

THE BOARD OF TAX APPEALS
STATE OF WASHINGTON

BETTS PATTERSON & MINES, PS,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Respondent.

Docket No. 19-069

RE: Excise Tax Appeal

FINAL DECISION ON
MOTION FOR SUMMARY
JUDGMENT

This matter came before the Board of Tax Appeals (the Board), on October 14, 2021, Lisa Marsh, Vice Chair, presiding, with Board Chair Claire Hesselholt participating on the panel.¹ Brett Durbin, of Lane Powell PC, represented the Appellant, Betts Patterson & Mines, PS (Taxpayer or BPM). Andrew Krawczyk, Assistant Attorney General, represented the Respondent, State of Washington, Department of Revenue (Department). Rachel Le Mieux and Sonjia Barker of BDO USA, LLP, observed. The hearing record was kept open until October 22, 2021, for the parties to file proposed findings of fact and conclusions of law, pursuant to WAC 456-09-915.²

Pursuant to WAC 456-09-545 and the Board's Pre-Hearing Order, issued on March 31, 2021, the Department filed a motion for summary judgment. In response, the Taxpayer requested that the Board grant summary judgment to the Taxpayer, or in the alternative deny the Department's motion for summary judgment and proceed to a hearing. The Board heard the oral arguments of counsel and considered the written materials filed in this matter, including the following:

1. Department's Motion for Summary Judgment
2. Department's Exhibits Nos. R-1 through R-17
3. Taxpayer's Opposition to Respondent's Motion for Summary Judgment
4. Appellant's Exhibit No. A-1

¹ Rosann Fitzpatrick was appointed April 1, 2022, but has recused herself from this case due to her recent appointment to the Board from the Office of the Attorney General's Revenue Division.

² Both parties timely submitted proposed findings of fact and conclusions of law.

5. Declaration of Rachel A. Le Mieux in Support of Appellant’s Opposition to Department’s Motion for Summary Judgment
6. Declaration of Lawrence Gottlieb in Support of Appellant’s Opposition to Department’s Motion for Summary Judgment
7. Department’s Reply in Support of Summary Judgment

Based on the parties’ written submissions and oral arguments, the Board concludes that “there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law.”³ The Board grants in part the Department’s motion for summary judgment and grants in part the Taxpayer’s motion for summary judgment.

ISSUES

1. Is the legal advice that the Taxpayer provides to insurance companies sourced to the location of the insurance companies’ claim administration and legal departments under WAC 458-20-19402(303)(c)?
Short Answer: Yes.
2. Are the litigation and defense services that the Taxpayer provides to insurance companies sourced to the location of the insurance companies’ claim administration and legal departments under WAC 458-20-19402(303)(c)?
Short Answer: No.
3. Has the Taxpayer demonstrated that it is entitled to a refund of the business and occupation taxes it paid from June 1, 2010, through June 30, 2014?
Short Answer: Yes, in part; no in part.

FACTS, ARGUMENTS AND CONTENTIONS OF THE PARTIES

The Taxpayer, BPM, is a law firm with offices in Seattle, Washington and Portland, Oregon. BPM provides legal services to various clients, including insurance companies.

BPM seeks a refund of taxes paid from June 1, 2010, through June 30, 2014, which the Department denied in part. The present appeal revolves around the apportionment of revenues that BPM received from insurance companies for providing two distinct services: (1) client advice on insurance coverage opinions, and (2) insurance defense and claim litigation (collectively “litigation”). The first of these services includes advising on whether a claim must be covered under the insurance policy, and the second includes both defending insurance

³ WAC 456-09-545.

companies in lawsuits brought by policyholders against the insurance company, and representing insureds to reduce or eliminate liability related to the claim.⁴

Both parties agree that the income from these two activities is properly apportioned to the location “[w]here the customer received the benefit of the taxpayer’s service.”⁵

Furthermore, both parties agree that WAC 458-20-19402(303)(c) is the portion of the Department’s rule that would apply to the two business activities at issue in this case. That section provides that for legal services unrelated to property, the benefit of legal services provided to businesses is received where the customer’s “related business activity” occurs. Both parties agree the customer for both of BPM’s relevant business activities are the insurance companies.

