LANE POWELL

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February 26, 2024

VIA ELECTRONIC MAIL

Administrative Review and Hearings Division
Washington State Department of Revenue
6400 Linderson Way S. W.
P.O. Box 47460
Olympia, WA 98504-7460

Re: **Petition for Executive Level Reconsideration of Det. No. 24-0020**
Fidelity National Title Co. of WA
Registration No. 600 357 574

Dear Sir or Madam:

1. **Identity of Taxpayer:** The taxpayer in this appeal is Fidelity National Title Company of Washington. ("Fidelity-WA") whose mailing address is:

601 Riverside Ave #V-5 Tax Dep
Jacksonville, FL 32204-2901

2. **Identity of Taxpayer's Representative:** The taxpayer is represented by:

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A CTIA is on file.

3. Grounds for Executive Level Hearing: This matter is appropriate for Executive Level reconsideration under WAC 458-20-100(4)(c), because this is a matter of first impression and also because it involves an issue of industry-wide significance.

A. This case involves an issue of first impression. Rule 100(4)(c) states that executive level review is appropriate when "a review involves an issue of first impression (one for which no agency precedent has been established)." There is no agency precedent regarding the B&O tax treatment of (1) recording fees handled by an escrow agent nor of (2) notary fees (3) inspection fees, or (4) cancellation fees. While RCW 82.32.410 authorizes the Department to publish determinations "designated as precedents," Det. No. 24-0020 does ***not*** cite to any published determinations or any other published agency guidance addressing any of the four disputed items that Audit classified as retail sales subject to both retailing B&O tax and sales tax, nor has counsel located any relevant published guidance. The absence of agency precedent regarding the proper B&O tax treatment of the four disputed items makes this matter appropriate for executive level review.

Rather its "analysis" of the taxability of those disputed items is limited to quoting a portion of RCW 82.04.050(3), followed immediately (and without explanation) by the conclusory assertion: "Thus, because Taxpayer is engaged in providing abstract, title insurance and escrow services, the amounts at issue are retail sales under RCW 82.04.050(3)."[1] Yet, ***none*** of the four disputed items are gross income from sales of either title insurance, or abstract services, or escrow services. Moreover, the unexplained implication that ***all*** amounts received or handled by persons engaged in abstract, title insurance or escrow services are classified as retail sales regardless of whether the amounts themselves are income from providing abstract, title insurance or escrow services is belied by the fact that Audit classified other Taxpayer income under the service and other activities B&O classification.

B. This case involves an issue of industry-wide significance. Rule 100(4)(c) also separately provides that executive level review is appropriate when the issue is one of industry-wide significance. That is true here. There are various transactions in which escrow can be used, but by far the most common in the United States are those transactions involving real estate. The Federal Housing Administration requires the use of escrow accounts for its loans. Both Fannie Mae and Freddie Mac advocate for their use. Escrow accounts are also used when buying and selling companies in both large and small mergers and acquisitions.

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[1] The Determination appears to copy the paragraph at the top of page 3 nearly verbatim, but without attribution, from an ***unpublished*** determination that the auditor likewise copied without attribution, that she produced in support of a similar assessment against a related company. Unpublished Det. No. 19-0001. A redacted copy is attached hereto as **Exhibit A**. A chart comparing the relevant portions of Det. No. 24-0020 and Det. No. 19-0001 is attached as **Exhibit B**. Unpublished determinations are ***not*** precedent, reinforcing the need for executive level review in this case.

Given the significant size of the industry and the large number of escrow agents operating in Washington, determining whether county recording fees are taxable compensation to the escrow agents is an appropriate subject for executive level review. Moreover, counsel is aware of at least three other matters currently pending before ARHD involving the same issue, again reinforcing the need for executive level review.

4. **Is An In-person Hearing Requested?** An in-person hearing in Seattle is requested.

5. **Relief Requested:** Reconsideration of Determination No. 24-0020 and remand of the assessment to Audit for adjustment of the assessment to reclassify notary fees, inspection fees and cancellation fees to the service B&O tax classification and to exclude county recording fees from the measure of tax under any classification.

6. **Summary of Grounds for Relief:**

In addition to involving issues of first impression and industrywide significance, Determination No. 24-0020 makes multiple factual and legal errors. It also ignores arguments raised in Fidelity's petition.

