Cite as Det. No. 14-0259, 35 WTD 160 (2016)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

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| In the Matter of the Petition for Correction of Tax Ruling of | ) | D E T E R M I N A T I O N |
| | ) | No. 14-0259 |
| . . . | ) | Registration No. . . . |

[1] RULE 224; RCW 82.04.2907: B&O TAX – SERVICE AND OTHER ACTIVITIES – COPYRIGHTED WEBINARS. Licensing workshops delivered via webinars are equivalent or analogous to the professional services enumerated in Rule 224(2) and fall under the service and other activities classification of the B&O tax.

[2] RULE 19402; RCW 82.04.462: B&O TAX – ATTRIBUTION OF INCOME – APPORTIONABLE INCOME – COPYRIGHTED WEBINARS. When a taxpayer's services do not relate to real or tangible personal property, 19402(303)(c) applies, and the benefit of the taxpayer's services are received where the taxpayer's client's related business activities occur. Because online training sessions cannot be attributed to the location where the online training session takes place, the cascading set of rules in RCW 82.04.462(3)(b)(iii) and Rule 19402(301)(b) provide that the taxpayer's income must be attributed to the states from which its clients order the services.

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.

Sohng, A.L.J. – Provider of training services petitions for correction of a letter ruling in which the Department instructed it to attribute income earned from its in-person and online training workshops to the location of each individual workshop participant at the time the training is provided. We revise the letter ruling. With respect to in-person workshops, a reasonable method of proportionally attributing income is to the location where the workshops take place. With respect to online workshops, income should be attributed to the participant's permanent office location because a reasonable method of proportionally attributing receipts is not available.[1]

## ISSUES

1. Should income earned from conducting copyrighted webinars be reported under the royalty or service and other activities classification of the business and occupation [(B&O)] tax?

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

2. Where do customers of in-person and online licensing workshops receive the benefit of those services under RCW 82.04.462(3)(b) and WAC 458-20-19402(301)?

## FINDINGS OF FACT

[Taxpayer] is a limited liability company based in . . . , Washington. In addition to Washington, Taxpayer files and pays taxes in other states, including . . . . Taxpayer advises businesses ("Clients") in understanding and negotiating the terms of their software licenses with [Software Company]. Taxpayer's services include licensing workshops, advisory and consulting services, and public commentary. Taxpayer's website describes its services as follows:

. . .

Licensing workshops are intensive one-to-four-day seminars that bring a Client's ". . . ." The advisory and consulting services are designed to help Clients ". . . ."[2] And finally, Taxpayer provides public commentary, which provides " . . . " and explains the broad impact that [Software Company's] licensing policies have on organizations, as well as the entire IT industry.[3]

Taxpayer's licensing workshops are the services at issue in this appeal. Taxpayer conducts the workshops both in-person (in-state and out-of-state) and online via copyrighted webinars (which may include video teleconferencing via Skype). Taxpayer does not license its copyrighted webinars to Clients. Clients are generally large businesses, such as . . . . Taxpayer's services relate to the Clients' business use and licensing of [Software Company] products. Taxpayer provided several sample agreements that it has entered into with Clients over the past several years. These agreements provide for non-itemized, lump-sum fees in exchange for Taxpayer's services.

Taxpayer's webinars are conducted via WebEx, an online conferencing application. Attendees log on via the internet to view the webinar materials (usually a PowerPoint presentation) and may call Taxpayer via a land line to hear the audio portion or via Skype for a videoconference. Personnel within a Client's organization who attend Taxpayer's workshops are typically procurement and contract management staff; systems administrators; and on rare occasions, attorneys from the legal department.[4] Once a Client has purchased Taxpayer's services, there is no limit on the number of employees (of Client) who may attend the workshop. Taxpayer states that it does not have the ability to track the employees who attend the online workshops and does not have access to their personal information, such as their identities or contact information. According to Taxpayer, Clients do not (and will not) provide such information due to the substantial amount of additional work that gathering and conveying it would require of Clients. Taxpayer also states that it is unable to determine the IP addresses of the computers that log on to any given WebEx webinar.

[2] *Id.*
[3] *Id.*
[4] *Id.*

Clients often provide conference rooms where a large group of employees may simultaneously participate in the online workshop from a single computer and log-in. However, employees may also log in through their personal computers from their own offices, their homes, or any place that has internet access. Taxpayer does not know which employees are physically present in the conference rooms for any given webinar. According to Taxpayer, Clients do not (and will not) keep track of which employees attend the webinars.

