Cite as 10 WTD 143

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

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| In the Matter of the Petition For Correction of Assessment of | ) | D E T E R M I N A T I O N |
| | ) | No. 90-365 |
| . . . | ) | Registration No. . . . |
| | ) | . . ./Audit No. . . . |

**[1] RULES 211 AND 105:** TAXICAB LEASES -- DRIVERS AS INDEPENDENT CONTRACTORS. Taxicab drivers were not employees or agents of taxpayer/owner where the owner did not control or have the right to control the drivers. The drivers, not the taxpayer, determined whether, when and where they worked during their shifts. A driver's income was the difference between the fares and the fixed lease payments made to the owner at the end of each shift, which is not a typical employer-employee relationship. Other factors in Rule 105 support finding the drivers were not employees or agents of the taxpayer.

**[2] RULE 211:** RETAILING B & O TAX - RETAIL SALES TAX - TAXICABS - LEASES. A lease is a contract whereby one party gives to another the right to use and possess property for a specified time, and ordinarily, for fixed payments. Here, drivers paid a fixed amount to use taxicabs for specified shifts. Amounts received by the taxpayer from drivers for the taxicab leases are subject to retail sales and retailing B & O taxes. Accord: Duncan Crane v. Dept. of Revenue, 44 Wn.App. 684, 689, 723 P.2d 480 (1986).

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:

The taxpayer/owner petitioned for a correction of an assessment of Retailing business and occupation (B & O) tax and retail sales tax on amounts which were determined to have been received from taxicab drivers for the lease or rental of his taxicabs.

FACTS:

De Luca, A.L.J. -- The audit covered the period from . . . through . . . . The auditor determined the proper B & O tax classification was retailing and allowed credit on income reclassified from service and other. The auditor also cited RCW 82.04.040 and stated that renting or leasing bare tangible personal property (taxicabs) to consumers (drivers) subjected the taxpayer to retail sales taxes. The taxpayer was assessed $ . . . in taxes, interest and penalties.

The taxpayer owned seven cabs and utilized seven to fourteen drivers during the audit period. The taxpayer pays for vehicle insurance, licensing, maintenance, repairs and provides dispatch service. He has a one page agreement with each driver entitled "Lease Drivers Responsibilities." The key elements provide:

> 5. Lease is to be paid at the end of each shift
>
> 6. You are expected to drive your scheduled shift and pay the lease for that shift
>
> EXTRA TIME OFF: You must give 24 hour notice <u>OR PAY</u> the <u>LEASE</u> for your shift

Other provisions require neat appearances for the drivers and cabs. A driver must return a car with a full tank of gas at the end of each shift. A driver is "responsible for any and all damage to vehicle caused by neglect."

Each driver pays the taxpayer $30.00 to use a cab for a twelve hour day shift. Drivers pay $25.00 each for a twelve hour night shift. A driver keeps the balance of his earnings for each shift after he fills the gas tank and pays the fixed amount. The drivers do not receive salaries, wages or commissions from the taxpayer. The taxpayer does not provide benefits to the drivers such as paid vacation, paid sick leave, medical insurance or a pension. The drivers are responsible for their own taxes. For example, the taxpayer does not withhold federal income tax or employment taxes on behalf of the drivers.

The drivers are free to work when and where they choose during their shifts. The taxpayer admitted the drivers can refuse to pick up passengers if they wish and he has no recourse other than terminate the agreements if there are excessive refusals.

ISSUES:

Were the drivers agents/employees of the taxpayer?

Whether the agreement between the taxpayer and the drivers created a lessor/lessee relationship?

TAXPAYER'S EXCEPTIONS:

The taxpayer objects to the application of WAC 458-20-211 (7) (Rule 211) by stating "in order for a taxable event to occur there must be a true lease or rental of tangible personal property." He contends the "...arrangement with his drivers/agents does not constitute either a true lease or rental." He then cites sections (3) and (6) of Rule 211 and argues "[a]ll individuals to whom petitioner `leases' taxis are agents of petitioner, subject to his control."

DISCUSSION:

WAC 458-20-211 (3) states:

> A true lease, rental, or bailment of personal property does not arise unless the lessee or bailee, or employees or independent operators hired by the lessee or bailee actually takes possession of the property and exercises dominion and control over it. Where the owner of the equipment or the owner's employees or agents maintain dominion and control over the personal property and actually operate it, the owner has not generally relinquished sufficient control over the property to give rise to a true lease, rental, or bailment of the property.

The question is whether the drivers are the taxpayer's employees or agents or are they independent contractors/lessees. WAC 458-20-105 (Rule 105) pertains to distinguishing employees from persons engaged in business. It reads in part:

> (1) The Revenue Act imposes taxes upon persons engaged in business but not upon persons acting solely in the capacity of employees.
>
> (2) While no one factor definitely determines employee status, the most important consideration is the employer's right to control the employee. The right to control is not limited to controlling the

result of the work to be accomplished, but includes controlling the details and means by which the work is accomplished....