While it is true in the abstract that "Washington imposes a business and occupation (B&O tax for 'the act or privilege of engaging in business in Washington.' RCW 82.04.220(1)," Det. 24-0020 at 2, the Determination ignores the Courts' instruction that because the tax rate, sourcing method and other elements of the tax turn on the classification of the business activity engaged in "the government 'must first identify a business activity and then determine which tax measure and rate applies (depending on the business activity'". *FPR II, LLC v. Dep't of Revenue*, 16 Wn. App. 706, 714 (2021)(*quoting Steven Klein, Inc. v. Dep't of Revenue*, 183 Wn.2d 889, 896-97 (2015)).

While income from ***activities*** defined as retail sales in RCW 82.04.030 are subject to both retailing B&O tax and sales tax, RCW 82.04.250 and RCW 82.08.020, income from activities "other than or in addition to an activity taxed explicitly under another" classification, is subject to B&O tax under the service and other activities classification RCW 82.04.290(2).

None of the amounts in dispute are income from either title insurance services, abstract services or escrow services. Consequently, to the extent they are income at all, they are subject to B&O tax under the service classification. In fact the assessment originally classified notary fees and cancellation fees under the service and other activities classification. *See* Original Assessment, Workpaper A, copy attached as **Exhibit C**. While the narrative for the Adjusted Assessment, indicates that the "differences from the original audit" included "the reclassification" of those items, there is no explanation for the reclassification apart from a selective quotation from Rule 156 emphasizing the word "fees". A copy of the adjusted assessment is attached as **Exhibit D**.

Det. No. 24-0020 erred in failing to analyze the specific business activities associated with each of the disputed items to determine the proper classification of the activity.

None of the amounts in dispute are amounts "charged to consumers ***for*** abstract, title insurance, or escrow services." WAC 458-20-156 (emphasis added). Consequently, none of the items in dispute are subject to retailing B&O tax or sales tax.

As Audit correctly acknowledges, each of abstract, title insurance, and escrow services, are different activities:

1. Abstract services. Audit notes that abstract services "are the inspection of the state of title through historical title records." Audit Resp. to Initial Petition at 1 ("Resp.") Copy attached as Exhibit A. There is no dispute that Fidelity-WA reported and paid retailing B&O tax and sales tax on its abstract fees. Neither Audit nor the Determination assert that any of the four disputed items are amounts charged by Fidelity-WA for abstract services.

2. Title insurance. Audit notes that title insurance "generally insures against the risk that there are defects in the title of real property." Resp. at 1. There is no dispute that Fidelity-WA reported and paid retailing B&O tax and sales tax on its title insurance income, that is, on title insurance premiums. Neither Audit nor the Determination assert that any of the four disputed items are amounts charged by Fidelity-WA for title insurance.

3. Escrow services. Here, Audit's description of escrow services is inaccurate. The Response describes escrow services as "the holding of evidence of title to real property and issuance of that title once instructions to issue it have been given." However, an escrow agent cannot and does not "issue title." Rather, as explained in Rule 156, escrow services consist of both ***receiving and delivering*** "any written instrument, ***money***, evidence of title to real or personal property, or other thing of value" in accordance with instructions under which the escrow agent is to act. WAC 458-20-156. Nevertheless, again there is no dispute that Fidelity-WA reported and paid retailing B&O tax and sales tax on its abstract fees. Neither Audit nor the Determination assert that any of the four disputed items are amounts charged by Fidelity-WA for escrow services.

4. Other miscellaneous services. Audit's Response asserts, that Fidelity-WA "also performs other miscellaneous services related to real property sales." Resp. at 1. Audit identifies "document recording services" as one of those "other real estate closing services," *Id.* at 2. Det. No. 24-0020 adopts Audit's characterization of Fidelity-WA activities as including not just abstract, title insurance and escrow services, but also "document recording services" Det. at 2.

Classification of "other miscellaneous services" as retail services, merely because the services relate to real property sales, is directly contrary to the controlling statutes, Rule 156, and the fundamental structure of the B&O tax. The first three activities identified by Audit, (i) abstract

services, (ii) title insurance and (iii) escrow services, are defined as retail services under RCW 82.04.050(3)(a). However, neither section (3) nor any other section of RCW 82.04.050 includes either "document recording services" or any "other miscellaneous services" in the definition of a retail sale. Consequently, the Determination's description of county recording fees as income from a "document recording service" does not support the assessment of retailing B&O tax on them.

