

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
)	No. 14-0155
...)	
)	Registration No. ...
)	

[5] RCW 82.32.105; RULE 228 – PENALTIES & INTEREST – WAIVER – LACK OF KNOWLEDGE. Penalties and interest cannot be waived for either financial hardship or lack of knowledge.

Bauer, A.L.J. – A Washington contractor challenges an audit assessment, arguing that retail sales tax was not due on construction it performed for [a State Institution] and a nonprofit charitable organization. It further asserts that it is entitled to a credit for amounts it paid under another business entity's Uniform Business Identifier (UBI), and additionally requests a waiver of interest and penalties on the assessment. Taxpayer's petition is denied.¹

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

ISSUES

1. In accordance with RCW 82.08.050, was Taxpayer required to remit retail sales tax that it collected on contracting work from [a State Institution]?
2. In accordance with RCW 82.08.050(3) and WAC 458-20-169, was retail sales tax due on Taxpayer's construction work for . . . a nonprofit 501(c)(3) charitable organization?
3. Under RCW 82.32.070 and WAC 458-20-254, did Taxpayer provide records establishing it was entitled to additional credit for income from [Customer A] that Taxpayer's owner allegedly reported under another Uniform Business Identifier (UBI)?
4. Under WAC 458-20-102, does Taxpayer have the burden of proof to determine whether [Customer E] had paid retail sales tax that Taxpayer had not billed or collected?
5. Under RCW 82.32.105, is Taxpayer eligible for the waiver of penalties and interest because it did not understand Washington's tax laws?

FINDINGS OF FACT

The Audit Division (Audit) of the Department of Revenue (Department) audited Taxpayer's records for the period February 1, 2008 through December 31, 2011 (audit period). As a result, an assessment was originally issued on November 13, 2012, for a total due of \$. . . Taxpayer submitted additional documentation over the course of the next year resulting in three post assessment adjustments (PAA#1, PAA#2, and PAA#3). PAA#3 was issued on November 13, 2013 for the following total amounts:

\$. . .	Retail Sales Tax
. . .	Retailing B&O
- . . .	Wholesaling B&O
. . .	Use/Deferred Sales Tax
- . . .	Small Business Credit
<u>. . .</u>	Taxes Due
. . .	Interest
<u>. . .</u>	5% Substantial Underpayment Penalty
. . .	Total Assessed
. . .	Additional Interest from 12/14/2012 to 12/13/2013
- . . .	Less Payment 1/31/13
<u>\$. . .</u>	Total Due as of the 12/13/2013 Payment Due Date

The assessment has not been paid. Taxpayer appealed the assessment to the Department's Appeals Division on May 11, 2013.

Taxpayer is a contractor located in . . . Washington. Its business activities during the audit period included concrete work for retail and wholesale customers in . . . Washington.

As a general matter, Audit observed that Taxpayer's accounting firm invoiced a number of customers for retail sales tax, and noted in other customers' information whether each was

taxable or exempt. The retail sales taxes invoiced were charged at the correct local rates, and were separately stated and identified as retail sales taxes on billing documents. Thus, Taxpayer's records reflected a general familiarity with Washington's tax laws as to contractors.

In 2008, taxpayer reported and remitted some of the retail sales tax it collected on its February 2008 return, but did not report any retail sales tax for the rest of 2008, even though sales tax had been collected. From 2009 to 2011, Taxpayer reported all income as wholesaling income, even if retail sales tax had been collected.

Taxpayer's accounting firm used a QuickBooks accounting software to manage Taxpayer's account. In reviewing Taxpayer's account in the accounting firm's QuickBooks, Audit used the Audit Trail report to review the history of Taxpayer's accounting firm's individual entries² Audit determined, from the Audit Trail report, that the accounting firm had essentially hidden retail sales taxes invoiced to or received from Taxpayer's customers by converting original retail sales tax entries in QuickBooks to "income" amounts. The invoice amount as finally amended in Quick Books is the only invoice that will print without resorting to the Audit Trail report, and that last invoice made it appear that retail sales tax had not been charged or paid.³

Taxpayer disputes the following in the audit:

1. [State Institution]. Taxpayer provided \$. . . worth of construction work for [a State Institution], Audit assessed retail sales tax on the \$. . . in the amount of \$. . . , an amount that Audit believes had been collected but not remitted in the accounting practice described above.

