Cite as 11 WTD 55 (1990).

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 90-205
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .

[1] RULE 107: RCW 82.04.270 AND RCW 82.04.060 -- B&O TAX -- SALE AT WHOLESALE -- WARRANTY SERVICES. Warranty repairs are sales of services at wholesale when performed by a dealership for a manufacturer-warrantor. The dealership doing the repair is B&O taxable on the value of the services provided.

[2] RULES 107 AND 111: RCW 82.04.270 AND 82.04.060 -- B&O TAX -- SALE AT WHOLESALE -- WARRANTY SERVICES -- PARTS --REIMBURSEMENT. Amounts received by a dealership from a manufacturer-warrantor for parts furnished in connection with warranty repair services are taxable under the wholesale classification of the B&O tax.

[3] RULE 115: RCW 82.04.040 AND RCW 82.04.060 -- SALE AT WHOLESALE -- WHAT CONSTITUTES. Taxable sales at wholesale result when dealership resells wheels and axles back to the manufacturer after they are used to deliver mobile homes. Resales of wheels and axles are not returns on deposit because the dealership acquires ownership. ACCORD: ETB 167.04.115 and Inland Dairy v. Department of Revenue, 14 Wn.App 592 (1975).

[4] RULE 145: RCW 82.08.050 -- LOCAL SALES TAX -- DUTY TO COLLECT -- LACK OF KNOWLEDGE OF ANNEXATION. A business has a duty to collect local option sales tax on sales after annexation into city limits even though the annexation was unknown to the business.

[5] RULE 244: RCW 82.04.220 AND RCW 82.04.140 -- B&O TAX -- SERVICE AND OTHER -- COMMISSION INCOME. Dealership that receives fees from banks for referrals is taxable on the fees as commission income under the Service and Other classification of the B&O tax.

[6] RULE 288: RCW 82.32.050 AND RCW 82.32.105 -- WAIVER OF INTEREST -- CIRCUMSTANCES BEYOND TAXPAYER'S CONTROL -- SERIOUS ILLNESS OF OFFICERS OF TAXPAYER. The illness of corporate taxpayer's officer is not one of the two circumstances listed in Rule 228 which will justify the waiver of interest. ACCORD: Det. 87-353, 4 WTD 317 (1987).

[7] RULE 288: RCW 82.32.105 -- WAIVER OF PENALTIES -- CIRCUMSTANCES BEYOND TAXPAYER'S CONTROL -- MISTAKE OF BOOKEEPER. A late payment of tax resulting from the error of an employee is not one of the seven circumstances listed in Rule 228 which will justify the waiver of penalties. ACCORD: Dets 87-302, 4 WTD 107 (1987) and 87-343, 4 WTD 257 (1987).

These 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.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: November 19, 1987

NATURE OF ACTION:

Taxpayer petitions for correction of assessment of tax resulting from an audit of its mobile home sales business.

FACTS:

Heller, A.L.J. (successor to Potegal, A.L.J.) -- The taxpayer is engaged in the business of selling new and used mobile homes. The Department of Revenue ("Department") conducted an audit of the taxpayer's records for the period January 1, 1983 through September 30, 1986. As a result of the audit, the Department issued a notice of assessment in the amount of $ . . . . The taxpayer now appeals certain aspects of the assessment.

When new mobile homes are delivered to the taxpayer from the manufacturer, the taxpayer is charged separately for the wheels and axles. In the past, the wheels and axles were furnished free of charge by the manufacturer on the understanding that they were the property of the manufacturer to be returned following the ultimate sale of the mobile homes. When the wheels and axles were not returned, the manufacturers began charging the dealers for them upon the delivery of the mobile home. The manufacturers will buy the wheels and axles back from the dealers, but the dealers assume the risk of loss or damage. The auditor concluded that the sale of the wheels and axles to manufacturers was a taxable sale at wholesale.

