

Cite as 1 WTD 283 (1986)

BEFORE THE INTERPRETATION AND APPEALS SECTION
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 of)	
)	No. 86-277
. . .)	
)	Registration No. . . .
)	Tax Assessment No. . . .

RCW 82.32.050, RCW 82.32.105 AND RULE 228: INTEREST -- UNREMITTED SALES TAXES -- EMBEZZLEMENT BY BOOKKEEPER -- FALSIFICATION OF RECORDS BY BOOKKEEPER. Where taxpayer's bookkeeper embezzled funds and falsified records to conceal theft of money so that sales taxes collected were not remitted to the Department of Revenue, the circumstances involved (concealed and deceptive criminal conduct) are held to be beyond the control of the taxpayer and warrant waiver of interest.

These 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: October 21, 1986

NATURE OF ACTION:

Petition for waiver of interest on audit assessment of liability for sales taxes collected and not remitted.

FACTS AND ISSUES:

Abraham J. Krebs, Administrative Law Judge -- . . . , Inc. (taxpayer) is engaged in the selling of meat products at retail.

The Department of Revenue examined the taxpayer's business records for the period from January 1, 1980 through March 31, 1984. As a result of this audit, the Department issued Tax Assessment No. . . . on August 15, 1984 which gave a credit for overpayment of excise taxes in the amount of \$3,391 plus statutory interest in the amount of \$241 for a total credit sum of \$3,632.

Subsequently, in September 1985, it came to the attention of the Department that a bookkeeper, . . . , employed by the taxpayer had embezzled about \$75,000 from the taxpayer. The amount embezzled included sales taxes collected from customers but not remitted to the Department. The Department then conducted an audit limited in scope to sales taxes collected and not remitted. As a result of this special audit, the Department issued Tax Assessment No. . . . on May 13, 1986 asserting sales tax liability in the amount \$17,224 for the period from May 31, 1982 through June 30, 1983 and interest due in the amount of \$4,494 for a total sum of \$21,718. The taxpayer made payment of \$17,224 under a partial payment plan and the balance remains due.

The taxpayer furnished the following information and explanation pertaining to the embezzlement and unremitted sales taxes. The bookkeeper was hired in 1977. The taxpayer has employed 32 to 50 persons at varying periods of time. The bookkeeper had various duties related to the financial affairs of the taxpayer including bookkeeping entries, reconciling bank statements, writing out checks to suppliers, writing out payroll checks, completing excise tax returns, etc. The bookkeeper had no power to sign checks. While the business was profitable, the taxpayer did not suspect any thievery. However, when the business incurred losses, the taxpayer began to suspect something was wrong. The taxpayer did a reconciliation of its checking account and found that in a five week period, nine checks were missing. The finger of suspicion pointed to the bookkeeper who controlled the checking account. The bookkeeper's embezzling activity was conducted in the following manner. A customer's payment of the amount owing would be entered into the computer but minus the sales tax even though the customer's payment included sales tax. The bookkeeper then wrote out forged signature checks to himself for amounts averaging \$1,500 to \$2,200 monthly as payroll checks and cashed them. When the canceled checks were returned by the bank, the bookkeeper destroyed the forged checks. The taxpayer has annual sales of eight million dollars and the defalcations of about \$25,000 annually were not readily perceptible. The bookkeeper used the falsified

computer printouts to complete tax returns. These falsified computer printouts were shown to the auditor during the first audit.

The later special audit was based on non-falsified invoices paid by customers and revealed the sales taxes paid by the customers but not entered into the computer.

The bookkeeper pleaded guilty on . . . to theft in the first degree, RCW 9A.56.030. The bookkeeper received a one year jail sentence reduced to 60 days and was ordered to make restitution of \$72,348.62 by payments of no less than \$500 per month. The taxpayer doubts that it will ever receive full restitution.

In petitioning for waiver of the audit interest of \$4,494, the taxpayer asserts that it had never been delinquent in filing tax returns with proper payment of taxes. The taxpayer further asserts that the bookkeeper's criminal activity was a deliberately concealed activity not known to it as the victim.

DISCUSSION:

RCW 82.32.050, in pertinent part, provides:

If upon examination of any returns or from other information obtained by the department it appears that a tax . . . 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 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.

The only authority to waive or cancel interest is found in RCW 82.32.105 which in pertinent part provides:

If the department of revenue finds that the payment by a taxpayer of a tax less than that properly due or the failure to 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. The department of revenue shall prescribe rules for the waiver or cancellation of interest or penalties imposed by this chapter. (Emphasis supplied.)

Administrative Rule WAC 458-20-228 (Rule 228), copy attached, states the two situations under which a waiver or cancellation of interest upon assessments pursuant to RCW 82.32.050 will be considered by the Department. None of the two situations apply to the taxpayer. Essentially, the failure of a taxpayer to pay any tax by the due date giving rise to the assessment of interest must be the result of circumstances beyond the control of the taxpayer to warrant waiver or cancellation of interest. Rule 228.

In this case, the bookkeeper embezzled funds from the taxpayer. In perpetration of the crime, the bookkeeper made false entries in the taxpayer's computer system so that sales taxes collected were not remitted to the Department. These false entries helped the bookkeeper to conceal the theft of money which the taxpayer would not be able to discover. The machinations of the bookkeeper resulted in tax deficiencies unknown to the taxpayer. Indeed, the Department's auditor did not discover the deficiencies during the first audit. We must conclude that the circumstances involved (concealed and deceptive criminal conduct) were beyond the control of the taxpayer. Accordingly, the assessment of audit interest is canceled.

DECISION AND DISPOSITION:

The taxpayer's petition is granted. The assessment of audit interest of \$4,494 in Tax Assessment No. . . . will be deleted. The terms of the partial payment agreement will be adjusted to reflect the deletion of the audit interest of \$4,494.

DATED this 31st day of October 1986.