

Cite as Det. No. 01-193, 21 WTD 264 (2002)

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 of)	
)	No. 01-193
...)	
)	Registration No. . . .
)	Docket No. . . .
)	FY. . . /Audit No. . . .

- [1] RULE 102; RCW 82.04.470, RCW 82.08.020, RCW 82.08.050, RCW 82.32.070: RETAIL SALES TAX – SELLER’S LIABILITY FOR – FAILURE TO TAKE RESALE CERTIFICATES – RECORDKEEPING REQUIREMENTS. A seller is liable for retail sales tax with respect to sales for which no resale certificate has been provided. The burden of maintaining proper records rests with the taxpayer.
- [2] RULE 228; RCW 82.32.090, RCW 82.32.045, RCW 82.32.050: INTEREST – PENALTIES – ACTIVE NONREPORTING STATUS – WHEN RETURNS ARE DUE. The taxpayer was not eligible for the active nonreporting status for any of the years included in the assessment because his gross proceeds of sales exceeded \$24,000 per year throughout the audit period. He did not file returns and did not pay taxes during the audit period. Thus, the taxpayer failed to pay his taxes on or before due date. As such, the taxpayer filed his returns late and because he did not qualify for penalty or interest waiver, was liable for penalties and interest with respect to the assessed taxes

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 protests assessment of retail sales tax on sales for which he has not provided valid resale certificates, as well as the assessment of interest and penalties.¹

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

FACTS:

C. Pree, A.L.J. -- The taxpayer is engaged in the business of installing flooring in Washington. The Taxpayer Accounts Administration Division (TAA) of the Department of Revenue reviewed the taxpayer's records for the period of January 1, 1997, through December 31, 2000.² On September 6, 2001, TAA issued an assessment of retail sales tax of \$. . . , retailing business and occupation (B&O) tax of \$. . . , wholesaling B&O tax of \$. . . , interest of \$. . . , and late payment penalty of \$ The taxpayer received a small business credit of \$ The assessment totaled \$

TAA determined the amount of the assessment by reviewing the taxpayer's Form 1099s, Schedule Cs, and resale certificates for the period at issue. To the extent the taxpayer provided valid resale certificates, TAA assessed tax under the wholesaling classification. To the extent the taxpayer was unable to provide valid resale certificates for his income, TAA assessed retailing B&O tax and retail sales tax.

At the time of the audit, the taxpayer was on active nonreporting status, and he did not file tax returns.³ However, the taxpayer's gross proceeds of sales exceeded \$24,000 for each year included in the audit period. See RCW 82.32.045 (among the requirements for qualification for the active nonreporting status is that the taxpayer's gross proceeds of sales must be less than \$24,000 per year.)

The taxpayer does not protest the assessment of B&O tax but protests the assessment of retail sales tax and the interest and penalties relating to that tax. The taxpayer explained that he is attempting to obtain additional Form 1099s and resale certificates to reduce the retail sales tax assessment amount. He stated it would be helpful if he knew which documents were missing. The taxpayer further explained that he is confident that the contractors and retail outlets for whom he provided labor paid retail sales tax on the amounts at issue, and he does not believe the tax should be paid twice.

ISSUES:

1. Whether the taxpayer (as a seller) is liable for retail sales tax with respect to sales for which no resale certificate has been provided.
2. Whether the taxpayer is liable for interest and penalties.

DISCUSSION:

² The audit was a partial audit and limited in scope to the information the taxpayer provided in response to the Department's request for information regarding the taxpayer's sales. In the Detail of Differences, TAA reserved the Department's right to assert any other tax due or tax credit found at a later date for the time period covered by the audit.

³ Department records reflect that the taxpayer last filed returns in 1990 and 1991.

1. Whether the taxpayer (as a seller) is liable for retail sales tax with respect to sales for which no resale certificate has been provided.

RCW 82.08.020 imposes the retail sales tax on each retail sale in this state. RCW 82.08.050, in turn, addresses the collection responsibilities with respect to the tax, as follows:

The tax hereby imposed shall be paid by the buyer to the seller, and each seller shall collect from the buyer the full amount of the tax payable in respect to each taxable sale . .

..

