

Cite as Det. No. 15-0132, 35 WTD 1 (2016)

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. 15-0132
)	
... )	Registration No. . . .
)	

RULE 102(13); RCW 82.32.291 – RESELLER PERMIT – UNLAWFUL USE – PENALTY. A taxpayer’s unawareness of its improper use of its reseller permit is not a circumstance beyond the taxpayer’s control for the misuse of reseller permit penalty waiver.

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.

Callahan, A.L.J. A business (“Taxpayer”) engaged in providing rotary brush cutting services and making sales of brush cutter parts and equipment protests the assessment of reseller permit misuse penalty with regard to items purchased for consumption by the business. Taxpayer argues it was not aware that it improperly used its permit. We deny the petition.<sup>1</sup>

ISSUE

Whether, under RCW 82.32.291 and WAC 458-20-102(13), the Department of Revenue (the “Department”) should waive the reseller permit misuse penalty when Taxpayer claims that it was unaware of the improper use of its reseller permit.

FINDINGS OF FACT

The Department’s Audit Division (“Audit”) examined Taxpayer’s books and records for the period of January 1, 2010 through June 30, 2013 (“audit period”). On April 17, 2014, Audit issued an assessment against Taxpayer for \$ . . . , which consisted of retail sales tax of \$ . . . , a wholesaling business and occupation (“B&O”) tax credit of \$ . . . , use tax/deferred sales tax of \$ . . . , the reseller permit misuse penalty of \$ . . . , and interest of \$ . . . . Taxpayer did not pay the assessment and petitioned the Department’s Appeals Division for correction of assessment. Taxpayer only disputes the reseller permit misuse penalty in its petition.

Taxpayer provides rotary brush cutting services to customers within and outside Washington. Taxpayer also sells miscellaneous brush cutter parts and equipment. During the audit period,

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

Taxpayer reported its service income under the wholesaling B&O tax classification. . . . Audit found some of the income Taxpayer reported under wholesaling B&O tax should be retail sales because they were provided to consumers. Audit reclassified that income to retailing B&O.

The majority of the assessment is on deferred sales tax and use tax on consumable supplies such as rotary blade bolts and nuts, hydraulic motors, steel supply, equipment repairs, a fuel tank, and other miscellaneous parts purchased from Washington vendors. Audit did not assess deferred sales tax and use tax on consumable items that Taxpayer used out of Washington State. Audit determined that many of Taxpayer's purchases were both used by its business and resold to customers. The percentage of the items Taxpayer purchased for resale was 6.5 percent according to Taxpayer.

To determine Taxpayer's deferred sales tax and use tax liability, Audit took the total purchase value, subtracted 6.5 percent from certain vendors where the products were both resold and consumed by Taxpayer. Audit then subtracted 57.25 percent from certain vendors where Taxpayer used the products out of Washington State.<sup>2</sup> In some instances, [where] Audit determined the items Taxpayer purchased were unique, it subtracted 30 percent instead of 57.25 percent.

Audit assessed a reseller permit misuse penalty on the parts and equipment Taxpayer purchased from Washington vendors. Audit explained the following in its Audit Standards and Procedures Supplemental Instructions for the reseller permit misuse penalty assessment:

- [Taxpayer] purchased capital assets and/or consumables items for use as a consumer from vendors registered with the State of Washington.
- No deferred sales tax was paid to the Department.
- [Taxpayer] did not make a good faith effort to pay the deferred sales tax as described in WAC 458-20-102.
- When improperly used, the Department must assess against that buyer a penalty of fifty percent on the tax due, WAC 458-20-102(9).

Taxpayer argues that it did not intentionally misuse its reseller permit when it used its reseller permit to purchase items for use on jobs. Taxpayer asserts that it was difficult for it to keep up with the changes of the Washington tax law as a small family business owner.

## ANALYSIS

All sales of tangible personal property within the RCW 82.04.050 definition of "retail sale" in the state of Washington are subject to retail sales tax, unless an exemption applies. RCW 82.08.020; RCW 82.04.050. A consumer is subject to use tax if the consumer has not paid retail sales tax on the retail sale when purchased. RCW 82.12.020. There is an exemption from the retail sales tax for purchases for resale without intervening use:

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<sup>2</sup> The 57.25 percent was based on Taxpayer's calculation of road maintenance instate versus road maintenance out of state.

(1)(a) "Sale at retail" or "retail sale" means every sale of tangible personal property ...to all persons irrespective of the nature of their business . . . other than a sale to a person who:

- (i) Purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person . . .

RCW 82.04.050(1)(a).

