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

In the Matter of the Petition For Refund of) D E T E R M I N A T I O N
)
) No. 88-401
)
. . .) Registration No. . . .
)
)

[1] **MISCELLANEOUS AND RCW 82.04.290:** B&O TAX -- SERVICES -- HORSE TRAINERS -- LIABILITY FOR TAX. Horse trainers report tax on the gross income from their business activities under the Services classification of the business and occupation tax. The fact that previously-unregistered horse trainers did not know of their obligation or did not report their activities to the Department of Revenue does not affect taxpayer's own liability for payment of tax on the privilege of engaging in business in this state.

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 AND PLACE OF CONFERENCE: September 21, 1987; Tacoma, WA

NATURE OF ACTION:

Taxpayer petitions for refund of taxes correctly owing and paid for the years 1982-1985, inclusive, contending that other operators of similar businesses were not registered or paying taxes and that the Department made registration of and payment by such taxpayers prospective from 1986 only.

FACTS AND ISSUES:

Johnson, A.L.J. (successor to Rosenbloom, A.L.J.) -- Taxpayer is a horse trainer, who has been registered with the Department of Revenue since 1970, has been correctly reporting his business activities under the Services B&O tax category and has been paying the taxes owed. Following publication of a notice in the October 1986, issue of the Horsemen's Benevolent and Protective Association

News, taxpayer petitioned for refund of taxes paid during the four-year statutory period allowed by RCW 82.32.060. The article stated that

> [t]he Department of Revenue will proceed with registering horse trainers and collecting the business and occupation service tax. Trainers are expected to register with the Department and begin paying the tax. Tax will be due on income generated in calendar year 1986. The Department will restrict the audit analysis to the current year, 1986.

Taxpayer's accountant wrote the Department on November 25, 1986, stating that

> [i]t has come to the attention of the above taxpayer that the Department of Revenue has agreed not to tax horse trainiers [sic] on training income that was generated prior to 1986. Since the above taxpayer has paid B&O tax on his training income for many years he feels he is entitled to a refund on the B&O taxes he has paid.
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> In telephone conversation [sic] with Mr. Pitman [sic] of the Olympia office confirmed [sic] that the taxpayer is entitled to a refund on the open years of 1982 through 1985. (Brackets supplied.)

The Deputy Director of the Department responded to this request on February 20, 1987, stating that

> the Department is barred from refunding taxes that have been properly paid. The Washington State Supreme Court has ruled that the refund of taxes properly paid would be an unconstitutional gift of public money [Council of Camp Fire v. Revenue, 105 Wn.2d 55, footnote 1 (1985)]. Your request for a refund is, therefore, denied.

Taxpayer next filed a petition for refund with the Department's Interpretation and Appeals Division; the petition states that

> [b]ased upon the recent decision of the Department of Revenue in which they did not require trainers to make any payments before January 1, 1986, by not refunding [taxpayer's] taxes that he paid in the years 1982, 1983, 1984 and 1985 this would be a violation of equal protection and due process and therefore that this fund [sic] be refunded to him, or in the alternative, that he be allowed to have credit on any future B&O taxes that he would pay.
>
> It seems clear to me that if the other trainers do not have to pay then [taxpayer] should not have to pay. If [taxpayer] has to pay then the other trainers should be required to pay also.

DISCUSSION:

[1] RCW 82.04.290 states that all persons engaging in service businesses are required to report gross income from their activities under the Services B&O tax classification. Taxpayer properly registered with the Department of Revenue in 1970 as a horse trainer and reported and paid taxes in the correct manner from that time to the present. Because other horse trainers failed in their duty to correctly inform themselves of the tax ramifications of their business activities in this state, they also failed in their duty to pay their taxes. Taxpayer complains that he is being treated differently than other similarly-situated persons and demands that the amounts he has paid be refunded for the four-year period permitted by the statute of limitations for refunds or, alternatively, that the amounts paid be credited toward his future taxes.

At the hearing in this matter, taxpayer's attorney cited three cases believed to support taxpayer's argument; however, these cases are distinguishable from the case at hand.

In Vergeyle v. Employment Security, 28 Wn. App. 399 (1981), the court considered the issue of a denial of unemployment benefits which was based solely on an examination of the employee's conduct; the court found that the employer's conduct was equally egregious and should have been considered by the administrative agency: "Agencies should strive for equality of treatment." Vergeyle at 404. It is noteworthy

that the court said "should," indicating that an effort should be made when possible, rather than "shall," which would have imposed a more stringent duty on the agency. Vergeyle differs from the present case in that the Department, in attempting to hold all horse trainers to their duty to pay tax, seeks to treat them all equally; the objective was to achieve compliance by all horse trainers, just as compliance was achieved with the petitioning taxpayer.

Taxpayer's second case was Lone Star Cement Corporation v. Seattle, 71 Wn.2d 564 (1967), in which the state supreme court found that the city was allowing apportionment to a company with a plant partly in and partly out of the city limits but was not allowing apportionment to a company with two plants, one of which was outside the city limits. There the court found that the administration of the city's B&O tax resulted in a denial of equal protection to the plaintiff and granted other taxpayers privileges and immunities not granted to the taxpayer. In the present taxpayer's case, there is no disparate treatment. All horse trainers are and always have been liable for payment of B&O tax. The horse trainers who were improperly failing to register and failing to report or pay their taxes cannot be said to have received privileges and immunities; there has been no privilege granted to evade taxes. Similarly, no privilege can be granted to this taxpayer to receive a refund of taxes properly due.

It is worthy of note that, given the number of businesses operating in Washington and the fact that other horse-trainer taxpayers were not previously registered, it is not surprising that others' reporting errors went unnoticed. An audit of those taxpayers at any time would certainly have resulted in notification that they were liable for tax on gross income derived from their activities.

Finally, taxpayer seeks to support his argument for a refund with State v. Perrigoue, 81 Wn.2d 640 (1972), a criminal case in which the defendant complained that his crime of writing a check with the knowledge that the account did not contain a covering balance was treated more severely than had he used a stolen credit card for the same purchase. There, the court held that the legislature found a rational basis for addressing the harm caused with the statute as enacted. In this case, the legislature has seen fit to include horse trainers within the reach of RCW 82.04.290, which directs such persons to report their taxes under the Services B&O classification. In the present case, the taxpayer complied with the law while others did not. As an administrative

agency, the Department of Revenue has no discretionary authority to grant a refund of taxes owing and properly paid. To do so would be to wrongfully make a gift of public funds. Council of Campfire v. Revenue, supra.

Consequently, we must reject the taxpayer's argument that the Department is obligated to grant a refund, or, alternatively, a credit against future taxes for the four-year statutory refund period in the amount of his taxes legally owed and properly paid. The taxpayer does not claim nor has our own investigation revealed that the Department has ever represented that horse trainers are not subject to tax. Furthermore, the Washington B&O tax is a self-assessing tax. It is the obligation of individuals engaging in taxable business activities within this state to correctly determine and report their tax liability. The Department uses its best efforts to disseminate useful information to assist taxpayers in this regard, but the ultimate responsibility lies with the taxpayer. It is no support for a claim for refund of taxes properly paid that the Department has failed to discover or advise other taxpayers in the horse training business that they were subject to the tax, nor is it support for such a claim that the steps which the Department is taking to achieve fair and full compliance by all horse trainers results in a "benefit" to some of them and not to the taxpayer himself.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 28th day of October 1988.