Cite as Det. No. 13-0250, 33 WTD 363 (2014)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of Assessment of . . .	)	D E T E R M I N A T I O N No. 13-0250 Registration No. . . .

[1] Rule 241, Rule 227; RCW 82.04.280: B&O TAX – RADIO OR TELEVISION BROADCASTING CLASSIFICATION – LICENSING CONTENT TO CABLE TELEVISION COMPANIES. A taxpayer that relicenses copyrighted television programs to cable companies for transmission to cable subscribers does not qualify for the television broadcasting rate in RCW 82.04.280(1). The taxpayer's advertising revenues are taxable under the service B&O tax rate.

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.

Chartoff, A.L.J. – Taxpayer that licenses copyrighted television programs to cable companies, protests Audit's reclassification of advertising income from the radio or television broadcasting classification to the service and other business activities classification. We conclude the taxpayer is not a television broadcaster and deny the petition.[1]

ISSUE

Whether, under RCW 82.04.280, WAC 458-20-241, and WAC 458-20-227, a taxpayer who licenses copyrighted television content to cable companies is subject to the radio or television broadcasting rate on its advertising income.

FINDINGS OF FACT

The relevant facts are not in dispute. . . .

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

The taxpayer obtains content from television [content providers]. The [content providers] license their copyrighted content to the taxpayer, who inserts advertising, and relicenses the content to various cable companies. The cable companies re-transmit the content to their subscribers, in its entirety.

The taxpayer earns the majority of its income from relicensing fees received from cable companies in exchange for the license to use the copyrighted content. The taxpayer also earns revenues from advertisers for placing their television commercials in the licensed programs.

The taxpayer does not broadcast its programs over the public airways to consumers or transmit television programming to consumers by cable. The taxpayer is not regulated by the Federal Communications Commission (FCC). The taxpayer does not have a partnership agreement with any cable company.

The Audit Division (Audit) of the Department of Revenue (Department) conducted a partial audit of the taxpayer's records for the period January 1, 2007 through December 31, 2010. The partial audit was limited in scope to a review of revenue. On July 12, 2012, Audit issued an assessment for $. . . , consisting of $. . . in royalties B&O tax, ($. . .) in service and other business activities B&O tax ($. . .) in radio and television broadcasting B&O tax, and $. . . in interest.[2]

The taxpayer petitioned the Appeals Division of the Department for correction of the assessment. The sole issue in this appeal is the proper B&O tax classification for the taxpayer's advertising revenues. During the audit period, the taxpayer reported advertising revenues on its excise tax return under the radio and television broadcasting (broadcasting) B&O rate in RCW 82.04.280(1)(f) and WAC 458-20-241. Audit determined that the taxpayer does not qualify for the broadcasting B&O rate because it is not a television broadcaster or cablecaster. Audit determined that the advertising income is therefore taxable under the service and other business activities (service) classification and qualifies for apportionment under WAC 458-20-19402.

The taxpayer admits is it not a television broadcaster or cablecaster. However, the taxpayer argues that its advertising revenues are "similar in form and context to broadcast advertising revenue and should be treated as such. Advertising . . . is sold to the same businesses in the same manner for the same reasons as a broadcast company and therefore should be treated the same."[3] The taxpayer cites Det. No. 92-363, 12 WTD 519 (1992) and Det. No. 87-308, 4 WTD 135 (1987) as authority for its position that it should be able to report under broadcasting because its activities and revenues are functionally similar.

[2] The credit for service and other business activities B&O tax resulted from Audit's reclassification of relicensing fees reported under the service classification to the royalties B&O tax classification.
[3] Taxpayer's petition for correction of Assessment.

ANALYSIS

RCW 82.04.220 imposes the B&O tax. The B&O tax "is levied and collected from every person that has a substantial nexus with this state . . . for the act or privilege of engaging in business activities. RCW 82.04.220(1). The tax rate and measure depend on the nature of the business activities engaged in by the taxpayer. *Id.*

RCW 82.04.290(2) imposes a "services and other business activities" classification for "persons engaging within this state in any business activity other than or in addition to an activity explicitly taxed under another section in this chapter or subsection (1) or (3) of this section . . . ." In the present case, the Audit Division determined the taxpayer's advertising revenues were subject to the services and other business activities B&O tax rate, and subject to apportionment under WAC 458-20-19402.

