

Cite as Det. No. 15-0308, 35 WTD 251 (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. 15-0308
)	
... )	Registration No. . . .
)	

[1] WAC 458-20-102(7); RCW 82.04.470: RETAIL SALES TAX – WHOLESALE SALE – RESELLER PERMIT – EXEMPTION CERTIFICATE – BURDEN OF PROOF. The burden is on the seller to prove that a sale is wholesale rather than retail. A seller is liable for retail sales tax on sales where it is unable to prove that the sales were at wholesale.

[2] WAC 458-20-102(9); RCW 82.32.291(1); RETAIL SALES TAX – WHOLESALE SALE – DUAL PURPOSES – GOOD FAITH – MISUSE OF RESELLER PERMIT – MISUSE OF RESELLER PERMIT PENALTY – UNINTENTIONAL MISUSE. Buyer who erroneously uses its reseller permit to make purchases of consumable supplies without payment of retail sales tax legally due, even if buyer does so without the intent to evade retail sales tax, has improperly used its reseller permit, and the Department is required to assess the misuse of reseller permit penalty of 50% on the buyer’s purchases.

[3] WAC 458-20-102(13); WAC 458-20-228; RCW 82.32.090; RCW 82.32.105: RESELLER PERMIT – MISUSE OF RESELLER PERMIT PENALTY – PENALTY WAIVER – DUAL PURPOSES – GOOD FAITH: Buyer was not entitled to a waiver of the misuse penalty on the basis that it made purchases for dual purposes, because it was unable to show that it made a good faith effort thereafter to report deferred sales tax on the portion of those purchases for which sales tax was legally due but not paid.

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.

LaMarche, A.L.J. – A flooring company disputes the assessment of retail sales tax arguing that the Department erred when calculating tax liability, and further, contests the assessment of a misuse of reseller permit penalty on certain purchases from Washington State businesses contending that it made the purchases as a subcontractor or government contractor, and therefore, did not owe retail sales tax. Taxpayer also requests the waiver of interest and a late-payment of return penalty on the grounds that they are excessive and unnecessary. We conclude

that the business has not shown that the Department erred when calculating and assessing retail sales tax or when the Department imposed the misuse of reseller permit penalty. We further determine that the business has not shown a basis for a waiver of interest or penalties. Accordingly, we deny the petition.<sup>1</sup>

#### ISSUES

1. Did the Department err in its calculation and assessment of Taxpayer's retail sales tax liability for tax year 2010?
2. Under RCW 82.04.470 and WAC 458-20-102 (Rule 102), has Taxpayer shown that certain sales were at wholesale?
3. Under RCW 82.32.291 and Rule 102, has Taxpayer shown that the misuse of reseller permit penalty does not apply to its purchases of certain consumable supplies from in-state businesses without payment of retail sales tax?
4. Under RCW 82.32.090, RCW 82.32.105, and WAC 458-20-228 (Rule 228), is Taxpayer eligible for waiver of penalties or interest?

#### FINDINGS OF FACT

[Taxpayer], provides services to both private and government customers in Washington State, which includes sanding, polishing, and waxing of flooring, and the sale and installation of flooring.

The Audit Division (Audit) of the Department of Revenue (Department) audited Taxpayer's business activities for the period of January 1, 2010 through December 31, 2013 (Audit Period). In relevant part, the audit showed that Taxpayer did not have reseller permits for certain claimed wholesale sales and had underreported its retail sales. *See Auditor's Detail of Differences and Instructions to Taxpayer*, November 18, 2014 (Auditor's Detail); *see also* Audit Report, November 18, 2014 (Audit Report), Schedules 2, 5A and 5B, and APS Data.

