

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

In the Matter of the Petition) D E T E R M I N A T I O N
For Correction of Assessments of)
) No. 89-163

)
. . .) Registration No. . . .
) . . . /Audit No. . . .
) . . . /Audit No. . . .

- [1] **MISCELLANEOUS:** RCW 82.32.070 -- TAX LIABILITY -- DUTY TO KEEP AND PRESERVE RECORDS -- FAILURE TO PRODUCE DOCUMENTATION. Persons engaged in business are required to keep and produce adequate records for examination during an audit. Should accurate records be supplied within the statutory period allowed for refunds or adjustments, an adjustment can be made.
- [2] **RULE 135:** RCW 82.04.230 -- RCW 84.33.086 (2) -- B&O TAX -- EXTRACTING -- FOREST EXCISE TAX. The legislature has expressly stated that tax due under Forest Excise Tax statutes of chapter 84.33 RCW is in addition to B&O tax.
- [3] **RULE 228:** PENALTIES -- INTEREST -- LATE PAYMENT -- RETURNS -- REGISTRATION -- LEGAL ADVICE -- RELIANCE. Taxpayer's mistaken belief that it was not subject to Washington tax liability is not a circumstance beyond the control of the taxpayer for purposes of waiving late payment penalties and interest associated with tax deficiencies assessed for periods in which the taxpayer was not registered with the Department and failed to file returns and pay taxes.

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.

NATURE OF ACTION:

Taxpayer petitions for correction of assessment of B&O tax, which was asserted in addition to the Forest Excise Tax on its activities.

FACTS AND ISSUES:

Johnson, A.L.J. -- Taxpayer is engaged in business growing and harvesting timber and raising livestock. The Department of Revenue determined that taxpayer's timber activities were subject to both B&O tax and to the Forest Excise tax and that taxpayer was, at the time of this discovery, not correctly reporting income from its activities. An audit was conducted for the years 1981-September 30, 1988, and the above-captioned assessments resulted.

Taxpayer protests the assessment for 1984, contending that "improper information" was used in calculating the tax.

Additionally, it contends that the auditor improperly taxed "timber harvest activity" under the category "extracting for hire," arguing that, "under provisions of RCW 84.33.071 [repealed in 1983 and replaced by 84.33.086], the Forest Excise Tax specifically replaced any B&O tax previously taxed under RCW 82.04.291 [repealed in 1979 and replaced by 84.33 during the same year] by legislative mandate in 1979." (Brackets supplied.)

Finally, taxpayer argues that there should be no penalty or interest on any taxes due under the B&O tax category relating to the timber harvest activities, "because not only was the taxpayer unaware of tax liability, but also the Department of Revenue has only recently began [sic] collecting for that tax." (Brackets supplied.)

DISCUSSION:

[1] Taxpayer contends that "improper information" was used in calculating tax for 1984. The auditor stated that he used the records supplied by the taxpayer. No records were supplied supporting taxpayer's contention that improper information was used. However, because this contention is in the nature of a factual dispute which is properly resolved at the audit level, we will not overturn the assertion of the tax.

The legislature has enacted RCW 82.32.070, which states that

[e]very 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 may be liable, which records shall include copies of all federal income tax and state tax returns and reports made by him. All his books, records, and invoices shall be open for examination at any time by the department of revenue. (Emphasis supplied.)

The legislature's use of the word "shall" makes mandatory the requirement that taxpayers maintain and produce records from which tax liability can be ascertained.

If taxpayer supplies the Audit Section with records supporting its contention that "improper information" was used in calculating the 1984 tax, the audit will be adjusted. At this time, taxpayer's petition is denied as to this issue.

[2] Taxpayer argues that its activities are not subject to B&O taxation for the audit period, 1981-1988. It cites the repeal of RCW 82.04.291, which authorized a surtax under the B&O tax statutes, for timber harvesting activities. We note that RCW 82.04.291(8), enacted in 1977, read as follows:

[t]he tax imposed by this section shall be in addition to any taxes imposed upon the same persons pursuant to one or more sections RCW 82.04.230 to 82.04.290, inclusive, and none of such sections shall be construed to modify or interact with this section in any way. . . (Emphasis supplied.)

