

Cite as Det. No. 99-158, 19 WTD 567 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment and Refund of)	
)	No. 99-158
)	
...)	Registration No. . . .
)	Warrant No. . . .

RULE 217; RULE 228; RCW 82.32.060; RCW 82.32.210: REFUND – APPLICATION OF AMOUNTS COLLECTED ON TAX WARRANT TO BALANCE OF OUTSTANDING ASSESSMENT. The Department may issue a warrant for amounts that are not paid within fifteen days of their due date. The Department may issue a refund when payment received under a warrant exceeds the taxpayer's outstanding tax liability. However, where the Department receives payment from the taxpayer's bank in excess of the amount due on a warrant, but the taxpayer also has an outstanding assessment, the Department may properly apply the excess amount to the assessment.

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 seeks refund of amount collected pursuant to a tax warrant.¹

FACTS:

Danyo, A.L.J.-- Taxpayers, [Taxpayer husband and Taxpayer wife] dba . . . (Taxpayer), during the audit period were in the business of selling used trucks, both wholesale and retail. Taxpayer closed the business as of July 31, 1997.

The Department of Revenue (Department) examined Taxpayer's business records from January 1, 1992 through June 30, 1996. As a result of this audit, the Department issued Tax Assessment No. FY ... (Assessment) on December 4, 1996 assessing excise tax liability of \$. . . and interest of \$. . . for a total of \$. . .

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

The Auditor's Detail of Differences and Instructions to Taxpayers (the Report) explained that in 1992 and 1993 Taxpayer had treated certain sales as wholesale transactions on which it did not collect or remit retail sales tax. Taxpayer, however, failed to provide resale certificates for these sales, so the Audit Division reclassified the sales from wholesaling to retailing. As a result of the reclassification, Taxpayer was assessed retailing business and occupation (B&O) tax and retail sales tax. See Schedule 2 of the Assessment.

Further, for the years 1992 and 1993, Taxpayer reported certain sales under the Retailing Interstate Transportation Equipment classification per WAC 458-20-174 (Rule 174). See Schedule 3 of the Assessment. Rule 174 [explains that] certain sales of motor vehicles to be used by motor carriers [are exempt from retail sales tax] when the statutory requirements are met. One such requirement is "[t]he seller, at the time of the sale, must retain as a part of its records an exemption certificate which must be completed in its entirety." Rule 174(3)(a). Taxpayer (seller) did not provide the required supporting documentation. Thus, the Assessment reclassified these sales to retailing and assessed retailing B&O tax and retail sales tax.

Using the test period of 1992 to 1993, the Department estimated Taxpayer's sales for the period of January 1, 1994 through June 30, 1996 and assessed retailing B&O and retail sales taxes on those amounts. See, Schedules 4 and 5 of the Assessment. The Report explains estimation was necessary because Taxpayer did not make records available for that period. The estimate was based on the 1993 percentage differences between the amount totaled from sales invoices and the amounts reported to the Department. Since 1993 income was underreported by about 50%, the Audit Department estimated the income for 1994 through June 1996 was underreported by the same percentage.

The Assessment disallowed interstate sales deductions relying on WAC 458-20-177 (Rule 177) which [explains that certain sales to non-residents are exempt from retail sales tax] when the statutory requirements of RCW 82.02.0264 are met. See Schedule 5 of the Assessment. The Report explains that the deductions were not based on interstate sales, but rather nonresident sales. The Report cites Rule 177's requirements and notes that the seller is required to take an affidavit from the buyer to evidence the exempt nature of the transaction. Taxpayer (seller) did not provide the affidavits required under Rule 177.

The Department issued Post Assessment Adjustment #1 (PAA) on May 14, 1997 and credited Taxpayer's account in the amount of \$. . . The credit was applied to Schedule 2, Schedule 4, and Schedule 5. The Department reclassified a Schedule 2 sale as wholesale when it received supporting documentation from Taxpayer. Further, the Department credited Schedule 4 to reflect actual income rather than estimated income after Taxpayer submitted actual records for 1994; and, the Department "decided to accept the explanations and eye-witness testimony" Taxpayer provided on several of the disallowed interstate sales deductions for a Schedule 5 adjustment.

On July 29, 1997, the Department's Compliance Division determined Taxpayer had not filed excise tax returns for the months of March, April, May, and June 1997, and issued Tax Warrant No. . . . (Warrant #1) against [Taxpayer husband and Taxpayer wife] dba . . . (Taxpayer) in the amount of \$.

. . for delinquent taxes, penalty, and interest. The Department estimated the tax owing on the delinquent returns. When Warrant #1 was issued, Taxpayer still owed a substantial amount of delinquent taxes assessed on the Assessment.