According to the Audit Trail report, the accounting firm entered [the State Institution's] original invoice -- 313C -- into QuickBooks on October 24, 2011, showing labor in the taxable amount of \$. . . . The accounting firm then edited this amount on December 1, 2011, to add another line -- "sales tax" -- in the amount of \$. . . .⁴ This retail sales tax amount, added to the original taxable amount of \$. . . , totaled \$. . . . On March 14, 2012, the accounting firm edited QuickBooks to change the \$. . . retail sales tax entry to "income." Thus, the final QuickBooks entry reflected the receipt of two income amounts --- \$. . . and \$. . . -- totaling \$. . . , with no indication that retail sales tax had ever been collected. In essence, Taxpayer's accounting firm converted the retail sales tax to income by editing the invoice in QuickBooks.

² QuickBooks is a double entry software accounting program used by many businesses. QuickBooks Audit Trail report is a built-in feature of QuickBooks that lists each accounting transaction and any additions, deletions, or modifications that affect the transaction.

³ Audit notes that the sale to [the State Institution], an issue discussed below, was not the only sale where Taxpayer invoiced and collected retail sales tax and then changed the sales tax amount to "income" and did not remit it. Similar actions were taken for other customers such as [Customer A], [Customer B], [Customer C], and [Customer D]. For [Customer D], it has copies of the actual invoices received by the customer showing that sales tax was invoiced; check stubs showing that the tax was paid; and evidence from the audit trail report demonstrating that invoiced sales tax was changed to 'income' in Taxpayer's QuickBooks account.

⁴ It is possible, although we don't know, that [the State Institution] voluntarily added the sales tax to the invoice when it was paid.

The Quick Books Audit Trail demonstrates retail sales tax on the job was collected, but neither reported nor remitted to the Department. We therefore find that Taxpayer collected, but did not remit, retail sales tax on this invoice.

2. [Nonprofit Entity]. Taxpayer billed for construction work provided to . . . , a federal tax exempt 501(c)(3) nonprofit entity without charging retail sales tax.

3. Customer A. Audit issued a credit in PAA #2 in the amount of \$. . . (for retailing B&O tax in the amount of \$. . . and retail sales tax in the amount of \$. . .) for work Taxpayer performed for [Customer A] that Taxpayer's owner had already reported under a previous Uniform Business Identifier (UBI).⁵ Taxpayer claims that that credit should have instead been \$. . . . Audit, in a response to Taxpayer's petition dated June 13, 2013, invited Taxpayer to provide supporting calculations.⁶ Taxpayer has, to date, provided no documentation supporting its claim for a larger credit to Audit or to this office.

4. [Customer E]. Audit assessed Taxpayer \$. . . in retail sales tax on work performed for [Customer E] after January 1, 2010. In the course of the audit, Taxpayer was able to locate in its records a resale certificate for [Customer E], but not a reseller permit. Audit advised Taxpayer that, according to Department records, [Customer E] did not have a valid reseller's permit for periods after January 1, 2010. Taxpayer asserts on appeal that [Customer E] assured Taxpayer that although it did not have a reseller permit, it would pay the sales tax owed on Taxpayer's work.

5. Interest and Penalties. Taxpayer's owner moved to Washington from Oregon. Taxpayer's regular accounting firm (also Taxpayer's representative in this matter) is located in Oregon. According to Taxpayer's representative, neither Taxpayer nor the accounting firm is very familiar with Washington's tax system. Further, Taxpayer asserts it has had some difficult years financially.

