

Cite as Det. No. 18-0044, 38 WTD 170 (2019)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS 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. 18-0044
)	
...)	Registration No. . . .
)	

RCW 82.32.070; RCW 82.32.100; RCW 82.26.060; RCW 82.26.120: OTHER TOBACCO PRODUCTS TAX – ESTIMATED ASSESSMENT – ADEQUATE BOOKS AND RECORDS. The Department has the authority to estimate a tobacco distributor’s tax assessment based upon information collected in a Liquor and Cannabis Board (LCB) investigation when the LCB determines that the tobacco distributor did not keep complete and accurate records under RCW 82.26.060. However, if the tobacco distributor subsequently produces records to the Department after the LCB investigation concludes, the Department is required to review the records and make its own determination whether the provided records are insufficient under RCW 82.32.070 and an estimate is warranted under RCW 82.32.100.

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, T.R.O. – An other tobacco products (OTP) retailer disputes an estimated assessment of tobacco products tax on unlicensed purchases of OTP. With its petition for review, the retailer provided additional records that it claims to be purchase invoices for all of its unlicensed OTP purchases and asks the Department of Revenue to recalculate tax due based upon these records. We remand this matter to the operating division to determine whether Taxpayer is entitled to an adjustment based on the records it provided with its petition.¹

ISSUE

Whether, under RCW 82.32.100, RCW 82.26.060, and WAC 458-20-185, the Department’s estimated assessment of tax on OTP purchases warrants an adjustment based on subsequently produced records of the taxpayer’s OTP purchases.

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

FINDINGS OF FACT

On November 28, 2015, the LCB completed a tobacco products investigation at the location of . . . (Taxpayer). During LCB's investigation, they found evidence of purchases of tobacco products from an unknown distributor. Based upon the written "Investigation Follow-up Synopsis," an LCB Officer requested all of Taxpayer's invoices of tobacco purchases.

The LCB Officer requested purchase information for five bins of loose tobacco. Taxpayer's owner stated that her son had purchased loose tobacco for sale. The LCB Officer advised Taxpayer's owner that it is a violation to self-package loose tobacco. The LCB then confiscated the bins of loose tobacco. The LCB Officer observed seven empty boxes labeled The LCB Officer also noted that she saw a label, dated September 7, 2015, indicating Taxpayer's purchase of Other Tobacco Product (OTP), net weight five pounds.

Taxpayer's owner informed the LCB Officer that she and her son had seen other places sell loose tobacco, so they decided to do the same. When asked the names of the other places, Taxpayer's owner stated that she did not want to get them into trouble and declined to provide names. The LCB Officer discussed the tobacco violation with Taxpayer's owner and advised that the case would be referred to the Department of Revenue for a possible tobacco tax assessment.

On April 5, 2017, the Department's Taxpayer Account Administration (TAA) Division began investigating whether Taxpayer was liable for OTP tax. The TAA Division sent a secure message and a paper letter to Taxpayer's owner to advise Taxpayer that the Department would issue a tax assessment based on the LCB investigation.

On May 5, 2017, the TAA Division issued an estimated tax assessment based on the LCB investigation. The estimated turnover rate provided by the LCB is that Taxpayer made seven purchases of OTP per year from 2013 through 2015. The 2013 period turnover rate was adjusted to 3.44 purchases, based upon Taxpayer reporting substantially lower income for the period. The TAA Division used Taxpayer's reported annual income for 2013, divided that amount by Taxpayer's annual income from 2017, and multiplied it by 7. The 2016 turnover rate was prorated to 6.42, based upon the LCB confiscation date of November 28, 2016.

On May 5, 2017, the TAA Division issued Assessment No. . . . , for the tax period of January 1, 2013, through December 31, 2016, in the amount of \$ The Assessment included \$. . . in OTP tax, \$. . . in interest, and a 5% penalty of \$

On May 25, 2017, Taxpayer petitioned for a correction of the assessment. With its petition for review, Taxpayer attached what it contends to be invoices for every tobacco purchase that it made during the assessment period. On review, Taxpayer does not deny that it owes OTP tax. Taxpayer simply requests that the tax be assessed on its actual purchases of OTP products rather than on an estimated basis.

ANALYSIS

Washington imposes a tax upon tobacco product distributors for the sale, handling, or distribution of tobacco products in this state.² RCW 82.26.020; *see also* RCW 82.26.030 (“It is the intent and purpose of this chapter to levy a tax on all tobacco products sold, used, consumed, handled, or distributed within this state and to collect the tax from the distributor as defined in RCW 82.26.010.”).

