

BEFORE THE BOARD OF TAX APPEALS  
STATE OF WASHINGTON

THE HAPPY CROP SHOPPE,	)	
	)	Docket No. 99532
Appellant,	)	
	)	ORDER DENYING
v.	)	EXCEPTION TO
	)	PROPOSED DECISION
STATE OF WASHINGTON DEPARTMENT	)	
OF REVENUE,	)	
	)	
Respondent.	)	
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The Respondent timely filed an exception to the Proposed Decision with the Board of Tax Appeals (Board). The Appellant timely filed a response.

By rule, the Board reviews “the specific factual and legal grounds” raised in the exception, and the Board is not permitted to consider any evidence or arguments that were not presented to the hearing officer.<sup>1</sup> To grant the exception, the Board must conclude that the hearing officer misunderstood or ignored pertinent facts or misapplied the facts to the applicable law.

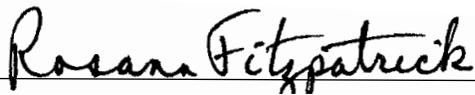
The Board has reviewed the Proposed Decision, the Respondent’s exception, and all relevant documents in the file. The Board finds that the Proposed Decision rests on supported facts, the correct legal standard, and a reasonable application of the law to the facts.

The Board, therefore, denies the exception and adopts the Proposed Decision as the Final Decision in the case.

ISSUED January 16, 2025.

BOARD OF TAX APPEALS

  
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CLAIRE HESSELHOLT, Chair

  
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ROSANN FITZPATRICK, Vice Chair

  
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MATTHEW RANDAZZO, Member

<sup>1</sup> WAC 456-10-730(2).

THE BOARD OF TAX APPEALS  
STATE OF WASHINGTON

THE HAPPY CROP SHOPPE, LLC,	)	
dba The Happy Crop Shoppe,	)	
	)	Docket No. 99532
Appellant,	)	
	)	RE: Property Tax Exemption Appeal
v.	)	
	)	PROPOSED DECISION
STATE OF WASHINGTON	)	
DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	

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This matter came before Michael S. Turner, Tax Referee, presiding for the Board of Tax Appeals (Board), on May 21, 2024, in an informal hearing pursuant to the rules and procedures set forth in chapter 456-10 WAC (Washington Administrative Code). Lisa Wendt, the Owner/Manager, represented the Appellant, The Happy Crop Shoppe, LLC, dba The Happy Crop Shoppe (Taxpayer). Gabriella Herkert, Tax Policy Specialist 3, represented Respondent, State of Washington Department of Revenue (Department). Michael Yale, Accountant, appeared as a witness for the Taxpayer. Carmen Cady, Audit Supervisor, appeared as a witness for the Department.

The Board heard the testimony, reviewed the evidence, and considered the arguments made on behalf of the parties. The Board now makes its decision as follows:

OWNER’S PETITION FOR TAX RELIEF

DOCKET NO.	DECISION OF THE DEPARTMENT	CONTENTION OF THE TAXPAYER	DECISION OF THE BOARD OF TAX APPEALS
99532	Income is subject to Retail Sales and Retailing B&O Taxes	Income is not subject to Retail Sales and Retailing B&O Taxes	Income is not subject to Retail Sales and Retailing B&O Taxes

ISSUE

The issue is whether the Department properly assessed retail sales tax and retailing B&O tax on certain debit card processing fees as part of the gross retail selling price.

## PROCEDURAL HISTORY

After the Department's Audit Division (Audit), audited the Taxpayer's business for the period from January 1, 2016, through September 30, 2018, (Audit Period), it concluded that certain debit card processing fees should be included in the retail selling price. The Department issued an assessment letter on January 14, 2020, Document No. L001859906. The Taxpayer timely filed a petition for review. The Taxpayer submitted a letter to the Department on January 24, 2020, disputing the Department's audit results. The Department issued Determination No. 21-0006 on January 12, 2021, after a telephone conference on April 21, 2020. The Taxpayer submitted a letter to the Department on March 4, 2021, disputing the Department's Determination No. 21-0006. The Department issued Determination No. 21-0006R on September 2, 2021. The Taxpayer emailed its Notice of Appeal of the Department's Determination No. 21-0006R to the Board on October 2, 2021. The Taxpayer contends that the fees at issue are not included in the sale price and are not subject to retail sales tax and retailing B&O tax.

The Department moved to exclude the testimony of Michael Yale prior to the hearing. After hearing arguments on the motion from each party, the Department's motion was granted.

