Cite as Det. No. 14-0165, 33 WTD 545 (2014)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Refund of Assessment of	)	D E T E R M I N A T I O N
	)	No. 14-0165
. . .	)	Registration No. . . .

[1] RULE 19401; RCW 82.04.460, RCW 82.04.067: SERVICE AND OTHER ACTIVITIES B&O TAX – ENGINEERING AND REPAIR SERVICES – APPORTIONMENT. When a taxpayer cannot provide evidence that it paid business activities taxes outside of Washington, and fails to provide evidence that it has substantial nexus outside of Washington, the taxpayer is not entitled to apportion its income outside of Washington.

[2] RULE 228; RCW 82.32A.030, RCW 82.32.090, RCW 82.32.105: PENALTY – WAIVER – TAXPAYER'S RIGHTS AND RESPONSIBILITIES – CIRCUMSTANCES BEYOND THE TAXPAYER'S CONTROL. A taxpayer has the responsibility to know its reporting obligations, and when it is uncertain about its obligations, to seek instructions from the department of revenue. A taxpayer that was unaware of the change in nexus and apportionment laws is not eligible for a waiver of penalties due to its lack of knowledge.

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

Anderson, A.L.J. – A Washington-based firm providing engineering and repair services on [tangible personal property] requests a refund of service and other activities business and occupation ("B&O") tax, interest, and additional assessment penalties, contending its income should be apportioned and that it had no notice of the change in nexus law. We deny the petition.[1]

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

ISSUES

1. Has Taxpayer shown that any of its apportionable income was taxable in another state pursuant to RCW 82.04.067?

2. Pursuant to RCW 82.32.105, can additional assessment penalties be cancelled on the basis that a taxpayer received no notice of changing nexus and apportionment laws?

FINDINGS OF FACT

[Taxpayer] performs engineering and repair services with respect to [tangible personal property]. It is a Washington corporation with a Washington office and performs services in Washington as well as in other states and countries.

This appeal concerns only professional services reported under the service and other activities B&O tax classification. Income from repairs and installation services is not at issue.

Taxpayer filed an Annual Reconciliation of Apportionable Income for 2010 and 2011. Taxpayer calculated an apportionment percentage of 30.16% for 2010, determined that it had overpaid, and requested a refund for 2010. The Washington State Department of Revenue's (the "Department's") Taxpayer Account Administration Division ("TAA") reviewed Taxpayer's request for a refund and determined Taxpayer was not entitled to apportion income in 2010. TAA found Taxpayer did earn apportionable income, but that Taxpayer was not "taxable in another state" and did not meet Washington's nexus standards in another state or country for 2010. On March 8, 2013, TAA issued a tax assessment against Taxpayer in the amount of $. . . for June 1, 2010 through December 31, 2011. The assessment consisted of $. . . in service and other activities B&O tax for June 1 – December 31, 2010, and $. . . in interest.[2] When Taxpayer did not pay or appeal the assessment on or before the thirtieth day following the due date of April 8, 2013, TAA assessed a 25% additional assessment penalty of $. . . .

Taxpayer paid the assessment and appealed, requesting a refund of $. . . (tax, interest, and penalties). It disputes the Department's assessment of service and other activities B&O tax alleging that it performed a significant amount of the 2010 services in Singapore, Mexico, Canada, and the Bahamas. Taxpayer argues that income from such services is exempt for Federal tax purposes, and that it is entitled to apportion such income. Taxpayer did not provide information about the alleged amount of receipts for services performed in Singapore, Mexico, Canada, or the Bahamas.[3] Taxpayer did not provide information about whether taxes were paid in such countries.

With regard to property and payroll in other states, Taxpayer made the following representations: A majority of the time, it would ship/bring equipment from Washington to perform the service activity out of state or overseas; Taxpayer's total payroll for 2010 was $. . . and $. . . was paid

[2] No tax was assessed for 2011.

[3] We note that Taxpayer did not report receiving income from these countries on Taxpayer's Annual Reconciliation of Apportionable Income for 2010, and has not explained the discrepancy.

to [Employee], who traveled to Mexico, Canada, and the Bahamas to perform [tangible personal property] services; and Taxpayer reports that services performed in Singapore accounted for approximately 20% of its work for the year.

In addition, Taxpayer argues that even if it is not entitled to apportionment, the Department should cancel the additional assessment penalty on the basis that it allegedly never notified Taxpayer of the change in nexus and apportionment laws.

ANALYSIS

Apportionment

Effective June 1, 2010:

> . . . any person earning *apportionable income* taxable under this chapter and also *taxable in another state* must, for the purpose of computing tax liability under this chapter, apportion to this state, in accordance with RCW 82.04.462, that portion of the person's apportionable income derived from business activities performed within this state.

RCW 82.04.460(1) (Emphasis added). "'Apportionable income' means gross income of the business generated from engaging in apportionable activities, including income received from apportionable activities performed outside this state if the income would be taxable under this chapter if received from activities in this state. . . " RCW 82.04.460(4)(a). "Apportionable activities" include activities subject to service and other activities B&O tax. RCW 82.04.046(4)(a)(vi). B&O tax may only be imposed if a person has a substantial nexus with this state. RCW 82.04.220(1); WAC 458-20-19401(1). Here, there's no dispute that Taxpayer earns apportionable income subject to the B&O tax. At issue is whether Taxpayer is also taxable in another state, and therefore eligible to apportion.

