Cite as Det. No. 05-0174, 25 WTD 48 (2006)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of . . .	)	D E T E R M I N A T I O N No. 05-0174 Registration No. . . . Document Nos. . . . Docket No. . . .

[1] RULE 193: B&O TAX -- SUBSTANTIAL NEXUS – ONE OR TWO BRIEF VISITS ANNUALLY TO WHOLESALE DISTRIBUTOR. One or two brief visits per year by an out-of-state manufacturer to its Washington wholesale distributor, for the purpose of presenting new or existing products and demonstrating use of products, establish substantial nexus. They are product-oriented visits for the purpose of creating or maintaining a customer base in Washington.

[2] RULE 246; RCW 82.04.423: B&O TAX – DIRECT SELLER'S REPRESENTATIVE EXEMPTION. The requirements of the direct seller's exemption are not met where the seller makes sales in Washington both through a representative and directly to customers, and the seller uses the representative to sell both consumer and non-consumer goods.

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

Prusia, A.L.J. – An out-of-state manufacturer/wholesaler appeals the assessment of Business and Occupation (B&O) tax on sales of goods to Washington customers, contending it did not have sufficient nexus with Washington to be subject to B&O tax, and the goods were received by the customers in [state A] rather than in Washington. The taxpayer contends, in the alternative, that its revenues were exempt from B&O tax under RCW 82.04.423, the direct seller's representative exemption. The taxpayer contends, if tax is found due, delinquent return penalties and assessment penalties should be waived, because the taxpayer in good faith believed it was not required to be registered in Washington. We conclude the goods were received in this state

and the taxpayer had nexus. The taxpayer did not qualify for the direct seller's exemption. The B&O tax applied to its sales revenues. We sustain the penalties. We deny the petition.[1]

ISSUES

[1] Did the taxpayer have nexus with Washington?

[2] Were the goods received by the purchasers in Washington?

[3] Did the taxpayer qualify for the direct seller's exemption under RCW 82.04.423?

[4] Can delinquent return penalties and unregistered business penalties be waived?

FINDINGS OF FACT

[Company] is . . . a designer and manufacturer of [products]. Its headquarters and manufacturing plant are in [state A location]. Since 1997, [Company] has made wholesale sales in Washington. [Company] has never maintained an office or any other facility in Washington, has not leased equipment located in Washington, and has never had resident employees in the state. Before 2004, [Company] was not registered with the Department of Revenue ("Department").

This is an appeal of two assessments against [Company] issued by the Department's Compliance Division, for the periods January 1, 1997, through December 31, 1999, and January 1, 2000, through December 31, 2003. The assessments totaled $. . . and $. . . respectively. Both assessments include delinquent penalties of 25% of the amount of tax, and unregistered business penalties of 5% of the amount of tax.[2] The assessments were issued April 22, 2004.

The assessments are <u>not</u> based on an audit of [Company] by the Department. The assessments are based solely on: a Washington Business Activity Questionnaire (WBAQ), dated September 6, 2003; a copy of a Manufacturer's Representative Agreement between [Company] and a Washington Company, [Washington Company] and a statement of [Company's] Washington sales by calendar year. [Company] submitted the documents during an investigation of [Company's] activities by the Compliance Division. [Company] registered in April 2004, submitting a Master Business Application.

The WBAQ that [Company] submitted states the following. [Company] sells [products] in Washington. It says [Company's] business activities in Washington are performed by resident manufacturer's representatives and in-state trade shows. A [Company] employee visits

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

[2] The following is a breakdown of the assessments: . . .

. . .

Washington two times per year for four days per visit to present new or existing products to customers and demonstrate the use of products. Sales have been solicited on [Company's] behalf from Washington customers by a representative, [Washington Company], located in [Washington city]. Sales are to retailers or distributors for resale. [Company] or a third party hired by it has performed other services in relation to establishing or maintaining sales in Washington. [Company] warrants its products, but warranty service is not performed in Washington; products are returned to [state A] for service. [Company's] products are delivered to Washington customers by [various carriers]. [Company] has not provided a Form 1099 to any Washington individual or business entity.

