Cite as Det. No. 14-0353, 34 WTD 302 (2015)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of Assessment and Letter Ruling of	)	D E T E R M I N A T I O N
	)	No. 14-0353
. . .	)	Registration No. . . .
. . .	)	Registration No. . . .

[1] RCW 82.04.320, RCW 48.14.080: B&O TAX – INSURANCE PREMIUMS TAX – EXTENDED VEHICLE WARRANTIES. Sales of vehicle service contracts, which are not insurance policies and extend warranties on cars, are subject to B&O tax with no deduction for insurance premiums paid by the seller when the seller was personally liable to its customers, and not an agent of the insurer. ACCORD Det. No. 01-089E, 21 WTD 219 (2002).

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.

M. Pree, A.L.J. – Two out-of-state companies providing extended warranties to vehicle purchasers in Washington protest a letter ruling that their sales of the warranties were subject to business and occupation (B&O) tax. One of the entities also appeals an assessment of B&O tax on these sales. They claim that their receipts were gross premiums in respect to insurance business upon which a premiums tax was paid. . . . Petitions denied.[1]

ISSUES

1. Under RCW 82.04.320 . . . , are payments for extended vehicle warranties exempt from B&O tax as gross premiums in respect to insurance business upon which a premiums tax is paid in lieu of other taxes under RCW 48.14.080?

2. . . .

FINDINGS OF FACT

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

[Taxpayer] and [Affiliate] provide vehicle purchasers with extended service warranties (VSCs) on their vehicles. The taxpayers are corporations headquartered outside of Washington. They are both owned by an out-of-state company that also owns the insurance company (insurer) from which the taxpayers purchase the required insurance for their warranty service contracts. The taxpayer was registered with the Department, but asked the Department to close its account in 2008. The taxpayer did not file excise tax returns after 2005. The affiliate was never registered with Washington.

The Department's Compliance Division investigated[2] the taxpayer's business activities in Washington State for the period of January 1, 2006 through June 30, 2013. On October 31, 2013, the Compliance Division issued two assessments against the taxpayer, Document No. . . . for the period January 1, 2006 through December 31, 2010, and Document No. . . . for the period from January 1, 2011 through June 30, 2013.[3] Document No. 201406075 totaled $. . . , and assessed $. . . in B&O tax under the retailing classification plus a $. . . delinquent penalty, a $. . . assessment penalty, and $. . . in interest. Document No. . . . totaled $. . . , and assessed $. . . in B&O tax under the retailing classification plus a $. . . delinquent penalty, a $. . . assessment penalty, and $. . . in interest.[4] The taxpayer appeals these assessments.

The affiliate never filed Washington excise tax returns. Like the taxpayer, the affiliate provided and administered VSCs nationwide. The affiliate sold the VSCs through dealers and paid claims to customers. The Department's Taxpayer Services Division (TI&E) issued a letter ruling to the taxpayer and affiliate on April 13, 2013, which concluded that they could not deduct their insurance premiums from the B&O tax or exclude from the B&O tax their income from VSCs as insurance premiums. The taxpayer and the affiliate also appeal TI&E's letter ruling.

The taxpayer had filed returns prior to 2000. On September 17, 2008, the Department notified the taxpayer that its combined excise tax return for the 2nd quarter of 2008 was delinquent. The taxpayer wrote back on October 2, 2008:

> Our records indicate that we filed and mailed this 2nd quarter 2008 Combined Excise Tax return out on September 26, 2008 with no tax due amount. Please note that this entity does not have any income due to our WA state apportionment rate is zero per[cent] and we are requesting to close this account number . . . .

The Department's records do not show that the taxpayer filed any returns for 2008. The Department closed the account on October 2, 2008, and reopened the account on August 27, 2013. The taxpayer resumed filing returns after the audit period.

When the automotive dealerships (dealers) sold cars and other vehicles, their customers could purchase the taxpayer's VSCs, which typically extended the warranty on the customer's vehicle, covering future costs to repair the vehicle. The dealers sell VSCs, for the taxpayers, and charge the customers retail sales tax on the VSCs. The customers pay the dealer for the VSC plus the retail sales tax. In accordance with its contract with the taxpayers, the dealer retains a portion as compensation for selling the VSC, and pays the balance to the taxpayers. The taxpayers state that they use a portion of the receipts to buy insurance from the insurer on the VSCs.

