

Cite as Det. No. 15-0281, 36 WTD 028 (2017)

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. 15-0281
)	
...)	Registration No. . . .
)	

[1] RULE 100; RCW 82.32A.020: RIGHT TO RELY – SPECIFIC WRITTEN INSTRUCTIONS – ONLY BINDING UNDER THE FACTS PRESENTED. If a taxpayer receives a letter ruling based on incorrect factual statements, the taxpayer is not entitled to rely on the resulting letter ruling. The holding of a letter ruling is only binding under the facts presented.

[2] RCW 82.32.050: STATUTE OF LIMITATIONS – VOLUNTARY REQUEST TO CLOSE TAX ACCOUNT – UNREGISTERED TAXPAYER. A taxpayer that registers its business in Washington and subsequently requests that the Department of Revenue close its tax account becomes an unregistered taxpayer and cannot avail itself of the four-year statute of limitation on assessments afforded to registered taxpayers.

[3] RULE 193, RULE 103; RCW 82.04.270. WHOLESALING B&O TAX – IN-STATE RECEIPT OF GOODS – COMMON CARRIER. Delivery of goods to a common carrier outside the state does not constitute receipt by the buyer outside the state, unless the for-hire carrier has express written authority to accept or reject the goods for the buyer with a right of inspection.

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.

Weaver, A.L.J. – Taxpayer, a berry wholesaler, protests the assessment of wholesaling business and occupation (B&O) tax, interest, and resulting penalties on its Washington sales. We conclude that the Department of Revenue’s (Department’s) assessment was proper because the taxpayer’s customers received taxpayer’s goods in Washington. We also conclude that the Department was not bound by a previous letter ruling because the facts upon which the letter ruling was based did not reflect Taxpayer’s actual business practices. Finally, we find that the Department was not barred by the statute of limitations because Taxpayer was an unregistered business. Taxpayer’s petition for correction of assessment is denied.¹

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

ISSUES

1. Whether, under RCW 82.32A.020, Taxpayer can rely on a letter ruling when the letter ruling is based on facts that do not reflect Taxpayer's actual business practices.
2. Whether, under RCW 82.32.050, the Department is barred from assessing taxes against a Taxpayer more than four years after the close of the tax year when the Taxpayer initially registered with the Department but immediately withdrew its registration.
3. Whether Taxpayer's goods were received by its customers in Washington for purposes of taxation under WAC 458-20-193.

FINDINGS OF FACT

[Taxpayer] is a wholesaler of fruit products. Taxpayer contracts with fruit growers throughout the country to grow fruit on its behalf, which is then sold to distributors and retailers for resale. Taxpayer has two employees who reside in Washington. These employees manage Taxpayer's relationships with fruit growers on the West Coast. Taxpayer also has nonresident employees who travel into Washington to meet with customers. Taxpayer typically delivers its products to Washington from out-of-state by third-party, for-hire freight carriers, but Taxpayer will also ship goods under its label directly from its Washington suppliers to its Washington customers.

Taxpayer registered with the Department, in 2007. However, on June 12, 2008, Taxpayer requested the Department close its tax reporting account with the State of Washington. This request was granted.

On June 27, 2008, Taxpayer's representative submitted a request for a letter ruling regarding Taxpayer's registration and tax reporting requirements in Washington State. That request for a letter ruling read, in relevant part, as follows:

. . . [Taxpayer] was contacted by the Department of Revenue after registering with Washington's Department of Employment Security. When registering with Employment Security, [Taxpayer]'s payroll department inadvertently indicated a newly hired Washington employee would be engaging in "sales". That was incorrect as the employee is actually involved on the purchasing side of [Taxpayer]'s business . . .

. . . [Taxpayer] recently hired an employee who resides in Washington. This employee oversees [berry] growing regions on the west coast of the United States. The employee interacts with growers on the west coast, who are [Taxpayer]'s vendors. The employee has no communication or contact with [Taxpayer]'s customers whatsoever.