[Company's] Manufacturer's Representative Agreement ("Agreement") with [Washington Company] designates [Company] "Supplier" and [Washington Company] "Sales Representative." The Agreement grants [Washington Company] the exclusive right to act as [Company's] sales representative to wholesale distributors, to solicit orders for [Company] in most of the far west, including all of Washington. The Agreement describes the relationship created between [Company] and [Washington Company] as an independent sales representative relationship in which [Washington Company] agrees to represent and promote [Company's] products. The Agreement provides that [Company] will establish the prices, charge, and terms of sale of its products, and all orders by [Washington Company] for [Company's] products will be forwarded to and subject to acceptance by [Company]. The Agreement provides that [Company] will pay [Washington Company] a commission of 10% on orders [Washington Company] solicits, and commissions are due and payable on the first working day of the month following receipt of the paid invoice. The Agreement provides that the parties will establish minimum performance standards for [Washington Company] relative to sales, development of customer base, service and other related matters.

Regarding the presence of [Company's] employees in Washington, [Company's] appeal petition states that the only physical contact in Washington is that [Company] sends one of its employees from [state A] to Washington two times each year, for at most four days each visit, to present new or existing products to [Washington Company].

On appeal, [Company] states[3] that the relationship between [Company] and [Washington Company] is strictly a manufacturer/independent wholesale distributor relationship. [Company] explains the Agreement, and details its relationship with [Washington Company], as follows. The Agreement does not describe the actual relationship between [Company] and [Washington Company]. The Agreement is a form agreement that [Company] uses throughout the United States, both with sales representatives and stocking representatives, and [Washington Company] is the latter. [Washington Company] is not a commissioned sales representative, but rather a reseller of [Company's] products that it purchases from [Company] at wholesale. [Washington Company] is unrelated to [Company], and sells products of many other manufacturers in Washington and other states in the West. Approximately 99% of [Company's] sales into

[3] [Company's] statements are taken from its petition, dated June 24, 2004, a letter from [Company], by . . ., dated February . . ., 2005, and a letter from [Company's] representative, dated March 25, 2005.

Washington are to [Washington Company]. [Company] sells the goods to [Washington Company] FOB point of origin in [state A], with shipping paid by [Washington Company]. [Washington Company] ships the goods, either to [Washington Company's] warehouse in Washington, or to [Washington Company's] customer, via [various carriers]. [Washington Company] has advised [Company] that [Washington Company] has always paid Washington wholesaling B&O tax on all its sales to its customers in Washington.

[Company] states that the other approximately 1% of [Company's] sales into Washington are either to retail customers who place credit card orders directly on [Company's] website, or to national account distributors who may order directly from [Company]. It states these customers also take title FOB point of origin ([State A]).

[Company] pays [Washington Company] a commission on these sales. [Washington Company] has advised [Company] that [Washington Company] has always paid Washington B&O tax on the sales commissions.

[Company] states that virtually all the items it sells to [Washington Company] and other Washington customers are used in consumer goods. These products include [items installed in homes]. Items that end in commercial, industrial, or municipal use in Washington average only $. . . per year.

[Company] states that none of [Company's] products are sold in Washington through permanent retail establishments. [Washington Company] sells [Company's] products to subdistributors who then resell the products to contractors who install the products in homes.

On appeal, [Company] provided a sample of invoices for October 2001 through 2003, which show [Washington Company] under both "SOLD TO" and "SHIP TO." The invoices list the items shipped, the quantity ordered and quantity shipped, the unit price, and the total price. A cover letter states the products listed are used for residential use.[4]

On appeal, [Company] provided a copy of its "Commission Report" for January 2005, which it states is similar to reports during the audit periods, which are in storage and not readily available. The report lists a $. . . "COMMISSION JAN 05" to [Washington Company], and includes a check request for a check payable to [Washington Company] for "COMMISSIONS" in the [same] amount of $. . . . A cover letter from [Company's] representative states that the report's use of the term "commissions" is largely misleading. It states that [the majority] of the "commissions" were really purchase price discounts for purchases by [Washington Company]. The remaining [amount was] "true commissions" on sales shipped to [Washington Company] customers in several states without [Washington Company] ever purchasing the goods shipped, and of those, only [a small amount was] commissions on sales into Washington.