As the Response concedes: "Business activities other than or in addition to those that are specifically enumerated elsewhere in Chapter 82.04 RCW or in RCW 82.04.290(1) are taxed under the service and other activities B&O tax classification. RCW 82.04.290(2)." Resp. at 3. Rule 156 reflects the same truism, providing that abstract, title insurance and escrow businesses are subject to retailing B&O tax on their "gross receipts from fees or premiums charged to consumers ***for*** abstract, title insurance or escrow services" while income from other services provided by such businesses "is subject to tax under the classification service and other activities." WAC 458-20-156 (emphasis added). Consequently, even if county recording fees were income to Fidelity-WA for "document recording services" which Audit identifies as a "miscellaneous service related to real property sales", such "income" would be taxable under the service classification, ***not*** retailing B&O tax and sales tax.

As discussed in more detail below county recording fees are part of the subject of escrow services – that is they are part of the monies the escrow agent receives and delivers in the performance of its escrow duties – not income ***for*** the performance of escrow services (or any other service). The other three disputed items, in contrast, are income for the performance of services – just not services that are defines as retail sale. Consequently, income from notary fees, cancellation fees, and inspection fees are properly classified as service income, not retail sales proceeds.

A. Characterizing an item as an "other service emolument" does not impact the applicable B&O tax classification; only income from retailing activities is subject to retailing B&O tax regardless of how the income is "designated."

The Determination incorrectly upheld the assessment against Fidelity-WA by asserting that the disputed amounts are subject to retailing B&O tax because (1) Fidelity-WA provides abstract, title insurance, and escrow services and (2) the disputed amounts "constitute '… service emoluments however designated.'" Det. at 3. As noted above and reflected in Exhibits A and B, this reasoning is copied without citation from Det. No. 19-0001. More importantly, it is also a misreading/misinterpretation of RCW 82.04.050(3):

> RCW 82.04.050(3)(a) states that interest, rents, fees, admission, and ***other service emoluments*** however designated, received by persons engaging in providing abstract, title insurance, and escrow services ***are retail sales***.

> Amounts [at issue] ***constitute an "other service emolument*** however designated" under RCW 82.04.050(3).
>
> ***Thus,*** because Taxpayer is engaged in providing abstract, title insurance and escrow services, the ***amounts at issue are retail sales*** under RCW 82.04.050(3).

Det. at 3 (emphasis added).[2] The first sentence, setting forth the premise, is a mischaracterization of the statute that leads directly to the faulty conclusion. It is not the ***income*** "however designated" that is the retail sale. Rather it is income ***from activities*** defined as retail sales that is subject to the retailing classification.

When persons providing retail services also provide other services, their income from those other services is taxed according to the classification applicable to the other service. Thus, as discussed above, income from providing a "document recording service" would be taxed under the catchall service and other classification because it is not specifically enumerated in any other classification, including but not limited to the retailing classification. This is true regardless of whether the "document recording service" provider only sells stand-alone document recording services or *also* sells title insurance, credit bureau services, storage garage services, horticultural services or any of the many other services specifically enumerated as retail sales in section (3) of RCW 82.04.050.

The erroneous premise appears to be based on a misreading of RCW 82.04.050(3), which the Determination merely characterizes. The relevant parts of the statute are set out below:

> (3) The term "sale at retail" or "retail sale" ***includes the*** sale of or ***charge made for*** personal, business, or professional ***services*** including amounts designated as ***interest, rents, fees, admission, and other service emoluments*** however designated, ***received by persons engaging in the following business activities***:
>
> (a) ***Abstract, title insurance, and escrow services***;
>
> (b) Credit bureau services;
>
> (c) … and storage garage services;
>
> (d) … and horticultural services …;
>
> (e) …;
>
> (f) … Tanning salon services … ; ***and***
>
> (g) … .

[2] The reference to RCW 82.04.050(3)***(a)*** is inaccurate. The list of designated types of income is set forth at the beginning of subsection (3), preceding the activities listed in subsection (3)(a), and applies to each of subsections (3)(a) to (3)(g).

RCW 82.040.050(3)(emphasis added). The Determination's selective focus on the phrases "other service emoluments" and "abstract, title insurance, and escrow services" masks its error. Structurally, RCW 82.04.050(3) begins with a list of types of income designations: "charge", "interest", "rent", "fee", "admission", "other service emolument" and notes that the particular designation is irrelevant. Next, the statute sets forth a list of service activities identified as retail activities, which list is not limited to title insurance, or even the three services in subsection (a). Contrary to the Determination's assertion, the list of income designations precedes ***all*** of the "following business activities" listed in subsections (a) through (g) of section (3).