[2] The investigation did not include a detailed audit of the taxpayer's accounting records.
[3] The assessments were qualified to allow a future audit covering all areas of possible taxation.
[4] It is undisputed that the taxpayer and affiliate have nexus with the State of Washington.

The taxpayers provided the following example of one representative transaction. An automobile purchaser completed the taxpayers' vehicle service application for an extended warranty on a preowned vehicle, which provided specific coverage (power train and electronics) for an additional 30 months or 36,000 miles. The purchaser paid the dealer $2,120 for the VSC, which included retail sales tax. The dealer remitted collected retail sales tax to the Department. The dealer retained $1,000, and paid the balance to the taxpayers, who in turn paid the insurer $506 on the policy. The taxpayers showed the insurer's $506 accounting entry, which they explain was reported to the Washington insurance commissioner by the insurer.

The taxpayers did not report or pay any tax on their VSC sales. Because the dealers collected the retail sales tax from the customers and remitted the tax to the Department, retail sales tax is not at issue. Rather, on schedule 2A, the Compliance Division assessed retailing B&O tax on the taxpayer's Washington VSCs sales measured by the customers' prices for the VSCs. The taxpayers contend that their VSC sales are exempt from B&O tax as premiums in respect to insurance business upon which a premiums tax is paid in lieu of other taxes. The taxpayers did not pay Washington's insurance premiums tax imposed under RCW 48.14.020. The taxpayers state that the insurer paid the insurance premium tax on the Washington policies.

The customers did not directly contract with the insurer. While the insurer was named in their VSCs, the taxpayers were primarily liable to the customers for repairs covered by the VSCs. The taxpayers purchased reimbursement policies from the insurer. The taxpayers state those policies were required by law. According to the taxpayers, they needed an indemnification policy with an insurer to sell VSCs. The taxpayer's VSCs with vehicle owners specifically state that the VSCs are not insurance policies.

The taxpayer was registered with the Washington Insurance Commissioner as a service contract provider.[5] The affiliate was not registered with the Insurance Commissioner, although according to the affiliate's website, the affiliate "administered" the VSCs,[6] which services could be taxable under the service and other activities B&O tax classification. The taxpayer's insurance registration does not identify it as corporate family group owned or controlled by the same company.[7] Nor is the taxpayer named as a member of the insured family's group.[8]

The taxpayers paid a portion their receipts to the insurer who agreed to indemnify the taxpayers for their obligations under the VSCs. However, their customers did not pay the taxpayers as the insurance company's agents or pay any amount designated as premiums. If the taxpayers did not pay the customers claims, the customers were entitled under their contracts with the taxpayers to make claims directly against the insurance company.

[5] *See* The Washington State Office of the Insurance Commissioner's website: http://www.insurance.wa.gov/. . .
[6] *See* . . .
[7] *Id*. We also note that the insurer named on the taxpayers' dealer agreements, . . . , does not appear to be listed as an insurance company on the Washington State Office of the Insurance Commissioner's website. The Washington State Office of the Insurance Commissioner's website: http://www.insurance.wa.gov/. . .
[8] The insurer, . . . , was listed on the Washington State Office of the Insurance Commissioner's website: http://www.insurance.wa.gov/. . .

ANALYSIS

Washington imposes a B&O tax "for the act or privilege of engaging in business" in the state. RCW 82.04.220. "Business" includes "all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly." RCW 82.04.140. The B&O rate is determined by the type of business activity in which a person is engaged. RCW 82.04.290. The sale or charge made for an extended warranty to a consumer falls within the definition of "retail sale" in RCW 82.04.050. RCW 82.04.250 imposes the B&O tax on persons making retail sales.

The taxpayer argues that as a licensed service contract provider with the Washington Insurance Commissioner,[9] the B&O tax on its income is preempted by RCW 48.14.080, which states:

> (1) As to insurers, other than title insurers and taxpayers under RCW 48.14.0201, the taxes imposed by this title are in lieu of all other taxes, except as otherwise provided in this section.
>
> (2) Subsection (1) of this section does not apply with respect to:
>
> > (a) Taxes on real and tangible personal property;
> >
> > (b) Excise taxes on the sale, purchase, use, or possession of (i) real property; (ii) tangible personal property; (iii) extended warranties; (iv) services, including digital automated services as defined in RCW 82.04.192; and (v) digital goods and digital codes as those terms are defined in RCW 82.04.192; and
> >
> > (c) The tax imposed in RCW 82.04.260(9), regarding public and nonprofit hospitals.
>
> (3) For the purposes of this section, the term "taxes" includes taxes imposed by the state or any county, city, town, municipal corporation, quasi-municipal corporation, or other political subdivision.