Taxpayer requested a ruling from the Department's Taxpayer Services Division [Taxpayer Services] seeking instructions on how it should be reporting its revenue to the Department. On March 8, 2013, Taxpayer Services issued a written ruling (the "Ruling") instructing Taxpayer to report revenue from its copyrighted webinars under the royalties classification of the B&O tax. The Ruling stated, "it appears that you are providing for the use of your copyrighted webinar for a fee which would be considered 'market use' of the intangible property." The Ruling also instructed Taxpayer to report income from "training sessions" (both in-person and online) under the service and other activities classification. With respect to the attribution of income, the Ruling stated:

> In general, income is attributed to where your customer receives the benefit of the service. This means that it is immaterial where you physically provide the service. In your case, income is attributable where your customer is located when you provide the training. Examples:
>
> - When you provide a training using Skype, the location of your customers is where income is attributed to, not your Washington location.
> - When you provide a live training session in Chicago, the income received from the attendees is attributable to Illinois.
>
> Royalty income is attributed differently. Income received from royalties is attributed to the location where the underlying intangible asset is used. In your case, the intangible property is used where your customer is located at the time you provide your presentation.

Taxpayer appeals the Ruling arguing that with respect to his online workshops, it is impossible to determine the location of each online participant. Taxpayer provides an example in which he delivered an online presentation to employees of [Client 1] over Skype. Taxpayer was physically present in . . . , and approximately fifty [Client 1] employees called in to the presentation. Taxpayer did not know the names or locations of the employees who called in. Taxpayer argues:

> If I were to follow your ruling as issued, I would be required to ask and determine the location of each caller and allocate the total fee I earned among those callers . . . . There is no reason for [Client 1] to send their [employees'] names and addresses to me. In fact, I doubt any company would engage a consultant who repeatedly asked for personal information about the location of their employees.

## ANALYSIS

### 1. Royalties

First, we will address the proper [B&O] tax classification for income received from conducting copyrighted webinars. Persons engaged in business in Washington report their income under specific tax classifications, if available; otherwise, they report their income under the service and other activities B&O tax classification. RCW 82.04.290(2). A special B&O tax classification applies to royalties under RCW 82.04.2907, which provides, in relevant part, as follows:

> (1) Upon every person engaging within this state in the business of receiving income from royalties, the amount of tax with respect to the business is equal to the gross income from royalties multiplied by the rate of 0.484 percent.
>
> (2) For the purposes of this section, "gross income from royalties" means compensation for the use of intangible property, including charges in the nature of royalties, regardless of where the intangible property will be used. For purposes of this subsection, "intangible property" includes copyrights, patents, licenses, franchises, trademarks, trade names, and similar items. "Gross income from royalties" does not include compensation for any natural resource, the licensing of prewritten computer software to the end user, or the licensing of digital goods, digital codes, or digital automated services to the end user as defined in RCW 82.04.190(11).

(Emphasis added.)

Taxpayer does not license its copyrighted webinars or any other materials to Clients. Therefore, the fees that Taxpayer earns from providing copyrighted webinars are not "compensation for the use of intangible property" under RCW 82.04.2907.

RCW 82.04.290(2) provides a "catch-all" B&O tax classification for taxpayers engaged in business activities not explicitly taxed elsewhere in Chapter 82.04 RCW. RCW 82.04.290(2). The statute provides:

> Upon every person engaging within this state in any business activity other than or in addition to an activity taxed explicitly under another section in this chapter or subsection (1) or (3) of this section; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of 1.5 percent.

WAC 458-20-224(2)("Rule 224") provides that taxpayers providing personal or professional services, such as accountants, architects, attorneys, physicians, engineers, and teachers, are subject to tax under the service and other activity classification of the B&O tax. Rule 224(2) states:

> Persons engaged in any business activity, other than or in addition to those for which a specific rate is provided in the statute, are taxable under a classification known as service and other business activities, and so designated upon return forms. In general, it includes persons rendering professional or personal services to persons (as distinguished from services rendered to personal property of persons) such as accountants, aerial surveyors and map makers, agents, ambulances, appraisers, architects, assayers, attorneys, automobile brokers, barbers, baseball clubs, beauty shop owners, brokers, chemists, chiropractors, collection agents, community television antenna owners, court reporters, dentists, detectives, employment agents, engineers, financiers, funeral directors, refuse collectors, hospital owners, janitors, kennel operators, laboratory operators, landscape architects, lawyers, loan agents, music teachers, oculists, orchestra or band leaders contracting to provide musical services, osteopathic physicians, physicians, real estate agents, school bus operators, school operators, sewer services other than collection, stenographers, warehouse operators who are not subject to other specific statutory tax classifications, teachers, theater operators, undertakers, veterinarians, and numerous other persons.