In short, the plain language of the statute provides that income that is earned "***for***" the ***business activity*** of providing title insurance (or any of the other retail services enumerated in section (3)) is income from a retailing activity subject to retailing B&O tax and sales tax, regardless of how the income from those enumerated activities is "designated." This plain reading of the statute is explicitly recognized in Rule 156, which explains that "[a]bstract, title insurance and escrow businesses are taxable under the classification retailing on gross receipts from ***fees*** or premiums charged to consumers ***for abstract, title insurance or escrow services"*** while income from other activities "is subject to tax under the classification service and other activities." In other words, taxpayers owe retailing B&O tax and retail sales tax on consideration received ***for*** providing abstract, title insurance, and escrow services, regardless of how the consideration is "***designated***" whether as a "fee", as "interest" as "rent" as "admission" or any other designation including, but not limited to "other service emolument." However, income ***for*** activities other than the activities enumerated in subsections (a) through (g) of section (3) is taxed according to the classification for that activity.

Contrary to the Determination's characterization, the statute does ***not*** "state" that any amount that can be labeled an "other service emolument" (or "interest" or "rent" etc.) becomes subject to retailing B&O tax independent of the activity that generates the "emolument" (or "rent" or "interest", etc.) Under the Determination's misreading of the statute, any income from the rental of real property earned by a person that also sells title insurance (or a garage storage service or any of the other services specifically enumerated in RCW 82.04.050(3)(a)-(g)) would be subject to retailing B&O tax and sales tax.[3] The same would be true of interest and admissions charges even when such income is ***not*** earned for providing title insurance, or any of the other services specifically enumerated in section RCW 82.04.050(3)(a)-(g)).

This is clearly reflected in the fact that Audit did not classify all of Fidelity-WA's income as retailing. As the Determination notes at p. 2, Audit notes that the assessment included

[3] Thus, for example, the Department explicitly distinguishes between non-taxable rental of a designated parking space for 30 days or more and the retail activity of parking and garage storage services. ETA 3030.2009. A provider of parking and garage storage services is not subject to sales tax on rentals of designated parking spaces for more than 30 days merely because some of its income comes from retail activities listed in RCW 82.04.050(3).

$46,607.75 of additional service B&O assessed (beyond the service B&O paid with Fidelity-WA's filed returns. In fact, amounts Audit identified as subject to tax under the service classification included "interest", one of the "designations" included in the list along with "other service emoluments." Under the Determination's strained reading of the statute, it is not just "other service emoluments" but any of the listed types of income, including both "interest" and "rent" that would be subject to retailing B&O whenever received by anyone engaged in any of the more than a dozen retail services specifically enumerated in section (3)(a)-(g) of RCW 82.04.050 without regard to whether or not the amount was ***for*** one of those enumerated retail services.

Such a strained reading is contrary to the fundamental structure of the B&O tax. RCW 82.04.250 imposes retailing B&O tax on the business activity of making retail sales and measures the tax by the gross proceeds "of such business." Similarly, RCW 82.04.070 defines gross proceeds of sale as the value proceeding "from" the sale of services rendered and RCW 82.04.080 defines gross income of the business as the value proceeding "by reason of the transaction of the business engaged in."

This fundamental structure also underlies both the Supreme Court's holding in *Klein Honda* that "in order for the government to impose [B&O] tax, it must first identify a business activity and then determine which tax measure and rate applies." 189 Wn.2d at 896.

B. County Recording Fees are part of the "money" received, held, and delivered by an escrow agent in compliance with the instructions under which the escrow agent is to act; in other words, they are part of the subject matter of the escrow.

The Determination mischaracterizes the nature of the county recording fees, not recognizing that they are the subject matter of the escrow service. They are not "[a]mounts ***paid*** to Taxpayer by clients for document recording services." Det. at 3. Contrary to the Determination's assertion, Fidelity-WA does not "provide[] document recording services as part of its abstract, title insurance, and escrow services." Det. at 2. In fact, Fidelity-WA cannot record mortgages and deeds, only the county can do so. It is important to understand what "escrow services" are and the role of an escrow agent to properly analyze the B&O tax treatment of county recording fees.

According to the Restatement (Second) of Agency § 14D cmt. a, an "escrow" is a deed, money or chattel delivered to a person, the escrow agent, by another and which the escrow agent contracts to retain until the happening or non-happening of an event. If the event happens, or fails to happen, before a specified time, the escrow is to be delivered to a third person; otherwise the escrow agent is to return it to the depositor. Ordinarily an escrow agent receives a deed or property from one person to be exchanged for the cash or other property of another person upon the happening of a specified event.