The "in lieu of all other taxes" preemption does not apply to extended warranties per subsection (2)(b)(iii). The taxpayers' VSCs are extended warranties. Therefore, their sales of VSCs are not preempted from B&O taxation by RCW 48.14.080. The preemptive language of RCW 48.14.080 is not a plenary or carte blanche immunity such that a licensed insurance company may engage in any kind of income producing business activity it chooses without incurring business tax liability. Det. No. 89-259A, 10 WTD 289, 293 (1990).

The taxpayers did not pay taxes imposed by Title 48 RCW, nor have they alleged that they owe taxes under Title 48 RCW. The taxpayers contend their receipts from selling the VSCs were exempt from B&O tax under RCW 82.04.320, which provides, "This chapter shall not apply to any person in respect to insurance business upon which a tax based on gross premiums is paid to the state . . . ."

[9] We note that the affiliate is not a licensed insurance company, and by its language, RCW 48.14.080 only applies to insurers.

The taxpayers' contracts with vehicle owners specifically state that the VSCs are not insurance policies. The customers do not pay the taxpayers' insurance premiums. The premiums are a cost or expense that the taxpayers incur when they provide VSCs. The taxpayers do not receive insurance premiums from the customers, dealers, or the insurer. The taxpayers' receipts are derived from selling VSCs, not insurance policies. Since the taxpayers have not paid the gross premiums tax on their VSC sales, they are not eligible for the RCW 82.04.320 exemption.

With the possible exception of affiliation,[10] our taxpayers' situation is similar to those of the taxpayer addressed in Det. No. 01-089E, 21 WTD 219 (2002) in which a company selling VSCs through used car dealers sought to exclude the amounts it collected from customers that were used to pay its insurance company. In that case, the company was obligated to reimburse customers for mechanical breakdown repairs. As in our case, the insurer guaranteed the VSCs as required by RCW 48.96.010(4), and that company sought to exclude, or deduct, the amount it paid to the insurer for the reimbursement insurance policies on the VSCs from the company's VSC receipts.

As in our case, the company was not an agent of the insurance company because it was legally obligated to pay the claims. 21 WTD 219 at 226-7. Like our taxpayers, the company did not represent itself as an agent to the customers. 21 WTD 219 at 227. As with our taxpayers, the company was liable for the premiums, not the customers. *Id.* We held that because the company was personally liable to the customers, it could not exclude or deduct from the payments it received from its VSC customers, the amounts that it paid to the insurer. *Id.* at 230. We consider that determination controlling precedent under RCW 82.32.410. The taxpayers may not deduct or exclude the amounts they paid to the insurer, from amounts paid by their VSC customers.

The taxpayers contend that we should distinguish 21 WTD 219, arguing that their activities are functionally related to its insurer's business. The taxpayers cite Det. No. 88-311A, 9 WTD 293 (1990) as precedent.[11] That determination involved an audit assessment imposed on a large insurance company and the intercompany transactions that occurred between the principal insurance company and its affiliated corporations. Our issue does not involve the assessment of intercompany transactions. Rather, the dealers paid the taxpayers amounts received from customers who purchased the VSCs. Unlike 9 WTD 293, the taxpayers' receipts were not from the insurance company for services functionally related to the insurer's business. The taxpayers' receipts were from the sales of VSCs.[12] The VSCs explicitly stated that they were not insurance policies.

. . .

[10] The affiliation asserted by the taxpayers is not supported by Washington State Office of the Insurance Commissioner's website:
http://www.insurance.wa.gov. . .

[11] The taxpayers also refer to an unpublished determination and an unpublished Court of Appeals decision. The Department will not consider these unpublished decisions. Det. No. 02-0127, 23 WTD 160, 164 (2004).

[12] In 9 WTD 293, we considered whether general administrative services such as accounting, personnel and data processing are functionally related when performed for an affiliate's insurance business. At issue were payments from the principal insurer. In our situation, the taxpayers were paid for the VSCs by their customers. They were not paid by the insurer to perform administrative services functionally related to the insurer's business. 9 WTD 293 did not address payments from the customers, and does not control our outcome.

DECISION AND DISPOSITION

We deny the petition.

Dated this 7th day of November 2014.