Section 19402 of chapter 458-20 WAC (Rule 19402) also provides that most taxpayers will be able to attribute apportionable receipts to the location where the customer received the benefit of the taxpayer’s service because either the taxpayer will know where the benefit is actually received or a reasonable method of proportionally attributing receipts will generally be available. WAC 458-20-19402(301)(a)(i). The phrase “[r]easonable method of proportionally attributing” means a method of determining where the benefit of an activity is received and where the receipts are attributed that is uniform, consistent, and accurately reflects the market, and does not distort the taxpayer’s market.⁶

The parties agree the legal analysis for apportionment looks to “[w]here the customer’s related business activities occur”⁷ to determine where the benefit is received, and more specifically, where the taxpayer’s customers received the helpful or useful effect of the taxpayer’s services. *ARUP Laboratories, Inc. v. Dep’t of Revenue*, 12 Wn. App.2d 269, 282, 457 P.3d 492, *as amended* (2020), *rev. denied*, 196 Wn.2d 1006, 471 P.3d 212 (2020); *see LendingTree, LLC v. Dep’t of Revenue*, 12 Wn. App.2d 887, 460 P.3d 640 (2020)). Here the

⁴ Declaration Of Lawrence Gottlieb In Support Of Appellant’s Opposition To Department’s Motion For Summary Judgment (“Gottlieb Decl.”) ¶¶ 7-8.

⁵ RCW 82.04.462(3)(b)(i).

⁶ WAC 458-20-19402(106)(f).

⁷ WAC 458-20-19402(303)(c).

parties disagree on what facts are material for purposes of determining what the benefit is and where the benefit is received.

Prior to June 30, 2014, BPM did not apportion any of its revenues and reported all of its revenue as Washington gross income.⁸ In 2014, BPM reviewed its apportionment methodologies⁹ and BPM's accounting firm determined that BPM had overpaid its business and occupation (B&O) taxes during the June 1, 2010, to June 30, 2014, tax periods, and filed a refund claim in October 2014 requesting a refund of the overpaid B&O taxes.¹⁰

BPM bases the majority of its claim for a refund of \$651,374 on a methodology of apportioning its receipts that sources its receipts to the billing address of each insurance company. BPM explains that the billing address represents the claims administration and legal departments of its insurance company customers. BPM argues the claims administration department is where the customer receives the benefit of insurance coverage opinion services and the legal department is where the customer receives the benefit of insurance litigation and defense services.

The Department's auditors researched the matters identified in BPM's methodology and determined the billing address state was generally not the location where the policy holder was located, claim made or matter litigated. The Department disagrees that the billing address is the location where BPM's customers received the benefit of BPM's legal services. The Department asserts that the insurance companies are engaged in the business of selling insurance policies to end consumers, some of whom are in Washington; and BPM was hired to provide legal services to these insurance companies with claims on these policies. With respect to coverage opinions, the Department avers that while it is true that BPM delivers its opinion to its claims department, the insurance company would utilize it to approve or deny covering the claim, including Washington claims. With respect to insurance defense, the Department concedes that the legal

⁸ Declaration Of Rachel A. Le Mieux In Support Of Appellant's Opposition To Department's Motion For Summary Judgment ("Le Mieux Decl.") ¶ 5.

⁹ Le Mieux Decl. ¶ 6.

¹⁰ Le Mieux Decl. ¶¶ 12-13.

departments direct BPM, but asserts that the insurer received BPM's litigation services and its useful effects at the location where BPM's attorneys appeared in cases and handled the litigation for the insurance company or the policyholder, which includes Washington cases.

The Department held BPM's methodology of apportioning receipts was unreasonable where it was not the same state. The Department partially granted the refund, allowing \$51,668 of the \$651,374 based on the matter specific information it researched and application of the throw out-rule.¹¹

The Taxpayer appealed the Audit Division's denial of most of the refund request to the Department's Administrative Review and Hearings Division which upheld the assessment in Determination No. 18-0219.¹² BPM asked the Department for a reconsideration, which denied. The Taxpayer timely appealed to the Board.