This mirrors Rule 156, which, defines escrow services as the activity of receiving "any written instrument, money, evidence of title to real or personal property or other thing of value" holding those items, and then delivering them "in compliance with instruction under which [the escrow agent] is to act." It is the fee for the service that is taxed, not the escrow itself.

County recording fees are part of the escrow; they are charged by the county for recording deeds and mortgages when real property changes hands. Fidelity's escrow agents collect the fees from property owners and delivers the collected recording fee to the designated county recording offices. Put simply, the county recording fees are part of the "escrow"; not fees paid to the escrow agents.[4]

County recording fees are part of the escrow and an escrow agent's position is like that of a trustee. This is similar to the collection of Washington sales taxes, which are "held in trust by the seller until paid to the department." Any seller who appropriates or converts the tax collected to the seller's own use or to any use other than the payment of the tax is guilty of a gross misdemeanor." RCW 82.08.050. The taxes are held in trust and are not part of the seller's gross proceeds of sale when calculating retailing B&O and retail sales tax. In short monies that are handled by the escrow agent in the performance of its duties, that is collected and disbursed in accordance with escrow instructions, are simply not income because they are not compensation or consideration for any service performed, but are instead part of the subject to the service.

C. Notary Fees, Inspection Fees, and Cancellation Fees Are Not Retail Sales Under RCW 82.04.050; Therefore They Are Taxable Under Service and Other.

Notary fees, inspection fees, and cancellation fees are income, but they are not income from title insurance services, abstract services or escrow services.[5] Nor are they income from any activity explicitly classified elsewhere. Consequently, they are subject to B&O tax under the service classification. As previously noted, the assessment originally correctly classified notary fees, and cancellation fees under the service and other activities classification. *See* Original Assessment, Workpaper A, copy attached as Exhibit C.

Notary services, inspection services, and cancellation services are not included in the term "retail sale." RCW 82.08.050. Therefore any fees for those services are not subject to retail sales tax. Instead, service B&O tax would apply to those activities since they are not "taxed explicitly under another" classification. RCW 82.04.290(2).

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[4] The Determination also errs factually when it asserts that Fidelity-WA "contracts with a third-party recording company." It is unclear what is meant, but it appears to be borrowing facts recited in unpublished Det. No. 19001.

[5] Notary fees and inspection fees are self-explanatory they are fees associated with notarizing documents and performing inspections. Cancellation fees are charged when a customer cancels an order for title insurance and no title insurance policy is issued.

CONCLUSION

For the reasons, Determination No. 24-002 should be granted executive level reconsideration and the assessment be remanded to remove recording fees from the measure of tax and to reclassify notary fee, cancellation fee and inspection fee income to service.

Very truly yours,

LANE POWELL PC

Scott M. Edwards

130215.0005/9672502.1

cc: Geoffrey Margolis

EXHIBIT A

STATE OF WASHINGTON
DEPARTMENT OF REVENUE

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON[1]

In the Matter of the Petition for Correction of Assessment of [redacted]	)	D E T E R M I N A T I O N No. 19-0001 Registration No. [redacted] Document No. 2[redacted] Audit No. [redacted] Docket No. [redacted]

TAXPAYER REPRESENTED BY: [redacted], Senior Manager, Indirect Tax

DATE OF TELEPHONE CONFERENCE: April 25, 2018

Sattelberg, T.R.O. – A title services company protests the Department's assessment of retailing business and occupation ("B&O") tax and retail sales tax. The company argues that its document recording services are not retail sales, and also argues that amounts it received from its clients for document recording should be excluded from its gross income. We deny the petition.

ISSUES

1. Whether amounts a title services company received from its clients for recording documents with county recorders' offices are subject to retail sales tax under RCW 82.04.050 and WAC 458-20-156.

2. Whether amounts a title services company received from its clients for recording documents with county recorders' offices should be excluded from gross income under WAC 458-20-111.

[1] This unpublished Determination applies only to the taxpayer named herein and may not be relied on by any other taxpayer. This is the decision of the Department of Revenue pursuant to WAC 458-20-100.

FINDINGS OF FACT

[redacted] ("Taxpayer") is a division of [redacted] ("Parent"), a national title insurance company. Taxpayer offers title insurance in a variety of real property transfers, including foreclosures. Its clients include individual property owners, local and national banks and lending institutions, escrow companies, and law firms.