The taxpayer argues that it is entitled to the preferential rate for radio or television broadcasters in RCW 82.04.280(1). RCW 82.04.280(1) imposes a preferential rate for persons engaged in radio and television broadcasting, as follows:

> (1) Upon every person engaging within this state in the business of . . . (f) radio and television broadcasting, excluding network, national and regional advertising computed as a standard deduction based on the national average thereof as annually reported by the federal communications commission, or in lieu thereof by itemization by the individual broadcasting station, and excluding that portion of revenue represented by the out-of-state audience computed as a ratio to the station's total audience as measured by the 100 micro-volt signal strength and delivery by wire, if any; … as to such persons, the amount of tax on such business is equal to the gross income of the business multiplied by the rate of 0.484 percent.

Under WAC 458-20-241, the term "broadcasting" is defined in relevant part as "television commercial broadcasting stations." Because RCW 82.04.280 makes specific reference to the FCC when discussing the proper application of the broadcasting B&O tax rate, and because the FCC licenses and regulates television broadcast stations, we give the FCC definition of broadcasting substantial weight. The term "television broadcast station" is defined in FCC regulations as "[a] station in the television broadcast band transmitting simultaneous visual and aural signals intended to be received by the general public." 47 CFR § 73.681. . . .

In 1991, the Department amended WAC 458-20-227 (Rule 227) regarding subscriber television services . . . . Rule 227 states, in pertinent part:

> (1) **Definitions.** The following definitions apply to this section.
>
> (a) "Subscriber television" refers to all businesses providing television programming to consumers for a fee. It includes, but is not limited to, cable television and satellite television. . . .
>
> (2) **Business and occupation tax.** Persons engaging in the business of subscriber television are subject to the business and occupation tax as follows: . . .

> (b) *Gross income derived from advertising revenues is subject to tax under the classification radio and television broadcasting. (See WAC 458-20-241.)*

(Italics added). Thus, the preferential rate for broadcasting applies to commercial television broadcast stations and to subscriber television services on their advertising revenues.

In the present case, the taxpayer does not argue that it is a television broadcaster or a subscriber television provider. There is no dispute that the taxpayer relicenses content to cable companies who transmit the content to subscribers. However, the taxpayer argues it sells advertising in the same manner and for the same purpose as commercial broadcast stations, and therefore should be entitled to report under the broadcasting classification. The taxpayer cites Det. No. 92-363, 12 WTD 519 (1992) and Det. No. 87-308, 4 WTD 135 (1987) as authority for its position that it should be able to report under broadcasting because its activities and revenues are functionally similar.

Det. No. 92-363, 12 WTD 519 (1992) held that subscriber fees from the delivery of pre-recorded programs to subscribers by use of FM sideband radio waves or direct satellite broadcasting, did not qualify for the broadcasting B&O tax rate. The holding in this case does not support the taxpayer's position that it should be able to report advertising revenues under the broadcasting B&O tax rate.

Det. No. 87-308, 4 WTD 135 (1987) concerned a taxpayer who used, in part, its own equipment to transmit client advertising a cablevision network during purchased timeframes. The taxpayer paid the cable company a percentage of the advertising revenues it collected. 4 WTD 135 held that the taxpayer was functioning as a cablecaster and therefore allowed the taxpayer to report its advertising revenues under the broadcasting classification. This case relied on the ALJ's factual finding that the taxpayer transmitted its client's content on a cablevision network to subscribers, using in part, the taxpayer's own equipment.

In addition, 4 WTD 135 is distinguishable from the present facts. In the present case, the taxpayer does not itself transmit content over a cable network to cable customers, but instead relicenses its content to the cable company who transmits the content. We conclude the 4 WTD 135 does not support the taxpayer's position that it should be able to report advertising revenues under the broadcasting classification.

In sum, the authorities cited by the taxpayer do not provide a legal basis for extending the broadcasting rate to persons who relicense content to cablecasters. Accordingly, we conclude the taxpayer's business of relicensing copyrighted television programs to cable companies for transmission to subscribers does not qualify for the television broadcasting rate in RCW 82.04.280(1). The taxpayer's advertising revenues are taxable under the service B&O tax rate and are subject to apportionment. The audit assessment is sustained.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 14th day of August.