## FACTS AND CONTENTIONS

1. The Taxpayer, Happy Crop Shoppe, is a business that sells marijuana and marijuana-related products from a store location in East Wenatchee.
2. The Taxpayer had two terminals, an automated teller machine (ATM) and a point-of-banking (POB) bank card processing machine, in the East Wenatchee store location.
3. Audit identified four distinct transaction types:
  - a. Purchase directly through the point-of-sale (POS) system connected to a debit card processing machine using a debit card.
  - b. Purchase through the POS system using a ticket received from the POB terminal using a debit card.
  - c. Purchase through the POS system with money accessed from a stand-alone ATM that is separate from the POS system, the POB system, and the debit card machine connected to the POS system.
  - d. Cash purchase through the POS system with cash acquired independently of the store location.

4. The second type of transaction, purchases made using a ticket received from the POB terminal, is the issue in this appeal. Audit verified that the first type of transaction and the third and fourth type of transactions are not an issue.
5. The Taxpayer entered into an agreement (Agreement) with US Debit Services for the POB terminal and processing POB transactions.<sup>1</sup> The Agreement identifies the terminal type as a POB Processing Terminal.
  - a. The Agreement provides “Convenience Fee Information,” which identifies a \$2 “Total Surcharge” and \$0.25 “Merchant Receives.”
  - b. The Taxpayer was later notified that the “Total Surcharge” was increased to \$4 per transaction. The evidence does not show that the Taxpayer was consulted before the total surcharge increased or that it approved the increase.
  - c. The Agreement includes an Automated Clearing House (ACH) authorization release by the Taxpayer. An ACH transfer is an electronic money transfer between banks and credit unions that utilizes the ACH network.
  - d. The ACH authorization is used by US Debit Services to deposit the funds requested by customers as a result of POB terminal debit card transactions into the Taxpayer’s checking account.
  - e. US Debit Services receives the surcharge. The Taxpayer does not have possession or control of the surcharge at any time. US Debit Services periodically pays the Taxpayer \$0.25 per POB terminal transaction.
  - f. The Agreement does not require the Taxpayer to pay the convenience fee surcharge to US Debit Services. The Agreement does not show that the Taxpayer has a legal obligation to pay the convenience fee surcharge.
  - g. The evidence shows that the customer is notified of the surcharge at the POB terminal and given the option to decline to pay the fee. The evidence does not show that the Taxpayer or the customer owes the POB convenience fee surcharge if the customer chooses to decline to authorize the fee at the terminal.
6. The debit card transactions using the POB terminal cause the funds requested by the debit card holder and the surcharge to be transferred from the debit card holder’s account to US Debit Services. The funds requested and the surcharge are transferred in a single transaction.

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<sup>1</sup> Department’s evidence, Exhibit 7, R7-37, R7-38, and R7-39.

7. The Taxpayer argues that the surcharge on its debit card POB transactions is equivalent to the fees paid for use of debit cards at ATMs. The Taxpayer argues that the debit card POB surcharge is not equivalent to the fees paid by merchants to credit card companies in compensation for being allowed to accept those credit cards.
8. The Department argues that the debit card POB transactions are for the purpose of purchasing merchandise at the Taxpayer's store and the surcharge is part of the purchase price, like credit card fees paid by merchants to credit card companies are taxed as part of the purchase price.
9. The Taxpayer asserts that the POB debit card transactions do not require the customer to exchange the receipt received by the customer for the Taxpayer's merchandise. The Taxpayer asserts that, because the customer has the right to request currency in exchange for the receipt, the surcharge is merely a convenience fee to access their bank funds and is not a necessary cost to accomplish a retail sale.
10. The Department asserts that the POB surcharge is a necessary expense incurred by the Taxpayer in order to sell merchandise to debit card holders who use the POB terminal and is, therefore, part of the Taxpayer's cost to sell merchandise. Thus, the POB terminal fee is a cost of the Taxpayer doing business and is included in the sale price.
11. The Taxpayer states that most, if not all, POB transactions result in the customer purchasing merchandise from the Taxpayer.
  - a. The evidence does not show that the customer is required to exchange the receipt from the POB terminal.
  - b. The evidence does not show that the customer cannot gift, sell, or otherwise dispose of the POB receipt without engaging in a retail sale transaction with the Taxpayer.
12. The Audit included a test transaction utilizing a debit card at the POB terminal.
  - a. The auditor states that, at the time of the test transaction, there was a sign posted near the cashier's station that notified customers that there was a \$4 charge for using a debit card.
  - b. The auditor states that the posted notice did not reference US Debt Services or otherwise notify customers that a fee was paid to a third party and not the Taxpayer.
  - c. The auditor's checking account bank statement shows a single, \$54 charge for the transaction.