[Taxpayer]'s marketing arm is located at their headquarters in [out-of-state], where sales activity is conducted via telephone and Internet. **[Taxpayer] does not have resident or nonresident employees that contact customers (or prospective customers) in Washington, nor do they engage independent contractors to solicit in Washington. If berries are purchased from a Washington grower, they must be processed at a**

distribution center, also located in [out-of-state], prior to sale to the customer. [Taxpayer]’s customers are responsible for picking up their orders at a point outside of Washington

Taxpayer’s Request for Letter Ruling, dated June 27, 2008 (emphasis added).

On July 23, 2008, the Department issued a letter ruling to Taxpayer. That letter ruling read, in relevant part, as follows:

Facts

. . . [Taxpayer] was contacted by the Department of Revenue after registering with Employment Security. When registering with Employment Security, [Taxpayer]’s payroll department inadvertently indicated a newly hired Washington employee would be engaging in “sales”. That was incorrect, as the employee is actually involved in the purchasing side of [Taxpayer]’s business.

. . . [Taxpayer] recently hired an employee who resides in Washington. This employee oversees [berry] growing regions on the west coast who are [Taxpayer] vendors. The employee has no communication or contact with [Taxpayer’s] customers whatsoever.

[Taxpayer]’s marketing arm is located at their headquarters in [out-of-state], where sales activity is conducted via telephone and Internet. **[Taxpayer] does not have resident or nonresident employees that contact customers or prospective customers in Washington, nor do they engage independent contractors to solicit in Washington. If berries are purchased from a Washington vendor, they are processed at a distribution center, prior to sale to the customer. [Taxpayer]’s customers are responsible for picking up their orders at a point outside of Washington.**

Ruling

Based on the information provided, [Taxpayer] does not have a Washington excise tax responsibility and does not need to have an open tax registration with the Department of Revenue.

Washington does not assert its business and occupation (B&O) or retail sales tax on the sale of goods originating outside the state unless: 1) the goods are received by the purchaser in this state and 2) the out-of-state seller has established *nexus* in Washington. Both the criteria must be met for the seller to be subject to Washington taxation. (See Washington Administrative Code (WAC) 458-20-193(7).)

Although you have an employee in the state, that employee oversees growing operations for . . . berries that [Taxpayer] will purchase and transport outside of Washington. Such purchases are not taxable transactions for [Taxpayer]. **You note the . . . berries purchased from Washington vendors are processed out-of-state and must be picked up by customers at points outside of Washington. Thus, there are not taxable transactions for state excise tax purposes.**

This ruling is binding on [Taxpayer] and the Department of Revenue **under the facts presented**. It will remain binding until: the facts change; the law (either by statute or court decision) changes; the applicable rule(s) change; the Department of Revenue publicly announces a change in the policy upon which this ruling is based; or [Taxpayer] is notified in writing that this ruling is not valid.

Letter Ruling, dated July 23, 2008 (emphasis added).

On June 26, 2013, the Department's Compliance Division (Compliance) contacted Taxpayer by letter and requested that a Washington Business Activities Questionnaire (WBAQ) be completed and returned by July 26, 2013. Taxpayer completed the WBAQ and Compliance received it on July 29, 2013.

On August 14, 2013, Compliance mailed a letter to Taxpayer requesting documentation to verify the facts upon which the 2008 Letter Ruling was based, including: Copies of sales contracts with at least three Washington customers; a three month sampling of all bills of lading for sales into Washington; a copy of the contract with the Washington facility that ships [Taxpayer's] products; a list of all 1099s paid to Washington individuals or entities since January 1, 2006; and a list of all visits to Washington by nonresident employees of Taxpayer's since January 1, 2006.

In a letter, dated October 31, 2013, Taxpayer's senior tax manager responded, in pertinent part, as follows:

Request 5: A list of all visits to Washington by nonresident [Taxpayer] employees since January 1, 2006.