The audit also showed that Taxpayer made certain purchases of consumable supplies from in-state businesses without paying retail sales tax. Taxpayer's purchases from Washington companies were comprised of scrapers and pads, batteries, duffel bags, paint masks, and sanding supplies. *See* Schedules 8B and Workpaper H of the Corrected Audit Report. Taxpayer used the purchased articles for its own use but did not remit to the Department use tax and/or deferred sales tax on their value. The Department concluded that Taxpayer misused its reseller permit for those purchases and assessed a 50% misuse of reseller permit penalty. *See* Auditor's Detail; *see also* Audit Report, Schedules 8A and 8B, and Workpaper H.

Audit issued an initial assessment on November 18, 2014, totaling \$ . . . , with a due date of December 18, 2014.<sup>2</sup> On December 12, 2014, Audit extended the due date to January 20, 2015

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

<sup>2</sup> The assessment issued on November 18, 2014, Document No. . . . , Invoice No. . . . , totaled \$ . . . , comprising \$ . . . retail sales tax, \$ . . . Retailing B&O tax, a credit of \$ . . . for Wholesaling B&O tax, a credit of \$ . . . for Services

to give Taxpayer additional time to produce records or to file an appeal of the assessment. *See* Taxpayer Accounts Receivable Integrated System (TARIS), Audit Notes, Screen 438. As of January 21, 2015, the day after the due date, Taxpayer had not paid the assessment, nor had it provided the requested records, filed an appeal, or requested a further extension of the due date; for these reasons, the Department assessed an additional late payment penalty of \$ . . . on February 3, 2015. *Id.*

After Taxpayer provided additional documents showing certain sales were at wholesale, Audit issued a corrected assessment on April 16, 2016 that reclassified those transactions and reduced retail sales tax liability.<sup>3</sup> The corrected assessment also included a late payment penalty of \$ . . . , resulting in total liability of \$ . . . . *Id.*

Audit based its calculation of retail sales tax for 2010 in the original assessment on total retail sales for that period of \$ . . . (derived from Taxpayer's QuickBooks records of 2010 sales invoices), \$ . . . in retail sales from reclassification of certain sales from wholesale to retail, less an allowable deduction of \$ . . . for interstate and foreign sales, for a total of \$ . . . . *See* Audit Report, Schedules 1 and 5A, and Workpaper A. However, Taxpayer's 2010 excise tax returns show that Taxpayer reported and paid tax on only \$ . . . in retail sales, a difference of \$ . . . . *Id.* Audit assessed tax on the difference of \$ . . . , including \$ . . . in Retailing B&O tax and \$ . . . in retail sales tax. *Id.*

After receiving the original assessment, Taxpayer provided additional proof to show that some sales were at wholesale; Audit made corresponding adjustments that reduced retail sales tax liability for 2010 to \$ . . . . *See* Corrected Audit Report, Schedule 5A, and Workpaper A. Taxpayer indicates that it attempted to obtain more documentation, including copies of contracts, from certain customers but had no success.

Taxpayer timely filed an appeal arguing that the Department erred in its calculation of retail sales tax liability for the period of January 1 through December 31, 2010. Taxpayer's owner (Owner) explained at the telephone conference on August 4, 2015, that he believed there was an error, alleging that total income in 2010 was only \$ . . . (rounded to \$ . . .), so retail sales tax liability should approximate only \$ . . . . Taxpayer also disputes the late payment penalty of \$ . . . and the misuse of reseller permit penalty of \$ . . . .

Owner indicated at the telephone conference that a Department employee told him he had an additional six to eight weeks to provide documents, but it was unclear whether the employee's statement referred to the extended January 20, 2015 due date or whether the statement referred to further extension of the January 20, 2015 due date. The Department's Appeals Division granted Taxpayer additional time after the telephone conference to provide proof of written correspondence or other written document showing that Taxpayer had requested or had been

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and Other Activities B&O tax, \$ . . . use tax and/or deferred sales tax, \$ . . . Government Contracting B&O tax, a Reseller Permit Misuse Penalty of \$ . . . , and interest of \$ . . . .

