THE BOARD OF TAX APPEALS
STATE OF WASHINGTON

VALENTE SOLUTIONS LLC, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Respondent.	Docket No. 19-156 RE: Excise Tax Appeal FINAL DECISION

This matter came before the Board of Tax Appeals (Board), on April 13, 2023, Claire Hesselholt, Chair, presiding, with Board Member Matthew Randazzo on the panel.[1] Scott M. Edwards and and Daniel A. Kittle, of Lane Powell, PC, represented the Appellant, Valente Solutions LLC (Taxpayer). Charles Zalesky, Assistant Attorney General, represented the Respondent, State of Washington Department of Revenue (Department). Patricia Wertheimer, President of Valente Solutions, testified for the Taxpayer. Lizeth Mogollan, Revenue Auditor, testified for the Department. Joann Jordan observed for the Department. The hearing record was kept open until May 1, 2023, for the parties to file proposed findings of fact and conclusions of law, pursuant to WAC 456-09-915.[2]

The Department objected to an exhibit filed the day of the hearing, Exhibit A92. The Taxpayer explained that Exhibit A92 is a demonstrative exhibit and that all the data in the exhibit comes from other, previously filed exhibits. The Department argued that there was no proper foundation for the exhibit, and that the exhibit appeared to contradict the Taxpayer's answer to interrogatory number eight, part of the prior discovery.[3] The Board agreed to allow Exhibit A92 to be used for demonstrative purposes but not as substantive evidence.

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

[1] Board Member Rosann Fitzpatrick was recused from this case because of her prior position in the Revenue Division of the Office of the Attorney General.
[2] Both parties timely submitted proposed findings of fact and conclusions of law.
[3] Exhibit R12-3.

ISSUES

FINDINGS OF FACT

1. The Taxpayer is a Washington limited liability company with its main office in Bellevue, Washington, and another location in California.[4]
2. The Taxpayer provides information technology services, primarily involving "translating client websites into foreign languages, creating and updating customer-facing websites, providing support for product launches in foreign markets, merchandising support, and website management."[5]
3. Between January 2011 through March 2015, the Taxpayer paid $454,890 in business and occupation (B&O) tax to Washington.[6]
4. In September 2015, the Taxpayer filed a refund claim with the Department, asserting that it had not correctly apportioned its income and was due a refund of $403,776.[7]
5. The Department granted the Taxpayer's refund request in part, providing a B&O tax refund of $96,275.[8]
6. The Taxpayer appealed the denial of the bulk of the refund request to the Department's internal appeals unit, which denied the appeal in May 2019.[9] That denial was upheld in August 2019.
7. The Taxpayer timely filed an appeal to this Board, requesting a refund of $307,500 in service and other (service) B&O tax, plus interest.[10] The Taxpayer filed an amended Notice of Appeal in May 2022, asserting a refund of $335,527 in tax.[11] At the hearing, the Taxpayer requested a refund as follows: $237,414, arguing that all Microsoft-related

[4] Exhibit R2-2.
[5] *Id.*
[6] Department's Hearing Brief, at 2.
[7] Exhibit R2-2.
[8] Exhibit R8-1. The actual refund amount was $93,195, because the B&O refund was offset by a use tax liability and increased by applicable interest.
[9] Exhibit R9.
[10] Taxpayer's Notice of Appeal dated September 23, 2019.
[11] Taxpayer's Amended Notice of Appeal dated May 19, 2022.

localization income should be assigned zero percent to Washington; $6,380 for double-counted income: and $17,886 for revised 2015 income, for a total refund of $293,610.[12,13]

