

Cite as Det. No. 15-0093R, 36 WTD 089 (2017)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of) D E T E R M I N A T I O N
Assessment of)
)
 No. 15-0093R
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... Registration No. . . .
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RCW 82.04.4272; RCW 82.08.807; RCW 82.08.010: B&O TAX – RETAIL SALES TAX – DIRECT MAIL – DELIVERY CHARGES – DIRECTION OF THE PURCHASER – POSTAGE COSTS. A taxpayer sending printed materials at the direction of the purchaser, the customer, meets the statutory definition of “direct mail.” A taxpayer that meets the statutory definition of direct mail is entitled to a B&O tax deduction for delivery charges. Likewise, if a taxpayer incurs postage costs for “delivery charges for the delivery of direct mail,” then the taxpayer is entitled to deduct those postage costs from retail sales taxation.

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.

Weaver, T.R.O. – Taxpayer petitions for a reconsideration of the holdings in Determination No. 15-0093. On reconsideration, we reverse [one of] the holdings in Det. No. 15-0093, and hold that Taxpayer is entitled to deduct its separately stated direct mail delivery charges before calculating its B&O and retail sales tax liability. . . .¹

ISSUES

Whether, under RCW 82.04.4272 and RCW 82.08.807, a company engaged in the business of providing proxy voting services is entitled to deduct separately stated charges for direct mail delivery charges before calculating its B&O and retail sales tax liability.

. . .

FINDINGS OF FACT

. . . Taxpayer filed a petition for reconsideration of Determination No. 15-0093, issued on April 10, 2015.

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

I. Background

. . . Taxpayer's services include investor communications, securities processing, and operations sourcing options.

Taxpayer's customers include brokerage firms, global banks, mutual funds, annuity companies, institutional investors, specialty trading firms, and clearing firms. Taxpayer's business operations are divided into two business segments: (1) investor communications solutions, and (2) securities processing solutions. Taxpayer provides its investor communications solutions to clients with investors in Washington State. [None of Taxpayer's securities processing solutions business activity occurred in Washington, and gross receipts from that line of business are not at issue in this appeal.]

A large percentage of Taxpayer's "investor communication solutions" business involves the processing and distribution of proxy materials to investors in equity securities and mutual funds, as well as the facilitation of related vote processing. Through its proxy services, Taxpayer helps its clients (broker-dealers and banks) fulfill their regulatory responsibilities. Taxpayer manages and facilitates every aspect of the proxy voting process, including: proxy distribution, voting, tabulation, and reporting, institutional proxy voting, paper, telephone, Internet, and mobile voting services for shareholders, global proxy management, and notice and access.

Proxy [materials] are delivered both electronically and in paper form. Ultimately, the decision as to whether materials are mailed or delivered electronically is made by individual shareholders. Indeed, under its client contracts, Taxpayer is required to honor shareholder delivery preferences. Further, Taxpayer is required under its client contracts to maintain secure paths and systems that allow shareholders to vote in a variety of methods including paper ballots, electronically through an internet website, electronically through an identified proxy vote agent, or by toll-free telephone.

II. Proxy Voting Services

Typically, publicly traded shares are not registered in the name of the ultimate beneficial owner. Instead, substantially all public companies' shares are [registered under the name of the] broker-dealers or banks [that hold the securities as "nominee" of the beneficial owner]. [A Clearing House] holds shares on behalf of its participant broker-dealers and banks.

The participant broker-dealers and banks, which are known as "nominees" because they hold securities in name only, hold the shares on behalf of investors, who are the individual beneficial owners. Nominees, upon request, are required to provide registrants (corporations and other issuers) with a list of beneficial owners who do not object to having their names, addresses, and share holdings supplied. Such beneficial owners are referred to as "non-objecting beneficial owners" or "NOBO." Taxpayer provides its clients with NOBO request fulfillment services and is required, under contract, to do so in accordance with Securities and Exchange Commission (SEC) regulations.²

² See Rules 14-b-1(b)(3) and 14b-2(b)(4)(ii) under the Securities and Exchange Act of 1934.

