Cite as Det. No. 02-0102, 22 WTD 84 (2003)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Reporting Instructions of	)	D E T E R M I N A T I O N
	)	No. 02-0102
. . .	)	Registration No. . . .
	)	Docket No. . . .

[1] RULE 224, RULE 159; RCW 82.04.080: B&O TAX – GROSS INCOME -- DEDUCTION -- BOAT BROKERS – COMMISSIONS -- CO-BROKERING. A listing broker will be taxed on the entire commission earned on a co-brokered sale unless the boat owner and listing broker have previously agreed in a written listing agreement that a split commission should be paid directly to the individual co-brokers.

[2] RULE 221; RCW 82.12.040: USE TAX – COLLECTION OF -- BOAT SALES -- BROKERS. Rule 221 and RCW 82.12.040 require that a person that receives compensation for acting as an independent selling agent for unregistered principals making sales of tangible personal property are required to collect and remit use tax on those sales.

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:

A vessel broker appeals future audit instructions stating that it must pay service B&O tax on 100% of its listing commissions and that it is responsible for collecting retail sales tax on brokered boat sales.[1]

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

FACTS:

Okimoto, A.L.J. -- . . . (Taxpayer) operates a marina in . . . Washington. The Audit Division (Audit) of the Department of Revenue (Department) examined Taxpayer's books and records for the period January 1, 1994 through June 30, 1997. The examination resulted in additional taxes and interest due. The tax assessments were assumed by Warrant No.. . . On March 7, 2000, the Compliance Division entered into a mutually agreeable closing agreement settling the outstanding balance in full. The agreement, however, allowed Taxpayer to seek clarification or reversal of the Audit Instructions contained in the audit report.

CONTENTIONS AND ARGUMENTS:

Taxpayer describes its transactions in its petition as follows:

> **The Transactions**: Taxpayer, in the regular course of business, solicits listing agreements for yachts and boats. These agreements provide that Taxpayer has an exclusive listing to sell the vessel, as agent for the vessel's owner, in exchange for a commission due on the sale. It is not unusual for a different broker to know a customer who is interested in purchasing a vessel listed by Taxpayer. In such circumstances, the other selling broker may handle the paper work regarding the sale and collect and disburse all funds from the purchase and sale transaction. In such cases, taxpayer does not ever receive any sales taxes that may have been collected on the transactions; nor does Taxpayer receive the amount to be paid to the seller. Taxpayer only receives its portion of the total commission specified in the listing agreement. The other broker retains the remainder of the commission. There is typically a signed agreement between Taxpayer and the other broker specifying how the commission will be split. The handling of the funds follows trade practices.
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> **Audit's Instructions**: Audit maintains that Taxpayer must remit the sales taxes it never receives and must pay business and occupation tax on amounts it never receives. Audit's view is that the listing agreement is only between Taxpayer and the seller. Therefore, it is irrelevant that another broker actually handles the transaction.
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> **Taxpayer's Position**: Taxpayer maintains that the transactions should be treated the same as real estate transactions. In such cases, business and occupation tax is only due on that portion of a sales commission actually retained by the selling or listing broker. Trade practices make it such that all parties know the commission is split even though the listing agent has an exclusive sales commission agreement. Here, the situation is the same. Trade practices, as well as contracts between the listing and selling agents, make it clear the sales commission is split. In addition, as Taxpayer never has control of the funds, it is impossible for taxpayer to remit sales taxes it never collects, or even has an opportunity to collect. Therefore, even if the instructions were correct as to the business and occupation tax, they could not be correct as to the sales tax. A party earning a commission for listing an item for sale does not become responsible for collecting sales

> taxes if it does not collect the funds and the seller and collecting agent are both in Washington.

ISSUES:

1) Is a listing broker entitled to report its commission income on a split basis where there is no written listing agreement specifying a split commission?

2) Is a listing broker responsible for remitting retail sales tax even though the actual sales transaction is consummated by the selling broker and the owner.