As part of Taxpayer's title insurance, Taxpayer provides document recording services. Taxpayer contracts with third-party document processing companies to have them file the documents that must be recorded with local jurisdictions as part of foreclosure proceedings and real property transaction closings. Contracting with third-party document processing companies saves Taxpayer from having to have staff available in every jurisdiction where real property documents are recorded. A contract with one of the document processing companies ("Company") specifically describes these services as:

> **Courier Services.** [Company] shall pick up documents on a daily basis from [Parent's] offices in . . . Seattle, Washington, to be submitted by [Company] for recording with the applicable county recorder's office (or other applicable governing body) on the next business day.
>
> **Recording Services.** [Company] shall promptly submit all documents obtained from [Parent] on the prior business day to the recorder's office (or other applicable governing body) for recordation on the next business day after pick up . . . .
>
> **Court Services**. [Company] shall obtain certified copies of recorded documents and court document filings from the county courthouse records, as requested by [Parent], and shall provide the documents to [Parent] within 24 hours of receipt by [Company] . . . .[2]

The document processing companies perform the document filing services after each real estate transaction has consummated, and Parent has provided them the paperwork to file. The document processing companies bill Taxpayer weekly for their services. Because the filing rate for each type of document had been established contractually, Taxpayer knows in advance how much it will be charged for document recording, and includes that amount, with no mark up, in the real estate closing. Taxpayer will then pay that contracted amount over to the document processing companies once it has been billed.

The document processing companies act as Parent's limited agent in certain circumstances. One contract contains the following terms:

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[2] Master Services Agreement for Document Processing Services between Parent and [redacted]. § 1.1 – 1.3

> [Company] shall serve as [Parent's] non-exclusive and limited agent, and [Parent] hereby appoints [Company] as its limited agent, for the purpose of executing, acknowledging and presenting for recording Notices of Default, Notice of Trustee Sale, Trustee's Deeds, Rescissions, Reconveyances and any other documents necessary to advance a non-judicial foreclosure . . . .[3]

For Washington State tax purposes, Taxpayer considered the amounts it received for the document recording from its customers as pass-through income excludable from gross income, and thus it did not report them for excise tax reporting purposes.

In 2016, the Department's Audit Division ("Audit") began auditing Taxpayer's records. As the audit progressed, Audit extended the audit period from January 1, 2013, through June 30, 2017. Audit found that Taxpayer had essentially reported correctly during the audit period, with the exception of document recording fees charged during real estate closings. Audit considered this income not excludable but a retail sale, and on December 15, 2017, issued Taxpayer an assessment totaling $[redacted][4]

Taxpayer timely petitioned for review of the assessment contesting the taxation of the recording fees. Taxpayer argues that its recording fees are not defined as retail sales and do not fall into another B&O tax classification, so they should be taxed under the Service and Other Activities B&O Tax Classification. Taxpayer further argues that it acts solely as an agent for its clients when hiring the document processing companies, and notes that it does not mark up the cost of the recording fees. Thus, Taxpayer argues, it qualifies for pass-through treatment on this income.

Taxpayer did not provide any contractual documentation detailing a relationship between its clients and the document processing companies. Taxpayer also did not provide any contractual documentation indicating that it contracted with the document processing companies to act as their agent, nor did it provide documentation indicating that the customers were solely liable for payment of document processing fees and Taxpayer was not primarily or secondarily liable for its payments to the document process companies.

ANALYSIS

1. Document Recording Fees are Retail Sales

Washington imposes retail sales tax and retailing B&O tax on each retail sale in this state. RCW 82.08.020; RCW 82.04.250. RCW 82.04.050 defines "retail sale" to include sales related to tangible personal property, as well as certain services. RCW 82.04.050(3) states the following, in pertinent part:

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[3] Master Services Agreement for Document Processing Services between Parent and Document Processing Solutions, Inc. § 2.1.

[4] The assessment consisted of $[redacted]2 in retail sales tax, [redacted] in retailing B&O tax, a substantial underpayment penalty of $5[redacted] and $[redacted] in interest.

> The term "sale at retail" or "retail sale" includes the sale of or charge made for personal, business, or professional services including amounts designated as interest, rents, fees, admission, and *other service emoluments however designated*, received by persons engaging in the following business activities:
>
> (a) Abstract, title insurance, and escrow services. . . .

(Emphasis added.)

Business activities other than or in addition to those that are specifically enumerated elsewhere in chapter 82.04 RCW or RCW 82.04.290(1) are taxed under the service and other activities B&O tax classification. RCW 82.04.290(2).