- d. The auditor states that at no point, during or after the transaction, was the auditor advised, verbally or through documents, that the transaction involved a third party. The auditor does not state that she asked if the POB transaction involved a third party.
  - e. The auditor does not state that she enquired about the convenience fee or who received the convenience fee, nor that this information was purposely withheld from her.
13. The Taxpayer states that she believes that a notice was posted at the POB terminal that a fee of \$4 would be charged by US Debit Services for use of a debit card at the terminal. The Taxpayer does not provide evidence to support her belief and states that, although this is her belief, she is not certain.
14. The POB terminal transaction provides the customer with a receipt, which the customer then submits to the Taxpayer in exchange for merchandise or legal tender. The evidence does not show that the customer is required to exchange the receipt with the Taxpayer.
15. The funds that the customer accesses in their bank account due to the POB terminal transaction are transferred to US Debit Services and are only distributed to the Taxpayer a few days later. The funds distributed to the Taxpayer do not include the convenience fee.

#### APPLICABLE LAW

Washington imposes a business and operation (B&O) tax for the act or privilege of engaging in business activities in the state.<sup>2</sup>

Retailing B&O tax is imposed on the “gross proceeds of sales” from retail activity.<sup>3</sup>

“Gross proceeds of sales” is defined to mean:

[T]he value proceeding or accruing from the sale of tangible personal property . . . and/or other services 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”<sup>4</sup>

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<sup>2</sup> RCW 82.04.220.

<sup>3</sup> RCW 82.04.250.

<sup>4</sup> RCWE 82.04.070.

Retail sales tax is also imposed on retail sales in Washington.<sup>5</sup> “Retail sale” or “sale at retail” means the sale of tangible personal property to all persons irrespective of the nature of their business, with exceptions that are not relevant in this case.<sup>6</sup>

The amount of retail sales tax is based on the “selling price,” which includes the “sales price.” “Selling price” or “sales price” means the total amount of consideration, except trade-in property of like kind, for which tangible personal property is sold.<sup>7</sup> When a customer makes a purchase using a credit card, the institution that issued the credit card charges a service fee. The seller pays the service fee as part of its cost of doing business. Because the service fee is a cost of doing business, the seller must include that in the selling price when determining its B&O tax and retail sales tax liabilities.<sup>8</sup>

Taxpayers are required to maintain records adequate for the Department to determine their tax liability.<sup>9</sup> This includes records of the amounts of gross receipts and sales, from all sources, whether or not the receipts and sales are taxable, which must be supported by original source documents or records.<sup>10</sup> The required original source documents include, but are not limited to, all purchase invoices and contracts. If a taxpayer does not provide the Department with the records necessary to determine the tax due, the Department “shall proceed, in such manner as it may deem best, to obtain facts and information on which to base its estimate of the tax.”<sup>11</sup> The taxpayer bears the burden of proving that its tax liability is less than the Department’s assessment.<sup>12</sup>

Tax statutes must normally be construed “most strongly against the taxing authority.”<sup>13</sup> When interpreting exemption or deduction provisions, however, “the burden of showing qualification for tax benefit . . . rests with the taxpayer . . . [and] in the case of doubt or

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<sup>5</sup> RCW Chapter 82.08.

<sup>6</sup> RCW 82.04.050(1)(A).

<sup>7</sup> RCW 82.08.010(1)(a)(i).

<sup>8</sup> WAC 458-20-108, citing RCW 82.04.070 and 82.08.010.

<sup>9</sup> RCW 82.32.070.

<sup>10</sup> WAC 458-20-254(3)(a)(i).

<sup>11</sup> RCW 82.32.100(1).

<sup>12</sup> *Yong S. Hong dba Nor-Pac Distributors v. Dep’t of Revenue*, BTA, Docket No. 18-004 (2009).

<sup>13</sup> *Simpson Investment Company v. The Department of Revenue*, 141 Wn.2d 139, 3 P.3d 741, (2000) (citing *Group Health Coop. of Puget Sound, Inc. v. Department of Revenue*, 106 Wn.2d 391, 401, 722 P.2d 787 (1986)).

ambiguity, [the provisions are] to be construed strictly, though fairly, and in keeping with the ordinary meaning of their language, against the taxpayer.”<sup>14</sup>

#### ANALYSIS AND CONCLUSIONS

The issue in this appeal is whether the Taxpayer’s POB terminal transaction convenience fee surcharges are included in its “selling price” upon which retail sales tax is imposed and, thus, are part of the Taxpayer’s “gross proceeds of sales” subject to retailing B&O tax.

The Taxpayer contends that the POB convenience fee surcharges are not included in its “selling price” or “gross proceeds of sale” because the fees are paid directly to US Debit Services from the customer’s bank account for the convenient access to the customer’s bank funds.

The Taxpayer has an ATM and the POB terminal available for customers in the store. Customers, therefore, have the option to utilize the ATM and receive cash directly, or utilize the POB terminal and receive a receipt. The customer is not required to use the POB terminal to purchase merchandise from the Taxpayer and is not required to exchange the POB terminal receipt for merchandise. The Taxpayer asserts that customers are not required to exchange all or part of the POB terminal receipt for merchandise, although most POB transactions result in merchandise sales.