[4] Letter from [Company], by . . . Accounting Manager, dated February . . ., 2005.

ANALYSIS

Washington imposes a B&O tax "for the act or privilege of engaging in business" in the State of Washington. RCW 82.04.220. The B&O tax measure and rate are determined by the type or nature of the business activity in which a person is engaged. Chapter 82.04 RCW. The measure of the B&O tax is the application of rates against "value of products, gross proceeds of sales, or gross income of the business, as the case may be." RCW 82.04.220.

[1] This appeal involves B&O tax assessed on wholesale sales of goods by an out-of-state seller ([Company]) to Washington buyers. [Company] contends the sales were not subject to B&O tax because [Company] did not have sufficient connection or "nexus" with Washington for Washington to tax the sales, and because the goods were received by the purchasers outside Washington. Taxpayer cites WAC 458-20-193(7) (Rule 193(7)) in support of its position. [Company] contends, in the alternative, that [Company's] sales qualified for the exemption provided by RCW 82.04.423 and WAC 458-20-246 (Rule 246), regarding sales to or through a direct seller's representative. We first address the nexus and receipt arguments.

A sale of tangible goods is treated as a local transaction occurring in the state where the sale is consummated (possession is transferred to the purchaser). *McGoldrick v. Berwind-White Coal Mining Co*., 309 U.S. 33 (1940). WAC 458-20-103 (Rule 103) defines when and where a sale takes place, for purposes of Washington tax liability. It states, in relevant part:

> For the purpose of determining tax liability of persons selling tangible personal property, a sale takes place in this state when the goods are delivered to the buyer in this state, irrespective of whether title to the goods passes to the buyer at a point within or without this state.

Rule 193(7) explains that for Washington's B&O tax to apply to inbound sales of tangible personal property, there must be both receipt of the goods by the purchaser in this state, and the seller must have nexus. The rule states, in relevant part:

> **Inbound sales.** Washington does not assert B&O tax on sales of goods which originate outside this state unless the goods are received by the purchaser in this state and the seller has nexus. There must be both the receipt of the goods in Washington by the purchaser and the seller must have nexus for the B&O tax to apply to a particular sale. The B&O tax will not apply if one of these elements is missing.

Nexus

Rule 193(2)(f) defines "nexus" as "the activity carried on by the seller in Washington which is significantly associated with the seller's ability to establish or maintain a market for its products in Washington." This definition was cited with approval in *Tyler Pipe Indus. Inc. v. Department of Rev.*, 483 U.S. 232, 250 (1987).

The nexus requirement comes from limitations on a state's jurisdiction to tax, found in the Due Process and Commerce Clause provisions of the United States Constitution. The limitations imposed by the two clauses are discussed in depth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and in DEPARTMENT determinations. *See, e.g., Det. No. 01-074*, 20 WTD 531 (2001); *Det. No. 96-144*, 16 WTD 201 (1996). The nexus limitation requires that the transaction being taxed have "substantial nexus" with the taxing state.[5] With respect to the duty to collect retail sales tax or use tax, "substantial nexus" includes a requirement of some physical presence (more than the "slightest presence") in the state. *Quill, supra.* Whether the same requirement applies to the B&O tax is uncertain. In *Det. No. 96-144, supra,* we concluded that, once the activities of a company go beyond purely mail order activities, and it has demonstrably more than the slightest presence in the state, substantial nexus is established.

Rule 193(7)(c) gives examples of activities that are sufficient nexus in Washington for the B&O tax to apply. These include:[6]

- (iii) The order for the goods is solicited in this state by an agent or other representative of the seller.
- (iv) The delivery of the goods is made by a local outlet or from a local stock of goods of the seller in this state.
- (v) The out-of-state seller, either directly or by an agent or other representative, performs significant services in relation to establishment or maintenance of sales into the state, even though the seller may not have formal sales offices in Washington or the agent or representative may not be formally characterized as a "salesperson".