ANALYSIS

1. [State Institution]. The first issue is whether Taxpayer owes retail sales taxes that it collected from [the State Institution]. Chapter 82.08 RCW imposes the retail sales tax, and RCW 82.08.050 specifically provides:

(1) The tax imposed in this chapter must be paid by the buyer to the seller. Each seller must collect from the buyer the full amount of the tax payable in respect to each taxable sale

(2) The tax required by this chapter, to be collected by the seller, is deemed to be held in trust by the seller until paid to the department. Any seller who appropriates or converts the tax collected to the seller's own use or to any use other than the payment of the tax to the extent that the money required to be collected is not available for payment on the due date as prescribed in this chapter is guilty of a gross misdemeanor.

⁵ The UBI was No. . . . , the sole proprietor of [Taxpayer]. .

⁶ Audit's response to Taxpayer's petition dated June 13, 2013.

(3) Except as otherwise provided in this section, if any seller fails to collect the tax imposed in this chapter 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 the seller's own acts or the result of acts or conditions beyond the seller's control, the seller is, nevertheless, personally liable to the state for the amount of the tax.

(Emphasis added.) Thus, if a seller collects retail sales tax, the seller is obligated to remit that tax to the Department.⁷

Taxpayer nonetheless asserts that [the State Institution] is an entity exempt from the payment of retail sales tax, and complains that the Department should not have assessed \$. . . in retail sales tax on this account. Whether [the State Institution] is exempt from the tax is not relevant.⁸ Because Taxpayer invoiced retail sales tax and collected it, Taxpayer is required to remit it to the Department. It was unlawful for the seller to keep it.

Taxpayer's petition as to this issue is denied.

2. [Nonprofit Entity]. The second issue is whether Taxpayer should have charged, collected, and remitted retail sales tax on construction performed for a nonprofit corporation. RCW 82.08.050(3) provides:

Except as otherwise provided in this section, if any seller fails to collect the tax imposed in this chapter . . . the seller is, nevertheless, personally liable to the state for the amount of the tax.

(Emphasis added.) Taxpayer argues that it did not charge or collect retail sales tax in the amount of \$. . . from [the Nonprofit Entity] because [the Nonprofit Entity] is a nonprofit charitable organization that is exempt from retail sales tax.

WAC 458-20-169 (Rule 169, "Nonprofit Organizations"), however, explains otherwise:

(1) . . . Unlike most states' and the federal tax systems, Washington's tax system, specifically its business tax, applies to nonprofit organizations. . . .

(4) . . . (b) . . . A nonprofit organization must pay retail sales tax when it purchases goods or retail services for its own use as a consumer, unless the purchase is specifically exempt by statute.

⁷ "The integrity of the entire taxing system demands that funds collected as taxes be remitted to the state." *Kitsap-Mason Dairymen's Ass'n v. Tax Comm'n*, 77 Wn.2d 812, 817, 467 P.3d 312 (1970). A seller may not retain such amounts even if no taxes were actually due. *Id.*

⁸ In general, [the State Institution] is not exempt from payment of retail sales taxes. The definition of "buyer" in RCW 82.08.010(3) – upon which the retail sales tax is initially imposed – includes "municipal corporation, quasi municipal corporation, and also the state, its departments and institutions and all political subdivisions thereof, irrespective of the nature of the activities engaged in or functions performed." In addition, WAC 458-20-189(5)(a) states that retail sales tax generally applies to all retail sales made to the state of Washington, its departments and institutions, and to municipal corporations of the state.

[See RCW 82.08.0101(3) (a “buyer” subject to retail sales tax includes nonprofit corporations). In other words], the Revenue Act does not provide an exemption from retail sales tax for an organization such as [the Nonprofit Entity] simply because it is a nonprofit charitable organization. Further, Taxpayer has not pointed to any exemption or deduction that would otherwise apply. Thus, because Taxpayer did not charge, collect, or remit retail sales tax on its charges, Taxpayer was rightfully assessed the retail sales tax owed.

