

Cite as Det. No. 02-0174, 22 WTD 218 (2003)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

|   |   |                                  |
|---|---|----------------------------------|
| In the Matter of the Petition For Correction of | ) | <u>D E T E R M I N A T I O N</u> |
| Assessment of                                   | ) |                                  |
|   | ) | No. 02-0174                      |
|   | ) |                                  |
| ...   | ) | Registration No. ...             |
|   | ) | FY ... /Audit No. ...            |
|   | ) | Docket No. ...                   |
|   | ) |                                  |

RCW 82.04.4457: B&O TAX – CREDIT – HELP DESK SERVICES TO THIRD PARTIES – INTERNET SERVICE PROVIDER. An internet service provider that provided help desk services to its own subscribers was not entitled to the help-desk services credit under RCW 82.04.4457 because it was not providing those services to third parties.

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:

An internet service provider protests the denial of a “Help Desk Services Credit” in an audit report.<sup>1</sup>

FACTS:

Okimoto, A.L.J. – ... (Taxpayer) is an internet service provider located in ... , Washington in . . . County. Taxpayer’s books and records were examined by the Audit Division (Audit) of the Department of Revenue (Department) for the period January 1, 1997 through December 31, 2000. As a result of that examination additional taxes and interest were found owing in the amount of \$ . . . , and Doc. No. . . . was issued in that amount on September 26, 2001. Taxpayer has protested the assessment, and it remains due.

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

Taxpayer provides internet connection services to its customers for a fee. Included in their monthly internet subscription fee is access to a help desk to assist their subscribers. Customers may contact the help desk by telephone or e-mail. Taxpayer's employees staff taxpayer's internet support desk, and the employees provide direct help to subscribers. Taxpayer does not contract with a software manufacturer to support the manufacturer's programs, nor does Taxpayer contract out its support services to an independent contractor.

If a subscriber's problem necessitates that a Taxpayer's employee go on site, Taxpayer charges the subscriber a separate fee for services rendered.

...

Schedules 3 & 5: Tax Due on Disallowed Help Desk Services Deduction and Credit;

In Schedules 3 & 5, Audit disallowed Taxpayer's claim for a help desk services credit/deduction from B&O taxes under RCW 82.04.4457.

ISSUE:

Is an internet service provider that provides help desk services to its own subscribers entitled to the credit conferred by RCW 82.04.4457?

DISCUSSION:

...

Schedules 3 & 5: Tax Due on Disallowed Help Desk Services Deduction/Credit

A help desk services B&O tax credit is granted in RCW 82.04.4457 and provides:

- (1) Subject to the limits and provisions of this section, a credit is authorized against the tax otherwise due under this chapter for persons engaged in a rural county in the business of providing information technology help desk services **to third parties**.
- (2) To qualify for the credit, the help desk services must be conducted from a rural county.
- (3) The amount of the tax credit for persons engaged in the activity of providing information technology help desk services in rural counties shall be equal to one hundred percent of the amount of tax due under this chapter that is attributable to providing the services from the rural county. In order to qualify for the credit under this subsection, the county must meet the definition of rural county at the time the person begins to conduct qualifying business in the county.

(Emphasis supplied.)

Audit agrees that Taxpayer is in the business of providing information technology help desk services in a rural county, but disallowed the credit because Taxpayer did not provide those services to third parties. Instead, Audit states that Taxpayer provides the help desk services only to its subscribers, which have a contract with Taxpayer to receive the internet services. Audit points out that there are only two parties to the subscriber contract, Taxpayer and its customers.

Taxpayer contends, however, that the credit is not restricted to only help desk services provided to third parties. Taxpayer relies on the fact that the Final Bill Report of HB 2519 (simplifying the excise tax code) and the Department's Special Notice announcing the credit fail to mention the limitation to third parties.

We first note that the credit conferred by RCW 82.04.4457 was actually enacted by Engrossed Substitute House Bill 2260 and not House Bill 2519. The final bill report for ESHB 2260 states in part:

A B&O tax credit is provided to businesses that provide information technology "help desk" services **to third parties** in a rural county. The credit equals 100 percent of the business and occupation tax. The tax credit terminates on December 31, 2003.

(Bolding added.)

As can be seen, the final bill report of the enacting legislation clearly limits the credit to "help desk" services provided to **third parties**.

Next, Taxpayer argues that the Special Notice issued by the Department on July 31, 1999 did not state that the credit was limited to help desk services to third parties and, therefore, the legislation should not be interpreted in such a manner. We recognize that the Special Notice does not specifically limit the credit to help desk services provided to third parties, and in that respect the notice is an incomplete statement of the credit requirements. RCW 82.04.4457 clearly does contain that restriction, however. The Department is without authority to allow an exemption or credit for business activities not specifically conferred by the legislature. *Budget Rent-A-Car v. Department of Rev.* 81 Wn.2d 171, 500 P.2d 764 (1972). We further note that the Special Notice was only a brief summary announcing recent legislative changes affecting rural counties and was not intended to be a comprehensive analysis of eligibility requirements for the new credit.

