

Cite as 10 WTD 155

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 Refund)	
)	No. 90-371
)	
. . .)	Registration No. . . .
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)	

[1] RULE 111: B&O TAX -- PAYMASTER. Corporation acting solely as payroll agent for other businesses not required to pay B&O tax on advances received for wages and taxes. RPM 90-1.

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: October 22, 1990

NATURE OF ACTION:

The taxpayer petitions for refund of B&O taxes assessed on payroll advances received from other business.

FACTS AND ISSUES:

Pree, A.L.J. -- The taxpayer provides employee references and performs payrolling duties for other businesses. For instance, another business may call in and request clerical help. The taxpayer will search its reference files for qualified individuals who expressed an interest to perform the work requested. The taxpayer would refer those individuals to the business requesting help.

The business would decide whether or not to accept or "hire" any individuals so referred. If accepted, the individual would work for the business at their office and under their direction. The individual would work at the rate set by the employer, although it may have been suggested by the taxpayer. For example, the taxpayer

would suggest that an employee it refers receive \$4.50/hour. The business would pay the taxpayer \$6.00/hour and allow the taxpayer to keep the difference. The business would submit time cards and payment for hours the individual worked. The taxpayer would compute and pay the wages due the individual as well as the payroll taxes due.

The business supervised and retained control over the employee. It evaluated and could terminate the employee. The taxpayer's sole function was that of paymaster.

The taxpayer reported only the portion it kept when it computed its business and occupation taxes (i.e. \$6.00 - \$4.50 = \$1.50 less applicable payroll taxes in the example above). The taxpayer was audited for the period . . . through Service B&O tax was assessed on the gross amount it received (\$6.00 in the example above). The taxpayer paid the amount assessed. The next day, the taxpayer received a copy of RPM 90-1 which indicated a change in the department's position. The taxpayer believes that under the new policy, it is entitled to a refund of the amount assessed.

DISCUSSION:

RCW 82.04.220 imposes the business and occupation tax on the gross income of a business. RCW 82.04.080 defines "gross income of the business" as:

"Gross income of the business" means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

WAC 458-20-111 (Rule 111) excludes from the measure of tax money or credits received as reimbursement or an advance in accordance with the regular and usual custom of the business. We must determine whether the amount received by the taxpayer qualifies as an advance. That is, was the taxpayer acting as the client's agent merely receiving an advance of the client's payroll expense which it used to pay the client's employees.

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 state 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.

In this case all the elements of control listed above are retained by the business paying the taxpayer, not the taxpayer. Since the client business had pervasive control, the taxpayer was entitled to

exclude the advances it received for payroll (Service B&O tax was properly paid on the amount it retained).

DECISION AND DISPOSITION:

The taxpayer's petition for refund is granted.

DATED this 29th day of October, 1990.