Taxpayer’s petition as to this issue is denied.

3. [Customer A]. The third issue is whether Taxpayer is due additional credit for income that its owner reported under another Uniform Business Identifier (UBI). RCW 82.32.070(1) provides:

Every person liable for any fee or tax imposed by chapters 82.04 through 82.27 RCW shall keep and preserve, for a period of five years, suitable records as may be necessary to determine the amount of any tax for which he or she may be liable. . .

Any person who fails to comply with the requirements of this section shall be forever barred from questioning, in any court action or proceedings, the correctness of any assessment of taxes made by the department of revenue based upon any period for which such books, records, and invoices have not been so kept and preserved.

WAC 458-20-254(3) similarly states:

(b) It is the duty of each taxpayer to prepare and preserve all records in a systematic manner conforming to accepted accounting methods and procedures. Such records are to be kept, preserved, and presented upon request of the department or its authorized representatives which will demonstrate: . . .

(ii) The amounts of all deductions, exemptions, or credits claimed through supporting records or documentation required by statute or administrative rule, or other supporting records or documentation necessary to substantiate the deduction, exemption, or credit.

In response to Taxpayer’s complaint that its credit as to the job it did for [Customer A] should have been \$. . . instead of \$. . . , Taxpayer was invited to provide records and calculations supporting that amount it claims should have been granted. Taxpayer, to date, has failed to do so.

Accordingly, Taxpayer’s petition as to this issue is denied.

4. [Customer E]. RCW 82.04.050(2)(b) classifies the constructing of new buildings or other structures as a retail sale. RCW 82.08.020 requires retail sales tax to be charged on each retail sale in this state unless, in accordance with RCW 82.08.050(7) and (13), the buyer presents a reseller permit,⁹ in which case the construction becomes a wholesale sale. RCW 82.08.050 further provides:

⁹ Prior to January 1, 2010, resale certificates were used for exemption.

(1) The [retail sales] tax imposed in this chapter must be paid by the buyer to the seller. Each seller must collect from the buyer the full amount of the [retail sales] tax payable in respect to each taxable sale in accordance with the schedule of collections adopted by the department under the provisions of RCW 82.08.060.

(3) Except as otherwise provided in this section, if any seller fails to collect the [retail sales] tax imposed in this chapter 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 the seller's own acts or the result of acts or conditions beyond the seller's control, the seller is, nevertheless, personally liable to the state for the amount of the tax.

(4) Sellers are not relieved from personal liability for the amount of the tax unless they maintain proper records of exempt or nontaxable transactions and provide them to the department when requested. . . .

(13) For purposes of this section:

(a) "Exemption certificate" means documentation furnished by a buyer to a seller to claim an exemption from sales tax. An exemption certificate includes a reseller permit or other documentation authorized in RCW 82.04.470 furnished by a buyer to a seller to substantiate a wholesale sale; . . .

(Emphasis added.) Thus, because Taxpayer did not obtain a reseller permit from [Customer E], Taxpayer was obligated to either collect retail sales tax or be liable for its payment to the Department. The resale certificate that Taxpayer had in its records from [Customer E] was no longer valid for work performed after January 1, 2010, as resale certificates expired on December 31, 2009, and were replaced on January 1, 2010, by reseller permits issued by the Department. Laws of 2009, ch. 563, § 403.

Taxpayer objects to the assessment of \$. . . attributable to contracting work for [Customer E], and has asked Audit to check to see whether [Customer E] paid the retail sales taxes it did not collect directly to the Department.

WAC 458-20-102(7) explains that a seller has the burden of proving that retail sales tax was not due on construction work:

(7) Seller's responsibilities. The seller has the burden of proving that the buyer had a reseller permit at the time of sale. A seller may meet its burden by taking from the buyer, at the time of sale or within one hundred twenty days after the sale, a copy of a reseller permit issued to the buyer by the department under RCW 82.32.780 or 82.32.783.