A buyer may use a reseller permit only when making wholesale purchases. RCW 82.04.060; Rule 102(6). In addition, RCW 82.08.130 allows a taxpayer, which is normally engaged in both consuming and reselling certain types of personal property to use a reseller permit or other documentation authorized under RCW 82.04.470 for the property purchases when it cannot determine whether the property will be consumed at the time of the purchase. The statute, in relevant part provides:

(1) If a buyer normally is engaged in both consuming and reselling certain types of personal property, the retail sale of which is taxable under this chapter, and the buyer is not able to determine at the time of purchase whether the particular property acquired will be consumed or resold, the buyer may use a reseller permit ... for the entire purchase if the buyer principally resells the property according to the general nature of the buyer's business. The buyer must account for the value of any articles purchased with a reseller permit ... that is used by the buyer and remit the deferred sales tax on the property to the department.

RCW 82.08.130(1) (emphasis added).

The Department adopted [WAC 458-20-102 ('Rule 102')] to administer the statutes related to reseller permits. Rule 102(12) explains the term "principally" used in RCW 82.08.130(1) means "greater than fifty percent." The rule further provides that

If the buyer gives a reseller permit for all purchases and thereafter consumes some of the articles purchased, the buyer must remit the deferred sales tax on the value of the article used to the department. The deferred sales tax liability should be reported under the use tax classification on the buyer's excise tax return.

WAC 458-20-102(12)(a).

In the present case, Taxpayer used its reseller permit when it purchased materials for use in its jobs within Washington State, and it also did not pay deferred sales tax as required under Rule 102. Taxpayer admitted that it only resold [6.5%] of the items it purchased. Therefore, Taxpayer may not use its reseller permit for purchases because it did not principally resell the property according to the general nature of Taxpayer's business. RCW 82.08.130(1) ; Rule 102(12).

When a taxpayer improperly uses its reseller permit, the taxpayer is subject to the reseller permit misuse penalty imposed under RCW 82.32.291(1), which provides:

(1) Except as otherwise provided in this section, if any buyer improperly uses a reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 to purchase items or services at retail without payment of sales tax that was legally due on the purchase, the department must assess against that buyer a penalty of fifty percent of the tax due, in addition to all other taxes, penalties, and interest due, on the improperly purchased item or service.

RCW 82.32.291(1).

The penalty is fifty percent of the tax due. RCW 82.32.291(1). Here, Taxpayer admits that it improperly used its reseller permit<sup>3</sup> to purchase items at retail without payment of sales tax that was legally due on the purchases, but argues that the Department should waive the misuse penalty because the penalty “was put into place to penalize people who intentionally use the resellers permit unlawfully”, which it asserts that it was not the case here. Taxpayer contends that it learned from the audit the proper use of its reseller permit and it was not aware that it was improperly using its reseller permit during the audit period.

RCW 82.32.291(2) addresses circumstances where the Department can waive the penalty:

(2) The department must waive the penalty imposed under subsection (1) of this section if it finds that the use of the ... reseller permit, ... was due to circumstances beyond the taxpayer's control or if the ... reseller permit, ... was properly used for purchases for dual purposes. The department must define by rule what circumstances are considered to be beyond the taxpayer's control.

RCW 82.32.291(2) (emphasis added).

Rule 102(13) addresses penalty waivers, and repeats the statutory standard that the Department will waive the penalty where the use was due to circumstances beyond the control of the buyer. Rule 102(13) in pertinent part states:

(13) **Waiver of penalty for misuse of reseller permits.** The department will waive the penalty imposed for misuse of reseller permits upon finding that the use of the . . . reseller permit . . . to purchase items or services by a person not entitled to use the reseller permit for that purpose was due to circumstances beyond the control of the buyer or if the . . . reseller permit . . . was properly used for purchases for dual purposes and the buyer made a good faith effort to report deferred sales tax. . . . The penalty will not be waived merely because the buyer was not aware of either the proper use of the reseller permit or the penalty. In all cases the burden of proving the facts is upon the buyer.

WAC 458-20-102(13) (emphasis added).

While we have no reason to dispute Taxpayer’s claim that it was acting in good faith when it made the error of using its reseller permit when it should not have, we cannot waive the penalty because Taxpayer was unaware of its improper use in this case. RCW 82.32.291(2); Rule

<sup>3</sup> [“Improper use” is defined in RCW 82.32.291(3).]

102(13).<sup>4</sup> Because, by statute and administrative rule, Taxpayer has not shown that the misuse was due to circumstances beyond its control, we deny the penalty waiver request. Therefore, we sustain the imposition of the penalty for misuse of a reseller permit included in the assessment and affirm the assessment in its entirety. We deny Taxpayer's petition.

#### DECISION AND DISPOSITION

We deny Taxpayer's petition.

Dated this 19th day of May, 2015.

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<sup>4</sup> It has also been long standing law that penalty waivers for late payment of taxes are also not granted when the basis for the waiver is the Taxpayer's claim that it was unaware of its tax obligations. WAC 458-20-228(9)(a)(iii)(B). *See* Det. No. 14-0170, 34 WTD 030 (2015); Det. No. 13-0306, 34 WTD 001 (2014); and Det. No. 14-0155, 33 WTD 496 (2014).