8. In its proposed Findings of Fact and Conclusions of Law, the Taxpayer revised its refund calculation to $253,728 in service B&O tax, consisting of $237,414 for localization service income, $6,380 for double-counted income, and $9,484 for 2015 income.
9. Ms. Wertheimer is the founder and President of the Taxpayer and testified on its behalf.[14]
10. Ms. Wertheimer testified that, during the period at issue, the Taxpayer focused on localization service, which involves adapting a product, content or messaging to meet the requirements of a specific locale.[15] Ms. Wertheimer described "localization" as more than just translating the message, but also reviewing the words, images, and colors so that the localized content appealed to the target market, that is, the customers in the country.[16]
11. The Taxpayer is primarily disputing the taxation of the localization services provided for Microsoft during the audit period.[17]
12. Ms. Wertheimer testified that the Taxpayer contracted with Microsoft in Redmond, but that the statements of work (SOWs) were managed by the local subsidiaries and the websites for which the work was done were all located in the subsidiaries' countries.[18]
13. Ms. Wertheimer testified that the Taxpayer paid income taxes in California when working for Google, but no income or business taxes in any other state or country.[19]
14. Ms. Wertheimer testified that she prepared and filed the Taxpayer's Washington tax returns during the audit period.[20] She testified that the initial refund claim was prepared by an outside firm, and she was unaware of how that firm calculated the refund amount.[21]

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[12] Taxpayer's opening arguments, Hearing Recording 1 at approximately minute 27. Also see Exhibit A68-3-A68-9, dated April 11, 2023.
[13] The Board notes that the numbers provided do not add up to the total requested, nor do they match Exhibit A92's demonstrative exhibit total.
[14] Hearing recording 1, at 36 minutes.
[15] Hearing recording 1, at 38 minutes.
[16] *Id.*
[17] *See* footnote 12.
[18] Hearing Recording 1, at 49 minutes.
[19] Hearing Recording 2, at 2 minutes and again at 29 minutes.
[20] Hearing Recording 2, at 3 minutes.
[21] Hearing Recording 2, at 7 minutes, Exhibit R2.

15. Ms. Wertheimer testified that she prepared and filed the Taxpayer's Washington tax returns during the audit period.[22] She testified that the initial refund claim was prepared by an outside firm, and she was unaware of how that firm calculated the refund amount.[23]
16. Ms. Wertheimer testified that the Taxpayer operated on a cash basis during the audit period.[24] Exhibit A78 shows the general ledger, with a final entry of "GJE" described as "to record A/R for year end" as accounts receivable, in the amount of $425,366.
17. Interrogatories No. 8 and 9 explained that the amended refund request was all the Taxpayer's B&O tax paid, less the amount already refunded, and that the denominator excluded throw-out income where the Taxpayer was not subject to tax, and Ms. Wertheimer confirmed that in her testimony.[25]
18. Ms. Wertheimer testified that the Taxpayer is now contesting only the receipts from localization services, and no longer arguing about non-localization services.[26]
19. Ms. Wertheimer testified that the SOW in Exhibit 80 was work for multiple "Tier I" European countries, including France, Germany, United Kingdom, Portugal, Ireland, Spain, and Italy.[27]
20. Ms. Wertheimer testified that the SOW in Exhibit A31 was work for France.[28]
21. Ms. Wertheimer testified that the SOW in Exhibit 81 was work for Tier I European countries.[29]
22. Ms. Mogollan has been with the Department of Revenue for 16 years and is currently a Revenue Auditor III.[30]
23. Ms. Mogollan testified that the Taxpayer provided 97 SOWs, 83 of which were within the refund period.[31]
24. Ms. Mogollan testified that the Summary of SOWs contained in Exhibit A68-3-9, filed April 11, 2023, took the first four columns were from information provided in Exhibit R3. The Audit Division (Audit) populated the remainder of the table, which included

[22] Hearing Recording 2, at 3 minutes.
[23] Hearing Recording 2, at 7 minutes, Exhibit R2.
[24] Hearing Recording 1, at 1:37.
[25] Exhibit R12 -3, Hearing Recording 2 at 22-23 minutes.
[26] Hearing Recording 2 at 24 minutes and 26 minutes, where it was confirmed by Taxpayer's counsel.
[27] Hearing Recording 2 at 32 minutes.
[28] Hearing Recording 2 at 34 minutes.
[29] Hearing Recording 2 at 35 minutes.
[30] Hearing Recording 2 at 47 minutes.
[31] Hearing Recording 2 at 58 minutes.