The Department's WAC 458-20-156 ("Rule 156") provides further guidance regarding abstract, title insurance, and escrow services. Rule 156 states, "Abstract, title insurance and escrow businesses are taxable under the classification retailing on gross receipts from fees or premiums charged to consumers for abstract, title insurance or escrow services."

Here, Taxpayer provides title insurance in real property transfers to a variety of clients.[5] RCW 82.04.050(3)(a) states that interest, rents, fees, admission, and other service emoluments however designated, received by persons engaging in providing title insurance, are retail sales. Amounts paid to Taxpayer by clients for document recording services constitute an "other service emolument however designated" under RCW 82.04.050(3). Thus, because Taxpayer is engaged in providing title insurance, the charges for document recording service fees are retail sales under RCW 82.04.050(3), and Audit correctly assessed retail sales tax on them. Accordingly, we deny its petition on this issue.

2. Rule 111 Does Not Apply

Washington levies a B&O tax for the act or privilege of engaging in business activities in Washington. RCW 82.04.220. The B&O tax measure is "the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be." *Id.*

"Gross proceeds of sales" is defined as:

> [T]he value proceeding or accruing from the sale of tangible personal property, digital goods, digital codes, digital automated services, and/or for other services

[5] Rule 156 does not define "title insurance." We, therefore, look to other sources to define these terms. Black's Law Dictionary defines "title insurance" as "an agreement to indemnify against loss arising from a defect in title to real property." Black's Law Dictionary (10th ed. 2014). Similarly, the Washington Practice Series, Real Estate section, defines title insurance as a "a form of indemnity insurance that insures policy holders against losses covered by their policies." Stoebuck and Weaver, 18 Washington Practice Series, Real Estate – Property Law and Transactions § 14.17.

> rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

RCW 82.04.070. The "value proceeding or accruing," in turn, is defined as "the consideration, whether money, credits, rights, or other property expressed in terms of money, actually received or accrued." RCW 82.04.090.

The Legislature "intended to impose the business and occupation tax upon virtually all business activities carried on within the state." *Simpson Inv. Co. v. Dep't of Revenue,* 141 Wn.2d 139, 149, 3 P.3d 741 (2000) (quoting *Time Oil Co. v. State*, 79 Wn.2d 143, 146, 483 P.2d 628 (1971)). Further, the B&O tax is not a tax on profit, net gain, capital gain, or sales "but a tax on the total money or money's worth received in the course of doing business." *Budget Rent-A-Car of Wash.-Oregon*, 81 Wn.2d 171, 172, 500 P.2d 764 (1972). In short, the B&O tax provisions "leave practically no business and commerce free of the business and occupation tax." *Id.* at 175. Accordingly, Taxpayer cannot exclude any costs of doing business, unless there is some specific exclusion that applies.

Taxpayer contends that the amounts it received from its customers for document recording are excludable under WAC 458-20-111 ("Rule 111"). Rule 111 recognizes that, in certain instances, amounts received by a taxpayer are not "gross proceeds of sales" or "gross income of the business." Rule 111 provides that amounts received as "reimbursements" may be "excluded from the measure of tax" where the "money . . . is received by a taxpayer as reimbursement of an advance in accordance with the regular and usual custom of its business . . . ." As Rule 111 explains:

> The foregoing is limited to cases wherein the taxpayer, as an incident to the business, undertakes, on behalf of the customer . . . the payment of money . . . to a third person, or in procuring a service for the customer which the taxpayer does not or cannot render and for which no liability attaches to the taxpayer . . . .
>
> On the other hand, *no charge which represents* an advance payment on the purchase price of an article or *a cost of doing or obtaining business*, even though such charge is made as a separate item, *will be construed as an advance or reimbursement*. Money so received constitutes a part of gross sales or gross income of the business, as the case may be. For example, no exclusion is allowed with respect to amounts received by . . . (4) a manufacturer or contractor for materials purchased in his own name or in the name of his customer if the . . . contractor is obligated to the vendor for the payment of the purchase price, regardless of whether the customer may also be so obligated . . . .

(Emphasis added.)