The first step in passing voting rights down the chain is the “omnibus proxy,” which [Clearing House] executes to transfer its voting rights to its participant nominees. Nominees are often prohibited from voting the securities held in their customers’ accounts in the absence of receiving such customers’ voting instructions. Once an annual meeting date is set, nominees (Taxpayer’s clients) have three days to transfer to Taxpayer, via powers of attorney, the authority to execute a proxy, which they receive from [Clearing House] via the omnibus proxy. Taxpayer then distributes, via mail or e-delivery, the proxy materials and voting instruction forms (VIFs) to shareholders.

Leading up to an annual meeting, Taxpayer periodically tabulates the proxy votes it has received and prepares a report showing the votes cast as they are received. Taxpayer uses this report to determine which shareholders have not voted and re-delivers the voter instruction forms to the non-participating shareholders. Once voting is complete, Taxpayer will tabulate the votes and create a multi-proxy report summarizing the results. In providing its proxy services, Taxpayer is required by contract to comply with SEC and New York Stock Exchange (“NYSE”) rules and regulations. These rules govern how proxy voting materials must be transmitted, time limitations, and billing processes. Specifically, the NYSE rules require Taxpayer to include its proxy service fees in the “processing fee” line item of its invoices.

Taxpayer’s invoices contain the following separately stated fees:

- Processing Fee
- Mail Elimination Fee
- Intermediary Fee
- Postage
- Envelopes/Forms
- Other

III. Procedural History

Taxpayer was audited by the Department’s Audit Division for the period of January 1, 2006, through June 30, 2011. During this period, Taxpayer reported all of its Washington revenue under the retailing B&O tax classification and deducted sales coded as non-taxable under the retail sales tax classification as an “other” deduction for postage. The Audit Division determined that 71.6% of these deductions were for postage and materials and were properly excluded.

The remaining 28.4% of these deductions were comprised of processing and intermediary fees. The Audit Division determined that Taxpayer’s services fell within the definition of a “mailing bureau” under WAC 458-20-141 and disallowed the deductions associated with processing and intermediary fees, and subjected these sales to retail sales tax. Because charges for direct delivery are also excluded from the measure of the B&O tax, the Audit Division allowed a credit for B&O tax previously paid on postage charges.

On January 30, 2013, the Audit Division issued Assessment No. . . . for the period January 1, 2006, through December 31, 2009, totaling \$ This assessment included \$. . . in retail sales tax, a retailing B&O tax credit of \$. . . , \$. . . in interest, and a 5% assessment penalty of \$ On January

30, 2013, the Audit Division also issued Assessment No. . . . , for the period January 1, 2010, through June 30, 2011. This assessment included \$. . . in retail sales tax, a retailing B&O tax credit of \$. . . , \$. . . in interest, and a 5% assessment penalty of \$

Taxpayer filed a timely appeal. At the appeals hearing, Taxpayer presented arguments against the assessment, specifically that it was not a mailing bureau subject to the retailing B&O tax classification and the retail sales tax. In Det. No. 15-0093, the Department granted Taxpayer's petition in part, and denied it in part. The Department agreed that Taxpayer's proxy voting services were not mailing bureau activities. For the period prior to July 26, 2009, the Department determined that Taxpayer's proxy voting revenue was subject to the service and other activities B&O tax classification. As of July 26, 2009, however, the Department ruled that Taxpayer's proxy voting services were digital automated services subject to the retailing B&O and retail sales tax.

In addition, the Department held that Taxpayer was not eligible for a retail sales tax deduction or B&O tax deduction for its postage charges. Finally, Det. No. 15-0093 remanded the matter back to the Audit Division for adjustments consistent with the determination.

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On July 23, 2015, the Audit Division issued Post Assessment Adjustment (PAA), on Assessment No. . . . , totaling \$ The PAA included \$. . . in retail sales tax, a retailing B&O tax credit of \$. . . , \$. . . in service and other activities B&O tax, \$. . . in interest, a 5% assessment penalty of \$. . . , and additional interest of \$. . . from March 2, 2013, to August 24, 2015.