On appeal, BPM argues the auditor's apportioning receipts is based on speculation and did not accurately reflect where the insurance products were sold to Washington individuals. It also argues that if a taxpayer is unable to determine where it receives the benefit of its services then it may apportion it based on where the customer ordered the service.

The Department responds to these arguments by pointing out that BPM bears the ultimate burden of establishing the excise tax refund due. Where the Department had matter level data, it reasonably and appropriately used it to determine the amount of refund allowed. Additionally, the Department asserts that BPM's proposed method of attributing receipts to the billing address distorted the market of where its customer's related business activities occurred and where it received the benefit of BPM's services. Furthermore, the Department argues that BPM did not meet its prima facie burden of establishing that it has no commercially reasonable means to acquire the information necessary to attribute the apportionable receipts. The Department argues that even if the Board were to accept BPM's argument that it was unable to

¹¹ The so-called throw-out rule is found in WAC 458-20-19402. WAC 58-20-19402(403) defines "throw-out income."

¹² Ex. R9-5.

apportion, it would be limited to those receipts where the Department had not found specific matter level information; and only after reapplication of the throw out rule to exclude states where BPM did not meet economic nexus thresholds.

APPLICABLE SUBSTANTIVE LAW

RCW 82.04.462 Apportionable income

(3) . . . (b) Except as otherwise provided in this section, for purposes of computing the receipts factor, gross income of the business generated from each apportionable activity is attributable to the state:

(i) Where the customer received the benefit of the taxpayer's service or, in the case of gross income from royalties, where the customer used the taxpayer's intangible property. When a customer receives the benefit of the taxpayer's services or uses the taxpayer's intangible property in this and one or more other states and the amount of gross income of the business that was received by the taxpayer in return for the services received or intangible property used by the customer in this state can be reasonably determined by the taxpayer, such amount of gross income must be attributed to this state.

WAC 458-20-19402 Single factor receipts apportionment – Generally

(106) **Definitions.** The following definitions apply to this rule:

(f) "**Reasonable method of proportionally attributing**" means a method of determining where the benefit of an activity is received and where the receipts are attributed that is uniform, consistent, and accurately reflects the market, and does not distort the taxpayer's market.

(301) **Attribution of receipts generally.** Except as specifically provided for in WAC 458-20-19403 for the attribution of apportionable royalty receipts, this Part 3 explains how to attribute apportionable receipts. Receipts are attributed to states based on a cascading method or series of steps. The department expects that most taxpayers will attribute apportionable receipts based on (a)(i) of this subsection because the department believes that either the taxpayer will know where the benefit is actually received or a "reasonable method of proportionally attributing receipts" will generally be available. These steps are:

(a) Where the customer received the benefit of the taxpayer's service (see subsection (302) of this rule for an explanation and examples of the benefit of the service);

(i) If a taxpayer can reasonably determine the amount of a specific apportionable receipt that relates to a specific benefit of the services

received in a state, that apportionable receipt is attributable to the state in which the benefit is received. When a customer receives the benefit of the taxpayer's services in this and one or more other states and the amount of gross income of the business that was received by the taxpayer in return for the services received by the customer in this state can be reasonably determined by the taxpayer, such amount of gross income must be attributed to this state. This may be shown by application of a reasonable method of proportionally attributing the benefit among states. The result determines the receipts attributed to each state. Under certain situations, the use of data based on an attribution method specified in (b) through (f) of this subsection may also be a reasonable method of proportionally attributing receipts among states (see Examples 4 and 5 below).

(303) **Benefit of the service explained.** The first two steps (subsection (301)(a)(i) and (ii) of this rule) used to attribute apportionable receipts to a state are based on where the taxpayer's customer receives the benefit of the service. This subsection explains the framework for determining where the benefit of a service is received.

(c) If the taxpayer's service does not relate to real or tangible personal property, the service is provided to a customer engaged in business, and the service relates to the customer's business activities, then the benefit is received where the customer's related business activities occur. The following is a nonexclusive list of business related services:

...

(iv) Legal and accounting services not specific to real or tangible personal property;

...