Nexus may be established through the activities of the seller's own employees, or the activities of independent contractor representatives. Rule 193(7); *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960); *Tyler Pipe, supra*; . . . ; *Appeal of Family of Eagles, Ltd.*, 275 Kan. 479, 66 P.3d 858 (2003).[7] The

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[5] In *Complete Auto Transit*, the Supreme Court articulated a four-pronged test that a state tax must satisfy to withstand a Commerce Clause challenge to its jurisdiction to tax. The decision held that the Commerce Clause requires that the tax: (1) be applied to an activity with a "substantial nexus" with the taxing state, (2) be fairly apportioned, (3) not discriminate against interstate commerce, and (4) be fairly related to the services provided by the state.

[6] The remaining examples are:

> (i) The goods are located in Washington at the time of sale and the goods are received by the customer or its agent in this state.
>
> (ii) The seller has a branch office, local outlet or other place of business in this state which is utilized in any way, such as in receiving the order, franchise or credit investigation, or distribution of the goods.
>
> (vi) The out-of-state seller, either directly or by an agent or other representative in this state, installs its products in this state as a condition of the sale.

[7] In *Scripto*, a Georgia corporation's only connection with Florida was that it had ten wholesalers, jobbers, or "salesmen" conducting continuous local solicitation in Florida and forwarding the order from Florida to the Georgia seller for shipment. The court held that Florida could constitutionally impose upon the Georgia seller the duty of

activities of the seller's employees or representatives need not involve the solicitation of sales. Any activity performed in this state on behalf of the seller that is significantly associated with the seller's ability to establish and maintain a market in this state for the sales establishes nexus over the seller. Rule 193(7); *Standard Pressed Steel Co. v. Department of Rev.*, 419 U.S. 560 (1975); *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977).

In Det. No. 00-003, 19 WTD 685 (2000), we found that certain in-state activities that did not involve the solicitation of sales were significantly associated with the ability to establish and maintain a market in this state. Those activities included in-state dealer training, supporting promotional efforts at in-state trade shows, introducing and promoting new products in Washington, and establishing a network of independent contractors in Washington for repair work. In other cases, we have also held that occasional visits by nonresident employees who do not solicit sales can establish substantial nexus with this state. For example, occasional visits by nonresident employees to provide advice on the safe handling of products provided substantial nexus. Det. No. 88-368, 6 WTD 417 (1988). In Det. No. 91-213, 11 WTD 239 (1991), substantial nexus existed where nonresident employees made occasional visits to this state to show product samples and to explain the Company's policies. Such product-related activities were held to be significantly associated with the ability to establish and maintain a market in this state for the products being sold in Washington. The test for nexus has been described as being "functional—not quantitative." . . .

In the present case, the Compliance Division contends [Washington Company] is a commissioned sales representative of [Company]. [Company] contends the Compliance Division's characterization is incorrect, and [Washington Company] is an unrelated independent Company that purchases [Company's] products for resale to [Washington Company's] own customers. We are unable to determine for certain, from the evidence before us, which characterization of the relationship is correct. Unfortunately, we do not have the benefit of an audit examination of [Company's] books and records.

Clearly, the Agreement sets out a commissioned sales representative relationship. It describes [Washington Company] as soliciting order[s] which are forwarded to [Company], and [Company] paying [Washington Company] a commission on the sales [Washington Company] solicits. Some of the information [Company] put in the WBAQ is consistent with this characterization. It states

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collecting Florida's use tax upon goods shipped to customers in Florida. In *Tyler Pipe*, the court held that Washington had sufficient nexus with an out-of-state seller whose only connection with Washington was the use of independent contractors in the state who acted daily on its behalf to solicit sales, call on customers, and maintain and improve the seller's good will, customer relations, and name recognition.

Situations in which nexus has been found to be established by the activities of a representative include the following. The out-of-state vendor has used an independent contractor to provide warranty and repair services in the state. NY Dep't of Taxation and Finance, TSB-A-00(42)S (Oct. 13, 2000). The out-of-state vendor has used teachers to act as its representatives in soliciting orders for its products, collecting payment, and receiving and distributing the products. *Scholastic Book Clubs, Inc. v. State Bd. of Equalization*, 207 Cal. App. 3d 734, 255 Cal. Rptr. 77 (1st Dist. 1989). An out-of-state furniture seller used a common carrier to perform extensive post-sale services in the state, including setting up and repairing the furniture. *Comptroller v. Furnitureland South, Inc.*, No. C-97-37872-OC, Md. Cir. Ct., Aug. 18, 1999, rev'd on other grounds, 364 Md. 126, 771 A2d 1061 (2001).

sales have been solicited on [Company's] behalf by [Company's] representative, [Washington Company]. It lists carriers that deliver [Company's] products to Washington customers, saying nothing about the customers arranging their own transportation from [state A]. [Company's] "Commission Report" for January 2005 also is consistent with the commissioned sales representative characterization. Not only does the Agreement state [Company] will pay [Washington Company] a commission, [Company's] own documents relating to the payment describe it as a "commission."

