

Cite as 4 WTD 417 (1987)

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

In the Matter of the Petition)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u>
<u>N</u>	
For Correction of Assessment and)	
Refund of)	No. 88-6
)	
)	Registration No. . . .
. . .)	Tax Assessment No. . . .
.	
)	
)	
)	

- [1] **RULE 145:** RETAIL SALES TAX -- RATE -- OUT-OF-STATE SELLER -- IN-STATE SALESMAN. An out-of-state seller soliciting sales in this state through a salesman who resides in this state must collect state and local sales tax on the sales made to Washington customers. The salesman's residence is the location for determining the rate of the local sales tax.
- [2] **RULE 103 AND RULE 102:** RETAIL SALES TAX -- REFUND. Tax, interest and penalties deleted on transactions for which the taxpayer subsequently provided evidence that the sales were for resale, or were sales made to an out-of-state buyer, or that the purchasers had paid the sales or use tax owing directly to this state.
- [3] **RCW 82.08.050:** RETAIL SALES TAX -- SELLER'S LIABILITY -- REFUND/CREDIT -- EVIDENCE REQUIRED. A seller who fails to collect the retail sales tax is personally liable to the state for the tax. To receive a refund or credit for sales tax assessed, a taxpayer must provide evidence that the transaction was exempt or that the purchaser paid the sales or use tax directly to the state.

- [4] **RULE 17001:** RCW 82.04.190: RETAIL SALES TAX -- CONSUMER -- GOVERNMENT CONTRACTOR. The retail sales or use tax must be paid by government contractors upon their purchases and leases or rentals of tangible personal property used by them as consumers in performing government contracting.
- [5] **RULE 228:** PENALTIES AND INTEREST; OUT-OF-STATE MANUFACTURER -- LACK OF KNOWLEDGE. If a taxpayer fails to pay taxes as required, the Department shall assess the tax and shall add interest and penalties due. RCW 82.32.050; RCW 82.32.090; RCW 82.32.100. Lack of knowledge of a tax obligation or voluntary compliance once an obligation is known are not identified by statute or rule as a basis for abating interest or penalties. 1 WTD 67 (1986).

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: July 2, 1987

NATURE OF ACTION:

The taxpayer, an out-of-state seller, seeks a refund of Retailing B&O and retail sales tax and a waiver of an assessment of penalties and interest.

FACTS AND ISSUES:

Frankel, A.L.J. -- The taxpayer's records were examined for the period January 1, 1983 through March 31, 1986. The audit disclosed taxes and interest owing in the amount of \$ [X]. Late payment penalties in the amount of \$ [X] were added to the assessment. Assessment No. . . . for the total amount due, \$ [X], was issued on October 21, 1986.

The taxpayer, a Washington corporation, is a wholly-owned subsidiary of a Japanese corporation and is headquartered in California. The taxpayer manufactures and sells During the period at issue, it solicited sales in this state through its resident salesman.

The auditor assessed retailing and retail sales tax on unreported retail sales. Tax was assessed on the selling price of property shipped to purchasers in Washington on sales solicited by the taxpayer's resident salesman. The assessment was made from the list of sales provided by the taxpayer.

After the assessment was issued, the taxpayer sent letters and copies of invoices on which sales tax was assessed to the purchasers. The letter stated:

Dear . . . Customer,

The enclosed invoice summarizes sales which have been assessed state and local sales tax by the Department of Revenue for the state of Washington.

This invoice is due and payable unless you provide [the company] with a properly authorized and executed Certification of Use and/or Deferred Sales Tax Paid form (sample enclosed) or a Resale Certificate.

[The company] is required by Washington state law to collect and remit sales tax on all taxable sales made to our customers in Washington.

The taxpayer phoned customers who did not respond to the letter. The taxpayer stated it received responses from customers representing \$ [X] in sales or 67.6% of all sales during the audit period. Of that amount, 90% reported that they were either exempt sales or that they had already paid sales or use tax directly to the Department. The remaining 10% reimbursed the taxpayer for the sales tax.

The taxpayer made payment of \$ [X] toward the assessment.¹ The taxpayer seeks an abatement of the assessment of penalties and interest and a refund of a portion of the taxes paid on the following grounds:

1) Error in sales and use tax rate. -- The sales and use tax rate applied during the audit was 7.0% from January 1983 through February 1983 and 8.1% after that time. The taxpayer

¹ The amount paid was the amount assessed for taxes. The Department, however, is required to apply payments first toward the interest and penalties and then upon the tax, without regard to any direction of the taxpayer. RCW 82.32.080.

submitted a letter from the Department indicating the residence of the taxpayer's district manager is the correct location for the application of local sales tax. The letter stated the applicable rates during the audit period are 7.8% and 7.9%. The taxpayer requests that the Department apply the proper rates to the taxable sales;

2) Exempt transactions. -- The taxpayer seeks a refund of the tax, interest, and penalties assessed on sales for which the customers provided evidence that the sales were for resale, that the customer resided out of state, or that the customer already had paid sales or use tax directly to the state;

