



MATTHEW J. COYLE
Acting Director

STATE OF WASHINGTON
DEPARTMENT OF REVENUE
Olympia, Washington 98504-0090 MS-AX-02

BEFORE THE INTERPRETATION AND APPEALS SECTION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	
For Correction of Assessment of)	<u>F I N A L</u>
)	<u>D E T E R M I N A T I O N</u>
)	
. . .)	No. 86-82A
)	Registration No. . . .
)	Tax Assessment No. . . .

- [1] RULE 99: ORAL INSTRUCTIONS -- ESTOPPEL -- NONWAIVER OF TAX LIABILITY -- ADMINISTRATIVE DISCRETION. The Department of Revenue is without any discretion or authority to cancel or waive tax liability due and owing under the law, notwithstanding claimed oral misinstructions to taxpayers.
- [2] RCW 82.04.050: CREDIT BUREAUS -- RETAIL SERVICES -- SALES FOR RESALE. Except for telephone services, no other personal services defined by RCW 82.04.050 to be "sales at retail" or "retail sales" may be purchased from third party providers, at wholesale, for retail resale.
- [3] RCW 82.04.050: RETAIL SALES TAX -- RETAIL SERVICES -- THIRD PARTY PROVIDERS. Except for telephone services, charges for all services expressly included within the statutory definition of "retail sales" are always subject to retail sales tax, even if purchased for pass-on or inclusion within charges to ultimate consumers.

These 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: . . .

HEARING CONDUCTED BY DIRECTOR'S DESIGNEES:

Gary O'Neil, Assistant Director of Policy and Administration
Garry G. Fujita, Chief of Interpretation and Appeals
Edward L. Faker, Sr. Administrative Law Judge

DATE AND PLACE OF HEARING: May 21, 1986; Olympia, Washington

NATURE OF ACTION:

Retailing business tax and retail sales tax, plus interest, were assessed upon amounts derived from credit bureau services performed in this state for customers located outside this state, where the credit reports were delivered outside this state.

Also, use tax (deferred retail sales tax) was assessed upon the value of repository credit reports, purchased by the taxpayer from third party credit bureau businesses, for inclusion in the taxpayer's own credit reports for customers.

Determination No. 86-82 was issued on March 5, 1986 after an original appeal hearing conducted in Renton, Washington on September 25, 1985. The Determination sustained the assessment of tax and interest in all respects. The taxpayer has appealed the findings and conclusions of that Determination to the Director.

FACTS AND ISSUES:

Faker, Sr. A.L.J. — The facts of this case are not in material dispute. They are fully reported in Determination 86-82 and will not be restated here except as necessary for perspective of the issues presented.

There are two distinct issues for consideration. The taxpayer is engaged in the credit bureau business in this state. It sometimes engaged in credit investigations, information retrieval, and the preparation of hard-copy credit reports for out-of-state customers. The taxpayer failed to bill such customers for retail sales tax and report retailing business tax and sales tax to this state, thinking that such transactions were entitled to interstate sales exemption. At the May 21, 1986 hearing the taxpayer acceded to its tax liability on these transactions prospectively and abandoned its petition for correction as to this issue, except with respect to the audit period in question here. That is, the taxpayer asserts that the taxes in question should be relieved for past periods because of misleading and incorrect information provided by agents of the Department.

Secondly, and the only remaining substantive issue, is whether credit bureau businesses are consumers of credit information reports they purchase from others for inclusion in their own credit reports for clients. If so, as ruled in Determination 86-82, they must pay retail sales tax on their purchases of such third party provided credit information; if not, they may purchase such credit information at wholesale, as ingredients or components of their retail sales to clients.