In case any seller fails to collect the tax herein imposed . . . he or she shall, nevertheless, be personally liable to the state for the amount of the tax, unless the seller has taken from the buyer in good faith a properly executed resale certificate under RCW 82.04.470.

RCW 82.04.470, in turn, provides in pertinent part as follows:

(1) Unless a seller has taken from the buyer a resale certificate, the burden of proving that a sale of tangible personal property, or of services, was not a sale at retail shall be upon the person who made it.

(2) If a seller does not receive a resale certificate at the time of the sale, have a resale certificate on file at the time of the sale, or obtain a resale certificate from the buyer within a reasonable time after the sale, the seller shall remain liable for the tax as provided in RCW 82.08.050, unless the seller can demonstrate facts and circumstances according to rules adopted by the department of revenue that show the sale was properly made without payment of sales tax.

Thus, the taxpayer bears the burden of proving his sales were at wholesale. In other words, “[a]ll sales are treated as retail sales unless the seller takes from the buyer a properly executed resale certificate.” WAC 458-20-102 (Rule 102).⁴ Where the taxpayer has not collected the retail sales tax from his buyers, has not taken a resale certificate, and cannot demonstrate facts and circumstances that show the sale was properly made without payment of sales tax, he is personally liable for the tax. RCW 82.08.050. Rule 102 emphasizes:

If the seller is unable to provide proper documentation, or unable to prove by facts and circumstances that the sales in question are wholesale sales, the seller becomes personally liable for the taxes in question.

The burden of maintaining proper records rests with the taxpayer. RCW 82.32.070 provides in pertinent part:

⁴ Rule 102 provides additional guidance regarding the requirements for resale certificates. Those provisions will not be repeated here.

Every person liable for any fee or tax imposed by chapters 82.04 through 82.27 RCW shall keep and preserve, for a period of five years, suitable records as may be necessary to determine the amount of any tax for which he may be liable, which records shall include copies of all federal income tax and state tax returns and reports made by him. . . . Any person who fails to comply with the requirements of this section shall be forever barred from questioning, in any court action or proceedings, the correctness of any assessment of taxes made by the department of revenue based upon any period for which such books, records, and invoices have not been so kept and preserved.

Thus, the taxpayer is responsible for maintaining records that are necessary to determine the proper tax classifications of his income. In this instance, the taxpayer must provide resale certificates for each of the sales. See RCW 82.04.470; Rule 102. With respect to the taxpayer's suggestion that it would be helpful to know which certificates were needed, we must find that this information is within the control of the taxpayer, and the taxpayer bears the burden of providing resale certificates from each of the buyers to whom he sold goods and services. Further, the taxpayer stated that he is confident that the contractors and retail outlets for whom he provided labor paid retail sales tax on the amounts at issue, and he does not believe the tax should be paid twice. Again, we must find that the taxpayer has the ability to prove this by obtaining resale certificates.

. . .

If the taxpayer . . . is later able to present the Department with valid resale certificates, the taxpayer may file a written request for refund of the taxes paid along with the applicable interest. See Rule 102. However, both the request and the proof that the sales in question were wholesale sales must be submitted to the department within the statutory time limitations provided by RCW 82.32.060.

2. Whether the taxpayer is liable for interest and penalties.

A late payment penalty and interest were included in the assessment. RCW 82.32.090 addresses late payment penalties, in pertinent part, as follows:

If payment of any tax due on a return to be filed by a taxpayer is not received by the department of revenue . . . on or before the last day of the second month following the due date, there shall be assessed a total penalty of twenty percent of the amount of the tax.

RCW 82.32.050 addresses the assessment of interest on late payments, in pertinent part, as follows:

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

When the legislature used the word “shall” in RCW 82.32.050 and 82.32.090, it made the assessment of late payment penalties and interest mandatory. See, e.g., Det. No. 99-279, 20 WTD 149 (2001); Det. No. 98-109, 18 WTD 124 (1999); Det. No. 87-235, 3 WTD 363 (1987). Thus, the only issues are whether the taxpayer’s payments were late, and if so, whether the circumstances of the late payments qualify for waiver of interest and penalties.

We will first address whether the taxpayer, who was on active nonreporting status at the time of the audit, filed his returns late. RCW 82.32.045 states when returns are due, as follows:

(1) Except as otherwise provided in this chapter, payments of the taxes imposed under chapters 82.04, 82.08 . . . along with reports and returns on forms prescribed by the department, are due monthly within twenty-five days after the end of the month in which the taxable activities occur.