auditor notes, where the work was attributed, the Washington percentage, and yearly receipts columns.[32]

25. Ms. Mogollan testified that Audit did not accept the refund request's attribution of income, but instead made its own determination of attribution based on the language of the SOWs.[33]
26. Ms. Mogollan testified that the SOW represented in line 3 of Exhibit A68-4 was attributed to Washington because Audit concluded that the service provided by the Taxpayer was to the benefit of the Microsoft team it worked with, and there were no marketing services provided that could be attributed to a foreign market.[34]
27. Ms. Mogollan testified that she would categorize Exhibit A4 as "product development and related to team management" and that she did not find anything in the enumerated list of tasks related to marketing.[35]
28. Ms. Mogollan testified that Exhibit R13 shows the calculation of the apportionment factor for the Taxpayer.[36] She testified that the calculation is the Washington apportioned receipts from Schedule C divided by worldwide income less throw-out income shown in Schedule E.[37]
29. Ms. Mogollan testified that the decisions on attribution for the SOWs were based on the entirety of the documents, particularly the description of the duties and deliverables.[38] She also testified that Audit had requested additional information that could have been used to substantiate the Taxpayer's attribution method, but none was provided.[39]
30. Ms. Mogollan testified that she believed that the decisions regarding the attributions were all based on where Audit determined that the customers received the benefit of the service.[40]
31. On redirect, Ms. Wertheimer testified that that localization is only for global releases; their resources are used to market Microsoft's products to a global audience.[41]

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[32] Hearing Recording 2 at 1:07, Exhibits R3 and A68 – dated April 11, 2023.
[33] Hearing Recording 2 at 1:09.
[34] Hearing Recording 2 at 1:10, Exhibit A68-4, Exhibit A81.
[35] Hearing Recording 2 at 1:21, Exhibit A4; also Hearing Recording 3 at 1:12.
[36] Hearing Recording 2 at 1:23, Exhibit R13.
[37] Hearing Recording 2 at 1:25, Exhibit R13, Exhibit A68 (filed March 6, 2023).
[38] Hearing Recording 3 at 27 minutes.
[39] Hearing Recording 3 at 28 minutes.
[40] Hearing Recording 3 at 1:27.
[41] Hearing Recording 4 at 2 minutes.

32. Ms. Wertheimer testified that the Taxpayer had a presence in every country for which it took on projects; when it did not have a presence, or vendors, it did not take on the project.[42] The nature of the presence was not specified.
33. Ms. Wertheimer testified that the Taxpayer is not a development company; it is a marketing company and steps in when the customer's product is ready to go global.[43]
34. Ms. Wertheimer testified that the engineering services mentioned in the Exhibit 4 SOW is related to translation, language, tones, and bugs, and she reiterated that the Taxpayer does not "do development."[44]
35. The Taxpayer agrees that its activities fall within the service B&O classification; during the audit period, service was apportioned to Washington under the single-factor receipts apportionment formula in RCW 82.04.462. Under that statute, the income is assigned to Washington when the customer receives the benefit of the taxpayer's services in Washington.[45] WAC 458-20-19402 (Rule 19402), the benefit of services provided to a customer are attributed to where the customer's related business activities occur.[46]
36. The Taxpayer asserts that the parties agree that, for localization services related to marketing, the benefit is received in the market for which the content is localized.[47]
37. As a result, the Taxpayer argues that all the localization services for Microsoft should be zero percent to Washington.
38. The Department argues that the Taxpayer has the burden to show both that the Department's calculations were erroneous and to prove the correct amount of refund owed.[48]
39. The Department asserts that the Taxpayer has not provided a calculation that properly applies the throw-out rule and that they have not properly applied the first cascading step