3) Computational errors. -- The taxpayer included two invoices for exempt sales for which the incorrect amount of the invoice was used in the audit. In addition, the taxpayer alleged computational errors were made on the following invoices:

Date	Invoice No.	Customer	Audit Amount	Correct Amount	Difference
7/25/85	29829	[A]	\$ [X]	0	\$ [X]
9/24/85	30540	[B]	[X]	0	[X]
1/21/86	31657	[C]	[X]	([X])	[X]
TOTAL ERRORS					\$ [X]

The taxpayer attached an invoice showing [A] is a Massachusetts customer. (. . .) It contends the transaction with [B] was a California sale to . . . Leasing, followed by a resale to [B]. In support of its contention that the transaction to [C] should not have been included, it attached the invoice which showed it was a credit memo for \$ [X] rather than an amount owing. (. . .);

4) Sales to government contractors. -- In its petition, the taxpayer contended some of the sales were to contractors doing business with the United States under contracts which provided that all equipment passed to the United States. The taxpayer contends that taxing sales made to U.S. government contractors is unconstitutional under the Commerce Clause. (. . .);

5) Interest and penalties. -- Interest and penalties should be waived on grounds that its failure to file the returns in question or to pay the tax timely was due to circumstances beyond its control as set forth in WAC 458-20-228. The taxpayer states its managers were not familiar with American tax laws and unsophisticated regarding state and local tax laws. The taxpayer complied with all requirements that it was aware of for filing returns and paying taxes and had no intention of avoiding Washington taxes; and

6) Extrapolated exempt transactions. -- The taxpayer stated that customers representing \$ [X] in sales, or 32.4% of total sales, did not respond to its inquiries. It contends that because 90% of those that did respond reported that they had paid or were exempt it would be reasonable to assume the same percentage of those not responding are either exempt or have already paid the tax. It seeks a refund of the tax on sales which it contends were probably exempt or for which the customer probably paid the tax. (\$ [X] sales reduction sought).

DISCUSSION:

[1] Error in sales and use tax rate. -- We agree that the assessment should be adjusted to reflect the proper tax rate as set forth in the Department's letter of March 20, 1987. The instructions that the correct location for application of the local sales tax is the residence of the taxpayer's district manager complies with WAC 458-20-145.

[2] Exempt transaction and computational errors. -- Furthermore, we agree that the tax, interest and penalties should be deleted on all those transactions in which the taxpayer has provided evidence that the transactions were exempt from retail sales tax. The exempt transactions include (1) all of those in which the taxpayer has provided resale certificates or letters from the purchasers stating the purchases were for resale; (2) those in which the purchasers have provided evidence that they remitted the sales or use tax owing directly to the state; and (3) those in which the taxpayer has provided evidence that the purchaser was an out-of-state business,

We also agree that the assessment should be adjusted to reflect the \$ [X] included as a sale to [C] rather than as a credit. The taxpayer has provided evidence showing the January 21, 1986 invoice was a credit memo.

[3] Extrapolated exempt transactions. -- We do not agree that the taxpayer should receive any credit for retail sales tax on the assumption that some of those purchasers who did not respond to the taxpayer's inquiries paid the tax directly to the state or were purchasing for resale. Arguably many of those that did not respond had not remitted the tax and did not want to pay the amount owing.

RCW 82.08.050 states that any seller who fails to collect the retail sales tax, "whether such failure is the result of his own acts or the result of acts or conditions beyond his control," shall be personally liable to the state for the tax. If the taxpayer subsequently obtains evidence actually showing additional transactions were exempt, that evidence may be provided to the audit section as long as it is within the four year limitation period provided by RCW 82.32.060. Also, the amount of the tax, until paid to the taxpayer by the purchasers, constitutes a debt from the buyer to the seller (RCW 82.08.050). The taxpayer could institute a civil action to collect the sales tax assessed on transactions where the customer has not responded to the taxpayer's inquiries. Although this puts the burden on the taxpayer, RCW 82.08.050 gives the Department the discretion to assess uncollected sales tax from either the seller or the buyer.

[4] Sales to government contractors. -- Sales to government contractors are not exempt from retail sales tax. RCW 82.04.190(3) and (6) defines "consumer" to include persons engaged in the business of public road or other government construction. The sales, therefore, are to the contractor rather than sales to the government. The retail sales or use tax must be paid by government contractors upon their purchases and leases or rentals of tangible personal property used by them as consumers in performing government contracting. WAC 458-20-17001.

[5] Interest and penalties. -- Finally, we are unable to waive the interest or penalties that were assessed. Although this state appreciates the fact the taxpayer cooperated with the audit and made a considerable effort to contact the Washington purchasers, we do not have discretion to waive interest or penalties because of lack of knowledge of a tax obligation or voluntary compliance once an obligation is known.

DECISION AND DISPOSITION:

The taxpayer's petition is denied as to the waiver of penalties and interest and as to its request to delete an amount for extrapolated exempt transactions. The assessment will be adjusted to reflect the proper tax rate and to delete those transactions for which the taxpayer provided evidence that the sales were exempt or the customer already paid the tax. The taxpayer shall receive a refund of any amount found due.

DATED this 19th day of January 1988.