

Cite as Det. No. 13-0321, 33 WTD 84 (2014)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Refund of)	<u>D E T E R M I N A T I O N</u>
)	
...)	No. 13-0321
)	
)	Registration No. . . .
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RULE 111; RCW 82.04.080: B&O TAX - GROSS INCOME - ADVANCES AND REIMBURSEMENTS – A medical clinic cannot exclude amounts it pays to an independent contractor doctor from gross income of its business, because it has no agency relationship with its patients and, therefore, cannot show that its liability to pay the independent contractor doctor arose out of any such agency relationship.

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, A.L.J. – A clinic for treatment of asthma and allergies requests a refund of business and occupation (“B&O”) tax paid on receipts it received from patients on behalf of its owner, a doctor working for Taxpayer as an independent contractor. Taxpayer argues it is entitled to an exclusion from gross income because the payments qualify as advances under WAC 458-20-111. We affirm the refund denial because Taxpayer provided services to patients through an independent contractor, and because Taxpayer was not liable for payment to the doctor solely as an agent of the patients. Taxpayer’s petition for refund is denied.¹

ISSUES

Whether amounts received by a taxpayer from patients qualify as “advancements” or “reimbursements” which can be excluded from gross income under WAC 458-20-111, when the taxpayer is not acting as an agent of its patients when it used those amounts to pay the independent physician who provided the patient services.

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

FINDINGS OF FACT

Taxpayer . . . operates [medical] clinics in . . . Washington. Taxpayer is owned by [the “Doctor”], and the Doctor is the sole shareholder. On March 12, 2012, Taxpayer requested a refund of taxes paid during January 1, 2007, through June 30, 2010, claiming that it paid service and other activities B&O tax on amounts that it was entitled to deduct as advances and reimbursements it received on behalf of the Doctor.² In support of its request, Taxpayer provided summary reports and income reconciliation reports, detailed information on dispensed drugs paid by Medicare, and blank forms for patients to complete on their first visit. On September 14, 2012, the Audit Division of the Department of Revenue (Department) granted Taxpayer’s refund on the value of the Medicare payments and denied the refund on the amounts paid to the Doctor. Taxpayer appeals the refund denial.

In support of its denial, the Audit Division cited the patient forms provided by Taxpayer. *See* Refund Request Letter, dated September 14, 2012. The Patient Information Form states:

The undersigned agrees, whether he signs as agent or as a patient, that in consideration of services to be rendered (e.g. skin testing, office visit, etc.) by [Taxpayer], to the patient named above, he hereby obligates himself, assumes financial responsibility, and agrees to pay upon request to provider all charges for such services incurred by said patient. Should the account be referred to an attorney/collection agency for collection, the undersigned shall pay all responsible attorney fees and collection expenses. The undersigned understands that all bills are payable upon presentation and that she/he, not the insurance company, is responsible for the payment of the services. *This office* will file and collect from insurance when insurance benefits are present. I hereby authorize [Taxpayer] to use “Signature on File” in lieu of an original signature for all medical claims submitted for services rendered on above patient.

See Patient Information Form (emphasis added). The Audit Division interpreted this language as showing patients contracted solely with Taxpayer for medical care, and determined the Doctor’s services were subcontracted to Taxpayer.

Taxpayer asserts it is entitled to deduct the amounts it paid to the Doctor because it received those payments for patient services solely as an agent for the Doctor. Taxpayer argues the Doctor was responsible for all business losses and expenses related to the medical services she provided, the Doctor was insured as a practitioner in her own name and she held herself out as providing the medical services that created the revenue at issue. Taxpayer claims it had no right to control the details or means by which the Doctor provided services, and bills sent to patients and insurers listed the Doctor as the “provider.” Taxpayer also points out that it did not pay the Doctor for her services unless it first received payment from a patient.

² Taxpayer’s refund request also requested a refund based on a credit for Medicare payments on certain dispensed drugs. That portion of Taxpayer’s refund request was accepted, so that portion of Taxpayer’s refund request is not at issue in this appeal.

ANALYSIS

The B&O tax is imposed for the act or privilege of engaging in business activities in this state. RCW 82.04.220. RCW 82.04.080 defines “gross income of the business” as:

[T]he 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, ...fees, ...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.

RCW 82.04.080. WAC 458-20-111 (Rule 111) allows a taxpayer to exclude from gross income those receipts representing advances and reimbursements from a customer or client when the taxpayer holds the money or credit to make a payment on behalf of the customer or client. The rule states:

The word “advance” as used herein, means money or credits received by a taxpayer from a customer or client with which the taxpayer is to pay costs.

The word “reimbursement as used herein, means money or credits received from a customer or client to repay the taxpayer for money or credits expended by the taxpayer in payment of costs or fees for the client.

The words “advance” and “reimbursement” apply only when the customer or client alone is liable for the payment of the fees or costs and when the taxpayer making the payment has no personal liability therefor, either primarily or secondarily, other than as agent for the customer or client.

