

Cite as Det. No. 18-0336, 40 WTD 087 (2021)

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. 18-0336
)	
... )	Registration No. . . .
)	

[1] RULE 250; RCW 82.04.050: B&O TAX - SOLID WASTE COLLECTION ACTIVITIES – RENTAL OF WASTE CONTAINERS. Charges for container rentals by a solid waste collection business are only subject to retailing B&O tax and retail sales tax when they are billed separately or are line-itemized on customer billings.

[2] RULE 228; RCW 82.32.105: PENALTIES – WAIVER – CIRCUMSTANCES BEYOND CONTROL OF TAXPAYER. Lack of knowledge of a tax liability is not a circumstance beyond a taxpayer’s control. The burden of becoming informed about a tax liability falls upon the taxpayer, and it is the taxpayer who bears the consequences of a failure to be correctly informed.

[3] RULE 228; RCW 82.32.105: INTEREST – WAIVER OR CANCELLATION. The Department may only waive or cancel interest in two limited circumstances: (1) The failure to timely pay the tax was the direct result of written instructions given to the taxpayer by the Department; or (2) the extension of a due date for payment of an assessment of deficiency was not at the request of the taxpayer and was for the sole convenience of the Department.

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.

Roberts, T.R.O. – A solid waste collection business appeals the Department’s classification of part of its waste disposal activities as the rental of waste containers, subject to retail sales tax and retailing B&O tax. The business argues that those activities should instead be subject to the service and other activities B&O tax. The business also argues for waiver of interest and penalties. We grant the petition in part, deny it in part, and remand it in part.<sup>1</sup>

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

## ISSUES

1. Whether, under RCW 82.04.250 and WAC 458-20-250(9) (“Rule 250(9)”), the “hauling fee” Taxpayer charged customers as part of its solid waste collection business constituted a charge for the rental of waste containers, subject to retail sales tax and retailing business and occupation (“B&O”) tax or was instead a waste collection activity subject to service and other B&O tax.
2. Whether, under RCW 82.32.105 and WAC 458-20-228 (“Rule 228”), Taxpayer demonstrated any circumstance entitling it to a waiver or reduction of penalties.
3. Whether, under RCW 82.32.105 and Rule 228, Taxpayer demonstrated any circumstance entitling it to a waiver or reduction of interest.

## FINDINGS OF FACT

. . . (“Taxpayer”) provides construction services and waste disposal services. With regard to the latter, Taxpayer’s activities consist of (1) providing waste containers for customers to fill with construction debris; and (2) hauling the filled waste containers to a waste disposal facility.

Taxpayer bills the customer on one invoice for the waste disposal services. The itemized invoice typically consists of two separate fees. The hauling fee, described as a Pick-Up/Delivery fee on the invoice, is determined by the size of the waste container and the distance to the waste disposal facility. The weight fee is determined by the weight of the material placed in the waste container and a rate per ton for the material being disposed. Taxpayer reported both fees under the wholesaling B&O tax rate.

The Department’s Audit Division (“Audit”) conducted a limited scope audit of Taxpayer’s business activities for the tax period of January 1, 2014, through June 30, 2017 (“Audit Period”), reviewing only gross income and capital assets. Determining Taxpayer operated in part as a solid waste collection business, Audit reclassified Taxpayer’s waste disposal services related to the weight fee to income subject to the service and other activities B&O tax classification. Audit additionally concluded that Taxpayer engaged in the rental of solid waste containers, and reclassified the activities related to the hauling fee to retailing activities subject to retail sales tax and retailing B&O tax.<sup>2</sup> As a result, Audit issued a tax assessment on December 19, 2017, in the amount of \$ . . . .<sup>3</sup>

On January 17, 2018, Taxpayer submitted a Review Petition before the Department, contesting the tax assessment. Taxpayer alleged that it had had insufficient time and ability to gather the appropriate documentation during the course of the audit due to personal circumstances. Taxpayer

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<sup>2</sup> Audit further determined that Taxpayer was liable for use tax/deferred sales tax on capital asset purchases upon which Taxpayer failed to provide documentation that tax was properly paid.

<sup>3</sup> The total tax assessment of \$ . . . comprised \$ . . . in retail sales tax, \$ . . . in retailing B&O tax, \$ . . . in service and other activities B&O tax, \$ . . . in use tax/deferred sales tax, \$ . . . in interest, and a \$ . . . assessment penalty, together with a credit adjustment of \$ . . . for income improperly reported as wholesaling.

additionally requested a reduction in penalties and interest on the basis that the Department failed to inform Taxpayer that it was reporting its sales improperly.<sup>4</sup>

Subsequently, with additional documentation submitted on March 8, 2018, Taxpayer argued that it does not charge customers a rental fee for the use of the waste containers. Rather, customers are simply provided with a waste container for use. Taxpayer states that customers are not billed based on the length of time that they have a container. However, the fine print on the bottom of each invoice states, “The rate quoted includes 2 weeks free rentals. Thereafter a fee of \$ . . . per day applies to each container.” During the hearing, Taxpayer stated that this fee has only been imposed “about twice.” Taxpayer claims that it can produce all of the invoices for the Audit Period, showing when the fee has and has not been imposed, upon request.

Taxpayer concedes that it incorrectly reported its waste collection activities under the wholesaling B&O tax classification, and apparently further concedes that the weight fees are subject to a service and other activities B&O tax. However, Taxpayer argues that Audit incorrectly classified the hauling fees as container rental fees, subject to retail sales tax and retailing B&O tax. Instead, Taxpayer asserts that the hauling fees should be subject to the service and other activities B&O tax.<sup>5</sup>

Taxpayer presented calculations showing that \$ . . . in hauling fees should be reclassified from retailing to service and other activities. However, Audit calculated hauling fees/container rental fees as totaling \$ . . . for the Audit Period. Taxpayer acknowledged the discrepancy and could provide no explanation. However, Taxpayer stated that its data was calculated directly from its invoices, which would be readily available upon request.