The Department does not dispute the Taxpayer’s assertion that the POB receipt can be exchanged for cash, but the Department maintains that, because most, if not all, POB transactions result in the purchase of merchandise, the convenience fee is a cost to the Taxpayer and is required to accomplish the merchandise sales that use a POB receipt.

First, the POB terminal transaction and the receipt exchange transaction are separate and distinct transactions. The POB terminal transaction does not define the receipt exchange transaction. Whether the receipt exchange results in a merchandise purchase, a gift, or other transaction, the receipt exchange transaction does not require the POB terminal transaction. The customer can accomplish a gift, merchandise purchase, or other transaction without the POB terminal transaction.

The POB terminal transaction is the customer’s choice and for the customer’s convenience. The convenience surcharge is a fee the customer agrees to pay to the entity that

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<sup>14</sup> *Id.* (citing *Group Health Coop of Puget Sound, Inc. v. Washington State Tax Comm’n*, 72 Wn.2d 422, 429, 433 P.2d 201 (1967)).

processes the customer's request for access to funds in the customer's bank account. Although the Department asserts that there is no notice to the customer at the POB terminal that the surcharge is paid to US Debit Services, the Department does not submit authority that such notice is required. Further, the Department does not dispute that the customer can decline to pay the surcharge and discontinue the POB terminal transaction. In addition, although the auditor states that no oral notice of a third party to the POB transaction was provided, the auditor does not indicate that a request was made to identify the recipient of the surcharge.

The Agreement signed by the Taxpayer with US Debit Services identifies the convenience fee as a surcharge and specifically states that the Taxpayer receives only \$0.25 per transaction. The most likely interpretation of the Agreement is that the surcharge is a convenience fee paid by the debit card holder to US Debit Services as compensation for processing the request for funds. Furthermore, the Agreement does not obligate the Taxpayer to pay the surcharge or otherwise directly compensate US Debit Services. The Taxpayer does not incur a legally enforceable expense for POB terminal transactions.

Furthermore, the POB terminal transactions are complete when the customer receives the receipt from the terminal. The Taxpayer has no control over which, of a number of possible transactions, the customer will choose to enter into with the POB terminal receipt. As a result, although the POB terminal transaction and use of the receipt to purchase merchandise are related transactions, they are two independent transactions.

First, the surcharge is income paid by the debit card holder to US Debit Services for the transaction processing services provided by US Debit Service to the debit card holder. The surcharge is not income received by the Taxpayer. Second, even if the surcharge is income received by the Taxpayer, it is not a necessary business expense incurred for the Taxpayer's sale of merchandise. Although the POB terminal transaction is related to the purchase of merchandise, it is not necessary. The customer may purchase by other means (cash in hand, cash from ATM, check, etc.) and may dispose of the POB terminal receipt without acquiring merchandise from the Taxpayer.

The Board concludes that the POB terminal surcharges are not part of the Taxpayer's gross retail selling price and are not an expense the Taxpayer must incur to make its retail sales. The Taxpayer does not, therefore, owe retail sales tax or retailing B&O tax on the POB terminal surcharges.

## DECISION

The Board sets aside the Department's Determination. The Department is hereby directed give full effect to the provisions of this decision.

DATED this 13<sup>th</sup> day of November, 2024.

### BOARD OF TAX APPEALS



MICHAEL S. TURNER, Tax Referee

### Right of Review

You may file an exception to this Proposed Decision.<sup>15</sup> The exception must be filed within 20 days of the date the Proposed Decision is issued.<sup>16</sup> You also must serve a copy of your exception on all other parties.<sup>17</sup> The exception must be filed and served by 5:00 p.m. Pacific Time on the due date.<sup>18</sup>

The exception must clearly state what evidence in the record supports the exception.<sup>19</sup> It may not exceed 3,000 words (approximately 6 pages) and must be typed and double-spaced.<sup>20</sup> No new evidence or arguments may be raised unless the written decision is based on a fact or facts that the parties did not already have an opportunity to address.<sup>21</sup>

Any party may submit a response to the exception within 14 days of the exception being served.<sup>22</sup> The Board will then issue a Final Decision. There is no reconsideration from the Board's Final Decision.

If no exception is filed, the Proposed Decision becomes final 20 days after it is issued.

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<sup>15</sup> WAC 456-10-730.

<sup>16</sup> WAC 456-10-730(2).

<sup>17</sup> WAC 456-10-410.

<sup>18</sup> WAC 456-10-410(1)(c) and (3)(b).

<sup>19</sup> WAC 456-10-730(3).

<sup>20</sup> WAC 456-10-415(1)(a-b) and (2)(d).

<sup>21</sup> WAC 456-10-730(3).

<sup>22</sup> WAC 456-10-730(4).