In support of its characterization of the relationship as being between a manufacturer/wholesaler and a purchaser for resale, [Company] has submitted invoices, and statements by a [Company] employee and [Company's] representative, that the Agreement and the "commissions" are something entirely different than they appear to be. The invoices appear to document sales to [Washington Company], but they could be documentation of transfers that are not outright sales. For example, they could be documentation of transfers to a stocking representative that stocks [Company's] products locally to sell on behalf of [Company]. Without an examination of all agreements and correspondence between the two, and an examination of [Company's] books, we do not know the context of the invoices. The fact that [Company] pays [Washington Company] thousands of dollars monthly, and labels it a "commission," is inconsistent with [Washington Company] being merely a purchaser for resale. [Company's] only other evidence supporting its characterization consists of conclusory and uncorroborated statements of an employee and a representative.

For purposes of this appeal, it makes no difference which characterization is correct. Under the above authorities, [Company's] sales into Washington have sufficient nexus with the state for the B&O tax to apply, under either characterization of the relationship between [Company] and [Washington Company]. If [Washington Company] was a commissioned sales representative that performed the activities set out in the Agreement, [Company] had a physical presence in Washington through [Washington Company], and [Washington Company's] activities created nexus. *Scripto, supra*; *Tyler Pipe, supra*; . . . . If [Washington Company] was merely a wholesale distributor that purchased for resale, [Company's] twice-yearly visits to [Washington Company] in Washington to present new or existing products and demonstrate use of products established nexus. Det. No. 98-146, 18 WTD 175 (1999); Det. No. 00-003, 19 WTD 685 (2000); Det. No. 91-213, 11 WTD 239 (1991); *Magnetek Controls, Inc. v. Department of Treasury,* 221 Mich. App. 400, 562 N.W.2d 219 (1997); *Arizona Department of Rev. v. Care Computers Systems, Inc.*, 4 P.3d 469 (Ariz. App. 2000).[8] The employees' visits to [Washington Company] were product-oriented visits to a distributor for the purpose of maintaining [Company's] place in Washington's marketplace.

We conclude that the nexus requirement of Rule 193(7) is satisfied in this case.

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[8] *Contrast Deptartment of Rev. v. Share Int'l, Inc.*, 667 So.2d 226 (Fla. 1995), *aff'd*, 676 So.2d 1362, *cert. denied*, 519 U.S. 1056 (1997), where the out-of-state business's only visit was to attend a trade seminar and the court found the activity was not for the purpose of creating a customer base.

Receipt in Washington

[Company] argues that even if it had nexus with Washington, the sales were not Washington sales, because the articles were shipped FOB [Company's] [State A] plant. The Department has rejected identical arguments in several decisions. Det. No. 99-216E, 18 WTD 264 (1999); Det. No. 98-0146, *supra*; Det. No. 99-298, 20 WTD 197 (2001). Det. No. 99-216E explains that commercial law delivery terms, and the Uniform Commercial Code's provisions defining sale or where risk of loss passes, do not determine the tax consequences of transactions. Tax consequences of transactions are governed by Rule 103 and Rule 193. Under those rules, a Washington sale takes place when the goods are received by the buyer or its agent in this state.

Delivery of goods to a common carrier outside the state does not constitute receipt by the buyer outside the state, except as explained in Rule 193(7)(a), which states:

> Delivery of the goods to a . . . for-hire carrier located outside this state merely utilized to arrange for and/or transport the goods into this state is not receipt of the goods [outside this state] by the purchaser or its agent unless the . . . for-hire carrier has express written authority to accept or reject the goods for the purchaser with the right of inspection.