ANALYSIS AND CONCLUSIONS

Summary Judgment Standard. The purpose of summary judgment “is to avoid a useless trial.”¹³ Summary judgment is appropriate where “the written record shows [1] that there is no genuine issue as to any material fact and [2] that the moving party is entitled to judgment as a matter of law.”¹⁴ A *material fact* is one upon which the outcome of the litigation depends.¹⁵ The Board’s role, in this appeal, is to determine, in light of the facts and the applicable law,

¹³ *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963).

¹⁴ WAC 456-09-545; *see also* CR 56(c).

¹⁵ *Haines-Marchel v. Dep’t of Corrections*, 183 Wn. App. 655, 662, 334 P.3d 99 (2014).

whether either party is entitled to judgment as a matter of law. A genuine issue of material fact exists only if reasonable minds could differ on the facts that control the result of the litigation.¹⁶ In arguing cross-motions for summary judgment, the parties necessarily agree that there is no genuine issue of material fact that would make an evidentiary hearing necessary.¹⁷ Thus, the only issues left to be resolved are legal issues.

FINDINGS OF FACT

1. The Taxpayer is a law firm with offices located in Seattle, Washington and Portland, Oregon.
2. Among its services, the Taxpayer provides both client advice and litigation to insurance companies. This can include client advice on whether a claim must be covered under an insurance policy, litigation representing insureds to reduce or eliminate liability on behalf of the insurance company, or litigation defending insurance companies in lawsuits brought by policyholders against the insurance company.¹⁸
3. In the case of insurance coverage matters, the legal advice is received by insurance company employees working in the claims administration or legal departments of the insurance companies.
4. In the case of insurance litigation matters, the Taxpayer's litigation services are received and acted on from the locations where the litigation is, or would be, filed.

Any Conclusion of Law that should be deemed a Finding of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this appeal.¹⁹
2. The purpose of summary judgment "is to avoid a useless trial."²⁰

¹⁶ *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

¹⁷ *See Pleasant v. Regence Blue Shield*, 181 Wn. App. 252, 261, 325 P.3d 237 (2014), citing *Tiger Oil Corp. v. Dep't of Licensing*, 88 Wn. App. 925, 930, 946 P.2d 1235 (1997).

¹⁸ *Gottlieb Decl.* ¶¶ 7-8.

¹⁹ RCW 82.03.130.

²⁰ *Balise v. Underwood*, 62 Wn.2d at 199.

3. Summary judgment is appropriate where “there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law.”²¹
4. The Board’s role in this appeal is to determine, in light of the facts and the applicable law, whether either party is entitled to judgment as a matter of law. Factual issues may be decided on summary judgment when reasonable minds could reach but one conclusion from the evidence presented.²² A *material fact* is one upon which the outcome of the litigation depends.²³ A genuine issue of material fact exists only if reasonable minds could differ on the facts that control the result of the litigation.²⁴ In arguing cross-motions for summary judgment, the parties necessarily agree that there is no genuine issue of material fact that would make an evidentiary hearing necessary.²⁵
5. “[A]ny ambiguity in a tax statute is construed in favor of the taxpayer.”²⁶
6. Exemptions to a tax law, however, are narrowly construed, taxation is the rule and exemption is the exception.²⁷
7. The burden is on the taxpayer to show that it is entitled to a refund.²⁸
8. The primary objective of statutory construction is “to ascertain and carry out the intent of the Legislature.”²⁹
9. Washington’s business and occupation (B&O) tax is imposed upon every person “for the act or privilege of engaging in business activities.”³⁰ RCW 82.04.290(2) states that persons engaged in any business activity other than or in addition to those for which a specific rate is provided in RCW 82.04 are taxable under the service and other activities B&O tax classification upon gross income from such business.

²¹ WAC 456-09-545; *see also* CR 56(c).

²² *Lane v. Harborview Med. Ctr.*, 154 Wn. App. 279, 288, 227 P.3d 297 (2010).

²³ *Haines-Marchel*, 183 Wn. App. at 662.

²⁴ *Ranger Ins.*, 164 Wn.2d at 552.

²⁵ *See Pleasant v. Regence*, 181 Wn. App. at 261, citing *Tiger Oil*, 88 Wn. App. at 930.

²⁶ *Flight Options, LLC v. State, Dep't of Rev.*, 172 Wn.2d 487, 500, 259 P.3d 234 (2011).