. . . .

(l) Proof of wholesale sales obtained, from a buyer not required to be registered, after one hundred twenty days have passed from sale date. If proof that a sale was a wholesale sale is obtained more than one hundred twenty days after the sale or sales in question, the nonregistered buyer must specifically identify the sale or sales to which it applies. Certificates, such as a uniform exemption certificate, used must be accompanied by other documentation signed by the buyer

specifically identifying the sales in question and stating that the provisions of the accompanying certificate apply. A nonspecific certificate that is not obtained within one hundred twenty days is generally not, in and of itself, acceptable proof of the wholesale nature of the sales in question. The certificate and/or required documentation must be obtained within the statutory time limitations provided by RCW 82.32.050.

(m) Additional time to secure documentation in audit situation. If in event of an audit the department discovers that the seller has not secured, as described in this subsection, the necessary certificates and/or documentation, the seller will generally be allowed one hundred twenty days in which to obtain and present appropriate certificates and/or documentation, or prove by facts and circumstances the sales in question are wholesale sales. The time allotted to the seller will commence from the date the auditor initially provides the seller with the results of the auditor's wholesale sales review. The processing of the audit report will not be delayed as a result of the seller's failure within the allotted time to secure and present appropriate documentation, or its inability to prove by facts and circumstances that the sales in question were wholesale sales.

Thus, Taxpayer was responsible for demonstrating by facts and circumstances that retail sales tax was not due on its construction work. In the alternative, Taxpayer may prove that the tax has been paid by [Taxpayer E] by asking [Taxpayer E] to complete the Certification of Use and/or Deferred Sales Tax Paid form that is available on the Department's website at <http://dor.wa.gov/docs/forms/usetx/certofuseand-ordeferredsalestaxpaid.pdf>. If [Taxpayer E] Construction were to certify that it has paid the tax, Adjustments to Taxpayer's audit can then be made.

Taxpayer's petition as to this issue is denied.

5. Penalties and Interest. As to Taxpayer's request for the waiver of penalties and interest, RCW 85.32.090(2) requires the Department to impose a 5% penalty for the substantial underpayment of taxes:

(2) If the department of revenue determines that any tax has been substantially underpaid, there is assessed a penalty of five percent of the amount of the tax determined by the department to be due. . . . As used in this section, "substantially underpaid" means that the taxpayer has paid less than eighty percent of the amount of tax determined by the department to be due for all of the types of taxes included in, and for the entire period of time covered by, the department's examination, and the amount of underpayment is at least one thousand dollars.

In this case, Taxpayer was lawfully assessed the 5% substantial underpayment penalty, as it had paid less than 80% of the amount of tax determined to be due in 2011. Taxpayer argues that the underpayment of its tax liability was not intentional, and requests a penalty waiver, explaining that it was unfamiliar with Washington's Revenue Act and that its payment would be a financial hardship.

RCW 82.32.105 provides for the waiver of penalties for circumstances not under the taxpayer's control:

(1) 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 penalties imposed under this chapter with respect to such tax.

WAC 458-20-228(9)(a), the Department's administrative rule implementing this provision, states that penalties may be waived when "circumstances beyond the control of the taxpayer" actually caused the underpayment or failure to pay the tax by the due date. Such a circumstance is generally one which is immediate, unexpected, or in the nature of an emergency, resulting in the taxpayer not having reasonable time or opportunity to obtain an extension of the due date or otherwise timely file and pay. WAC 458-20-228(9)(a)¹⁰ provides examples of such circumstances, none of which apply in this case.