[42] Hearing Recording 4 at 3 minutes.
[43] Hearing Recording 4 at 4 minutes.
[44] Hearing Recording at 7 minutes.
[45] Hearing Recording 4, at 11 minutes.
[46] Hearing Recording 4, at 12 minutes, WAC 458-20-19402(3)(c).
[47] Hearing Recording 4, at 13 minutes.
[48] Hearing Recording 4, at 16 minutes.

in RCW 82.04.462, which, during most of the audit period, required attribution to a single state.[49]

40. The Department argues that the invalidation of proportional attribution in the rule means that the statutes' plain language applies.[50] If the activity cannot be attributed to a single state (or foreign country), then the attribution is to Washington.[51]
41. In addition, the Department asserts that the Taxpayer has not shown any calculation that properly applies the throw-out rule; the purpose of apportionment is not to create "no-where" income, not taxable in any state or country.[52] A throw-out rule makes the denominator of the apportionment calculation the gross income attributable to states where tax returns are filed or where the taxpayer has nexus. The Taxpayer has not shown any computation with a throw-out rule.[53]
42. The Department concedes that Audit only applied the throw-out rule to some of the income, rather than all the income.[54]
43. The Department argues that it is a fatal flaw in the Taxpayer's refund request that it has not proven the correct amount of refund owed, even if the auditor got the categorization of the SOWs wrong.[55]
44. The Taxpayer argues that the *AT&T* case is not applicable; if the benefit is received 50 percent or more in one jurisdiction it goes entirely to that jurisdiction, and if the benefit is received in one country the benefit goes to that country.[56]
45. The Taxpayer argues that, when localization is done for more than one country, it is 100 percent for each of those countries and *AT&T* is not triggered.[57]
46. The Taxpayer also asserts that "throw-out" is not triggered because it had physical presence in every foreign jurisdiction in which it operated.[58]

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[49] Hearing Recording 4, at 17 minutes.
[50] *Id, AT&T Services, Inc., v. Dep't of Revenue*, Thurston County Superior Court Docket No. 19-2-06196-34 (May 24, 2021).
[51] Hearing Recording 4, at 18 minutes.
[52] Hearing Recording 4, at 19 minutes.
[53] Hearing Recording 4, at 20 minutes.
[54] Hearing Recording 4, at 22 minutes.
[55] Hearing Recording 4 at 23 minutes.
[56] Hearing Recording 4 at 26 minutes.
[57] *Id.*
[58] *Id.*

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

CONCLUSIONS OF LAW

1. Pursuant to RCW 82.03.130(1)(a), the Board has jurisdiction to hear and decide this appeal.
2. The B&O tax is imposed on every person for "the act or privilege of engaging in business activities" in the state.[59] A business engaged in service-taxable activities in more than one jurisdiction is entitled to apportion its gross income among the various jurisdictions in which it does business.[60]
3. In 2010, the legislature changed the state's method of apportionment for most service income to a single-factor sales apportionment formula.[61] The numerator of the receipts factor is the gross income of the business attributed to Washington, and the denominator of the factor is the total gross apportionable income everywhere.[62]
4. Gross income is attributed to Washington if the business's customer received the benefit in Washington.[63]
5. The statute provides a hierarchy to determine what income it attributed to Washington and included in the Washington numerator. For periods prior to June 12, 2014 (when the statute was amended), those steps were:
    i. If the taxpayer's customer received the benefit of the service in only one state, the gross income is attributed to that state.
    ii. If the taxpayer's customer received the benefit of the service in more than one state, the gross income is attributed to the state where the benefit was primarily received.
    iii. When the taxpayer is unable to attribute the gross income under either of the first two steps, the gross income is attributed to the state from which the customer ordered the service.