As a dealer, the taxpayer is authorized by manufacturers to perform warranty repairs on the mobile homes it sells. The dealer passes the cost of labor and materials furnished in connection with warranty service on to the manufacturer with no mark-up. Most replacement parts used in warranty service are provided by the manufacturer. Under certain circumstances, the taxpayer purchases the necessary parts and passes the cost on to the manufacturer. The auditor treated the warranty service and the furnishing of parts as taxable sales at wholesale.

[In May of 1986], the city of . . . [Washington] annexed the taxpayer's business location into the city limits. Unaware of the annexation, the taxpayer failed to collect the local option sales tax on sales of mobile homes made after the annexation. The auditor assessed additional retail sales tax on these sales.

The taxpayer receives income from financial institutions that finance the purchase of mobile homes by the taxpayer's customers. Apparently, these amounts are in the nature of a referral fee and are reflected in the taxpayer's records as "dealer reserves." The auditor assessed tax under the Service and Other classification of the business and occupations tax on unreported dealer reserves.

TAXPAYER'S EXCEPTIONS

The taxpayer's exceptions are set forth in its petition as follows:

> 1) [The taxpayer], specifically requested (sic) review of the wholesaling tax on warranty sales imposed for the 1983, 1984, 1985 and 1986 tax

years. The Department of Revenue is double taxing [the taxpayer] for reselling axles and wheels they have already paid for from the manufacturers. Further, [the taxpayer] does warranty repair work for the manufacturer, as a convenience to the manufacturer and merely passes along the charge without profit, to the manufacturer.

2) Local sales tax increases after annexation. [The taxpayer] was annexed into the city of . . . [in May of 1986] and as a result, a different tax structure was imposed. [The taxpayer] had no actual notice of the annexation date and therefore did not charge their customer the additional local taxes. [The taxpayer] should not be taxed prior to their actual notice of the change in the tax structure.

3) Service Tax on Finance Reserve. [The taxpayer] should not be taxed on the amount of money they receive when they sell a contract to a financial institution. They are already taxed on gross sales and as such would be double taxed if taxed upon the amount they receive from a financial institution for the sale of this contract.

4) [The taxpayer] specifically appeals the late payment and interest charges on delinquent retail sales for the years 1983 and 1984. The failure to pay the taxes was the result of a serious illness of the taxpayer.[1]

5) [The taxpayer] specifically appeals the penalty on delinquent retail sales tax for March of 1986. The reporting was made on time, but the new bookkeeper of [the taxpayer] failed to insert a check for payment of the taxes. Once [the taxpayer] was advised of the failure to include a check with the report a check was immediately issued.

DISCUSSION

[1] Warranty Sales. The Washington State business and occupation tax is imposed upon all sales at wholesale pursuant to the provisions of RCW 82.04.270. RCW 82.04.270 provides in part as follows:

> (1) Upon every person except persons taxable under subsections (1) or (8) of RCW 82.04.260 engaging

[1] The taxpayer seeks only the waiver of interest as no penalty was assessed on the amount related to this exception.

> within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of forty-four one-hundredths of one percent . . . .

For purposes of RCW 82.04.270, a "sale at wholesale" is defined as:

> . . . any sale of tangible personal property . . . which is not a sale at retail and means any charge made for labor and services rendered for persons who are not consumers, in respect to real or personal property, if such charge is expressly defined as a retail sale by RCW 82.04.050 when rendered to or for consumers . . .
> (Emphasis supplied.)

RCW 82.04.060.

According to RCW 82.04.060, a "retail sale" includes: "the sale of or charge made . . . for labor and services rendered in respect to . . . [t]he installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers."

The dealer sells mobile homes with manufacturer's warranties. If a customer discovers a defect covered by the warranty, the taxpayer will perform the required warranty work on behalf of the manufacturer. This service is performed in fulfillment of the manufacturer's warranty agreement. For this purpose, the customer is the consumer of the warranty service as the owner of the mobile home being repaired. Therefore, the payment received by the taxpayer for the warranty services constitutes a taxable sale at wholesale. The taxpayer performs repair services on behalf of the manufacturer which if performed for consumers would be taxable as a retail sale, thus satisfying the provisions of RCW 82.04.060. Whether the taxpayer provides these services to the manufacturer at a profit is irrelevant to the determination of whether the tax is imposed on gross receipts, not on profits.