¹⁰ WAC 458-20-228(9)(a)(ii) provides examples of circumstances beyond the control of the taxpayer:

- (A) The return payment was mailed on time but inadvertently sent to another agency.
- (B) Erroneous written information given to the taxpayer by a department officer or employee caused the delinquency. A penalty generally will not be waived when it is claimed that erroneous oral information was given by a department employee. The reason for not canceling the penalty in cases of oral information is because of the uncertainty of the facts presented, the uncertainty of the instructions or information imparted by the department employee, and the uncertainty that the taxpayer fully understood the information given. Reliance by the taxpayer on incorrect advice received from the taxpayer's legal or accounting representative is not a basis for cancellation of a penalty.
- (C) The delinquency was directly caused by death or serious illness of the taxpayer, or a member of the taxpayer's immediate family. The same circumstances apply to the taxpayer's accountant or other tax preparer, or their immediate family. This situation is not intended to have an indefinite application. A death or serious illness which denies a taxpayer reasonable time or opportunity to obtain an extension or to otherwise arrange timely filing and payment is a circumstance eligible for penalty waiver.
- (D) The delinquency was caused by the unavoidable absence of the taxpayer or key employee, prior to the filing date. "Unavoidable absence of the taxpayer" does not include absences because of business trips, vacations, personnel turnover, or terminations.
- (E) The delinquency was caused by the destruction by fire or other casualty of the taxpayer's place of business or business records.
- (F) The delinquency was caused by an act of fraud, embezzlement, theft, or conversion on the part of the taxpayer's employee or other persons contracted with the taxpayer, which the taxpayer could not immediately detect or prevent, provided that reasonable safeguards or internal controls were in place. See (a)(iii)(E) of this subsection.
- (G) The department does not respond to the taxpayer's request for a tax return (or other forms necessary to compute the tax) within a reasonable period of time, which directly causes delinquent filing and payment on the part of the taxpayer. This assumes that, given the same situation, if the department had provided the requested form(s) within a reasonable period of time, the taxpayer would have been able to meet its obligation for timely payment of the tax. In any case, the taxpayer has responsibility to insure that its return is filed in a timely manner (e.g., by keeping track of pending due dates) and must anticipatively request a return for that purpose, if one is not received. (Note: Tax returns and other forms are immediately available to download at no cost from the department's internet site, <http://dor.wa.gov>. When good cause exists, taxpayers are advised to contact the department and request an extension of the due date for filing, before the due date of concern has passed. See subsection (12) of this section. Taxpayers who have registered

Taxpayer nonetheless requests a waiver of penalties, arguing that its financial hardship was beyond its control.¹¹ WAC 458-20-228(9)(a), however, specifically states:

(iii) The following are examples of circumstances that are generally not considered to be beyond the control of the taxpayer and will not qualify for a waiver or cancellation of penalty:

(A) Financial hardship;

(B) A misunderstanding or lack of knowledge of a tax liability.

(Emphasis added.) Because under Rule 228 financial hardship or lack of knowledge cannot be considered a circumstance beyond the control of the taxpayer, Taxpayer is not entitled to a waiver of the substantial underpayment penalty under RCW 82.32.105(1). *See also* Det. No. 05-0066, 24 WTD 454 (2005).

As to waiving interest, RCW 82.32.105(3) provides:

The department shall waive or cancel interest imposed under this chapter if:

(a) The failure to timely pay the tax was the direct result of written instructions given the taxpayer by the department; or

(b) The extension of a due date for payment of an assessment of deficiency was not at the request of the taxpayer and was for the sole convenience of the department.

In this case, Taxpayer's failure to timely pay the tax due was not due to either written instructions or the extension of a due date by the Department. Thus, interest cannot be waived.

Taxpayer's petition as to penalties and interest is denied.

...

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 9th day of May, 2014.

to file electronically with e-file will avoid potential penalties relating to paper returns not received.
See subsection (1)(b) of this section.)

¹¹ Taxpayer has additionally given a number of reasons, citing IRS criteria, why the penalties in this case should be waived. However, we note that Washington law on the waiver of penalties differs substantially from the federal law and rules applied by the Internal Revenue Service.