Finally, Taxpayer argues that Taxpayer's help desk services qualify for the credit because it does, in fact, render such help desk services to third parties. Taxpayer argues that:

As an Internet Service Provider, the client allows for the contact of the customer and the web. The customer can easily be defined as the third party in this triad.

We disagree. The term “third party” is not defined in the Revenue Act, so we must utilize the common and ordinary meaning of the term, which can be found in dictionaries. *John H. Sellen Const. Co. v. Department of Revenue*, 87 Wn. 2d 878, 558 P.2d 1342 (1976).

*Black’s Law Dictionary* (7<sup>th</sup> ed.) (1999) defines “third party” as:

One who is not a party to a lawsuit, agreement, or other transaction but who is somehow involved in the transaction: someone other than the principal parties.

In the scenario contemplated by the legislature,<sup>2</sup> the two principal parties of the transaction are a software (or hardware) manufacturer and its help desk services provider. The two party contract runs directly between the software manufacturer and the help desk services provider. The third party to whom the help desk services are to be provided is the customer purchasing the software/hardware. In this type of transaction, the help desk services provider is obligated through its contract with the manufacturer to provide help desk services to a customer, who becomes a third-party beneficiary of the contract.

The help desk services credit could also apply to internet services if the internet service provider contracted out its help desk services activity to an independent contractor. In this case, the two party contract would run directly between the internet services provider and its help desk services provider. The third party to whom the help desk services are to be provided is the subscriber purchasing internet services from Taxpayer. In this type of transaction, the help desk services provider is obligated through its contract with the internet services provider (Taxpayer) to provide help desk services to a subscriber, who becomes a third-party beneficiary of the contract between Taxpayer and the help desk services provider. Under this scenario, the independent help desk services provider would be entitled to the credit, but not Taxpayer.

...

Under Taxpayer’s scenario above, however, there is simply no contract or agreement between Taxpayer and any person on the web, or elsewhere, to provide “help desk” services to Taxpayer’s subscribers. Instead, the obligation to render help desk services stems solely from Taxpayer’s contractual obligation to its subscribers to provide internet services. This is only a two party transaction between Taxpayer and its subscribers. Consequently, since Taxpayer does not provide help desk services to third parties, Taxpayer is not entitled to the help desk services credit.

Finally, Taxpayer argues that it was the Legislature’s intent in enacting the credit to encourage the development of internet services in rural counties. Taxpayer reasons that since it is engaged

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<sup>2</sup> The help desk services to third parties credit was primarily an effort by the legislature to attract highly mobile help desk services businesses to rural counties. The reasoning was that since the help desk services providers received all their contacts over the telephone or internet, they could easily locate in rural counties. See *Department of Rev. Fiscal Note for ESHB 2260* dated April 7, 1999., p. 3.

in internet services then it should be entitled to the credit. Taxpayer relies on the following language of legislative intent.

It is the intent of the legislature to attract and retain technology-based businesses in rural counties. Section 302 of this act provides a tax incentive to those businesses that develop or manufacture software and hardware in rural counties. Section 303 of this act provides a tax incentive to those businesses that are engaged in the business of providing technical support services from rural counties. Encouragement of these types of business will stimulate the information technology industry and be of benefit to the state economy in general.

Notwithstanding the fact that the legislature intended to provide tax incentives to attract and retain technology-based businesses in rural counties, RCW 82.04.4457 specifically limits the credit to persons that provide help desk services to third parties. Regarding exemptions and deductions *Group Health Coop. of Puget Sound, Inc. v. State Tax Comm'n*, 72 Wn.2d 422, 429, 433 P.2d 201 (1967) states:

In connection with each, the burden of showing qualification for the tax benefit afforded likewise rests with the taxpayer. And, statutes, which provide for either are, in case of doubt or ambiguity, to be construed strictly, though fairly and in keeping with the ordinary meaning of their language, against the taxpayer.

The language is clear and unambiguous that there must be some third party beneficiary in the contract. In Taxpayer's case there are none. The Department is without authority to allow a credit for business activities not specifically conferred by the legislature. *Budget Rent-A-Car, supra*.

#### DECISION AND DISPOSITION:

In respect to Schedules 3 & 5 (Help Desk Services Credit) Taxpayer's petition is denied.

Dated this 29<sup>th</sup> day of October 2002.