Response: [Taxpayer] does not maintain information relating to visits to Washington. In an effort to reply to your request, I have spoken with the two . . . employees most likely to travel to Washington on customer related business to provide me information about Washington visits. **One of the employees has traveled to Washington on customer related business.** The employee indicates that, out of approximately twenty customers who have Washington sales outlets, **he has only visited** the . . . [Vendor #1] buying offices in **each of the referenced years**. He further indicates that there was likely at least one visit to . . . [Vendor #2] between 2007 and 2010.

Taxpayer's Response letter dated October 31, 2013 (emphasis added).

As a result of its inquiries, Compliance made the following factual findings, which were listed in a letter to Taxpayer, dated January 27, 2014:

- [Taxpayer] is a [out-of-state] company that is engaged in the business of selling berries throughout the world.
- [Taxpayer] [as of January 27, 2014] has two Washington resident employees. Wages were first reported to the Washington State Employment Security Department in Quarter 3, 2007. The employees oversee . . . berry growing operations and interact

- with [Taxpayer's] vendors on the West Coast. These employees have no interaction with [Taxpayer's] customers.
- [Taxpayer's] marketing arm is located in [out-of-state]; **however a nonresident [employee] has travelled into Washington to meet with customers on a recurring basis since at least 2006.**
 - **Nonresident . . . employees have also travelled into Washington State to attend events and present at conferences.**
 - **Some of the goods [Taxpayer] sells are processed at its vendors' locations in Washington State.**
 - **[Taxpayer] ships products, sold in its own name, directly from the location of one of its vendors in Washington State to customers' locations in Washington State. Some customers take receipt of the goods, in their own trucks, at the vendor's location in Washington State. These transactions do not leave the State of Washington and therefore; could not be characterized as anything other than a Washington sale.**
 - **[Taxpayer] ships products to customers' locations in Washington State by third-party for-hire trucking companies. Its customers do not take receipt of the goods until they have arrived at the customers' Washington State locations.**
 - [Taxpayer] paid 1099s to a Washington Resident marketing and strategy consultant from 2007 through 2010.

Letter dated January 27, 2014 (emphasis added).

Based on these stated facts, Compliance found that Taxpayer had taxable nexus in Washington. Compliance also found that the Department's 2008 Letter Ruling was not binding on the Department because the facts provided by Taxpayer in its letter ruling were significantly different than Taxpayer's actual activities in Washington. *See id.*

On July 25, 2014, Compliance issued Assessment No. . . . , for the period January 1, 2009, through October 31, 2013, which totaled \$ That assessment included \$. . . in wholesaling B&O tax, \$. . . in litter tax, a \$. . . delinquency penalty, \$. . . in interest, and a 5% assessment penalty of \$ On July 25, 2014, Compliance also issued Assessment No. . . . , for the period January 1, 2007, through December 31, 2008, which totaled \$ That assessment included \$. . . in wholesaling B&O tax, \$. . . in litter tax, a \$. . . delinquency penalty, \$. . . in interest, and a 5% assessment penalty of \$

Taxpayer appealed these assessments.

Taxpayer states that it ships its fruit to Washington customers F.O.B. from [out-of-state]. Taxpayer states that the carriers accept those berries on behalf of Taxpayer's customers, that the carriers have the right and duty to inspect the berries received, and that the carriers have the responsibility to reject berries on behalf of the customers prior to shipment if the berries are defective. Taxpayer cites language in the bills of lading where carriers attest to receipt of "the perishable property described below, in good order and condition." Taxpayer states that title to berries transfers from Taxpayer to its customers [out-of-state].