In 1979, as taxpayer notes, the legislature repealed RCW 82.04.291. However, what actually occurred was that the legislature saw fit to expand the statute, creating a new chapter, 84.33 RCW. Section 82.04.291(8) was recodified without amendment as RCW 84.33.071(8). At that time, the tax now imposed by 84.33 RCW was, as always, in addition to any B&O tax liability. In 1984, the legislature amended 84.33 RCW and repealed RCW 84.33.071. However, it added RCW 84.33.086(2), which states that

[t]he taxes imposed by this chapter are in addition to any taxes imposed upon the same persons under chapter 82.04 RCW. (Emphasis supplied.)

RCW 82.04.230 states that extractors are subject to B&O taxation. WAC 458-20-135 (Rule 135), states that

"extractor" means every person who, from the person's own land or from the land of another under a right or license granted by lease or contract, either directly or by contracting with others for the necessary labor or mechanical services, for sale or for commercial or industrial use. . .fells, cuts or takes timber. . .

. . .

In addition to all other taxes, a person engaged in business as a harvester of timber is subject to the forest excise tax levied by chapter 84.33 RCW. The word "harvester" means every person who from the person's own land or from the land of another under a right or license granted by lease or contract, either directly or by contracting with others for the necessary labor or mechanical services, fells, cuts, or takes timber for sale or for commercial or industrial use. (Emphasis supplied.)

Clearly, the Forest Excise Tax is not, and never has been, in place of B&O tax; it is equally clear that taxpayer's business activities are and have been subject to B&O taxation under the "extractor" classification. Taxpayer's petition is denied with regard to this issue.

[3] Taxpayer finally protests the assessment of penalties and interest on the taxes found to be due on its activities during the period in which it failed to report income from those activities.

We are unable to grant the taxpayer's request for waiver because the assessment of penalties and interest for late payment of taxes is mandatory under Washington law. RCW 82.32.100 provides in part:

If any person fails or refuses to make a return . .
. 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. . .

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. . . (Emphasis added.)

RCW 82.32.090 specifically provides for the imposition of penalties:

If payment of any tax due is not received by the Department of Revenue by the due date, there shall be assessed a penalty of five percent of the amount of the tax; and if the tax is not received within thirty days after the due date, there shall be assessed a total penalty of ten percent of the amount of the tax; and if the tax is not received within sixty days after the due date, there shall be assessed a total of twenty percent of the amount of the tax. (Emphasis supplied.)

RCW 82.32.050 likewise provides for the imposition of interest:

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 as to assessments made on and after May 1, 1965, including assessments for additional tax or penalties due prior to that date 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.)

The use of the word "shall" is a clear indication of the legislature's intent that the penalty and interest provisions be mandatory.

RCW 82.32.105 declares that the Department will waive or cancel the penalties or interest when

. . . the failure of a taxpayer to pay any tax by the due date was the result of circumstances beyond the control of the taxpayer ...

WAC 458-20-228 (Rule 228), the administrative regulation that implements the above legislation, provides in part:

The Department will waive or cancel the penalties imposed under RCW 82.32.090 and interest imposed

under RCW 82.32.050 upon finding that the failure of a taxpayer to pay any tax by the due date was due to circumstances beyond the control of the taxpayer. The Department has no authority to cancel penalties or interest for any other reason. (Emphasis supplied.)

It is the obligation of persons engaged in business within this state to correctly inform themselves of the tax consequences of their activities. This Department maintains a staff of qualified personnel to whom inquiries regarding such matters may be addressed, and information is freely available without charge. Had the taxpayer inquired, it would certainly have been advised that it was required to register with the Department and to report and pay taxes. Det. No. 87-286, 4 WTD 51 (1987).

Consequently, the taxpayer's mistaken belief that it was not subject to Washington B&O tax liability cannot be construed as a circumstance beyond the control of the taxpayer.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 24th day of March 1989.