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[59] RCW 82.04.220.
[60] RCW 82.04.460(1).
[61] Laws of 2010, 1st Spec Sess, ch. 23, s.101(2)(b).
[62] RCW 82.04.462(3)(a).
[63] RCW 82.04.462(3)(b)(i).

iv. When the taxpayer is unable to attribute the gross income under the first three steps, the gross income is attributed to the state to which the billing statements or invoices are sent to the customer.

v. When the taxpayer is unable to attribute gross income under the first four steps, the gross income is attributed to the state from which the customer sends payment to the taxpayer.

vi. When the taxpayer is unable to attribute gross income under the first five steps, the gross income is attributed to the state where the customer is located as shown by its address.

vii. When the taxpayer is unable to attribute gross income under the first six steps, the gross income is attributed to the taxpayer's commercial domicile.[64]

6. The statute provides that "[g]ross income of the business from engaging in an apportionable activity must be excluded from the denominator of the receipts factor if, in respect to such activity, at least some of the activity is performed in this state, and the gross income is attributable under (b) of this subsection (3) to a state in which the taxpayer is not taxable."[65]
7. A taxpayer is "not taxable" in a state if it is not subject to a business activities tax in that state, but it is considered taxable if it has "substantial nexus" with that state, even if no tax is imposed.[66]
8. During the audit period, a taxpayer had "substantial nexus" when it "(a) is a resident or domiciliary of the state; (b) is organized or commercially domiciled in the state; or (c) had more than fifty thousand dollars of property or payroll in the state or more than two hundred fifty thousand dollars of receipts from the state."[67] The Board finds that no evidence was introduced to show that the Taxpayer had nexus in any state or country other than Washington or California.

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[64] RCW 82.04.462(3)(b) (2012). This "cascading" method of attributing gross income assures that all amounts received are attributed somewhere.
[65] RCW 82.04.462(3)(c).
[66] RCW 82.04.462(3)(c).
[67] RCW 82.04.067(1), prior to 2015 amendments.

9. For most of the audit period, the Department allowed taxpayers with receipts attributable to multiple states to assign the receipts proportionally to those states through its rule, WAC 458-20-19402 (Rule 19402).[68] The Thurston County Superior Court found that the rule's authorization of proportional attribution was invalid for the period prior to the law change in 2014.[69] The statutory change was effective June 12, 2014.[70]
10. After the statute was revised, proportional attribution was statutorily allowed.[71]
11. Taxes are presumed valid, and the burden is on the taxpayer to show that the Department's assessment is incorrect.[72]
12. The Taxpayer provided sworn testimony that the SOWs identified as "localization" by its original accountants were all done for the benefit of Microsoft subsidiaries in other countries.[73] The Taxpayer provided sworn testimony regarding three of the SOWs provided; that testimony noted that Exhibits 80 and 81 were for work done in multiple European countries, and that Exhibit 31 was for work done in France.[74] Other than the testimony regarding Exhibit 31, no specific evidence or testimony attributed the localization work to a "primary" or "single" country. [75]
13. Under the version of RCW 82.04.462(3)(b) in effect prior to June 12, 2014, a Taxpayer attributed the income to one state (or country) if the benefit was received in that state; when the customer received the benefit of a service in multiple states, the Taxpayer attributed the income to the state where the customer *primarily* received the service. For periods prior to June 12, 2014, the Taxpayer has not shown that the Department's attribution of income is incorrect.
14. The Board concludes that the evidence, including the testimony of Ms. Wertheimer, does not establish that Microsoft received the benefit of Valente's localization service in a specific state, or primarily in a specific state. While a foreign country is a "state" for purpose of the apportionment statute, the Taxpayer still has the burden of establishing

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[68] Exhibit R11*, AT&T Services, Inc., v. Dep't of Revenue*, Thurston County Superior Court Docket No. 19-2-06196-34 (May 24, 2021).
[69] Exhibit 11-6.
[70] Laws of 2014, ch. 97, s. 304.
[71] *Id.*
[72] *Space Age Fuels, Inc. v. Dep't of Revenue*, 178 Wn. App. 756, 762, 315 P.3d 604 (2013).
[73] See Finding of Fact 12.
[74] *See* Findings of Fact 17, 18, and 19.
[75] *See* Exhibit A68-7, line 53. The Department attributed zero percent of the income from Exhibit 31 to Washington.