On appeal, we find that Taxpayer had at least two resident employees in Washington as early as 2007. We find that Taxpayer had at least one non-resident employee who was traveling into Washington to meet with customers every year from 2006 to 2012. We find this fact to be in direct conflict with the version of facts presented by Taxpayer in its request for a letter ruling. We also find that Taxpayer was delivering goods from a Washington vendor's location directly to Washington customers. We find this fact to be in direct conflict with the version of facts presented by Taxpayer in its request for a letter ruling. We find that Taxpayer ships products to its customers' locations in Washington State by third-party, for-hire trucking companies. We find this fact to be in direct conflict with the version of facts presented by Taxpayer in its request for a letter ruling because, in that letter ruling request, Taxpayer stated that its customers were responsible for picking up their orders at a location outside of Washington. As a final matter, we find all of Compliance's factual findings, in its January 27, 2014 letter quoted above, to be factually correct and we adopt them into this determination by reference.

ANALYSIS

I. Taxpayer Does Not Have the Right to Rely on the Prior Letter Ruling.

RCW 82.32A.020(2) invests the taxpayers of Washington with the right to "rely on specific, official written advice to that taxpayer." RCW 82.32A.020(2); *see also* Det. No. 14-0292, 34 WTD 114 (2015). The written advice at issue in this case is a letter ruling issued in accordance with WAC 458-20-100 (Rule 100). Rule 100 is the administrative rule addressing letter rulings. It provides the following:

The tax ruling *must state all pertinent facts* upon which the opinion is based and, if the taxpayer's name has been disclosed, is binding upon both the taxpayer and the department *under the facts stated*. It will remain binding until . . . the taxpayer is notified in writing that the ruling is no longer valid. Any change in the ruling will have prospective application only.

Rule 100(2)(b) (emphasis added).

In this matter, the Department issued its July 23, 2008 letter ruling based on at least three facts that were contrary to Taxpayer's actual business practices. First, the July 23, 2008 letter ruling was premised on the stated fact that Taxpayer had no "resident or nonresident employees that contact customers or prospective customers in Washington." In its later correspondence with the Department, dated October 31, 2013, Taxpayer's senior tax manager states that Taxpayer had at least one employee contacting customers in Washington in every year since 2006.

Second, the July 23, 2008 letter ruling was also premised on the stated fact that when Taxpayer purchased berries from a Washington vendor, those berries were shipped out of Washington before being sold to Washington customers. After a fuller inquiry, Compliance discovered that Taxpayer was shipping berries directly from Washington vendors to Washington customers.

Third, the July 23, 2008 letter ruling was premised on the stated fact that "Taxpayer's customers are responsible for picking up their orders at a point outside of Washington." Upon investigation,

it is undisputed that Taxpayer ships its product to Washington customers on third-party, for-hire trucking companies. Taxpayer's contention, in its request for a letter ruling, that its customers are responsible for picking up their orders at a point outside of Washington is false.

Given the three incorrect factual statements upon which the Department's letter ruling was based, Taxpayer is not entitled to rely upon the ruling. *See* 34 WTD 114 (holding that when the facts provided in a letter ruling request do not actually reflect the Taxpayer's business activities, the Taxpayer is not entitled to rely on the resulting letter ruling). Indeed, by the ruling's own explicit terms, it is only binding "under the facts presented." Because the facts in the letter ruling did not accurately describe Taxpayer's actual business activities, Taxpayer cannot rely on its holding to dispute the assessment at issue on appeal.

II. Taxpayer Cannot Avail Itself of the Statute of Limitations.

RCW 82.32.050 imposes a statute of limitations on assessments by the Department. RCW 82.32.050(4) provides:

No assessment or correction of an assessment for additional taxes, penalties, or interest due **may be made by the department more than four years after the close of the tax year, except (a) against a taxpayer who has not registered as required by this chapter,** [or] (b) upon a showing of fraud or of misrepresentation of a material fact by the taxpayer
.....

RCW 82.32.050(4) (emphasis added), *see also* WAC 458-20-230(2).

