

Cite as 1 WTD 67 (1986)

BEFORE THE INTERPRETATION AND APPEALS SECTION
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 Refund of)
) No. 86-226
)
) Registration No. . . .
)
)

[1] 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.

[2] EQUAL PROTECTION; ASSESSMENT OF PENALTIES AND INTEREST
Assessment of penalties and interest not denial of equal
protection because of Department's prior position of
assessing penalties or interest, but not both.

These headnotes are provided as a convenience for the reader and
are not in way a part of the decision or in any way to be used in
construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .

NATURE OF ACTION:

Petition for a waiver of penalties assessed.

FACTS AND ISSUES:

Anne Frankel, Administrative Law Judge--The taxpayer is an out-of-
state manufacturing company. On January 29, 1985 the Department
sent a Business Activities Statement to the taxpayer to determine
if its activities in Washington required it to register and pay
excise tax on its Washington sales.

The Department received the completed statement on November 4, 1985. Based on the statement that the taxpayer had resident employees who solicit sales from Washington customers, the Department determined the taxpayer was engaged in taxable business in this state. The Department requested that the taxpayer register and submit a schedule of Washington sales from January 1, 1978 through the end of the most recent full calendar quarter.

The taxpayer supplied the requested information on December 11, 1985. Based on that information, the Department issued two tax assessments on February 11, 1986: Assessment No. . . . for \$. . . based on the period January 1, 1978 through December 31, 1980 and Assessment No. . . . for \$. . . based on the period January 1, 1981 through September 30, 1985. Both assessments included interest and penalties. The taxpayer paid the assessments and petitioned for a refund of the \$. . . in penalties paid.

The taxpayer does not dispute that taxes are owing, but believes the following reasons warrant cancellation of the penalties:

1. The taxpayer was unaware of its obligation to report and pay the Business and Occupation Tax to the state of Washington until it was contacted by the Department last year, because it has always considered its contacts with the State to be minimal. Failure to pay based on a sound factual basis for which the applicable law is unclear should constitute sufficient grounds for waiver of this penalty.

2. Once the taxpayer was notified of its obligation to pay, it provided the State with the information necessary to enable it to issue an assessment of tax, and has paid the tax due in a timely manner.

If the penalty is not cancelled, the taxpayer contends the amount should be reduced. The taxpayer contends the Department previously audited a related company and assessed either penalty or interest, whichever was greater, for the years tax was due. The taxpayer contends that to deny it the same treatment that was afforded a similarly situated taxpayer, is to deny it equal protection of the law.

In the alternative, therefore, the taxpayer petitions for a refund of \$5,102 in interest and \$15,586 of the penalties paid.

DISCUSSION:

The taxpayer was assessed tax, interest, and penalties under the Wholesaling classification on the income it received from sales of its products in Washington which had not been reported.

[1] If 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." RCW 82.32.100. (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.

The only authority to cancel penalties or interest is found in RCW 82.32.105 which allows the Department to waive or cancel interest or penalties if the failure to pay any tax on the due date was the result of circumstances beyond the control of the taxpayer. That statutory provision 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 only situations under which a cancellation of interest or penalties will be considered. Rule 228 states that the Department will waive or cancel the penalties imposed under RCW 82.32.090 or the interest imposed under RCW 82.32.050 only upon the 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. 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 is enclosed.

None of the circumstances relied on by the taxpayer are identified by statute or rule as a basis for abating interest or penalties. As an administrative agency, the Department does not have the 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.

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.

Many states impose business taxes. The burden on one who does business in Washington to inquire about Washington's tax laws is not unreasonable. One engaging in business in Washington could reasonably expect to have to pay a Washington tax. The destination theory of Washington's gross receipts taxation of interstate sales activity received approval by the Supreme Court in General Motors Corp. v. Washington, 377 U.S. 436 (1964). WAC 459-20-193B is the Department's rule dealing with sales of goods originating in other states to persons in Washington. The rule gives examples of sufficient local nexus for application of the business and occupation tax. If the taxpayer believed the applicable law was unclear, it could have requested a written opinion and ruling from the Department regarding its tax liability. WAC 458-20-100.

[2] The Department's former position was to assess interest or penalties, which ever was higher, but not both. This position was changed in 1985 because it was subsequently determined that the above cited legislation mandated the imposition of both interest and penalties. The decision was made prospectively only. Prior assessments, as the one relied on by the taxpayer in this case, were not adjusted to include both interest and penalties for each year taxes had been found due.

We do not agree, therefore, that the imposition of both penalties and interest is a denial of equal protection of the law. All registered and unregistered businesses, including Washington businesses, are now assessed interest and penalties when taxes have not been paid when due. The penalties and interest were not imposed on the taxpayer because of some arbitrary classification prohibited by the constitution. See, e.g. Frame Factory, Inc. v Department of Ecology, 21 Wn.App. 50, 57 (1978)

DECISION AND DISPOSITION:

The taxpayer's petition for a refund is denied.

DATED this 13th day of August 1986.