which foreign country received the benefit of its localization service with respect to each Microsoft SOW.[76]

15. From June 12, 2014, forward, the statute allowed proportionate attribution when the Taxpayer's work provided benefits in multiple states, and the Board finds that proportionate attribution for work done after that date is appropriate. No evidence has been provided, however, to show which of the disputed transactions listed took place in the relevant period, or to where the transactions should be assigned. The Board "will not sort through raw data, no matter how germane, in order to support a party's position."[77] The Taxpayer has 30 days from the date of this decision to present evidence to the Department to support its attributional claims for periods after June 12, 2014, through the end of the audit period, for adjustment.
16. The Board finds that the Department's analysis of the throw-out rule is correct under the law and if it has to be applied, gross income not subject to tax in any state or country is not included in the denominator of the receipts factor.
17. The Taxpayer argued that proportionate attribution is not required because the localization revenue is attributable 100 percent to the country in which the benefit was received and that the decision in *AT&T* is thus not relevant. Two of the SOWs discussed by the Taxpayer assigned work to multiple countries, and *AT&T* made clear that, at that time, the law required that work be assigned to a single state or location for apportionment purposes.[78]
18. The Taxpayer also argued that the amount asserted as taxable as "GJE," or general journal entry, was merely an accounting entry and did not represent income in 2014. The Board finds that, in this instance, accounting entries are not income, but it notes other "GJE" entries in the audit period and finds that any adjustments are attributable to all such entries.[79]

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

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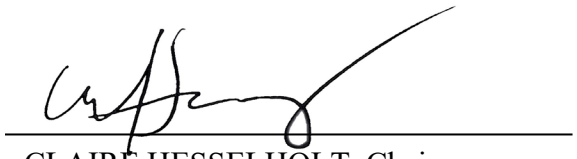
[76] RCW 82.04.462(5)(b),
[77] *Hancock v. Gassaway*, BTA Docket No. 57028 (2002).
[78] Exhibit R11-6.
[79] *See* Exhibit A68, Workpaper B.

DECISION

For the forgoing reasons, and pursuant to RCW 82.03.130(1)(a) and .190, the Board affirms, in part, the Department's Determination No. 19-0128. The Board agrees that the Taxpayer is entitled to a refund of tax asserted on net amounts labeled as "GJE." The Taxpayer may be entitled to a refund for taxes paid on amounts designated as "Microsoft localization" in Exhibit A68 for the period June 12, 2014, through the end of the audit period, provided that the Taxpayer can provide evidence to support its claims within 30 days of the date of this decision. This matter is remanded to the Department for actions consistent with this opinion.

ISSUED October 27, 2023.

BOARD OF TAX APPEALS



CLAIRE HESSELHOLT, Chair

MATTHEW RANDAZZO, Member

Right of Reconsideration of a Final Decision

You may file a petition for reconsideration of this Final Decision.[80] The petition must be filed within 14 days of the date the Final Decision is issued.[81] You also must serve a copy of your petition on all other parties.[82]

[80] WAC 456-09-955.
[81] WAC 456-09-955(2).
[82] WAC 456-09-345.

The petition must clearly state the specific grounds for relief.[83] It may not exceed 3,000 words (approximately 6 pages) and must be typed and double-spaced.[84] 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.

Any party may submit a response to the petition within 10 days of the petition being served.[85] The Board will either accept or deny the petition within 30 days.[86]

Note that when an appeal is made to superior court, the appealing party is responsible for ordering and paying for a transcript of the Board's hearing.[87]

[83] WAC 456-09-955(2).
[84] WAC 456-09-557(1)(a-b) and (2)(d).
[85] WAC 456-09-955(3).
[86] WAC 456-09-955(4).
[87] WAC 456-09-960.