On July 23, 2015, the Audit Division also issued a PAA on Assessment No. . . . totaling \$ The PAA included \$. . . in retail sales tax, \$. . . in interest, a 5% assessment penalty of \$. . . , and \$. . . in interest from March 2, 2013, to August 24, 2015.

Taxpayer seeks to address two issues in this reconsideration. First, Taxpayer believes it is eligible for the postage deduction/exemption available under RCW 82.04.4272 and RCW 82.08.807. . . .

ANALYSIS

I. Taxpayer Is Entitled to Deduct its Postage Costs.

Washington statutes provide a B&O tax deduction and retail sales and use tax exemption for delivery charges associated with direct mail. For B&O tax purposes, RCW 82.04.4272 reads, as follows:

- (1) In computing tax there must be deducted from the measure of tax, amounts derived from delivery charges made for the delivery of direct mail if the charges are separately stated on an invoice or similar billing document given to the purchaser.
- (2) "Delivery charges" and "direct mail" have the same meanings as in RCW 82.08.010.

RCW 82.04.4272(1), (2). This statute was enacted in 2005.

As a general rule, RCW 82.08.010 does not allow “delivery charges” to be deducted from the “selling price” for purposes of determining the retail sales tax. However, under RCW 82.08.807, retail sales tax does not apply to delivery charges of direct mail if the charges are separately stated on the invoice. It is undisputed that Taxpayer does not directly bill the recipients of the proxy voting materials for the postage costs. It is also undisputed that Taxpayer separately states its postage charges on its billing invoices.

RCW 82.08.010 defines “direct mail” as printed material delivered or distributed by United States mail to addressees on a mailing list provided at the direction of the purchaser when the cost of the items is not billed directly to the recipients. RCW 82.08.010(5). “Delivery charges” are charges by the seller of services for preparation and delivery to a location designated by the purchaser including, but not limited to, transportation, shipping, postage, handling, crating, and packing. RCW 82.04.010(4).

The holding in Det. No. 15-0093 was premised on a finding that “[t]axpayer is not sending printed material to addresses provided by its clients.” Det. No. 15-0093, at 9. Specifically, Det. No. 15-0093 found that: “part of the value of Taxpayer’s services to its customers is Taxpayer identifying the correct stockholders who are entitled to receive proxy materials.” *Id.* On reconsideration, Taxpayer has presented new evidence showing that this factual finding is erroneous. In actual fact, Taxpayer is given lists of individual stockholders who are entitled to receive proxy-voting materials from its clients, the nominees, who receive the lists of entitled shareholders from the [Clearing House], after the omnibus proxy process. We hereby correct the erroneous factual finding in Det. No. 15-0093, and find that Taxpayer does not identify the correct stockholders who are entitled to receive proxy materials and, therefore, does send printed proxy materials to addressees at the direction of its clients.

Because Taxpayer is sending “printed materials to addressees on a mailing list provided at the direction of the purchaser,” we find that Taxpayer’s services meet the statutory definition of “direct mail.” *See* RCW 82.08.010(5). Because Taxpayer is providing “direct mail,” it is entitled to a B&O tax [deduction] for its delivery charges. *See* RCW 82.04.4272(2). Likewise, because Taxpayer separately states its postage costs on its billing invoices, under RCW 82.08.807, Taxpayer is entitled to deduct those postage costs from retail sales taxation, as those postage costs are “delivery charges for the delivery of direct mail.” RCW 82.08.807. Taxpayer is entitled to deduct its postage costs from both the B&O tax and the retail sales tax. The contrary holding in Det. No. 15-0093 on the deductibility of Taxpayer’s postage costs is hereby overruled.

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DECISION AND DISPOSITION

Taxpayer's petition is granted in part and remanded to the Audit Division for adjustments consistent with this determination.

Dated this 18th day of May 2016.