²⁷ *Budget Rent-A-Car of Washington-Oregon, Inc. v. Dep't of Revenue*, 81 Wn.2d 171,174, 500 P.2d 764 (1972).

²⁸ *See Total Terminals International, LLC v. Dep't of Revenue*, BTA No. 10-079 (2011).

²⁹ *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009).

³⁰ RCW 82.04.220(1).

10. Apportionable income is gross income of the business generated from engaging in apportionable activities.³¹ Apportionable activities specifically include those taxed under RCW 82.04.290 the service and other activities B&O tax classification.³²
11. BPM provides legal services which are taxable under RCW 82.04.290 and therefore the income the taxpayer earned from the rendition of its services is subject to apportionment under RCW 82.04.460.
12. Under Washington’s single factor apportionment methodology a taxpayer’s apportionable income based on “[w]here the customer received the benefit of the taxpayer’s service.”³³
13. In the case of services provided to businesses that are not related to tangible personal property or real property, the benefit of the service is received “where the customer’s related business activities occur.”³⁴
14. The insurance companies that hire the Taxpayer are the customers for purposes of WAC 458-20-19402(303)(c).
15. The benefit of the Taxpayer’s services are received where the insurance companies’ “related business activities occur.”³⁵
16. The benefit that insurance companies receive from the legal advice provided by the Taxpayer is at their claims administration or legal department offices. Accordingly, the locations where the insurance companies receive legal advice are “where the customer’s related business activities occur.” The Taxpayer’s revenue from the client advice is properly apportioned to those locations.
17. The benefit of the insurance defense and other litigation services provided by the Taxpayer is received at the location where the litigation services were provided, that is, the jurisdiction where the settlement occurred, litigation was filed, or litigation occurred. Because the Taxpayer used the location of the insurance companies’ claims administration or legal department to also apportion the revenue it received from litigation activities, the Taxpayer did not correctly apportion these revenues in its refund

³¹ RCW 82.04.460(4)(a).

³² RCW 82.04.460(4)(a)(vi).

³³ RCW 82.04.462(3)(b)(i).

³⁴ WAC 458-20-19402(303)(c).

³⁵ *Id.*

request, and the Department was correct in ascribing the litigation services to the jurisdiction handling the matter.

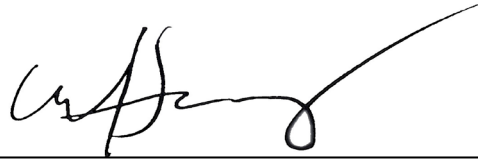
Any Finding of Fact that should be deemed a Conclusion of Law is hereby adopted as such.

DECISION

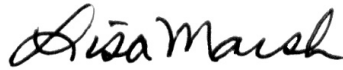
For the forgoing reasons, and pursuant to WAC 456-09-545, the Board hereby grants the Department's Motion for Summary Judgment in part, and grants the Taxpayer's motion in part. The matter is remanded to the Department to re-calculate the assessment from Determination No. 18-0219 in accordance with this Decision.

ISSUED July 28, 2022.

BOARD OF TAX APPEALS



CLAIRE HESSELHOLT, Chair



LISA MARSH, Vice Chair

Right of Reconsideration of a Final Decision

Pursuant to WAC 456-09-955, you may file a petition for reconsideration of this Final Decision. You must file the petition for reconsideration with the Board within 14 calendar days of the date of mailing of the Final Decision. The petition must state the specific grounds upon which relief is requested. You must also serve a copy on all other parties and their representatives of record in compliance with WAC 456-09-345.

A party opposing a petition for reconsideration must, within 10 calendar days of the date the petition for reconsideration was served, submit to the Board a response together with proof of service pursuant to WAC 456-09-345.

The petition shall be deemed denied if, within 30 calendar days from the date the petition is received by the Board, the Board does not either accept or deny the petition. The Board may require the parties to submit briefs or to appear and present oral argument.

Please be advised that a party petitioning for judicial review of a Final Decision is responsible for the reasonable costs incurred by this agency in preparing the necessary copies of the record for transmittal to the superior court. Charges for a transcript of the board's hearing may be payable separately to the transcriptionist.