(3) PERSONS ENGAGING IN BUSINESS. The term "engaging in business" means the act of transferring, selling or otherwise dealing in real or personal property, or the rendition of services, for consideration except as an employee. The following conditions will serve to indicate that a person is engaging in business.

If a person is:

(a) Holding oneself out to the public as engaging in business with respect to dealings in real or personal property, or in respect to the rendition of services;

(b) Entitled to receive the gross income of the business or any part thereof;

(c) Liable for business losses or the expense of conducting a business, even though such expenses may ultimately be reimbursed by a principal;

(d) Controlling and supervising others, and being personally liable for their payroll, as a part of engaging in business;

(e) Employing others to carry out duties and responsibilities related to the engaging in business and being personally liable for their pay;

(f) Filing a Statement of Business Income and Expenses (Schedule C) for federal income tax purposes;

(g) A party to a written contract, the intent of which establishes the person to be an independent contractor;

(h) Paid a gross amount for the work without deductions for employment taxes (such as Federal Insurance Contributions Act, Federal Unemployment Tax Act, and similar state taxes).

(4) EMPLOYEES. The following conditions indicate that a person is an employee.
If the person:

(a) Receives compensation, which is fixed at a certain rate per day, week, month or year, or at a

> certain percentage of business obtained, payable in all events;
>
> (b) Is employed to perform services in the affairs of another, subject to the other's control or right to control;
>
> (c) Has no liability for the expenses of maintaining an office or other place of business, or any other overhead expenses or for compensation of employees;
>
> (d) Has no liability for losses or indebtedness incurred in the conduct of the business;
>
> (e) Is generally entitled to fringe benefits normally associated with an employer-employee relationship, e.g., paid vacation, sick leave, insurance, and pension benefits;
>
> (f) Is treated as an employee for federal tax purposes;
>
> (g) Is paid a net amount after deductions for employment taxes, such as those identified in subsection (3)(h) of this section.

[1] After reviewing the facts before us in light of the criteria listed in Rule 105, it is clear that the factors determining an independent contractor outweigh those of an employee. Such a finding is most apparent when the right of control is considered. The taxpayer here does not have or exercise a right of control over the drivers. They determine whether, when and where they work. The taxpayer admits he cannot do anything about such driver decisions other than terminate the lease agreements. Other factors supporting the finding are: the drivers are entitled to receive the gross income of their business; they are liable for their business expenses and losses; they are not treated as employees for federal income tax purposes; they do not receive compensation payable in all events and do not receive any fringe benefits. See also RHO Co. v. Department of Rev., 113 Wn.2d 561 (1989) holding that the concept of control and right of control must be considered in determining whether one is an employee or an independent contractor.

Although the language of the driver agreement is not controlling by itself, it repeatedly refers to leases and lease payments. A driver's income is the difference between the cab fares and the fixed payment made to the owner at the end of each shift, which is not the typical employer-employee relationship. In the context of the facts, "lease" accurately describes the relationship between the taxpayer and the drivers and supports the finding that the drivers are not employees or agents of the taxpayer.

Section 7 of Rule 211 provides:

> Outright rentals of bare (unoperated) equipment or other tangible personal property as well as "true" leases or rentals of operated equipment or property are generally subject to the retailing classification of the business and occupation tax. Under unique circumstances when such things are rented for rerent by the lessee, without intervening use, then the original rental is subject to the wholesaling classification of tax and the subsequent rental is subject to the retailing classification.[1]

[2] The auditor found the taxpayer leasing his cabs outright to the drivers in return for a fixed amount of money per shift and therefore reclassified the taxpayer B & O status to retailing. According to the usual definition, a lease is a "contract whereby one party gives to another the right to the use and possession of property for a specified time, and ordinarily, for fixed payments." Duncan Crane v. Dept. of Revenue, 44 Wn. App. 684, 689, 723 P.2d 480 (1986). The facts of this matter conform to the usual definition of a lease.

Moreover, the retail sales tax is applicable to "...the renting or leasing of tangible personal property to consumers." RCW 82.04.050 (4). See also WAC 458-20-211 (9). Accordingly, the Department of Revenue's position is when the agreement between the drivers and the taxicab company regards the drivers as independent contractors Rule 211 provides that the lease payments are subject to retail excise taxes (sales and B & O).

Finally, the taxpayer's reference to section 6 of Rule 211 is misplaced. Reading section 6 in context with sections 4 and 5 of the rule, one concludes those three sections pertain only to the rental of construction equipment, not taxicabs. Moreover, the text of section 6 no more supports the taxpayer than does section 3.

DECISION:

The taxpayer's petition is denied.

DATED this 24th day of October, 1990.

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[1]The taxpayer does not contend the wholesaling B & O classification applies because the drivers do not rerent the cabs to their customers, who never assume dominion and control over the vehicles but merely pay fares to ride in them.