Cite as Det. No. 93-004, 12 WTD 553 (1993).

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. 93-004
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .
	)	. . ./Audit No. . . .
	)	Notices of Balances Due

[1] RCW 82.32.100 AND RPM 89-4: B & O TAX -- UNREGISTERED TAXPAYER -- PERIOD OF LIMITATION. Taxpayer was not registered with Department of Revenue and did not voluntarily do so until after its presence in Washington was discovered by the Department during an audit of an affiliate conducting the same business in this state. The affiliate was also required to register following discovery by the Department of its activity. Because DOR discovered the taxpayer was doing business in this state and was unregistered, it is subject to a seven-year period for tax assessments, plus applicable penalties and interest, rather than the four-year period granted to voluntary registrants. ACCORD: Det. No. 91-53, 10 WTD 410 (1991).

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: . . .

NATURE OF ACTION:

Audit Division assessed an unregistered taxpayer B&O taxes for seven years following discovery of the company during an audit of its affiliate. The taxpayer contests assessment of penalties for full period and a portion of the interest that accrued when returns were mailed to an incorrect address.

FACTS AND ISSUES:

Adler, A.L.J. -- Taxpayer is engaged in the business of selling . . . products. The Department's tax discovery division located and conducted an audit of an affiliated taxpayer, which engages in the same type of business. While performing the affiliate's audit, the Department's auditor states he discovered the existence of the taxpayer and informed the companies' tax compliance officer that the taxpayer should also be registered in Washington and might owe state taxes for past periods. Taxpayer contends its compliance officer made the first overture regarding registration.

After a number of delays, during which taxpayer said it was attempting to determine whether it had nexus for tax purposes and was trying to assemble the necessary information regarding taxes owed, the taxpayer registered with the Department. Nearly one year later, the taxpayer filed returns and remitted payment of taxes owed for the years 1984-1990.

Taxpayer protests assessment of $ . . . in interest, which was assessed after the returns and payments were mailed to the Department's former address. It states the returns were sent by certified mail to the auditor's attention [in October 1991] but were inadvertently mailed to the Department's old address. Upon return of the envelope, the taxpayer sent to the auditor at the correct address a copy of the original envelope as proof of its first effort to deliver the returns and payments. They were finally received at [a Department's field] office [in November 1991]. Taxpayer notes its payment included interest through [October 1991], the anticipated date of receipt by the Department, which it believes is evidence of the its "good faith in attempting to fully compensate the State of Washington for interest due on unpaid tax. Inadvertently mailing the returns and checks to the wrong address should not negate this fact."

Additionally, it protests assessment of penalties for the full period. It states:

> The DOR alleges that the Corporation did not "voluntarily register" and is thus not entitled to the penalty relief provisions of Revenue Policy Memorandum 89-4 (RPM 89-4). The DOR's holding is premised on the Corporation's "lack of response to the auditor's request for information as well as the numerous delays encountered." The Corporation, however, believes that it has "voluntarily" filed prior year delinquent B&O tax returns and as such should be entitled to the penalty relief provisions of RPM 89-4.
>
> The issue of whether the Corporation was registered for Washington B&O tax purposes first arose during the

> audit (begun in July 1989 and concluded in August 1990) of a related taxpayer [affiliate] . . . . At that time, . . . the Manager of Tax Compliance indicated to the Washington auditor . . . that based on the results of [affiliate's] audit, the Corporation would voluntarily file prior year B&O tax returns, if it determined it had the requisite nexus with Washington during those years.

Taxpayer proceeds to describe the efforts of its tax compliance officer to determine whether nexus existed and the amount of tax, if any, due:

> What the DOR calls "delays" was simply part of the inescapable process of ascertaining and documenting when the Corporation was first liable for the B&O tax and securing the data needed to prepare the relevant tax returns, and has no bearing on whether the Corporation voluntarily filed/registered for B&O tax purposes. In fact, the Corporation agreed at the outset to file prior year B&O tax returns if it found it was liable for such a tax.
>
> The DOR cites the failure to provide information as another reason for not granting penalty relief under RPM 89-4. It is difficult to see how the Corporation failed to provide information to the auditor when an audit was never conducted. In fact, the Corporation did agree to prepare and voluntarily file B&O tax returns for the prior years.
>
> The Corporation further maintains that it made a "voluntary disclosure" within the meaning of RPM 89-4. During [affiliate's] audit the Corporation realized that if it conducted activities similar to [affiliate's] in Washington, it would be liable for the B&O tax and would be required to file returns. This commitment was communicated to the Washington auditor during [affiliate's] audit.
>
> It is discriminatory to other taxpayers who shoulder their burden of ascertaining their tax liabilities to maintain that a taxpayer's opportunity at voluntary disclosure is lost when an auditor initiates an inquiry of a taxpayer's Washington activities based on information obtained while auditing a related entity. It effectively denies members of a commonly controlled group the opportunity to ever voluntarily comply with Washington tax law. This is especially true in this case where the audit findings in [the case of the affiliate], operating in the same industry, would have

> prompted a reasonable person to question whether the Corporation should also have been filing returns in prior years.

DISCUSSION:

82.32.050 provides:

> (1) 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 . . . .

(Emphasis supplied.)