A “distributor” includes “any person engaged in the business of selling tobacco products in this state who handles for sale any tobacco products that are within this state but upon which tax has not been imposed.” RCW 82.26.010(8)(d). When Taxpayer – a tobacco products retailer – handled untaxed tobacco products for sale, it became a tobacco products distributor, liable for the tobacco products tax on such items. RCW 82.26.010(8)(d); RCW 82.26.020. *See also* WAC 458-20-185 (205) (“ . . . For example, if a retailer buys tobacco products from an Indian retailer or an out-of-state wholesaler who does not have a tobacco distributor license, the retailer must obtain a distributor license and pay the tobacco tax due. . . .”).

Generally, the sale, handling, or distribution, of tobacco products in Washington, is subject to a tax equal to 95% of the taxable sales price.³ RCW 82.26.020. Here, Taxpayer does not dispute that it was a “distributor,” in that it handled untaxed tobacco products for sale. Taxpayer also does not dispute that it owes tax on the tobacco products that it handled. What Taxpayer disputes is the Department’s estimate of the amount of untaxed tobacco products that it handled. Taxpayer asserts that, on review, it has now provided records sufficient for the Department to determine the actual amounts of tobacco products that it handled during the assessment period.

RCW 82.26.060 explains a tobacco product distributor’s obligation to maintain and provide, the Department, with purchase records. In pertinent part, it states as follows:

(1) Every distributor shall keep at each place of business complete and accurate records for that place of business, including itemized invoices, of tobacco products held, purchased, manufactured, brought in or caused to be brought in from without

² “Tobacco product” is statutorily defined to mean:

. . . cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco, snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking, and any other product, regardless of form, that contains tobacco and is intended for human consumption or placement in the oral or nasal cavity or absorption into the human body by any other means, but does not include cigarettes as defined in RCW 82.24.010.

RCW 82.26.010(21).

³ “Taxable sales price” is statutorily defined. In pertinent part, RCW 82.26.010(19)(a)(i) states: “In the case of a taxpayer that is not affiliated with the manufacturer, distributor, or other person from whom the taxpayer purchased tobacco products, the actual price for which the taxpayer purchased the tobacco products.” If the purchaser and seller are affiliated, RCW 82.26.010(19) provides several other potentially applicable definitions.

the state, or shipped or transported to retailers in this state, and of all sales of tobacco products made.

(2) These records shall show the names and addresses of purchasers, the inventory of all tobacco products, and other pertinent papers and documents relating to the purchase, sale, or disposition of tobacco products. All invoices and other records required by this section to be kept shall be preserved for a period of five years from the date of the invoices or other documents or the date of the entries appearing in the records.

WAC 458-20-185(401)(a) explains, “The itemized invoice for each purchase or sale must be legible and must show the seller’s name and address, the purchaser’s name and address, the date of sale, and all prices and discounts.” *See also* RCW 82.32.070(1) (“Every person liable for any tax collected by the department must keep and preserve, for a period of five years, suitable records as may be necessary to determine the amount of any tax for which the taxpayer may be liable. . .”). Should a taxpayer not keep and preserve such records, the Department may proceed to do its best to estimate tax due, based upon the records provided. RCW 82.26.120, RCW 82.32.100(1).

The TAA Division, after reviewing the LCB investigative files, determined that Taxpayer’s records were not suitable to determine the amount of any tax under RCW 82.32.070. Having concluded that Taxpayer’s records were not suitable, the TAA Division relied on the provisions of RCW 82.32.100(1) to estimate Taxpayer’s sales of OTP. This statutory provision affords the Department wide discretion in the methodology employed to calculate a reasonable estimate of tax. *See, e.g.*, Det. No. 15-0350, 35 WTD 291 (2015) (“We have previously noted and affirmed the Department’s authority to assess taxes based on a reasonable estimate.”; *citing* Det. No. 14-0106, 33 WTD 402 (2014); Det. No. 13-0302R, 33 WTD 572 (2014); Det. No. 03-0279, 23 WTD (2004); Det. No. 97-134R, 18 WTD 163 (1999)).

Indeed, in this case, Taxpayer initially did not provide the LCB Officer nor the TAA Division with sufficient purchase records to determine its OTP tax liability. However, on review, Taxpayer has provided actual invoices of OTP purchases for the assessment period. Taxpayer states that the invoices provided on review are the complete list of OTP purchases that it made during the assessment period.

We are unable, on review, to properly evaluate the completeness or authenticity of the OTP purchase invoices provided by Taxpayer. For this reason, we are remanding the matter to the TAA Division to determine whether Taxpayer is entitled to an adjustment of its assessment based on the actual invoices that were provided with its petition for review. The records provided by Taxpayer with its petition for review will be forwarded on remand to the TAA Division for a determination whether they are adequate to identify the amount of OTP tax that is due and for a possible adjustment based on these records.

DECISION AND DISPOSITION

We are remanding the case to the TAA Division (Operating Division) for possible adjustment to the assessment based on the records Taxpayer provided with its petition for review.

Dated this 8th day of February 2018.