Warrant #1 was filed in . . . Superior Court on August 12, 1997. Due to nonpayment of Warrant #1, collection activity was commenced. On August 16, 1997 and August 17, 1997, the Department sent Notice and Order to Withhold and Deliver (Notice) to several banks. The Bank of . . . received the Notice and withdrew the funds from Taxpayer's account. The Bank of . . . mailed a cashier's check for \$. . . to the Department. The Department received the cashier's check on August 20, 1997 and applied it to the tax warrant that day.

On August 28, 1997, the Department received (via fax) March and April 1997 tax returns. The Department adjusted the tax warrant to reflect the March and April 1997 tax returns.² After adjustment, the amount owing on Warrant #1 was \$. . . The Department used the \$. . . it received and processed on August 20, 1997 to pay the Warrant #1 (\$. . .); the remainder (\$. . .) was established as a credit.

Approximately 10 days after the credit was established, it was applied to the Assessment, which, at that time, showed approximately \$. . . due and owing. On December 2, 1997, the Department issued Tax Warrant No. . .³ (Warrant #2) for outstanding balance of \$. . . (principle and interest) of the Assessment.

Taxpayer seeks a refund of approximately \$. . .⁴ collected pursuant to the Warrant #1 (No. . . .). Taxpayer asserts it has fully satisfied its obligation to the Department and a refund should be granted. Taxpayer asserts it has filed and paid all excise tax due for March 1997. Taxpayer states [it] went out of business in March 1997 and forwarded a "No Business" return for April 1997 to the Department on August 27, 1997.

ISSUES:

Is Taxpayer entitled to a refund of amounts collected on one tax warrant when Taxpayer has unpaid interest, penalty, and taxes not included in the tax warrant?

DISCUSSION:

First we will examine whether the warrant was properly issued.

² On August 27, 1997, [Taxpayer's husband] told the Audit Division that he was in Canada and had closed his business operation in Washington.

³ To date, the balance on Warrant #2 has not been paid.

⁴ Taxpayer's petition seeks refund of "approximately \$. . . ." The Department received \$. . . from the Bank of Bellingham on the Notice and Order to Withdraw and Deliver. We believe the difference is a clerical error and not relevant in considering this appeal.

RCW 82.32.210 states:

- (1) If any fee, tax, increase, or penalty or any portion thereof is not paid within fifteen days after it becomes due, the department of revenue may issue a warrant in the amount of such unpaid sums, together with interest thereon from the date the warrant is issued until the date of payment. *If, however, the department of revenue believes that a taxpayer is about to cease business, leave the state, or remove or dissipate the assets out of which fees, taxes or penalties might be satisfied and that any tax or penalty will not be paid when due, it may declare the fee, tax or penalty to be immediately due and payable and may issue a warrant immediately.*

(Emphasis added).

WAC 458-20-228 (3) (Rule 228) provides:

For monthly reporting taxpayers, the tax returns are due on the 25th of the following month. For quarterly and annually reporting taxpayers, the tax returns are due on the last day of the next month after the period covered by the return. For example, tax returns covering the first quarter of the year are due on April 30.

The Department has authority to issue a tax warrant and assess a penalty if any tax is not paid within fifteen days after it becomes due. RCW 82.32.210; Rule 228(4)(c).

Taxpayer sold used trucks at retail and wholesale and therefore, filed a monthly Combined Excise Tax Return with the Department. Taxpayer's monthly excise tax returns were due on the 25th of the month after the month being reported. Rule 228. For example, on July 25, 1997 Taxpayer's June 1997 tax liability was due and payable. Taxpayer failed to timely file returns for the months of March, April, May, and June 1997. The Audit Division had reason to believe that Taxpayer was no longer in business when it issued the Warrant #1. In addition to the four delinquent months, the Audit Division was aware of outstanding tax still owing on the Assessment. On July 29, 1997, the Department was authorized to and did issue an estimated tax warrant for the months Taxpayer had not filed returns. Rule 228. The Department mailed a copy of the warrant to Taxpayer who did not respond to the warrant letter.

WAC 458-20-217 (Rule 217) explains any unpaid tax constitutes a debt to the state and may be collected in the same manner as any other debt. Rule 217 provides:

When a warrant issued under RCW 82.32.210 and 82.32.220 has been filed with the clerk of the superior court and entered in the judgment docket, the warrant becomes a specific lien upon all goods, wares, merchandise, fixtures, equipment or other personal property used in the conduct of the business of the taxpayer, including property owned by third persons who have a beneficial interest, direct or indirect in the operation thereof, and no sale or transfer of such personal property in any way affects the lien The department of revenue is authorized to issue to any person . . . a notice and order to withhold and

deliver property of any kind whatsoever when there is reason to believe that there is in the possession of such person . . . property which is or shall become due, owing or belonging to any taxpayer against whom a warrant has been filed.