<sup>3</sup> The corrected assessment issued on April 16, 2015, Document No. . . . , totaled \$ . . . , which was comprised of \$ . . . retail sales tax, \$ . . . Retailing B&O tax, a credit of \$ . . . for Wholesaling B&O tax, a credit of \$ . . . for Services and Other Activities B&O tax, \$ . . . use tax and/or deferred sales tax, \$ . . . Government Contracting B&O tax, a Reseller Permit Misuse Penalty of \$ . . . , initial interest of \$ . . . , additional interest for Dec. 19, 2014 to May 18, 2015, and an additional late payment penalty of \$ . . . .

granted an extension of the January 20, 2015. However, as of November 4, 2015, Taxpayer has not provided such proof.

## ANALYSIS

### 1. Retail Sales

Pursuant to RCW 82.04.250(1), retailing B&O tax is assessed on the gross proceeds of sales that are retail sales. In addition, pursuant to RCW 82.08.020(1), retail sales tax is levied on “each retail sale” in Washington. RCW 82.04.050 includes the following activities in the definition of “retail sale”:

(1)(a) . . . [E]very sale of tangible personal property (including articles produced, fabricated, or imprinted) to all persons irrespective of the nature of their business . . . .

...

2)(a)The constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers . . . .

...

d) The cleaning . . . of existing buildings or structures, . . .

RCW 82.04.050. As to tax liability, Taxpayer disputes only the amount of retail sales tax imposed in the assessment, particularly the period from January 1 through December 31, 2010.

Here, it appears Taxpayer simply misunderstands the audit documents. At the telephone conference on August 4, 2015, Owner indicated that the amount of retail sales tax assessed for 2010 must be in error, alleging that the amount in dispute was only \$ . . . (rounded to \$ . . . in the assessment), thus retail sales tax on that amount must be closer to \$ . . . , rather than the \$ . . . assessed.

However, our examination of the Audit Report shows that the \$ . . . figure, to which Owner refers, solely represents the amount of wholesale sales for 2010 that Audit reclassified as retail sales due to Taxpayer’s failure to produce reseller’s permits or other proof of wholesaling. *See* Corrected Audit Report, Workpaper A.

What Owner does not take into consideration is that the assessment also includes Taxpayer’s underreported retail sales. Audit calculated that retail sales for 2010 totaled \$ . . . . That figure included not only \$ . . . from reclassification of certain transactions from wholesaling to retailing, but also \$ . . . in retail sales from Taxpayer’s QuickBooks records, and a credit of \$ . . . for allowable interstate and foreign sales. *Id.* Because Taxpayer reported only \$ . . . on its 2010 excise tax returns, the initial assessment was based on the difference between total retail sales of \$ . . . , less the \$ . . . Taxpayer previously reported, or \$ . . . . *Id.*

After the initial assessment, Taxpayer provided proof showing that certain sales were at wholesale and Audit reclassified those sales, reducing retail sales tax liability for 2010 by \$ . . . , from \$ . . . to \$ . . . , in the corrected assessment issued April 16, 2015. Therefore, we conclude that Taxpayer has not shown error on the part of the Department when it calculated Taxpayer's 2010 retail sales tax liability. Accordingly, we uphold the assessment and deny the petition in that regard.

## 2. Sales at Wholesale

The burden is on the seller to prove that a sale is wholesale rather than retail. RCW 82.04.470; WAC 458-20-254(3). *See* Det. No. 12-0349, 33 WTD 45 (2014); Det. No. 87-47, 2 WTD 235 (1986). RCW 82.04.470(1) provides that a seller can meet its burden of proving that a sale is wholesale “by taking from the buyer, at the time of sale or within a reasonable time after the sale as provided by rule of the department, a copy of a reseller permit issued to the buyer by the department under RCW 82.32.780 or 82.32.783.” [*See also* Rule 102(7).]

If the seller cannot provide a copy of the reseller permit, RCW 82.04.470(2) states that a seller may instead accept from a buyer required to be registered with the Department, a “uniform exemption certificate approved by the streamlined sales and use tax agreement governing board” or any other “exemption certificate as may be authorized by the department.”