As used in RCW 82.04.460(1), "taxable in another state" means:

> . . . that the taxpayer is subject to a business activities tax by another state on its income received from engaging in apportionable activities; or the taxpayer is not subject to a business activities tax by another state on its income received from engaging in apportionable activities, but any other state has jurisdiction to subject the taxpayer to a business activities tax on such income under the substantial nexus standards in RCW 82.04.067(1).

RCW 82.04.460(4)(b)(i). The term "state" as used herein means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any foreign country or political subdivision of a foreign country." RCW 82.04.462(5)(a). RCW 82.04.460(4)(b)(ii)

We have no evidence suggesting that Taxpayer paid business activities taxes on its income in Singapore, Mexico, Canada, or the Bahamas; therefore, we must apply the substantial nexus

standards of RCW 82.04.067(1) to Taxpayer's business activities in Singapore, Mexico, Canada, and the Bahamas.

RCW 82.04.067(1) provides, in relevant part:

> (1) A person engaging in business is deemed to have substantial nexus with this state if the person is:
> (a) An individual and is a resident or domiciliary of this state;
> (b) A business entity and is organized or commercially domiciled in this state; or
> (c) A nonresident individual or business entity that is organized or commercially domiciled outside this state, and in any tax year the person has:
> (i) More than fifty thousand dollars of property in this state;
> (ii) More than fifty thousand dollars of payroll in this state;
> (iii) More than two hundred fifty thousand dollars of receipts from this state; or
> (iv) At least twenty-five percent of the person's total property, total payroll, or total receipts in this state.[4]

Taxpayer has not provided evidence of property exceeding $50,000 in Singapore, Mexico, Canada, or the Bahamas.

While Taxpayer has provided its total payroll for 2010 and the amount paid to one individual ([Employee]), there is no indication of the amounts of payroll from alleged services provided in Singapore, Mexico, Canada, or the Bahamas, not properly reportable in Washington. WAC 458-20-19401(5) provides that payroll compensation is received in Washington if it is properly reportable in Washington for unemployment compensation tax purposes, regardless of whether it was actually reported to this state. Taxpayer has not provided evidence of more than $50,000 of payroll in Singapore, Mexico, Canada, or the Bahamas.

Similarly, while Taxpayer has provided the amount of total gross receipts for 2010, there is neither indication of the gross receipts from services allegedly performed in Singapore, Mexico, Canada, or the Bahamas. Taxpayer has not provided evidence of more than $250,000 of receipts attributed to Singapore, Mexico, Canada, or the Bahamas.

Accordingly, lacking the specific amounts of Taxpayer's total property, payroll, or receipts, attributed to Singapore, Mexico, Canada, or the Bahamas, we cannot conclude that at least 25% of its total property, payroll, or receipts, are attributed to any such country.[5] Taxpayer has failed to show that it had substantial nexus with Singapore, Mexico, Canada, or the Bahamas, from June 1 – December 31, 2010. We sustain the tax assessment.

[4] The substantial nexus thresholds are subject to adjustment based on the consumer price index. Effective January 1, 2013 they were adjusted to $53,000 in property and payroll and $267,000 in receipts. See WAC 458-20-19405.

[5] Further, we note that Taxpayer stipulated that its work in Singapore accounted for approximately 20% of its work for 2010 – thus falling below the 25% statutory threshold.

Penalties

RCW 82.32.090(2) provides for the assessment of an additional penalty when a taxpayer has failed to timely pay an assessment. It states as follows:

> If payment of any tax determined by the department to be due is not received by the department by the due date specified in the notice, or any extension thereof, there is assessed a total penalty of fifteen percent of the amount of the tax under this subsection; and if payment of any tax determined by the department to be due is not received on or before the thirtieth day following the due date specified in the notice of tax due, or any extension thereof, there is assessed a total penalty of twenty-five percent of the amount of tax under this subsection.

RCW 82.32.090(2). Here, Taxpayer's payment of the tax assessment was due April 8, 2013; Taxpayer did not pay it until May 9, 2013 – thirty one days following the due date; and TAA assessed a twenty-five percent penalty. Taxpayer requests waiver or cancellation of the penalties on the basis that it received no notice of the changing nexus or apportionment laws.

RCW 82.32.105 provides when the Department may waive or cancel penalties, and 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.

RCW 82.32.105 (emphasis added).

"Circumstances beyond the control of the taxpayer" is defined in WAC 458-20-228, which states:

> 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.

WAC 458-20-228(9). WAC 458-20-228(9) goes on to provide a non-exclusive list of circumstances that generally will and will not be considered circumstances beyond the control of the taxpayer. As relevant here, a misunderstanding or lack of knowledge of a tax liability is generally not considered a circumstance beyond the control of the taxpayer and will not qualify for a waiver of the penalty. WAC 458-20-228(9)(a)(iii)(B). Det. No. 01-096, 22 WTD 126 (2003) ("'Lack of knowledge' is not a 'circumstance beyond the control of the taxpayer' because

the law, regulations, and Department publications explaining all tax laws are publicly available . . .").

Further, RCW 82.32A.030(a) places upon taxpayers the responsibility to "[k]now their tax reporting obligations, and when they are uncertain about their obligations, seeks instructions from the department of revenue." The Department has a Taxpayer Information and Education Division and field offices throughout the state to answer any questions pertaining to tax liabilities. It would be inconsistent with this statutory scheme to waive penalties on taxes properly due where Taxpayer misunderstood the law and failed to seek instruction from the Department. *See also* WAC 458-20-228. Accordingly, we sustain the assessment of penalties.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 21st day of May, 2014.