As we stated in the facts above, the Department filed Warrant #1 with . . . Superior Court on August 13, 1997. Collection activity was commenced when the Department mailed out Notices to several banks on August 16, 1997 and August 17, 1997. The Bank of . . . responded by sending a cashier's check to the Department for \$. . ., representing the amount in Taxpayer's account. Neither state nor federal constitutional rights are violated when the Department seizes Taxpayer's commercial bank account to satisfy Taxpayer's tax indebtedness if the agency complies with relevant statutes and has probable cause to believe the bank funds belong to the taxpayer. Peters v. Sjöholm, 95 Wn.2d 871, 877, 631 P.2d 937 (1981).

Based on the evidence presented, Tax Warrant No. [1] is upheld as valid and the monies seized from the Bank of . . . were properly seized.

The second issue is whether Taxpayer fully satisfied its obligation to the Department so as to be entitled to a refund.

RCW 82.32.060 in the pertinent part provides:

If, upon receipt of an application by a taxpayer for a refund . . . it is determined by the department that . . . *any amount of tax, penalty, or interest has been paid in excess of that properly due*, the excess amount paid within, or attributable to, such period shall be credited to the taxpayer's account or shall be refunded to the taxpayer, at the taxpayer's option.

(Emphasis added.)

Rule 228(4)(a)(iii) outlines Department policy regarding payments received:

The department will apply the payment of the taxpayer first against interest, next against penalties, and then upon the tax, without regard to any direction of the taxpayer. In applying a partial payment to a tax assessment, the payment will be applied against the oldest tax liability first.

On December 4, 1996, the Department issued the Assessment assessing tax liability of \$. . . (including interest). The Department issued a PAA on May 14, 1997 crediting Taxpayer's account \$. . . The Department issued a tax Warrant #1 (No. 294087) on July 29, 1997 (filed August 13, 1997) in the amount of \$. . . On August 28, 1997, the Department adjusted the Warrant #1 to reflect a \$. . . balance owing after the Department received supporting documentation from Taxpayer. The Department received \$. . . from the Bank of . . . on August 20 1997, which the Department used to pay the Warrant #1 (\$. . .) and the remainder (\$. . .) was established as a credit. On August 20, 1997, Taxpayer had not paid the balance owing on the Assessment.

The Department may issue a refund when payment received exceeds outstanding tax liability. RCW 82.32.060. On, August 20, 1997, upon receipt of about \$. . . from the Bank of . . . Warrant #1 was satisfied leaving an amount of about \$. . . to be applied to interest, penalty, and tax of Taxpayer's oldest tax liability. At that time, the balance owing from the Assessment was about \$. . . As stated above, on December 2, 1997, the Department issued Tax Warrant No. . . . (Warrant #2) for outstanding balance of \$. . . (principle and interest) assessed in 1996. Because Taxpayer had unpaid interest, penalties, and taxes when the Department received payment on Warrant #1, the Department correctly applied the balance from Warrant #1 to Taxpayer's outstanding tax liability.

According to its petition, Taxpayer believed that its obligation to the Department had been satisfied when it funds had been seized and applied to Warrant #1. In a memo to the Department dated August 27, 1997, Taxpayer wrote that it had gone out of business in March 1997 and had filed and paid all excise tax due for March 1997. Exhibit B to the petition is the memo that was faxed to the Department from [Taxpayer husband] on August 27, 1997. It states:

Re: Sales Tax due for March 1997 and re-submitted forms for other months.

Attached is a copy of the tax due for the month of March 1997 and also copies of the forms that are signed to show no sales for April 1997. As you stated yesterday, once this is submitted to you, the funds that are being held by the Bank of . . . would be released. The person that had been doing the taxes prior to the closing of the business April 1, 1997, I thought had told me that there was more tax due then what is on this form, however, he admitted to me today that he really had no idea what was due, because all that he did was to put the Tax Return in with the files, he didn't look to see if the sales were in state or out of state.

I will be more than happy to bring you in the original if you so choose, with the check for \$. . . in the morning; if it will expedite the funds being released.....

Please contact me and let me know what we need to do from here....

We do not agree that Taxpayer fully satisfied its obligation to the Department. We find that Taxpayer had paid the excise tax reported as due for March 1997. However, payment of one month's excise tax did not relieve Taxpayer from its liability for unpaid interest, penalty, and tax amounts. Taxpayer has not satisfied Warrant #2 and, we note that, after applying Taxpayer's credit to the Assessment, Taxpayer still has an outstanding balance due of approximately \$. . . plus additional interest. Thus, we find that Taxpayer is not entitled to a refund.

DECISION AND DISPOSITION:

Taxpayer's petition for refund of amounts collected on a tax warrant is denied.

Dated this 28th day of May 1999.