RCW 82.04.470(3) addresses sales to a buyer *not* required to be registered with the Department and states that a seller may accept from a buyer a “uniform exemption sales and use tax exemption developed by the multistate tax commission,” a “uniform exemption certificate approved by the streamlined sales and use tax agreement governing board,” or any other “exemption certificate as may be authorized by the department.”

If the seller cannot provide a copy of a reseller permit or an exemption certificate, it will be liable for retail sales tax on the sale unless it can demonstrate facts and circumstances that show the sale was properly made at wholesale or that it captured the relevant data elements as allowed under the Streamlines Sales and Use Tax Agreement.<sup>4</sup> RCW 82.04.470(4) and (5); WAC 458-20-102(7). *See* Det. No. 13-0031, 33 WTD 336 (2014).

The seller has the obligation to maintain evidence of the wholesale sale and to keep and preserve for five years “suitable records as may be necessary to determine the amount of any tax for which he or she may be liable,” RCW 82.32.070(1). *See also* RCW 82.32A.030(3).

Here, Taxpayer has not met its burden of proving that the sales in dispute were wholesale in nature. Taxpayer has not provided reseller permits or exemption certificates for the sales in question, nor has it shown that it captured the relevant data points. Further, Taxpayer indicated that it was unable to obtain copies of contracts or other proof from its buyers that would show the wholesale nature of the disputed sales. Because Taxpayer failed to produce records to show the wholesale nature of the remaining disputed sales, the Department properly reclassified those sales as retail sales. RCW 82.04.470; WAC 458-20-102(5); Det. No. 12-0349, 33 WTD 45

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<sup>4</sup> RCW 82.58.030 provides, “The department shall enter into the streamlined sales and use tax agreement with one or more states to simplify and modernize sales and use tax administration. . . .”

(2014). Therefore, we conclude that Taxpayer has not met the burden of proof required under RCW 82.04.470, and is accordingly liable for the retail sales tax assessed on those sales. RCW 82.04.470; WAC 458-20-102; Det. No. 15-0104, 34 WTD 434 (2015). We, therefore, deny the petition and uphold the assessment in regard to retail sales tax liability.

If Taxpayer, after paying the assessment, is later able to present the Department with valid reseller permits or other proof as allowed under RCW 82.04.470, Taxpayer may file a written request for refund of the taxes paid, along with the applicable interest and associated penalties. *See* Rule 102(7)(j). 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. Also, Taxpayer must comply with the procedural requirements of WAC 458-20-229 when requesting a refund, including certain statutory time limits.

### 3. Misuse of Taxpayer's Reseller Permit

The Department is required to impose a penalty on a buyer that improperly uses its reseller permit. RCW 82.32.291(1) provides in part:

(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.

...

Rule 102(9) mirrors the language in RCW 82.32.291(1) in respect to improper use of a reseller permit, and states that the penalty can be imposed even when the taxpayer was not intending to evade paying retail sales tax. *See* Det. No. 14-0404, 34 WTD 337 (2015). Taxpayer does not dispute that it used its reseller permit to make the disputed purchases, but argues that retail sales tax was not legally due on those purchases.

Here, Taxpayer has not shown that it did not improperly use its reseller permit to make purchases from instate businesses without payment of retail sales tax legally due. RCW 82.04.050 defines activities that are subject to retail sales tax, and provides in relevant part,

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

...

(ii) Installs, repairs, cleans, alters, imprints, improves, constructs, or decorates real or personal property of or for consumers, if such tangible personal property becomes an ingredient or component of such real or personal property without intervening use by such person; . . .

RCW 82.04.050(1)(a)(ii) (Emphasis supplied).

The term “consumer” is defined under RCW 82.04.190(1)(b) to include:

- (1) Any person who purchases, acquires, owns, holds, or uses any article of tangible personal property irrespective of the nature of the person's business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers other than for the purpose of:

...

- (b) Incorporating such property as an ingredient or component of real or personal property when installing, repairing, cleaning, altering, imprinting, improving, constructing, or decorating such real or personal property of or for consumers; . . .