Taxpayer argues that it collected amounts from Customers and paid them to the document processing companies as an agent of the document processing companies, and therefore these amounts are excludable from its gross income. The Washington Supreme Court addressed the tax implications of being a "collection agent" in *Washington Imaging Services, LLC. v. Dep't of Revenue,* 171 Wn.2d 548, 561-62, 252 P.3d 885 (2011). In that case, a medical imaging company, Washington Imaging, retained a third-party medical image interpreter, Overlake, to provide interpretive reports to accompany Washington Imaging's medical images. *Id.* at 551. The patients that ordered this service were not specifically made aware of the arrangement between Washington Imaging and Overlake, and were not otherwise informed that they had any obligation to pay Overlake for its service component. *Id*. Instead, patients signed "an agreement to be financially responsible to Washington Imaging." *Id.* The Court considered whether Washington Imaging was a "collection agent" for Overlake, articulating the following:

> For Washington Imaging to prevail on the argument that it acted only as a collection agent of Overlake, it must have collected money *owed to Overlake*. But the patients contracted solely with Washington Imaging to pay for medical imaging services and have no separate obligation to Overlake.

Id. at 557 (emphasis in original).

Here, the facts are highly similar to those in *Washington Imaging.* Taxpayer's clients hired it for its title insurance and other real estate closing services. Taxpayer separately arranged for the document processing companies to file the documents necessary to properly record the transactions. Taxpayer's clients had no pre-existing relationship, contractual or otherwise, with the document processing companies. Taxpayer's clients are like the patients from *Washington Imaging*, Taxpayer is like Washington Imaging itself, and the document processing companies are like Overlake. Similar to the taxpayer in that case, Taxpayer has not shown that its clients had a separate obligation to the document processing companies. Therefore, Taxpayer has not established that it acted as agent for the document processing companies in this case and is not entitled to exclude its income from tax under Rule 111. The fact that the document processing companies acted as limited agents for Parent is irrelevant here.

DECISION AND DISPOSITION

We deny Taxpayer's petition.

This decision will become final February 4, 2019, unless you seek reconsideration of the decision. If you decide to ask the Department to reconsider this decision, you must comply with the requirements for reconsideration contained in WAC 458-20-100(6). WAC 458-20-100 and other references cited in the determination may be found at the DOR's Internet website under "Find a law or rule" http://dor.wa.gov/content/FindALawOrRule/.

Information on our administrative review process is on the DOR website http://dor.wa.gov/content/FileAndPayTaxes/ReviewsAndAppeals/. For a copy of WAC 458-20-100 or for other information please call or write the Administrative Review and Hearings Division at:

Administrative Review and Hearings Division
Department of Revenue
PO Box 47460
Olympia WA 98504-7460
(360) 534-1335
Fax: (360) 534-1340

You may appeal the decision to the Board of Tax Appeals ("BTA"). The BTA's appeal procedures are set forth in chapter 82.03 RCW, in chapter 456-09 WAC (formal appeals), and in chapter 456-10 WAC (informal appeals). You must comply with the statutory and administrative rule requirements to perfect your appeal to the BTA, which must be filed within 30 days of the date of this letter. You may contact the BTA at (360) 753-5446 or at bta@bta.state.wa.us. Appeal to the BTA does not stay collection activity by the Department. To obtain a stay of collection, the taxpayer must post a bond. *See* RCW 82.32.200.

Alternatively, if you have paid the amount in dispute, you may sue for a refund in Thurston County Superior Court. You must comply with RCW 82.32.180. The Thurston County Superior Court is the only court in the state that has original jurisdiction to hear excise tax matters.

Dated this 4th day of January, 2019.

STATE OF WASHINGTON DEPARTMENT OF REVENUE

_____
Ethan Sattelberg
Tax Review Officer

EXHIBIT B

Determination 24-0020

RCW 82.04.050(3)(a) states that interest, rents, fees, admission, and other service emoluments however designated, received by persons engaging in providing abstract, title insurance, and escrow services, are retail sales.

Amounts paid to Taxpayer by clients for document recording services, as well as notary fees, inspection fees, and cancellation fees, constitute "amounts designated as . . . fees . . . and other service emoluments however designated" under RCW 82.04.050(3).

Thus, because Taxpayer is engaged in providing abstract, title insurance, and escrow services, the amounts at issue are retail sales under RCW 82.04.050(3), and Audit correctly assessed retailing B&O tax and retail sales tax on the charges. Accordingly, we deny Taxpayer's petition on this issue.

Determination No. 19-0001

RCW82.04.050(3)(a) states that interest, rents, fees, admission, and other service emoluments however designated, received by persons engaging in providing title insurance, are retail sales.

Amounts paid to Taxpayer by clients for document recording services constitute an “other service emolument however designated” under RCW 82.04.050(3).

Thus, because Taxpayer is engaged in providing title insurance, the charges for document recording service fees are retail sales under RCW 82.04.050(3), and Audit correctly assessed retail sales tax on them. Accordingly, we deny its petition on this issue.