RCW 82.32.030 requires that if any person engages in business or performs any act upon which a tax is imposed under Title 82 RCW, that person must apply for and obtain a registration certificate from the Department. *See* RCW 82.32.030(1).

In this case, Taxpayer registered to do business in Washington in 2007. However, on June 12, 2008, of its own volition, Taxpayer closed its tax reporting account. Despite the fact that Taxpayer was an unregistered Taxpayer, it contends that the Department is in violation of RCW 82.32.050 and cannot assess taxes against it for the years 2007 through 2009. Taxpayer's arguments are that it was, at one point, a registered taxpayer; and it had a right to rely on the Department's July 23, 2008 letter ruling for its decision to remain an unregistered taxpayer.

Taxpayer, in this case, was engaging in business in the state of Washington and was therefore, required to obtain a registration certificate. Despite doing business in Washington, Taxpayer decided that it did not need to be registered in Washington and voluntarily requested that its tax reporting account be closed. Taxpayer now seeks the benefit of being a "registered Taxpayer" despite paying no taxes in Washington and after it specifically requested the Department close its tax reporting account. Det. No. 87-66, 2 WTD 325 (1987), in addressing a situation where an unregistered taxpayer registered its business during the audit, and then claimed the benefit of the statute of limitations, because it was registered, held that:

RCW 82.32.100 does not specifically tie a taxpayer's registration status at the moment a tax assessment is issued to the subject exception to the four-year limitation. It simply imposes the exception against one who has not registered when required to do so.

Id. The facts of this case demand the same outcome. Taxpayer was doing business in Washington, was required to be registered, but failed to register its business. As an unregistered taxpayer, Taxpayer cannot avail itself of RCW 82.32.050.

Moreover, WAC 458-20-101 recognizes that closing a taxpayer's account has the effect of "rescinding" its registration. *See* Rule 101(14). By requesting that the Department close its account in 2008, Taxpayer's registration was rescinded and the Taxpayer regained the status of an unregistered Taxpayer. Accordingly, under the plain meaning of RCW 82.32.050, the period for an assessment was not limited to four years after the close of the tax year for a taxpayer that was not registered as required by RCW Chapter 82.32.

Although WAC 458-20-230 discusses voluntary registration for purposes of the UBI system, it is silent as to the effect of the rescission of a tax registration after someone voluntarily registered. Because Taxpayer rescinded its registration with the Department, we find no basis for limiting the statutory assessment period.

Finally, we have determined in Part I, *supra*, that Taxpayer has no right to rely on the July 23, 2008 letter ruling and, for those reasons, we hold that Taxpayer cannot rely on that letter ruling to claim protection under the statute of limitation. Taxpayer was doing business in Washington and was responsible to know its tax reporting obligations and register with the Department. *See* RCW 82.32A.030. Taxpayer failed to register its business, despite the fact that it should have known that the July 23, 2008 letter ruling was based on facts that had either changed or were erroneous from the outset. Because Taxpayer was doing business in Washington as an unregistered taxpayer, we conclude that Compliance properly assessed tax against Taxpayer for periods beginning in January 1, 2007.

III. Taxpayer's Goods Shipped into Washington are Taxable in Washington.

RCW 82.04.220 imposes the B&O tax for the act or privilege of engaging in business activities in this state. The tax rate and measure depend on the classification of the activity engaged in by the taxpayer. Taxpayers "engaging within this state in the business of making sales at wholesale" are taxable under the wholesaling classification and pay tax measured by "the gross proceeds of sales of such business multiplied by [the specified wholesaling tax rate]." RCW 82.04.270.

RCW 82.04.040 defines the term "sale," in relevant part, as "any transfer of the ownership of, title to, or possession of property for a valuable consideration...." RCW 82.04.040(1). WAC 458-20-103 (Rule 103) defines the place of sale, and 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 sold 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 103 (emphasis added).