DISCUSSION:

[1] The Audit Instructions for B&O tax that Taxpayer appeals are contained in a letter from . . . Field Audit Manager, dated Aug. 1, 2000. It states in part:

> In the audit, tax was asserted on all commissions because there was no pre-determined arrangement or agreement from the owner that the commission would be split if another broker were involved (listing broker and selling broker). In the listing agreements reviewed, the seller was obligated only to pay a commission to [Taxpayer], the listing broker.

WAC 458-20-224 (Rule 224) states:

> (2) Persons engaged in any business activity, other than or in addition to those for which a specific rate is provided in the statute, are taxable under a classification known as service and other business activities, and so designated upon return forms. In general, it includes persons rendering professional or personal services to persons (as distinguished from services rendered to personal property of persons) such as accountants, aerial surveyors and map makers, agents, ambulances, appraisers, architects, assayers, attorneys, automobile brokers, barbers, baseball clubs, beauty shop owners, **brokers**, chemists, chiropractors, collection agents, . . . stenographers, warehouse operators who are not subject to other specific statutory tax classifications, teachers, theater operators, undertakers, veterinarians, and numerous other persons.

(Emphasis added.)

Such persons are taxable upon the gross income of the business. In general, gross income means the value proceeding or accruing by the reason of the transaction of the business engaged in without any deduction for any costs or expenses incurred including selling expenses. RCW 82.04.080. Therefore, no deduction is allowed for amounts paid to another broker providing selling services for the listing broker during a sale. With regard to vessel brokers, however, the Department does recognize co-brokering sales by two or more boat brokers under certain

conditions. The *Guide For Vessel Brokers and Dealers*, (Washington State Dept. of Revenue, June of 1998), explains the Department's policy on co-brokering sales of boats and vessels. It states:

> Co-brokering means a sale which is facilitated between two or more boat brokers. The commission fee is taxed according to the pre-determined conditions of the listing agreement.
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> When no special commission splits/arrangements (either by percentage or set dollar amount) are authorized by the owner prior to the time of granting authority to sell as a broker, the person entitled to the commission pursuant to the listing agreement must pay B&O tax on the full amount of the commission even if they subsequently disburse a portion of the funds to another broker outside of contract requirements. . . .
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> For tax purposes, the owner of the boat must authorize a split commission in order for the listing broker to report only the actual amount of commission retained. An example of suitable language for listing agreements which authorizes a split commission is:
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> *"If a cooperative Brokerage situation occurs, whereby the Listing Broker is not the Selling Broker, the Owner agrees to pay the Listing Broker and the Selling Broker a total commission, not to exceed XX percent (XX%) of the gross selling price of the vessel. The commission split shall be determined at the time of negotiating the sale. This agreed commission split shall be disclosed in writing, and this written disclosure shall become a part of this Agreement. These fees shall be paid directly to each independent Broker at the time the sale is closed."*

[Emphasis added.] In the audit report and [Field Audit Manager's] letter, dated August 1, 2000, Audit stated that Taxpayer, as a listing broker, would be liable for B&O tax on 100% of the broker's commission unless Taxpayer had a written listing agreement between the boat owner and Taxpayer, specifically authorizing that a split commission should be paid directly to both the listing broker and selling broker. These audit instructions correctly state the Department's policy on this matter as reflected in Rule 224 and the *Guide For Vessel Brokers and Dealers*, (Washington State Dept. of Revenue, June of 1998). Accordingly, Taxpayer's petition for correction of Audit instructions is denied.

[2] The Audit Instructions for retail sales tax that Taxpayer appeals are also contained in a letter from . . . Field Audit Manager, dated Aug. 1, 2000. It states in part:

> WAC 458-20-159 requires the consignee to collect and remit the retail sales tax on all sales. Exceptions are provided, including where a report is filed with the Department by the broker/bailee notifying the Department of the name of the buyer, name of seller, amount of sale, approximate date of sale and a description of the property sold.
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> [Taxpayer] was held responsible (see audit report) for unreported retail sales tax with regard to any brokered sale where this report was not filed as required. The audit

> instructions stated, however, that a credit would be given if documentation were provided showing the selling broker did remit the retail sales tax on those transactions.