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.

The foregoing is limited to cases wherein the taxpayer, as an incident to the business, undertakes, on behalf of the customer, guest or client, the payment of money, either upon an obligation owing by the customer, guest or client to a third person, or in procuring a services for the customer, guest or client which the taxpayer does not or cannot render and for which no liability attaches to the taxpayer. It does not apply to cases where the customer, guest or client makes advances to the taxpayer upon services to be rendered by the taxpayer or upon goods to be purchased by the taxpayer in carrying on the business in which the taxpayer engages.

Rule 111.

Based on this language, the Washington Supreme Court has applied a three-part test to determine whether payments received by a taxpayer may be properly excluded from gross income as

advances or reimbursements. *Washington Imaging Servs., LLC, v. Dep't of Revenue*, 171 Wn.2d 548, 562, 252 P.3d 885, 892 (2011.); *Rho Co. v. Dep't of Revenue*, 113 Wn. 2d 561, 567-68, 782 P.2d 986 (quoting *Christensen, O'Connor, Garrison & Havelka v. Dep't of Revenue*, 97 Wn.2d 764, 768, 649 P.2d 839, 842 (1982)). To qualify, payments must be customary reimbursement for advances made to procure a service for the client, they must involve services that the taxpayer did not or could not render and the taxpayer must not be liable for paying the third party except as the agent of the client. The third element has two components. The taxpayer must prove both that the payment in dispute was made pursuant to an agency relationship and that the taxpayer's liability to pay the funds to a third party constituted solely agent liability. *City of Tacoma v. William Rogers Co.*, 148 Wn.2d 169, 177-78, 60 P.3d 79 (2003); *Rho*, 113 Wn.2d at 568-73.

In this case, Taxpayer argues it could not provide the services in question because it is not licensed to practice medicine. This argument was considered and rejected in *Washington Imaging*; the fact that a business "may not engage in the practice of medicine by employing licensed physicians...does not prevent persons without medical licenses from providing medical services through independent contractor physicians." *Washington Imaging*, 171 Wn.2d at 558. Here, as in *Washington Imaging*, the Taxpayer provides services to patients through an independent contractor. The patient information form and insurance verification form provided by Taxpayer both indicate to patients that services are rendered by Taxpayer. In addition, the independent contractor agreement provided by Taxpayer states that "Contractor will provide medical services on behalf of the [Taxpayer]."

Rule 111 states payments may be treated as an advance or reimbursement "only when the customer or client alone is liable for the payment of the fees or costs and when the taxpayer making the payment has no personal liability therefor, either primarily or secondarily, other than as an agent for the customer or client." In order to reach the question of whether Taxpayer's liability is solely as an agent for the client, Taxpayer must first show an agency relationship exists. The elements of agency are mutual consent and control by the principal of the agent. *Uni-Com Northwest v. Argus Pub. Co.*, 47 Wn. App. 787, 737 P.2d 304, *review denied*, 108 Wn.2d 1032 (1987). Agency "is a legal concept that depends on the manifest conduct of the parties; it does not depend upon the intent of the parties to create it, nor their belief that they have done so." *Rho*, 113 Wn.2d at 570. Rather, facts and circumstances must "establish that one person is acting at the instance of and in some material degree under the direction and control of the other." *Washington Imaging Services*, 171 Wn.2d at 565 (quoting *Matsumura v. Eilert*, 74 Wn.2d 362, 368-69, 444 P.2d 806 (1968)).

Taxpayer has provided no evidence supporting the existence of an agency relationship between itself and its patients. The patient information forms and insurance forms above make no mention of consent by either party for Taxpayer to act as a patient's agent. Although Taxpayer correctly asserts that consent may be implied, it has not provided evidence of the conduct of either party manifesting consent for Taxpayer to act as an agent for patients.

Even if Taxpayer could meet its burden of showing an agency relationship existed between itself and its patients, it must still establish any liability to the Doctor existed solely in its capacity as

an agent. See *Washington Imaging*, 171 Wn.2d at 562; *Rho*, 113 Wn.2d at 573. Here, Taxpayer's obligation to pay the Doctor arises from its contract with the Doctor and not from its relationship with its patients. "Where contractual obligations exist to pay a third party service provider the taxpayer's obligations cannot be characterized as 'solely agent liability.'" *St. Joseph Gen. Hosp. v. Dep't of Revenue*, 165 Wn. App. 23, 32, 267 P.3d 1018 (2011) (quoting *Washington Imaging*, 171 Wn.2d at 567). Taxpayer has failed to prove its liability for paying the Doctor arose solely as agent for patients because its payment obligations stemmed from its independent contract with the Doctor and not from any agency relationship with its patients. For these reasons, we deny Taxpayer's claims that the payments at issue may be excluded from gross income under Rule 111.

DECISION AND DISPOSITION

Taxpayer's petition for refund is denied.

Dated this 31st day of October, 2013.