TAXPAYER'S EXCEPTIONS:

As to the first, collateral issue the taxpayer now recognizes its liability for retailing business tax and collection of retail sales tax measured by gross receipts from credit reports where the retail services which generate such reports are performed in this state. This is correct, under the law, even

where the customer or client is located outside this state at a place where the credit report, which tangibly evidences the retail services rendered, is delivered. However, the taxpayer asserts upon specific telephoned inquiries to the Department on four different occasions it was advised that the business tax and sales tax would not apply in cases where its customers were located outside this state and the credit reports were delivered outside this state. The taxpayer asserts that it relied upon that information in good faith. Though there was no written memorialization of the first three claimed telephone contacts, the taxpayer claims to have memorialized the fourth. At the May 21, 1986 hearing it submitted a copy of a memorandum to the taxpayer's executive vice president, Mr. . . . , from Mr. . . . , who purportedly made the inquiry. That memo is attached to this Final Determination as Exhibit A. This memo was proffered as being an immediately prepared memorial of the telephone inquiry. Thus, because of the consistently incorrect information it was given, the taxpayer seeks relief for the tax liabilities for periods prior to April 29, 1985 when it was, finally, properly advised of its tax liability.

As to the second issue in contention, in addition to the taxpayer's arguments set forth in Determination 86-82, the taxpayer asserts that the entire credit bureau industry considers the credit investigation services to result in a "product" rather than a "service." Thus, credit bureau businesses should be allowed to purchase other information reports for inclusion as ingredients or components of their own retail "products," at wholesale, without paying retail sales tax or use tax upon the value of such components. The taxpayer asserts that the Washington State Legislature did not intend to exclude only credit bureau businesses from the right or ability to purchase components and ingredients for resale as parts of their own retail "products." Others in the industry and their legal counsel agree, according to the taxpayer.

The standards for the credit bureau industry, set to some extent by the Department of Housing and Urban Development, "Fannie Mae," and "Freddie Mac," require that the kinds of "repository reports" purchased by the taxpayer from third parties must be included in final credit reports. These repository reports include simple credit card information from credit financiers and retail stores, which is not otherwise available to credit bureaus. Such creditors generally will not provide the credit information to anyone other than a repository; e.g., . . . , the repository company utilized by the taxpayer. This is primarily a matter of convenience for such creditors, to be able to report to a single information repository rather than separately to many individual credit investigation agencies. The repository report is electronically produced through computer systems utilizing a data base located in Atlanta, Georgia. The taxpayer ends up with a hard copy of the information taken from its printer in Washington. The taxpayer simply types the information, translates it or reformats it and sometimes adds current information to the basic repository report. This credit card information is simply combined with information gathered through the taxpayer's own resources, including legal records. The taxpayer often conducts interviews with credit applicants to confirm the information gathered and secure updated personal information. The compilation of all of this information becomes the taxpayer's final report "product." The taxpayer provides facts only. It does not recommend loan action nor underwrite any lending based upon the information

gathered. It does attempt to verify current employment of the "subject" of its report.

It is the taxpayer's position that it purchases the repository report data for resale together with the taxpayer's own product, even if that product is considered to be a service. That is, RCW 82.04.050 should be uniformly applied for so-called retail services providers as well as sellers of tangible personal property products. The extremely technical interpretations of RCW 82.04.050 (Retail sale) and RCW 82.04.060 (Wholesale sale) relied upon in Determination 86-82 should not be used to elevate form over substance. That is, the form of the taxpayer's transactions may be that they are services rather than sales of tangible personal property, but the substance is that the taxpayer buys repository report data to sell to consumers as a component and ingredient of its own retail sale, be it a product or a service. What the taxpayer's customer pays for, in substance, is the product of its information gathering, not its analysis or recommendations based upon such data.

Finally, the taxpayer knows of no other credit bureaus which are being taxed upon their purchases of repository reports. Other members of the state association of credit bureaus have advised the taxpayer that they do not pay sales or use tax upon these reports. Some, which claim to have been audited by the Department, have not been assessed for tax in this manner.

DISCUSSION:

We have given considerable deliberation to the positions urged by the taxpayer and have undertaken an extensive and detailed analysis of the statutes in question. We find it impossible, even when giving the benefit of all weight to the taxpayer's arguments, to derive any construction of the statutory law which is favorable to the taxpayer's positions.