82.32.105 permits waiver of interest or penalties in certain limited situations:

> If the department of revenue finds that the payment by a taxpayer of a tax less than that properly due or the failure of a taxpayer to pay any tax by the due date was the result of circumstances beyond the control of the taxpayer, the department of revenue shall waive or cancel any interest or penalties imposed under this chapter with respect to such tax.

(Emphasis supplied.)

Taxpayer contends interest should be waived on the delinquent returns and payments for the month during which the misdirected letter failed to be received by the Department. Normally, we would be persuaded by a taxpayer's submission of a returned, postmarked envelope that the taxpayer had made every effort to comply with the law. In this case, the envelope is stamped with attempted delivery dates [in October and November 1991]. However, the taxpayer's file contains a copy of a letter sent by the auditor to the taxpayer's tax compliance officer. The letter is dated [November 1990]. The printed letterhead included the Department's correct, current address. Additionally, the auditor closed by advising the taxpayer [to send the completed Master Business Application, the appropriate registration fees, and the income figures with the correct address listed].

This letter was received by the taxpayer, as is evidenced by the Department's receipt of the completed Master Business Application form [in November 1990], almost a year before the taxpayer made its payments. As such, we find the failure of the taxpayer to

ascertain that the returns and payments were mailed to the correct address was not a "circumstance beyond the control of the taxpayer." The Department has consistently held that failure to correctly inform itself is not a circumstance beyond a taxpayer's control. This is especially true here, since taxpayer's office received actual notice of the correct address both on the letterhead carrying the correct address and in the body of the letter.

Taxpayer also contends it should be entitled to the shorter audit period and waiver of penalties available to persons who voluntarily register with the Department. We disagree. RPM 89-4 is based on the plain language of RCW 82.32.100:

> If any person fails or refuses to make any return or to make available for examination the records required by this chapter, 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; and to this end the department may examine the books, records, and papers of any such person and may take evidence, on oath, of any person, relating to the subject of inquiry.
>
> As soon as the department procures such facts and information as it is able to obtain upon which to base the assessment of any tax payable by any person who has failed or refused to make a return, it shall proceed to determine and assess against such person the tax and penalties due . . . To the assessment the department shall add the penalties provided in RCW 82.32.090. . . .
>
> No assessment or correction of an assessment may be made by the department more than four years after the close of the tax year, except (1) against a taxpayer who has not registered as required by this chapter . . .

(Emphasis supplied.)

RPM 89-4 provides:

> It is and has been the policy of the Department of Revenue that the tax laws of this state should be administered in such a manner as to encourage and facilitate compliance by all persons subject to such laws.

PROCEDURES

Limitations on interest and penalties

A) Unregistered accounts:

1. Voluntary disclosure: In the case of any unregistered taxpayer who voluntarily registers and in good faith attempts to report all taxes due, the Department shall assess taxes and interest for a period not to exceed four years plus the current year, but it shall not assess penalties for late payment under RCW 82.32.090 so long as there is no evidence of an intent to evade tax under RCW 82.32.050. Such disclosure includes voluntary filing by a person for an identification number under the new UBI system, whether or not the person does so for the purpose of registering with the Department of Revenue.

2. Discovery by the Department: In cases where the Department discovers any unregistered taxpayer doing business in this state, the Department will assess any taxes plus applicable interest and penalties for a period not to exceed seven years plus the current year in which the discovery is made. RCW 82.32.100.

(Emphasis supplied.)

RPM 89-4 grants no new or special treatment to taxpayers who are discovered by the Department. RCW 82.32.100 clearly provides for assessment of taxes and penalties against persons who have failed to register as required by the law and contemplates that the Department will or may be forced to obtain information to support an assessment from sources other than the taxpayer itself. RCW 82.32.105 explicitly speaks in terms of "examination of any returns or from other information obtained" in determining amounts of tax, interest, and penalties due. Taxpayer's affiliate was not registered until it was discovered and audited by the Department. During that audit, taxpayer itself was discovered. Despite the fact that it engaged in exactly the same business, taxpayer delayed registration and payment of delinquent taxes, stating it was deciding whether nexus existed. Only where a taxpayer comes forward and makes the first contact to the Department does it receive the benefit of the treatment granted under RPM 89-4, which merely restates the law limiting the tax laws' application to four years plus the current year. Where persons fail to register, they lose the benefit of the shorter statute of limitations. This is true even where a person registers with other regulating agencies but fails to register with the Department of Revenue. Det. No. 91-153, 10 WTD 410 (1991).

The delays resulted in more interest accruing, but they did not affect whether the penalties were applied. The taxpayer's failure to timely register and pay its taxes caused the penalties to be imposed. We do not believe any hardship or inequity has occurred in this case. Taxpayer states it maintains a tax compliance department; but that division apparently failed to diligently explore the companies' tax obligations in this state with the result that they enjoyed the benefit of tax-free and tax-deferred years of exploitation of the Washington market. When the taxpayer was discovered by the Department and required to pay its obligations, it was also required to pay the penalty for its failure to follow the law and the interest for its use of Washington's money over the seven-year period.

Finally, taxpayer accumulated a number of balance due notices for taxes and returns due in 1991 prior to its eventual payment of the amounts . . . . It subsequently asked that these notices be included in this appeal. For the reasons stated above, relief is denied on these as well.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 14th day of January 1993.