[Company] has not asserted, nor is there any evidence, that the for-hire carriers had express written authority from [Company's] customers to accept or reject the goods in [State A].

We conclude that under Rule 103 and Rule 193, the products sold by [Company] to its Washington customers were delivered and accepted in Washington, even when they were shipped FOB [Company's] [State A] plant.

We conclude that the receipt requirement of Rule 193(7) is satisfied in this case. We conclude that because the goods were received in this state and [Company] had nexus, [Company's] sales to Washington customers were subject to B&O tax, unless a specific exception or exemption applied.

Direct Seller's Exemption

[2] RCW 82.04.423 provides a narrow exemption from B&O tax for wholesale and retail sales made by an out-of-state seller that makes sales exclusively to or through a "direct seller's representative" and meets other requirements. WAC 458-20-246 (Rule 246) is the administrative rule that explains the exemption. [Company] contends its revenue from Washington sales were exempt from B&O tax under that statute.

In order to qualify for the exemption, a "direct seller" must meet four requirements:

> (1) This chapter shall not apply to any person in respect to gross income derived from the business of making sales at wholesale or retail if such person:

> (a) Does not own or lease real property within this state; and
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> (b) Does not regularly maintain a stock of tangible personal property in this state for sale in the ordinary course of business; and
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> (c) Is not a corporation incorporated under the laws of this state; and
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> (d) Makes sales in this state exclusively to or through a direct seller's representative.

RCW 82.04.423(1). RCW 82.04.423(2) also defines the term "direct seller's representative," as follows:

> [A] person who buys consumer products on a buy-sell basis or a deposit-commission basis for resale, by the buyer or any other person, in the home or otherwise than in a permanent retail establishment, or who sells, or solicits the sale of, consumer products in the home or otherwise than in a permanent retail establishment; and
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> (a) Substantially all of the remuneration paid to such person, whether or not paid in cash, for the performance of services described in this subsection is directly related to sales or other output, including the performance of services, rather than the number of hours worked; and
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> (b) The services performed by the person are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract provides that the person will not be treated as an employee with respect to such purposes for federal tax purposes.

[Company] has not shown that it met the fourth requirement for qualifying as a "direct seller," for two reasons. First, sales in this state must be "exclusively" to or through a direct seller's representative. [Company's] petition states that approximately 1% of [Company's] sales in Washington were made directly by [Company] to persons other than [Washington Company]. [Company] argues these sales were "de minimis," and should not affect [Company] qualifying as a direct seller. We rule against [Company] on that question. The statute says "exclusively.". . .

The second reason [Company] would not meet the fourth requirement is that, based on the information [Company] has provided, [Washington Company] did not fit the definition of "direct seller's representative." For [Washington Company] to qualify as a wholesale "direct seller's representative," [Washington Company] must have performed its services pursuant to a written agreement, and must have bought consumer products on a buy-sell basis or a deposit-commission basis for resale. The only written agreement with [Washington Company] that [Company] has provided is the Agreement referenced above. The Agreement does not provide that [Washington Company] will purchase on a buy-sell basis or a deposit-commission basis.[9] It states [Washington Company] is to solicit orders, and is paid commissions on the orders it solicits, which are due and payable on the first working day following [Company's] receipt of the paid invoice.

[9] Rule 246(4)(b)(i)(A) explains these terms.

Moreover, [Washington Company] would not fit the definition to the extent it bought non-consumer goods for resale, and [Company] would not be selling to a direct seller's representative to the extent it sold non-consumer goods to [Washington Company]. [Company] admits that not all the products it sold to [Washington Company] were "consumer goods."[10]

We conclude that [Company's] revenue from its Washington sales during the assessment period were not exempt from B&O tax under RCW 82.04.423.

Delinquent, Assessment, and Unregistered Business Penalties

If a taxpayer fails to timely file excise tax returns, RCW 82.32.090(1) requires the Department to assess a late payment of return penalty. The amount of the penalty varies depending on how long a return is delinquent. For tax returns that are filed after July 1, 2003, late payment penalties start at 5% of the amount of the tax, increasing to a maximum of 25% if the tax has remained unpaid after the last day of the second month following the due date.

