

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. 90-253
)	
. . . )	Registration No. . . .
)	. . ./Audit No. . . .
)	
)	

[1] **RULE 111:** EMPLOYEE PAYMASTER -- PERVASIVE CONTROL.  
Mere payrolling agent whose client retained elements of control listed in RPM 90-1 may exclude employee salaries and benefits. For periods before November 1, 1989, unregistered businesses pay on net under the statutory tax classification applicable for the nature of the work performed.

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 HEARING: August 1, 1989

NATURE OF ACTION:

The taxpayer petitions for the correction of assessment for the audit period . . . through . . . of business and occupation taxes, penalties, and interest totalling \$ . . . .

FACTS AND ISSUES:

Pree, A.L.J. -- The taxpayer is a corporation engaged in the business of providing contract engineering personnel or technical engineering help services. It provided workers to a Washington corporation (client) assigning contract or temporary employees to work at the client's facilities under the complete supervision, direction, and control of the client.

The client determines the workers' initial hourly rate, and any

adjustments in that rate based on its performance reviews. The client determines the length of employment and whether or not the employee is terminated, with or without cause. The employee submits time sheets to the taxpayer after they are signed by the client. The employee signs an agreement with the taxpayer indicating that (s)he is under the exclusive control and supervision of the client regarding matters of work practices, hours, length of assignment and termination. The agreement also states that the taxpayer retains no control on those matters.

The customer notifies the taxpayer of positions to be filled. The taxpayer searches its files for workers qualified to perform the customer's tasks. The taxpayer may advertise to locate additional recruits. It then submits the resumes to the customer who selects the workers that it wants.

The customer pays the taxpayer a sum which includes the wages, taxes and travel expenses applicable to each employee. An additional sum is provided as compensation for the taxpayer's service based on a percentage markup of the hourly wage exclusive of per diem and travel allowances.

The auditor assessed Service B&O tax on the gross amount received by the taxpayer. Since the taxpayer had not registered with the state and no taxes had been paid, penalties and interest were added to the assessment.

The taxpayer contests the applicability of the Service B&O tax to the gross amount received by the taxpayer. In addition, the taxpayer requests that the Department waive or cancel the penalties and interest on the assessment.

#### DISCUSSION:

WAC 458-20-111 (Rule 111) is the Department's rule which provides for the exclusion of advances or reimbursements, stating:

There may be excluded from the measure of tax amounts representing money or credit received by a taxpayer as reimbursement of an advance in accordance with the regular and usual custom of his business or profession.

Normally, the payor of workers is taxed on all its receipts resulting from the workers' labor. However, the recent court case, Rho Company, Inc. v. Department of Revenue, 113 Wn.2d 561 (1989), provides that a company which is to be regarded as the employer of workers for taxation purposes depends on the degree of control the respective businesses exercise over the workers. Mere payrolling agents may exclude employee salaries and benefits paid to them by their client businesses and passed through to the workers. Rule 111 entitles the payrolling agent an exclusion for

advances of the workers' wages.

To qualify for the exclusion, the payrolling agent must show that the client business exercised pervasive control over employees of the paymaster. In RPM 90-1, issued after the Rho decision, the Department of Revenue outlines 10 factors or elements of control considered in the Rho decision that the Department considers when determining who has pervasive control. If none of those elements of control exist in the paymaster, the client will be considered the employer and the paymaster can exclude the payments it passes through to the workers.

According to the RPM, we must consider the following elements of control:

- 1.Ultimate decision as to hiring and firing the worker;
- 2.Ultimate decision as to duration of employment;
- 3.Setting the rate, amount, and other aspects of compensation;
- 4.Determining the worker's job assignments and instructions;
- 5.Exercising exclusive guidance and supervision over the work performed;
- 6.Evaluating the worker's performance;
- 7.Determining the days and hours of work performed;
- 8.Providing the office space or other controlled work premises;
- 9.Providing the tools and materials applied in the workplace;
- 10.Compensating workers for vacation time, sick leave, and insurance benefits.

The taxpayer has stated that none of these elements of control exist in its behalf. In addition the taxpayer has provided copies of its contracts with employees as well as client businesses to corroborate that statement. The audit division has indicated that it is satisfied that the taxpayer has sufficiently verified that it was acting solely as a payrolling agent.

Under RPM 90-1, businesses engaged only as agents to provide workers for others during periods before November 1, 1989 and which have not registered and paid tax on the gross receipts may

report tax on the gross receipts under the statutory tax classification applicable for the nature of the work performed by the workers provided and may deduct any amounts received for employee payroll and benefits. Since the taxpayer was not registered it may pay tax under the applicable tax classification after deducting amounts received for payroll and benefits.

DECISION AND DISPOSITION:

The case is remanded to the Audit Division to determine the applicable tax classification and issue a corrected assessment after deducting the amounts received for payroll and benefits.

DATED this 27th day of June, 1990.