WAC 458-20-193 (Rule 193) (2010) explained the application of Washington's B&O tax and retail sales tax applications to interstate sales of tangible personal property for periods prior to March 27, 2010. With respect to inbound sales of tangible personal property, Rule 193(7) stated: "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."

In the present case, the taxpayer does not dispute nexus. Instead, Taxpayer argues that its goods are not received by its customers in this state because the third-party, for-hire carriers that deliver the goods into Washington have the right to inspect and reject Taxpayer's goods.

Rule 193(2)(d) defined "received" as "the purchaser or its agent first either taking physical possession of the goods or having dominion and control over them." "Agent," for purposes of Rule 193, was defined as "a person authorized to receive goods with the power to inspect and accept or reject them." Rule 193(2)(e).

With respect to delivery into this state by a for-hire carrier, Rule 193(7) stated:

Delivery of the goods to a freight consolidator, freight forwarder or 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 by the purchaser or its agent unless the consolidator, forwarder or for-hire carrier has express written authority to accept or reject the goods for the purchaser with the right of inspection.

Rule 193(7)(a).

In the present case, the taxpayer uses a for-hire carrier to transport the goods into Washington. In accordance with Rule 193(7)(a), delivery of the goods to the for-hire carrier was not receipt of the goods by the purchaser. Taxpayer's customers, the purchasers, first take physical possession of the goods and have dominion and control over them when the goods are delivered to their Washington locations.

Delivery of goods to a common carrier outside the state does not constitute receipt by the buyer outside the state, unless the for-hire carrier has express written authority to accept or reject the goods for the buyer with the right of inspection. Rule 193(7)(a);² Excise Tax Advisory 3091.2009

² Effective March 28, 2010, WAC 458-20-193 (Rule 193) defines "receive" and "receipt" as occurring when the purchaser first either takes physical possession of, or has dominion and control over, tangible personal property." See Rule 193(202)(a). [This language was also present in prior iterations of Rule 193. See, e.g., Rule 193(2)(d) (1992).] "Receipt by a shipping company" specifically does "not include possession by a shipping company on behalf of the purchaser, regardless of whether the shipping company has the authority to accept and inspect the goods on behalf of the purchaser." Rule 193(202)(b)(ii). Therefore, because the revised Rule 193 specifically addresses Taxpayer's "receipt" argument, we find that Taxpayer's goods in question on this appeal were all received in Washington. Rule 193(202)(b)(ii). [While the revised Rule 193 gives more guidance on the issue of "receipt," we also hold that Taxpayer's goods were "received" in Washington under prior iterations of Rule 193, prior to March 28, 2010. The revised Rule 193 incorporates the Department's interpretation in ETA 3091.2009, which was repealed as moot after Rule 193 was promulgated.] Furthermore, Rule 193(203) states that the sale of tangible personal property is sourced

[(since repealed)]. Taxpayer has failed to show any such express written authority of the common carriers to accept or reject goods in this case. For that reason, we hold that that the sales to Taxpayer's customers at issue in this appeal were received in Washington.

Finally, Taxpayer argues that under the Uniform Commercial Code, the sales occurred outside of Washington. Specifically, Taxpayer notes that the goods were shipped "FOB out of state" and therefore claims that risk of loss and title transferred outside of Washington. Once again, we have repeatedly held that commercial law delivery terms and the Uniform Commercial Code's provisions defining when a sale occurs do not determine the Washington tax consequences of transactions. *See, e.g.*, 25 WTD 48; Det. No. 99-298, 20 WTD 197 (2001); Det. No. 99-216E. As explained above, the tax consequences of sales to Washington customers by out-of-state taxpayers are governed by Rule 103 and Rule 193, and under those rules, the taxpayer's sales occurred in Washington.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 27th day of October, 2015.

to the location where receipt by the purchaser occurs, unless the tangible personal property is received at the business location of the seller. *See* Rule 193(202), (203). In this case, all the sales in question were delivered to Taxpayer's customer's places of business and, therefore, all sales were properly sourced to Washington.