RCW 82.04.190(1)(b) (Emphasis supplied).

WAC 458-20-170 (Rule 170), was adopted, in part, to administrate taxation of activities like those of Taxpayer. Rule 170 explains that prime contractors, who are persons performing construction for consumers, are making retail sales, but that subcontractors who perform construction for prime contractors are generally engaging in wholesaling activity (sales for resale). Rule 170; *see also* Det. No. 14-0338, 34 WTD 234 (2015). However, retail sales tax is legally due on purchases of consumable supplies that are primarily for use by the contractor, rather than for resale as an ingredient or component of the finished structure. *Id.*

First, Taxpayer argues that retail sales tax was not legally due on the disputed purchases it used as a subcontractor because they were made for the purpose of resale. We disagree. Here, the disputed purchases from Washington companies were comprised of scrapers and pads, batteries, duffel bags, paint masks, and sanding supplies. *See* Schedules 8B and Workpaper H of the Corrected Audit Report. Clearly, these were purchases of consumable supplies to be used by the Taxpayer as a consumer, rather than for resale as an ingredient or component part of the finished structure. Therefore, retail sales tax was legally due on those purchases under RCW 82.04.050(1). RCW 82.04.190(1)(b); Rule 170; 34 WTD 234, *supra*.

Second, we do not agree with Taxpayer’s argument that because it made certain disputed purchases in its role as a government contractor, retail sales tax was not legally due on those purchases. Taxpayer is misreading the statutes.

RCW 82.04.050(12) states that the term “retail sale” does not include:

[T]he sale of or charge made for labor and services rendered in respect to the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW, including the installing, or attaching of any article of tangible personal

property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation.

This provision means that the sale to the governmental entity itself is excluded from the definition of “retail sale.” However, the sales at issue here are the sales to the *Taxpayer*, which are subject to retail sales tax because Taxpayer is a “consumer” as that term is defined under RCW 82.04.190(6).

RCW 82.04.190(6) defines “consumer” to include:

. . . Any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation; . . . Any such person is a consumer within the meaning of this subsection in respect to tangible personal property incorporated into, installed in, or attached to such building or other structure by such person, . . .

(Emphasis provided.) Therefore, under RCW 82.04.190(6), Taxpayer is the consumer not only of its own consumable supplies but also of all the materials incorporated into or installed in the building or other structure, regardless of whether they become part of the real property by virtue of installation. This is clarified in the Department’s rule regarding government contracts.

WAC 458-20-17001(5) (Rule 17001(5)), adopted to administer government contracting, explains:

5) The retail sales tax does not apply to the gross contract price, or any part thereof, for any business activities taxable under the government contracting classification. Prime and subcontractors who perform such activities are themselves included within the statutory definition of "consumer" under RCW 82.04.190 and are required to pay retail sales tax upon all purchases of materials, including prefabricated and precast items, equipment, and other tangible personal property which is installed, applied, attached, or otherwise incorporated in their government contracting work. This applies for all such purchases of tangible personal property for installation, etc., even though the full purchase price of such property will be reimbursed by the government or housing authority in the gross contract price. It also applies notwithstanding that the contract may contain an immediate title vesting clause which provides that the title to the property vests in the government or housing authority immediately upon its acquisition by the contractor.

(6) Also, the retail sales tax must be paid by government contractors upon their purchases and leases or rentals of tools, consumables, and other tangible personal property used by them as consumers in performing government contracting.

Rule 17001(5) and (6) (Emphasis provided).

Here, as a government prime contractor or subcontractor, Taxpayer was required to pay retail sales tax on its purchases of materials and supplies used in those activities. RCW 82.04.190(6); Rule 17001(5) and (6). *Id.* Therefore, retail sales tax was legally due on those purchases. Because Taxpayer used its reseller permit to make the disputed purchases without payment of retail sales tax legally due, even if it did so without the intent to evade retail sales tax, Taxpayer improperly used its reseller permit. RCW 82.32.291; Rule 102. Therefore, the Department was required under RCW 82.32.291 to assess the misuse of reseller permit penalty of 50% on Taxpayer's purchases of consumable supplies, as set forth in Schedules 8B and Workpaper H of the Audit Report. Accordingly, we deny the petition in that regard.

