contract. As a result, taxpayer has not had to enforce the contract's provision stating that failure to pay the deposit will entitle taxpayer to split the agent's next commission on a 50-50 basis.

Taxpayer notes that the contract calls for payment by the seventh day of the month, while closings tend to occur by the fifth. Agents receive their commissions and write a check to cover their deposits. To subject the deposit payment to tax is "a matter of semantics." Essentially, the department is taxing the payment because the agent writes the broker a check, rather than paying the broker by having the deposit payment deducted from the agent's commission prior to its distribution. Taxpayer believes this treatment is unfair, violates RCW 82.04.255 by taxing the commission dollars twice, and fails to recognize that the high-split method of operation is here to stay.

Taxpayer argues that the auditor placed undue emphasis on a portion of the language of RCW 82.04.255, which provides in part:

> The measure of the tax on real estate commissions earned by the real estate broker shall be the gross commission earned by the particular real estate brokerage office including that portion of the commission paid to salesmen or associate brokers in the same office on a particular transaction. . .(Emphasis supplied.)

Taxpayer asserts the auditor is taxing the $750 deposit because it is paid on a monthly basis by the agent rather than the broker's share of the agent's commissions being deducted from commissions received from particular transactions at the time of receipt and before payment to the agents. Taxpayer contends the most important operative words of the statute are "the measure of the tax on real estate commissions earned by the real estate broker shall be the gross commission earned by the particular real estate brokerage office." Further, the manner of settlement of commissions between broker and agent is not dictated by law, and the time of when splitting must occur to be viewed as a single transaction is not specified anywhere in the law or the rule. Consequently, the auditor is incorrect in taxing anything attributable to a commission-splitting arrangement where B&O tax is being paid on the full commissions received by the brokerage office. Taxpayer cites Crescent Realty, Inc. v. Department of Rev., Docket No. 82-2-01299-5 in support of its argument. In Crescent, the court found that Crescent's particular factual situation was such that it did not follow its own "100%" contract. It held that the net effect of Crescent's method was that it worked as a commission-splitting agreement similar to those in standard use.

DISCUSSION:

[1] RCW 82.04.255 requires that commissions earned by a brokerage office be taxed only once, at the office level. The agent was not subject to tax at the time his or her portion of the commission was received. Davenport, Inc. v. Department of Rev., 6 Wn.App. 581 (1972).

Taxpayer argues that the Thurston County Superior Court case, Crescent Realty, supra, supports its position. We disagree. In Crescent, the court specifically concluded that

> The 100% program as designated and operated by Plaintiff...was in no way or form a lease or contract for services and imposed no obligation upon any of the sales people to pay monies to Plaintiff which would be taxable... (Emphasis supplied.)

The Crescent contract stated that "in return for services" listed in the contract, the salesperson agreed to

> Pay to the Broker...a pro rata share of monthly brokerage expenses...together with One Hundred Dollars per month...

The Department had taxed the one hundred dollars because of the contract's language stating that the payment was "in return for services."

Under the facts as presented during the trial, the court found that the contract was virtually never enforced and that the standard practice of Crescent was to deduct commissions and reimbursements owed by the agent to the broker from commissions as they were received. As a result, the practice of the business was to disregard the contract's terms and to split commissions in the traditional manner.

In taxpayer's case, the contract is honored by both parties. Taxpayer's representatives stated they could not remember an occasion when an agent could not make the monthly payment, because the agents are specifically chosen for their production abilities and constantly have transactions in process.

Taxpayer's arrangement also differs in that the contract specifically designates the deposits as "nonrefundable." It is not contingent on whether commissions are actually earned by the agent. Even if this is a new form of commission sharing, the net result is a transaction wholly separate from the earning of commissions by the brokerage office. As such, it is outside the special treatment granted by the legislature under RCW 82.04.255. The Department of Revenue, as an administrative agency, is empowered only to administer the statutes as written by the legislature. The treatment sought by taxpayer would result in an impermissible expansion of the statute to accommodate a changing industry. Such requests are properly addressed to the legislature.

Taxpayer also argues that illegal double taxation results. This argument must fail. The B&O tax is, by its very nature, a pyramiding tax. Unlike an income tax, the same dollars may be taxed when different taxable activities take place. Here, two activities are subject to B&O tax: the actual earning of commissions and taxpayer's absolute right to receive a monthly payment from its high-producing agents.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this the 16th of October, 1990