[2] We consider next the taxability of the purchase, on behalf of the manufacturer, of parts and supplies used in performing warranty service. Both RCW 82.04.270 and RCW 82.04.060 provide for the taxation of the sale of tangible personal property. However, WAC 458-20-111 ("Rule 111)

provides an exemption from tax of amounts received by a taxpayer as reimbursement of an advance provided the amount so received is in accordance with the regular and ordinary course of the taxpayer's business or profession. Rule 111 also provides:

> . . . 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 . . . (3) a garage for furnishing parts in connection with repairs . . .
> (Emphasis supplied.)

The warranty work conducted by the taxpayer falls squarely within example (3) of Rule 111, and therefore, is not an exempt reimbursement. As in the case of sales of warranty repairs to a manufacturer constitute taxable sales at wholesale. Again, it is not determinative that the taxpayer does not make a profit on the sale of these parts and supplies.

[3] Next the taxpayer argues that its resale of wheels and axles back to the manufacturer are not taxable sales at wholesale. Apparently, the taxpayer is arguing that the transaction between the dealership and the manufacturer is in the nature of a return on deposit and not a sale. We disagree. RCW 82.04.040 defines a "sale" as "any transfer of the ownership of, title to, or possession of property for a valuable consideration." All sales of tangible personal property which are not sales at retail are taxable as sales at wholesale. RCW 82.04.060. Here, the taxpayer purchases the wheels and axles from the manufacturer for cash for purposes of delivering mobile homes. The taxpayer is free to make whatever use of the wheels and axles it sees fit and is under no contractual obligation to resell them to the manufacturer. The subsequent sale of these items to the manufacturer constitutes a transfer of ownership for valuable consideration. This situation is to be distinguished from transactions where the items received are merely loaned for use and then exchanged for a like number of similar items. In the foregoing situation title never passes. The Department has consistently held that where title to the item in question passes, the transaction is a taxable sale and not a return on

deposit. See ETB 167.04.115 and Inland Dairy v. Department of Revenue, 14 Wn.App 592 (1975). We conclude that the sale by the taxpayer of wheels and axles constitute taxable sales at wholesale.

[4] Annexation. The taxpayer argues that it should be relieved of the duty to collect local options sales tax because it did not know that its place of business was annexed into the city limits of . . . . According to the taxpayer, the duty to collect additional sales tax arose only after it had actual knowledge of the annexation. Therefore, the taxpayer argues "it should not be taxed". The taxpayer misunderstands its obligations with respect to the retail sales tax. RCW 82.08.050 imposes upon the seller in each taxable sale the obligation to collect the sales tax and remit the same to the Department. The tax is imposed upon the buyer. RCW 82.08.050 also provides:

> In case any seller fails to collect the tax herein imposed or having collected the tax, fails to pay it to the department in the manner prescribed by this chapter, whether such failure is the result of his own acts or the result of acts or conditions beyond his control, he shall, nevertheless, be personally liable to the state for the amount of the tax.

The obligations of the seller are clear. We do not doubt that the taxpayer knew nothing of the annexation, and while we sympathize with the taxpayer's situation, we are without authority to grant relief. The taxpayer's remedy is more appropriately with the buyer. In this regard, RCW 82.08.050 states:

> The amount of tax, until paid by the buyer to the seller or to the department, shall constitute a debt from the buyer to the seller and any seller who fails or refuses to collect the tax as required with intent to violate the provisions of this chapter or to gain some advantage or benefit, either direct or indirect, and any buyer who refuses to pay any tax due under this chapter shall be guilty of a misdemeanor.

[5] Service Tax on Finance Reserves. The taxpayer receives a fee from financial institutions for arranging financing in connection with the sale of mobile homes. The taxpayer's petition states that this income is derived from the sale of finance contracts entered into between it and the customers.