#### 4. Penalties and Interest

In its petition dated May 5, 2015, Taxpayer asks for relief in the form of a waiver or cancellation of the assessed late payment of assessment penalty, the misuse of reseller permit penalty, and assessed interest, stating that they are "very excessive and unnecessary."

However, the Department is required by law to impose penalties if the conditions for them are met, and the Department's authority to waive or cancel penalties is limited by statute. RCW 82.32.090(1); Det. No. 14-0201, 33 WTD 612 (2014).

**Late-Payment Penalty.** RCW 82.32.090(2)<sup>5</sup> provides for the mandatory assessment of a late-payment penalty, and states:

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 the tax under this subsection. No penalty so added may be less than five dollars. . . .

RCW 82.32.105(1) allows for cancellation of penalties, as follows:

If the department of revenue finds that the payment by a taxpayer of a tax less than that properly due . . . 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.

WAC 458-20-228 ("Rule 228"), the administrative rule that implements RCW 82.32.105 explains:

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<sup>5</sup> Effective August 1, 2015, the Legislature amended RCW 82.32.090 to increase late payment penalties. *See* Laws of 2015, Ch. 5, § 401. Beginning August 1, 2015, the new rates at which late payment penalties are assessed, if payment of the tax due is not received by the due date, are as follows: One day after the due date through the last day of the month following the due date: 9% (previously 5%); First day of the second month following the due date through the last day of that month: 19% (previously 15%); First day of the third month and thereafter: 29% (previously 25%). *Id.* *See also* Special Notice, Late Payment Penalties Increase, issued July 27, 2015.

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.

Here, Taxpayer received the initial assessment before its due date of December 18, 2014, and Audit granted Taxpayer an extension until January 20, 2015 to provide documents or to appeal the assessment. *See* TARIS, Audit Notes, December 12, 2014. However, Taxpayer did not provide the required documents or file an appeal by the January 20, 2015 due date; nor did Taxpayer request or receive an additional extension until it filed its appeal on May 7, 2015, *after* it received the corrected assessment issued April 16, 2015.

Taxpayer could have avoided the late-payment penalty if it had: 1) immediately paid the assessment; 2) filed a petition requesting correction of the assessment; or 3) requested an extension of time to pay the assessment. However, Taxpayer took none of those actions prior to the due date of January 20, 2015. Because payment on the corrected assessment was not received on or before the thirtieth day following the due date specified in the notice of tax due, or any extension thereof, the Department assessed a 25% late-payment penalty on the balance of \$ . . . , or \$ . . . .

Although Taxpayer was given additional time after the telephone conference on August 24, 2015 to provide a copy of written correspondence or other written document showing that it had requested or had been granted an extension, Taxpayer did not provide such proof. Therefore, we conclude that the Department was required under RCW 82.32.090(2) to assess the 25% late-payment penalty, and that Taxpayer has not shown circumstances beyond its control as required for a penalty waiver under RCW 82.32.105(1). Accordingly, we uphold the late-payment penalty.

**Waiver of Misuse of Reseller Permit Penalty.** As discussed above, RCW 82.32.291(1) requires the Department to impose a 50% penalty against a buyer that 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.

However, under RCW 82.32.291(2), the Department must waive the penalty if the taxpayer can show that the improper use of the reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 was:

- Due to circumstances beyond the taxpayer's control, or
- The reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 was properly used for purchases for dual purposes.