RCW 82.32.090(2) requires the Department to add a 5% penalty on all assessments issued after June 30, 2003. The statute states: "If the department of revenue determines that any tax is due, there shall be assessed a penalty of five percent of the amount of the tax determined by the department to be due . . . ." The penalty increases if payment is not received by the due date specified in the assessment notice. The 5% assessment penalty is based solely on the Department determining that taxes are due for some past period.

RCW 82.32.090(4) requires the Department to impose a 5% unregistered taxpayer penalty, if the Department finds that a person has engaged in any business or performed any act upon which a tax is imposed under this title and that person has not obtained a registration certificate as required by RCW 82.32.030.

Assessment of the above penalties is mandatory. *See, e.g.*, Det. No. 01-193, 21 WTD 264 (2002); Det. No. 99-279, 20 WTD 149 (2001); Det. No. 87-235, 3 WTD 363 (1987). All were properly assessed against the taxpayer, as required by the applicable statutes.

The Department is an administrative agency, and its authority to waive or cancel penalties is restricted to the authority granted by the Legislature. The Legislature has granted the Department limited authority to waive or cancel interest and penalties, set out in RCW 82.32.105 and RCW 82.32A.020. The Department has no discretionary authority to waive or cancel penalties or interest. Det. No. 98-85, 17 WTD 417 (1998); Det. No. 99-285, 19 WTD 492 (2000).

RCW 82.32A.020(2) gives taxpayers the right to have penalties waived where they have detrimentally relied on specific, official written advice from the Department to them. The taxpayer had no contact with the Department prior to the Compliance Division contacting it in 2003, so RCW 82.32A.020(2) does not provide a basis for relief in this case.

[10] "Consumer products" is defined in Rule 246(4)(b)(ii).

The other penalty waiver statute, RCW 82.32.105, provides, in pertinent part:

> (1) If the department of revenue finds that the payment by a taxpayer of a tax less than that properly due or the failure of 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 penalties imposed under this chapter with respect to such tax.

(Emphasis added.) The term "circumstances beyond the control of the taxpayer" is explained in Rule 228(9). It refers to erroneous written information from the Department, or circumstances that are unexpected, or in the nature of an emergency, such as sickness or unavoidable absence immediately prior to a tax filing date.[11] Failure to pay because of a good faith belief that one is not required to register and pay Washington taxes does not fit any of the examples.

Rule 228(9) also gives examples of circumstances that are generally not considered beyond the control of the taxpayer. These include a misunderstanding or lack of knowledge of Washington taxes. The Department has always interpreted this non-qualifying circumstance as including situations where the taxpayer in good faith believed it did not have to report, but upon being audited was found to have a tax liability. *See* Det. No. 89-555, 9 WTD 043 (1989). This non-qualifying example describes the circumstance [Company] asserts.

The Department realizes that the nature of a particular taxpayer's business can make application of the tax laws difficult. For that reason, the Department has a procedure for taxpayers to obtain written rulings of future tax liability from the Department on particular tax questions. WAC 458-20-100(9). This is explained on the Department's website, dor.wa.gov, under the "Contact Us" tab. The written opinion is binding upon both the taxpayer and the Department under the facts presented, until specified changes occur.

In sum, there are no circumstances in this case that permit the Department to waive either the unregistered business penalties or the delinquency penalties. Accordingly, we must deny the taxpayer's petition for cancellation of penalties.

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[11] Rule 228 gives examples of qualifying circumstances, which we paraphrase as follows for purposes of brevity:

- fraud, embezzlement, theft, or conversion by the taxpayer's employee or other persons contracted with the taxpayer, which the taxpayer could not immediately detect or prevent.
- inadvertently mailing the return to another agency.
- erroneous written information given the taxpayer by a Department officer or employee.
- death or serious illness of the taxpayer or member of the immediate family or of the tax preparer or preparer's immediate family, which denies a taxpayer reasonable time or opportunity to obtain an extension or otherwise arrange timely filing and payment.
- unavoidable absence of the taxpayer or key employee prior to tax filing date.
- destruction of the taxpayer's place of business or records.
- the taxpayer had timely requested forms from the Department, but the Department had not provided them in sufficient time to permit the completed return to be paid before its due date

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 16th day of August, 2005.