The licensing workshops delivered via webinars are equivalent or analogous to the professional services enumerated in Rule 224(2), above, and fall under the service and other activities classification of the B&O tax under RCW 82.04.290(2).

2. Attribution of Income

Effective June 1, 2010, RCW 82.04.460(1) provides:

> Except as otherwise provided in this section, any person earning apportionable income taxable under this chapter and also taxable in another state must, for the purpose of computing tax liability under this chapter, apportion to this state, in accordance with RCW 82.04.462, that portion of the person's apportionable income derived from business activities performed within this state.

"Apportionable income" is gross income of the business generated from engaging in apportionable activities. RCW 82.04.460(4)(a). "Apportionable activities" specifically include those taxed under RCW 82.04.290, the service and other activities B&O tax classification. RCW 82.04.460(4)(a)(vi). Here, Taxpayer performs consulting services, which are taxable under RCW 82.04.290. Therefore, Taxpayer was engaged in "apportionable activities" in Washington and earned "apportionable income." Taxpayer is also taxable [out of state]. Thus, the income Taxpayer earned [from] the rendition of its services is subject to apportionment under RCW 82.04.460.

Income apportioned to Washington is multiplied by a "receipts factor," the numerator of which is the gross income of the business attributed to Washington and the denominator of which is the gross income of the business worldwide. RCW 84.04.462(1), (3)(a). The statute provides a series of cascading rules for purposes of determining which state gross income is attributable to. RCW 82.04.462(3)(b) provides as follows:

> . . . [F]or purposes of computing the receipts factor, gross income of the business generated from each apportionable activity is attributable to the state:
>
> (i) Where the customer received the benefit of the taxpayer's service or, in the case of gross income from royalties, where the customer used the taxpayer's intangible property.
>
> (ii) If the customer received the benefit of the service or used the intangible property in more than one state, gross income of the business must be attributed to the state in which the benefit of the service was primarily received or in which the intangible property was primarily used.
>
> (iii) If the taxpayer is unable to attribute gross income of the business under the provisions of (b)(i) or (ii) of this subsection (3), gross income of the business must be attributed to the state from which the customer ordered the service or, in the case of royalties, the office of the customer from which the royalty agreement with the taxpayer was negotiated.

(Emphasis added.)

In sum, if a taxpayer can reasonably determine the amount of a specific apportionable receipt that relates to a specific benefit of the service received in a state, the apportionable receipt is attributable to the state in which the benefit is received. However, if a taxpayer is unable to determine where the benefit of the service is received, use of this method is not appropriate. In such cases, the taxpayer should look to the other methods described in RCW 82.04.462(3)(b)(iii) – (vii), in descending order.

WAC 458-20-19402 ("Rule 19402") is the Department's rule implementing RCW 82.04.462. Rule 19402(301) explains how to attribute apportionable receipts and provides as follows:

> Receipts are attributed to states based on a cascading method or series of steps. The department expects that most taxpayers will attribute apportionable receipts based on (a)(i) of this subsection because the department believes that either the taxpayer will know where the benefit is actually received or a "reasonable method of proportionally attributing receipts" will generally be available. These steps are:
>
> (a) Where the customer received the benefit of the taxpayer's service (see subsection (302) of this rule for an explanation and examples of the benefit of the service);
>
> (i) If a taxpayer can reasonably determine the amount of a specific apportionable receipt that relates to a specific benefit of the services received in a state, that apportionable receipt is attributable to the state in which the benefit is received. This may be shown by application of a reasonable method of proportionally attributing the benefit among states. The result determines the receipts attributed to each state. Under certain situations, the use of data based on an attribution method specified in (b) through (f) of this subsection may also be a reasonable method of

proportionally attributing receipts among states (see Examples 4 and 5 below).

* * *

(b) If the taxpayer is unable to attribute an apportionable receipt under (a) of this subsection, the apportionable receipt must be attributed to the state from which the customer ordered the service.

(Emphasis added.)

Rule 19402 strongly favors the application of subsection (301)(a), under which the vast majority of taxpayers are expected to "reasonably determine the amount of a specific apportionable receipt that relates to a specific benefit of the services received in a state." However, in the unusual event that a taxpayer is "unable to attribute an apportionable receipt" under Rule 19402(301)(a), it must attribute it to the state from which the customer ordered the service. RCW 82.04.462(3)(b); Rule 19402(301)(b).