[1] As to the first issue, the Department lacks any discretion or authority to excuse or waive tax liability actually incurred under the law. As the tax administering agency of this state, the Department cannot limit statutory tax applications nor provide for exemptions or exclusions from tax through its administrative rules or interpretations. See Budget Rent-A-Car v. State, 81 Wn.2d 171 (1972). This is so even where the Department has, inadvertently or through outright error, misinformed or misdirected a taxpayer concerning its tax liability under the law. See Kitsap-Mason Dairymen's Association v. Tax Commission, 77 Wn.2d 825 (1970). Determination 86-82 briefly touched on this point and to it was attached a copy of Excise Tax Bulletin 419.32.99 which explains the rationale for the position that oral instructions or interpretations by employees of the Department are not binding. As the Determination properly states, there are not sufficient grounds upon which to grant retroactive relief.

[2] As to the second issue, we are constrained to sustain the findings and conclusions of Determination 86-82 because of the express language of the statute in question. We must conclude that, except for telephone services which the legislature has expressly addressed, no other personal services declared by statute to be "retail sales" may be purchased at wholesale for

resale by a seller of retail services. In short, all charges for retail services are subject to retailing business tax and retail sales tax, even if they will be passed on to ultimate consumers for a charge. Under present statutory law it is not possible to acquire third party provided retail services for "resale" without paying sales tax or use tax upon such charges. Moreover, it is clear that this is the substantive effect of statutory provisions, not merely the elevation of technical form.

RCW 82.04.050, which defines the term "retail sale" includes all charges, however designated, received by persons engaged in certain, specifically named businesses, including "credit bureau businesses." The statute does not specify that such charges must be received from "consumers," or exclude such charges from the definition of "retail sale" if the service purchased is for resale. In no way does the law contemplate that these personal services can be resold to anyone. As Determination 86-82 explains, this is entirely different from the way in which purchases of tangible personal property may be treated. Such distinctions at law are clearly within the province of the State Legislature. (See Determination 86-82, p.5, p2.)

Further support for this legal conclusion is evidenced by the language of RCW 82.04.060 which defines "sale at wholesale." This definition includes sales of "tangible personal property" or "any sales of telephone service" to persons who are not consumers. It also includes charges for "labor and services" rendered for nonconsumers, "in respect to real or personal property," if the charge would be a retail sale when such labor and services were rendered for a consumer. In short, sales of tangible personal property, telephone services, and labor and services on real and personal property can be sold at wholesale, for resale at retail. Sales of anything else, including personal services, cannot. Again, the Department has no authority to challenge such clear statutory distinctions.

[3] It is noteworthy that, in 1981, when the Legislature reclassified telephone services from the public utility tax to the business and occupation tax, it also amended RCW 82.04.060 to expressly provide for "wholesale sales" of telephone services. Clearly, had it not expressly done so, telephone services - which are personal services rather than tangible personal property - could not be purchased at wholesale for resale. Clearly, telephone services are the only kind of personal services which can be purchased at wholesale, from some third party provider, and resold at retail. Credit bureau services, like the five other categories of personal services which have been declared to be "retail sales," cannot be purchased for resale, sans sales or use tax. The other categories are "amusement and recreation businesses . . . abstract, title insurance and escrow businesses . . . automobile parking and storage garage businesses." These substantive workings of the law may be complex and difficult to comprehend but they are, nonetheless, the technically correct results of statutory prescriptions. They are the substance, not the mere form, of the law. There is no case law construing these statutes or clarifying the prima facie distinctions embodied in them. The Department must administer these statutes as written.

Concerning the claimed inconsistent application of the law - that some credit bureaus have not been assessed for tax in this manner - we are nonplussed. The Department has no specific knowledge of any such cases where credit bureaus have been allowed to purchase credit investigation services or credit information from third party credit business providers without paying sales tax or use tax upon such charges.

We cannot speak to the possibility of oversight or error in specific cases which are not brought to our attention. As an administrative appeal matter this question is one of first impression before the Department. However, the findings and conclusions of Determination 86-82 and this Final Determination represent the uniform ruling of the Department to be consistently applied for all persons similarly situated.

DECISION AND DISPOSITION:

The taxpayer's petition is denied. The outstanding balance of Tax Assessment No. . . . , including extension interest, in the amount of \$10,689 is due for payment by September 25, 1986.

DATED this 5th day of September 1986.