Rule 102(13) elaborates on the waiver of the misuse of reseller permit penalty and states, in part, "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.” *Id.*

Taxpayer has not shown that misuse of its reseller permit was due to circumstances beyond its control. Taxpayer itself knowingly used its reseller permit to make the disputed purchases, and its improper use was due to the fact that it was not aware of the proper use of the reseller permit in regard to purchases either for government contracting, or for purchases of consumable supplies for its own use as a subcontractor. Lack of awareness of the proper use of a reseller permit is specifically described under the rule as an inadequate basis for waiver of the penalty. *Id.* Therefore, Taxpayer has not shown that the improper use of its reseller permit was due to circumstances beyond its control.

Nor has Taxpayer shown that it properly used its reseller permit for purchases for dual purposes, or that it made a good faith effort to report deferred sales tax on purchases for dual purposes. Rule 102(13) explains that the Department shall waive the penalty if a taxpayer properly used its permit for purchases for dual purposes, and the buyer made a good faith effort to report deferred sales tax.

Rule 102(12) elaborates on proper use of a reseller permit for purchases for dual purposes, and explains that if a buyer is engaged in both consuming and reselling certain types of tangible personal property, and is not able to determine at the time of purchase whether the particular property purchased will be consumed or resold, the buyer must purchase according to the general nature of its business per RCW 82.04.140. If the buyer principally consumes the articles in question, the buyer should *not* give a reseller permit for any part of the purchase. *Id.* If the buyer principally resells the articles (i.e., resells more than 50% of the articles it purchases), it may furnish a reseller permit for the entire purchase. *Id.*

However, 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. *Id.*

If the buyer fails to make a good faith effort to remit the tax liability, the purchases will be subject to the misuse of reseller permit penalty under RCW 82.32.291(1). *Id.* The Department will generally consider a buyer to be making a good faith effort to report its deferred sales tax liability if the buyer discovers a minimum of 80% of its deferred sales tax liability within 120 days of purchase, and remits the full amount of the discovered liability on its next tax return. *Id.* If the buyer does not satisfy the 80% threshold, but can show by other facts and circumstances its good faith efforts to report the tax liability, the penalty will not be assessed. *Id.* Conversely, if the Department can show by other facts and circumstances that the buyer did not make a good faith effort in remitting its tax liability, the penalty will be assessed, even if buyer has met the 80% threshold. *Id.*

Here, Taxpayer made purchases of tangible personal property for which it gave a reseller permit, and subsequently consumed the articles in question. Under Rule 102(12), Taxpayer should have remitted to the Department deferred sales tax on the value of the articles it used, but failed to do

so. Alternatively, the Department would generally consider Taxpayer to be making a good faith effort to report its deferred tax liability if Taxpayer discovered a minimum of 80% of its deferred tax liability within 120 days, and remitted the full amount of deferred sales tax on its next return. However, Taxpayer failed to do so, and therefore, did not demonstrate a good faith effort to remit the deferred sales tax.

We conclude that Taxpayer has not shown a basis for relief under RCW 82.32.291(2). Accordingly, we deny Taxpayer's request for waiver of the misuse of reseller permit penalty.

**Interest.** Under RCW 82.32.050(1), if a taxpayer pays less tax than is properly due, the Department must assess the additional amounts found due, and include interest.<sup>6</sup>

The Department has limited authority to waive or cancel interest. RCW 82.32.105(3) authorizes two circumstances under which the Department "shall waive or cancel interest:"

- (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 or deficiency was not at the request of the taxpayer and was for the sole convenience of the department.

The facts of this case do not involve either scenario a) or b) above. Taxpayer's failure to pay the tax was not due to its reliance on the Department's written instructions to Taxpayer, nor was it due to the extension of a due date not at Taxpayer's request and only for the convenience of the Department. Thus, under RCW 82.32.050(1), the Department cannot waive the assessed interest.

In summary, Taxpayer has not shown that the Department erred when calculating retail sales tax liability, or that the Department erred when it reclassified certain claimed wholesale sales as retail sales. Further, we conclude that Taxpayer has not shown a basis upon which the Department may waive penalties or interest. Accordingly, we must deny the petition.

#### DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 10th day of November, 2015.

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<sup>6</sup> Det. No. 01-193, 21 WTD 264 (2002).