First, we examine whether we can determine where the benefit of Taxpayer's services are received under Rule 19402(301)(a). Rule 19402(303) explains how to determine where a taxpayer's customer receives the benefit of the service in attributing apportionable receipts under Rule 19402(301)(a). Rule 19402(303) provides:

(c) If the taxpayer's service does not relate to real or tangible personal property, the service is provided to a customer engaged in business, and the service relates to the customer's business activities, then the benefit is received where the customer's related business activities occur. The following is a nonexclusive list of business related services:
  (i) Developing a business management plan;
  (ii) Commission sales (other than sales of real or tangible personal property);
  (iii) Debt collection services;
  (iv) Legal and accounting services not specific to real or tangible personal property;
  (v) Advertising services; and
  (vi) [Theater] presentations.

(Emphasis added.)

Rule 19402(303)(c) applies here because Taxpayer's services do not relate to real or tangible personal property, are provided to Clients who are engaged in business, and relate to the Clients' business activities. Therefore, the benefit of Taxpayer's services is received where the Clients' related business activities occur. Rule 19402(304) contains "examples of the application of the benefit of service analysis and reasonable methods of proportionally attributing receipts." Rule 19402(304)(c) provides specific examples that illustrate the application of Rule 19402(303)(c) (where the service does not relate to real or tangible personal property, the service is provided to a customer engaged in business, and the service relates to the customer's business activities) in the context of training services:

> **Example 19.** Training Company provides training to Customer's employees who are all located in State A. The training is provided in State B. The training relates to the employees' ethical behavior within Customer's organization. Customer receives the benefit of Training Company's service in State A, where Customer's office is located and the employees presumably practice their ethical behavior. Training Company must attribute the apportionable receipts to State A where the benefit is solely received.
>
> **Example 20.** Same facts as Example 19, except the training is provided for employees from several states and Training Company knows where each employee works. The benefit of the Training Company's services is received in those several states. Attributing receipts from the training based on where the employees work is a reasonable method of proportionally attributing the receipts income.

(Emphasis added.)

Under Examples 19 and 20, a reasonable method of proportionally attributing income under Rule 19402(301)(a)(i) is to where the customer's employees work (and utilize the ethics knowledge learned during the ethics training sessions), not the location where the Training Co. actually performed the training services. Thus, the customer's "related business activities" (per Rule 19402(303)(c)) occur in the office locations of the employees who attended the training. Applying these examples to the instant situation, the Clients receive the benefit of Taxpayer's services where the Clients' employees work (and utilize the licensing knowledge learned during the training workshops), not where Taxpayer physically performed the licensing workshops or where the employees were located at the time they logged in to the webinar. Thus, under Rule 19402(303)(c) and 19402(304)(c), the Clients' "related business activities" are the specific office locations where their employees are assigned to work, which constitutes one "reasonable method of proportionally attributing receipts."

Here, however, Taxpayer does not know any personal information, including the work location for its Clients' employees who attend the workshops; nor does Taxpayer have access to such information since Clients are either unable or unwilling to provide it. Thus, Taxpayer is unable to attribute receipts under the reasonable proportional method provided in Examples 19 and 20, above. With respect to *in-person* training sessions, another reasonable method of proportionally attributing receipts under Rule 19402(301)(a)(i) is the location where the workshops take place, which we conclude is a close proxy and reasonable substitute for the employees' work locations (as provided in Examples 19 and 20).

The *online* training sessions, however, present unique difficulties in determining a reasonable method of proportionally attributing receipts to a specific state. Absent unusual circumstances (as are present here), the Department expects that most taxpayers will attribute apportionable receipts under RCW 82.04.462(3)(b)(i) and Rule 19402(301)(a). Given this difficulty, we must turn to the next step in the cascading series of rules provided in RCW 82.04.462(3)(b)(iii) and Rule 19402(301)(b), which provides that Taxpayer's income must be attributed to the state from which Clients *order* the services. Here, Clients order Taxpayer's services from the office location that entered into and negotiated the contract with Taxpayer, information to which Taxpayer agrees it has ready access. Thus, Clients receive the benefit of Taxpayer's online

training services in the state where they ordered the services (i.e., the Client location where the contracts were entered into).

## DECISION AND DISPOSITION

We revise the Ruling as set forth in this determination

Dated this 18th day of August, 2014.