(2) The department of revenue may relieve any taxpayer or class of taxpayers from the obligation of remitting monthly and may require the return to cover other longer reporting periods, but in no event may returns be filed for a period greater than one year. For these taxpayers, tax payments are due on or before the last day of the month next succeeding the end of the period covered by the return. . . .

(4) Notwithstanding subsections (1) and (2) of this section, the department may relieve any person of the requirement to file returns if the following conditions are met:

(a) The person’s . . . gross proceeds of sales . . . from all business activities taxable under chapter 82.04 RCW, is less than twenty-four thousand dollars per year; . . .and;

(c) The person is not required to collect or pay to the department of revenue any other tax or fee which the department is authorized to collect.

Persons qualifying under RCW 82.32.045(4) are said to be on “active nonreporting” status. In this case, the taxpayer was not eligible for the active nonreporting status for any of the years included in the assessment because his gross proceeds of sales exceeded \$24,000 per year throughout the audit period (and, perhaps, also because he will ultimately be required to collect or pay retail sales taxes with respect to some of his sales).

WAC 458-20-228(Rule 228) explains:

. . . Taxpayers whose accounts are placed on an “active nonreporting” status do not automatically receive a tax return and must request a return if they no longer qualify for this reporting status.

Persons placed on an active-nonreporting status by the department are required to timely notify the department if their business activities no longer meet the conditions for active-nonreporting status. . . . The late payment of return penalty will be imposed if any tax due from unreported business activities while on active-nonreporting status is not paid by the due dates used for taxpayers that are on an annual reporting basis.

The taxpayer did not file returns and did not pay taxes during the audit period. Thus, the taxpayer failed to pay his taxes on or before the last day of the second month following the due date. As such, we find that the taxpayer filed his returns late, and unless he qualifies for waiver, TAA properly assessed the 20% late payment penalty, as well as interest.

We will next address whether the taxpayer qualifies for waiver of the late payment penalty and interest. RCW 82.32.105 provides for the waiver of interest and penalties in certain limited circumstances, as follows:

(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,⁵ the department of revenue shall waive or cancel any penalties imposed under this chapter with respect to such tax.

⁵ With respect to circumstances beyond the control of the taxpayer, Rule 228 provides:

(ii) The circumstances beyond the control of the taxpayer must actually cause the late payment. Circumstances beyond the control of the taxpayer are generally those which are immediate, unexpected, or in the nature of an emergency. Such circumstances result in the taxpayer not having reasonable time or opportunity to obtain an extension of the due date or otherwise timely file and pay. Circumstances beyond the control of the taxpayer include, but are not necessarily limited to, the following.

(A) The return payment was mailed on time but inadvertently sent to another agency.

(B) Erroneous written information given to the taxpayer by a department officer or employee caused the delinquency. A penalty generally will not be waived when it is claimed that erroneous oral information was given by a department employee. The reason for not cancelling the penalty in cases of oral information is because of the uncertainty of the facts presented, the uncertainty of the instructions or information imparted by the department employee, and the uncertainty that the taxpayer fully understood the information given. Reliance by the taxpayer on incorrect advice received from the taxpayer's legal or accounting representative is not a basis for cancellation of a penalty.

(C) The delinquency was directly caused by death or serious illness of the taxpayer, or a member of the taxpayer's immediate family. The same circumstances apply to the taxpayer's accountant or other tax preparer, or their immediate family. This situation is not intended to have an indefinite application. A death or serious illness which denies a taxpayer reasonable time or opportunity to obtain an extension or to otherwise arrange timely filing and payment is a circumstance eligible for penalty waiver.

(D) The delinquency was caused by the unavoidable absence of the taxpayer or key employee, prior to the filing date. "Unavoidable absence of the taxpayer" does not include absences because of business trips, vacations, personnel turnover, or terminations.

(E) The delinquency was caused by the destruction by fire or other casualty of the taxpayer's place of business or business records.

(F) The delinquency was caused by an act of fraud, embezzlement, theft, or conversion on the part of the taxpayer's employee or other persons contracted with the taxpayer, which the taxpayer could not immediately detect or prevent, provided that reasonable safeguards or internal controls were in place. See subsection (9)(a)(iii)(E).

