

Cite as 1 WTD 295 (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 )	
)	No. 86-280
)	
. . . )	Registration No. . . .
)	Tax Assessment No. . . .
)	
)	

[1] **RCW 82.32.100:** PENALTIES -- UNREGISTERED TAXPAYER.  
RCW 82.32.100 provides that the Department shall add late payment penalties if a person fails to make any return required by the Revenue Act.

[2] **RULE 228 AND RCW 82.32.105:** PENALTIES OR INTEREST -  
- WAIVER -- CIRCUMSTANCES BEYOND CONTROL OF TAXPAYER  
-- WHAT CONSTITUTES. Lack of knowledge of a tax obligation does not render failure to pay taxes "beyond the control" of the taxpayer within the meaning of RCW 82.32.105 and WAC 458-20-228 which allow the Department of Revenue to waive or cancel interest and penalties under limited situations.

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 20, 1986

NATURE OF ACTION

The taxpayer petitions for a waiver of interest and penalties added to an assessment of taxes on the commissions earned as an insurance agent.

FACTS AND ISSUES

Anne Frankel, Administrative Law Judge -- The taxpayer's records were examined for the period September 1, 1983 through March 31, 1986. The audit disclosed taxes owing in the amount of \$686.00. Interest and penalties totaling . . . were added to the assessment which was issued June 26, 1986. The taxes were assessed under the Insurance Agents and Brokers classification on insurance commissions which had been unreported because the taxpayer's business was unregistered. The taxpayer contends he was unaware of his business tax liability on his insurance commissions. He does not dispute the assessment of the tax, but does protest the added interest and penalties.

The taxpayer relies on the following in support of his request for a waiver of the interest and penalties:

- 1) The insurance company provided weeks of training and substantial amounts of materials when he became an insurance agent. He believed the information he received was complete, yet he was never told that he should register with the Department of Revenue and that he might owe Business and Occupation taxes.
- 2) He has an insurance license but neither the Insurance Commissioner's office nor the Department of Revenue has ever informed him he should register.
- 3) He was a bank employee prior to starting his insurance agency. He had no knowledge of Washington's B & O tax.

#### DISCUSSION

Washington's business and occupation tax is imposed on every person for the act or privilege of engaging in business activities in this state. The tax is measured by the application of rates against the value of products, gross proceeds of sales, or gross income of the business. RCW 82.04.220. RCW 82.04.320 states, in pertinent part:

This chapter shall not apply to any person in respect to insurance business upon which a tax based on gross premiums is paid to the state: Provided, that the provisions of this section shall not exempt any person engaging in the business of representing any insurance company, whether as general or local agent, or acting as broker for such companies: . . . (Emphasis added.)

RCW 82.04.260(14) enacted in 1983 and effective July 1, 1983, created a new classification applicable to insurance agents, brokers, or solicitors licensed under chapter 48.17 RCW. Upon such licensed activity, the tax is imposed at the rate of .011. RCW 82.04.260(14); 82.04.2904.

An insurance company can choose whether to utilize employees or independent agents to sell insurance. When a company chooses to create the relationship of principal and independent contractor, the agent is liable for business and occupation tax.

WAC 458-20-164 (Rule 164) is the Department of Revenue's duly adopted rule governing the taxability of insurance agents, brokers and solicitors. Rule 164 states:

Every person acting in the capacity of agent, broker, or solicitor is presumed to be engaging in business and is taxable under the insurance agents and brokers classification upon the gross income of the business unless such person is a bona fide employee. The burden is upon such person to establish the fact of his status as an employee. (See WAC 458-20-105 - Employees.)

Rule 105 distinguishes employees from persons engaging in business. That rule states in pertinent part:

The fact that a person is construed to be an employee under the provisions of the State Employment Security Act or the Federal Social Security Act, does not conclusively establish such persons as an employee within the provisions of the Revenue Act. However, where a person is not construed to be an employee under the State Employment Security Act or the Federal Social Security Act, such person will not be considered an employee under the Revenue Act. (Emphasis supplied.)

The taxpayer agrees that he does not meet the above requirements for finding he is an employee rather than an independent contractor. Because of his good faith belief that he was not operating as a taxable business, though, he requests a waiver of the interest and penalties.

[1] The Department has limited authority to waive penalties and interest. RCW 82.32.100 provides that when a taxpayer fails to make any return as required, the Department shall proceed to obtain facts and information on which to base its estimate of the tax. As soon as the Department procures the facts and information upon which to base the assessment, "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 provides that if any tax due is not received by the Department of Revenue by the due date, there shall be assessed a penalty. The penalty for returns which are not received within 60 days after the due date is 20 percent of the amount of the tax. RCW 82.32.050 provides that if a tax or penalty has been paid less than properly due, the Department shall assess the additional amount due and shall add interest at the rate of nine percent per annum from the last day of the year in which the deficiency is incurred until the date of payment.

[2] The only authority to cancel penalties or interest is found in RCW 82.32.105. That statute allows the Department to waive or cancel interest or penalties if the failure of a taxpayer to pay any tax on the due date was the result of circumstances beyond the control of the taxpayer. The statute also requires the Department to prescribe rules for the waiver or cancellation of interest and penalties.

The administrative rule which implements the above law is found in the Washington Administrative Code 458-20-228 (Rule 228). Rule 228 lists the situations which are clearly stated as the only circumstances under which a cancellation of penalties and/or interest will be considered by the Department. A copy of Rule 228 was provided to the taxpayer. None of the situations described in Rule 228 apply in the present case.

We have no reason to doubt that had the taxpayer known of his tax obligation earlier, he would have paid the amount owing. Lack of knowledge or a good faith belief that one is not conducting a taxable business, though, is not identified by statute or rule as a basis for abating interest or penalties. As an administrative agency, the Department does not have discretion to change the law and grant relief. The state does try to provide accessible taxpayer information. There are 17 regional offices around the state to assist taxpayers and

answer questions without charge. The state also maintains an office of taxpayer information. The ultimate responsibility for registering with the Department and properly reporting taxes, however, rests on persons in business. The Department is not required to make sure that every business knows its tax obligations before it can assess taxes, interest or penalties. With over 275,000 registered taxpayers in Washington, the burden must be on the taxpayer to determine if it has an obligation to pay taxes.

We are unable to grant relief because the taxpayer was not informed by the Insurance Commissioner's office of an insurance agent's possible B & O tax liability. The administration of the business and occupation tax is vested in the Department of Revenue. RCW 82.32.300. Inquiries regarding tax liability must be directed to this Department to receive proper consideration. As noted above, the Department tries to provide accessible information.

Imposition of the late penalty is viewed primarily as a means to partially compensate the state for the additional expense in collecting taxes that are late or not paid rather than solely as a punitive measure. The state does recognize the difference between nonpayment due to lack of knowledge of a tax obligation and tax evasion. In the case of intentional tax evasion, the Department is required to impose a penalty of 50 percent of the additional tax found due. RCW 82.32.050.

No evasion penalty is assessed unless misrepresentation or fraud is specifically found. No such intent was found in the present case. Interest is imposed on late payments because the state has not had the use of the money that was owed.

The taxpayer paid the assessment of taxes prior to the hearing and made payment of the interest and penalties, including additional extension interest, after the hearing. The State appreciates the taxpayer's compliance with the assessment and his courteous manner during the audit and appeal process.

#### DECISION AND DISPOSITION

The taxpayer's petition for correction of Assessment No. . . . is denied.

DATED this 31st day of October 1986.