During the telephone conference on this matter, the taxpayer indicated that it was not selling contracts but was, in effect, receiving a commission for putting the lender and customer together. The taxpayer gives no reason why this income should be excluded.

The business and occupations tax is imposed upon every person "for the act or privilege of engaging in business activities." RCW 82.04.220. For this purpose, the term "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 tax is determined by applying prescribed rates for different types of activities against the gross income of the business. The auditor determined that the amounts reflected in the taxpayer records were finance charges, carrying charges, or service charges taxable under the Service and Other classification as prescribe by WAC 458-20-109 ("Rule 109"). If the taxpayer is correct in asserting that these amounts were actually commissions paid for arranging financing, these payments would not be considered finance or related charges covered by Rule 109. Nevertheless, we conclude that these amounts would still be taxable service income. Clearly, the commissions are payments received in the conduct of a business and are taxable as such. The regularity with which the taxpayer provides these services to lenders has no bearing on whether these commissions are taxable.

[6] Waiver of Interest. Next the taxpayer seeks the waiver of interest imposed on delinquent retail sales tax for the years 1983 and 1984. The imposition of interest upon taxes found to be due is governed by RCW 82.32.050. This statute provides in part:

> If upon examination of any returns or from other information obtained by the department it appears that a tax or penalty has been paid less than that properly due, the department shall assess against the taxpayer such additional amount found to be due and shall add thereto interest at the rate of nine percent per annum from the last day of the year in which the deficiency is incurred until date of payment. (Emphasis added).

According to the statute, the assessment of interest is mandatory. The only authority of the Department to cancel or waive interest is found in RCW 82.32.105 which allows the Department to waive or cancel interest or penalties if the failure of a taxpayer to pay any tax when due was the result of circumstances beyond the control of the taxpayer. That statute also requires the Department to prescribe rule for the waiver or cancellation of interest or penalties.

The administrative rule which implements the above statute is WAC 458-20-228 ("Rule 228"). Rule 228 lists the only situations under which a cancellation of interest or penalties will be considered. Rule 228 states that the Department will waive or cancel interest only upon a finding that the failure of a taxpayer to pay the tax by the due date was due to "circumstances beyond the control" of the taxpayer. Rule 228 lists the situations which are clearly stated as the only circumstances under which a cancellation of penalties or interest will be considered by the Department. According to Rule 228, there are only two situations where interest will be waived:

> 1. The failure to pay the tax prior to issuance of the assessment was the direct result of written instructions given to the taxpayer by the department.
>
> 2. Extension of the due date for payment of an assessment was not at the request of the taxpayer and was for the sole convenience of the department.

The taxpayer argues that the failure to timely remit the sales taxes for these years was the result of the drug and alcohol dependence of its officers. The taxpayer maintains that the illnesses of the officers constitute circumstances beyond its control. We have no doubt that the afflictions which the taxpayer's officers were suffering from contributed to its failure to timely meet its tax obligations. However, an illness of the taxpayer or its officers is not one of the two grounds listed in Rule 228 for cancellation of interest. As an administrative agency, the Department does not have discretion to change the law and grant relief. Situation 3 under Rule 228 does provide for the waiver or cancellation of penalties in the event of the death or serious illness of the taxpayer or a member of the taxpayer's family. Interest, on the other hand, is treated differently. Interest is imposed to compensate the state for loss of the use of money it would have had if the taxes were paid when due. Interest is not

penal in nature, and therefor, the grounds for waiver are narrower.

[7] Waiver of Penalties. The same analysis applies to the claim by the taxpayer that the late payment penalty imposed upon the delinquent sales tax for March of 1986 should be waived due to an employee's mistake. The failure of an employee to properly carry out his or her duties is not one of the seven situations listed in Rule 228 which will justify the waiver or cancellation of penalties. Furthermore, to the extent that the bookkeeper handled the taxpayer's affairs, we must presume that she was under the control of, and accountable to the taxpayer. This is not a circumstance beyond the taxpayer's control.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

DATED this 25th day of May, 1990