(G) The taxpayer, prior to the time for filing the return, made timely application to the Olympia or district office for proper forms and the forms were not furnished in sufficient time to permit the completed return to be paid before its due date. In this circumstance, the taxpayer kept track of pending due dates and reasonably fulfilled its responsibility by timely requesting replacement returns from the department.

(iii) The following are examples of circumstances that are generally not considered to be beyond the control of the taxpayer and will not qualify for a waiver or cancellation of penalty:

(A) Financial hardship;

(B) A misunderstanding or lack of knowledge of a tax liability;

(2) The department shall waive or cancel the penalty imposed under RCW 82.32.090(1) when the circumstances under which the delinquency occurred do not qualify for waiver or cancellation under subsection (1) of this section if:

(a) The taxpayer requests the waiver for a tax return required to be filed under RCW 82.32.045 . . . ; and

(b) The taxpayer has timely filed and remitted payment on all tax returns due for that tax program for a period of twenty-four months immediately preceding the period covered by the return for which the waiver is being requested.

(3) The department shall waive or cancel interest imposed under this chapter if:

(a) The failure to timely pay the tax was the direct result of written instructions given the taxpayer by the department; or

(b) The extension of a due date for payment of an assessment of deficiency was not at the request of the taxpayer and was for the sole convenience of the department.

The taxpayer bears the burden of proving he qualifies for penalty waiver. See, e.g., Det. No. 00-030, 20 WTD 154 (2001); Det. No. 86-261, 1 WTD 209 (1986). The taxpayer has neither alleged nor proven any circumstances beyond his control that caused the late payment of the returns. As such, we cannot waive the penalty under this provision. With respect to the 24 month penalty waiver provision, Rule 228 provides:

If a taxpayer has obtained a tax registration endorsement with the department and has engaged in business activities for a period less than twenty-four months, the taxpayer is eligible for the waiver if the taxpayer had no delinquent tax returns for periods prior to the period covered by the return for which the waiver is being requested. . . . This is the only situation under which the department will consider a waiver when the taxpayer has not timely filed and paid tax returns covering an immediately preceding twenty-four month period.

In this case, the taxpayer had obtained a tax registration and had engaged in business for a period of more than 24 months prior to the late 1997 return.⁶ (The taxpayer filed Washington state excise tax returns in 1990 and 1991.) Thus, to qualify for penalty waiver under the 24 month provision, the taxpayer must have timely filed and paid his taxes for the entire preceding twenty four month period, or he must show that no taxes were due for that period. The taxpayer has not

(C) The failure of the taxpayer to receive a tax return form, EXCEPT where the taxpayer timely requested the form and it was still not furnished in reasonable time to mail the return and payment by the due date, as described in subsection (9)(a)(ii)(G), above;

(D) Registration of an account that is not considered a voluntary registration, as described in subsection (5)(a)(ii);

(E) Mistakes or misconduct on the part of employees or other persons contracted with the taxpayer (not including conduct covered in subsection (9)(a)(ii)(F), above); and

(F) Reliance upon unpublished, written information from the department that was issued to and specifically addresses the circumstances of some other taxpayer.

⁶ We note that the only possible return for which penalty waiver would be allowed would be the 1997 return. The taxpayer's 1998, 1999, and 2000 late returns will not qualify for penalty waiver because the 1997 return was filed late.

presented any evidence in this regard (such as federal tax returns reflecting less than \$24,000 in gross income and proof that he was not required to collect or remit any tax to the state). . . . , the taxpayer's request for penalty waiver is denied.

With respect to the waiver of interest, we note that the taxpayer's failure to timely pay the tax was not the direct result of written instructions given the taxpayer by the department. See RCW 82.32.105(3)(a). As noted above, taxpayers who no longer qualify for active nonreporting are required to inform the Department of their change in status. See Rule 228. Further, we find that there was no extension of the due date "for the sole convenience of the department." See RCW 82.32.105(3)(b). As such, we cannot waive the interest on the assessment. The taxpayer's petition is denied with respect to this issue.

DECISION AND DISPOSITION:

[Taxpayer's petition is denied.]

Dated this 24th day of December 2001.