Taxpayer objects to these instructions because they hold Taxpayer responsible for insuring that retail sales tax was remitted on the transaction even though Taxpayer never had control of the funds. Taxpayer states that it is impossible for it to remit retail sales taxes that it never collects or even has an opportunity to collect.

Both Taxpayer and Audit rely on WAC 458-20-159, (Rule 159) and although it may apply to those situations where the listing broker has actual or constructive possession of the boat listed for sale, the regulation that the Department has traditionally applied to situations where a broker lists a boat on behalf of an unregistered owner, is WAC 458-20-221 (Rule 221)[2]. Rule 221 covers the collection of use tax by retailers and selling agents. It is the lawfully promulgated regulation explaining the tax liabilities of selling agents acting for unregistered principals making sales of tangible personal property, such as boats. It states in part:

> (7) SELLING AGENTS. RCW 82.12.040 of the law provides, among other things, as follows:
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> (a) "Every person who engages in this state in the business of acting as an independent selling agent for persons who do not hold a valid certificate of registration, and who receives compensation by reason of sales of tangible personal property of his principals made for use in this state, shall, at the time such sales are made, collect from the purchasers the tax imposed under this chapter, and for that purpose shall be deemed a retailer as defined in this chapter."

We first note that RCW 82.12.040 and Rule 221 do not require that the selling agent actually sell the boat, but only require that the selling agent "engages in this state in the business of acting as an independent selling agent for persons who do not hold a valid certificate of registration, and who receives compensation by reason of sales of tangible personal property of his principals made for use in this state." In this case, Taxpayer is engaged in the business of acting as an independent selling agent for unregistered boat owners, and Taxpayer also receives compensation because the boat is sold. Rule 221 clearly applies to Taxpayer's business activity. Therefore, we find that under RCW 82.12.040 and Rule 221, Taxpayer is required to collect use tax from the purchasers in these sales transactions. RCW 82.12.040(3) further provides:

> . . .In case any seller fails to collect the tax herein imposed or having collected the tax, fails to pay the same to the department in the manner prescribed, whether such failure is the result of his own acts or the result of acts or conditions beyond his control, he shall nevertheless, be personally liable to the state for the amount of such tax.

[2] *See, Guide For Vessel Brokers and Dealers,* (Washington State Dept. of Revenue, June of 1998) at 23.

Taxpayer complains that being held liable for unremitted use taxes is an unreasonable burden to place upon a listing agent that has no opportunity to collect the tax. Taxpayer argues that this interpretation could not have been intended by the legislature. We disagree. Rule 221 specifically contemplates a situation where a listing broker is excluded from the actual sales transactions. Under such circumstances, Rule 221 creates a safe harbor to relieve selling agents from all use tax collection liability provided that they comply with specified registration or reporting requirements. It states:

> (b) However, in those cases where the agent receives compensation by reason of a sale made pursuant to an order given directly to his principal by the buyer, and of which the agent had no knowledge at the time of sale, the said agent will be relieved of all liability for the collection of or payment of the tax. Furthermore, in other cases where payment is made by the buyer direct to the principal and the agent is unable to collect the tax from the buyer, the agent will be relieved from all liability for the collection of the tax from the buyer and for payment of the tax to the department, provided that within ten days after receipt of commission on any such sale, the agent shall forward to the department a written statement showing the following: Name and address of purchaser, date of sale, type of goods sold, and selling price. (Agents may avoid all liability for collection of this tax, provided their principals obtain a certificate of registration.)

Rule 221 provides two alternate safe harbors to relieve Taxpayer from its responsibility to collect and remit use tax in this situation. Taxpayer may either register its principal with the Department or Taxpayer may file a complete informational report with the Department within ten days after it receives its commission. Rule 221 is the lawfully promulgated regulation implementing RCW 82.12.040 and has the same force and effect of law unless declared invalid by the judgment of a court of record not appealed from. RCW 82.32.300.

Since we believe the instructions contained in the audit report and [Field Audit Manager's] letter, dated August 1, 2000 are consistent with Rule 221 and this determination, Taxpayer's petition to reverse Audit Instructions is denied.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

Dated this 25th day of June 2002.