## ANALYSIS

### Solid Waste Collection Activities

Washington imposes the Business and Occupation (“B&O”) tax on the privilege of engaging in business in this state. RCW 82.04.220. Washington’s B&O tax applies to various tax classifications, including making sales at retail pursuant to RCW 82.04.250, and providing services pursuant to RCW 82.04.290. In addition to the B&O tax, RCW 82.08.020 imposes a retail sales tax on each retail sale in this state. Generally, the seller must collect the retail sales tax from its customers, and then remit the collected tax to the Department. RCW 82.08.050. If the seller fails to collect the tax, the seller must still pay the tax to the Department. RCW 82.08.050(3).

The issue in this case is whether Taxpayer makes a “retail sale” when it provides its waste disposal services in this state. For purposes of both the retailing B&O tax classification and the retail sales

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<sup>4</sup> In its Review Petition, Taxpayer further asserted that it contracted primarily with general contractors, who worked with and billed the customer directly, and Taxpayer believed it was the general contractor’s duty to collect retail sales tax from the customer. During the course of the audit, Audit classified these sales as wholesale activities where Taxpayer provided the reseller permit. Where a valid reseller permit was not provided, Audit classified the activity as a retail sale. At the hearing in this matter, Taxpayer was presented with the opportunity to provide additional reseller permits, but Taxpayer indicated that it had no further reseller permits to provide with regard to the taxed construction activities.

<sup>5</sup> . . .

tax, RCW 82.04.050 defines “sale at retail” or “retail sale” to include “[t]he renting or leasing of tangible personal property to consumers . . . .” RCW 82.04.050(4)(a).

WAC 458-20-211(2)(a) provides that leasing and renting “refer generally to the act of granting to another the right of possession to and use of tangible personal property for a consideration.”

By contrast, RCW 82.04.290(2) imposes the service and other activities B&O tax on “persons engaged in the business of rendering any type of service which does not constitute a ‘sale at retail’ or a ‘sale at wholesale.’”<sup>6</sup>

Rule 250(8) provides:

A solid waste collection business is subject to service and other activities B&O tax on the gross income from solid waste collection activities. There is no deduction for any cost of doing business or any amounts paid over to other solid waste collection businesses. Late charges or penalties are subject to the service and other activities B&O tax.

RCW 82.18.010(1) defines “Solid waste collection business” as “every person who receives solid waste for transfer, storage, or disposal including but not limited to all collection services, public or private dumps, transfer stations, and similar operations.” It is unchallenged that Taxpayer is involved in the solid waste collection business as defined in RCW 82.18.010.

Rule 250(9) states:

Solid waste collection businesses which provide waste receptacles, containers, dumpsters, and the like to their customers for a charge, separate from any charge for collection of the waste, are engaged in the business of renting tangible personal property separate and apart from the solid waste collection business. Charges for such rentals, however designated, are subject to retailing B&O tax and retail sales taxes when they are billed separately or are line itemized on customer billings.

Taxpayer protests the retailing B&O tax and retail sales tax assessed on the hauling fee, which Audit determined constituted the rental of waste containers. Taxpayer argues that the hauling fee is instead a waste collection activity subject to the service and other activities tax. Audit determined the hauling fees should be classified as waste container rental fees because the fee was separately itemized from the weight fee on each invoice and the fee appeared to be a charge for the use of a waste container.

It is clear, from the face of each invoice provided, that the hauling fee is not a fee for container usage, [nor is it] separate from any charge for the collection of waste, as required for the fee to constitute a rental charge subject to retailing B&O tax and retail sales tax under Rule 250(9). Taxpayer billed each customer after the completion of the waste disposal services. Taxpayer

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<sup>6</sup> Persons engaged in making sales at wholesale in Washington are subject to the wholesaling B&O tax. RCW 82.04.270. “Sale at wholesale” or “wholesale sale” means “[a]ny sale, which is not a sale at retail, of . . . (a) [t]angible personal property . . . .” RCW 82.04.060(1)(a).

calculated the hauling fee based upon the size of the waste container and the distance to the waste disposal facility.

From the invoices provided, Taxpayer charged a base rate of \$ . . . for a 15 yard container and a base rate of \$ . . . for a 20 yard container. Where the location of the container was more than 20 miles from Taxpayer's business location, Taxpayer increased the hauling fee by \$ . . . . The invoices characterized the total hauling fee as a "Pick Up/Delivery" cost.

Each invoice clearly stated that there was no rental charge for the use of the waste container for the first two weeks; after that two week period expired, a \$ . . . fee per day would be charged. Taxpayer alleges a rental late-charge has been very rarely imposed, but – where it has been – it is separately itemized on the invoice. On the invoices which were provided, the number of days between delivery and pick-up varied between 10 days and 31 days. No rental fee was charged on any of those invoices.

Charges for container rentals [by a solid waste collection business] are only subject to retailing B&O tax and retail sales taxes when they are billed separately or are line itemized on customer billings. Rule 250(9). None of the invoices provided show that a rental of the container was billed separately from any other service provided. Instead, the hauling fee varied depending on the location of the container, which reflected Taxpayer's business of rendering waste collection and disposal services. Also, on the invoices provided, the hauling fee base rate remained the same regardless of whether the customer held the container for 14 days or 31 days. These invoice descriptions correspond to waste collection activities, and not to the rental of a waste container.

We determine that the hauling fee constitutes income from a solid waste collection activity, and is therefore subject to the service and other activities B&O tax pursuant to Rule 250(8). However, to the extent that a rental late fee was charged on the invoice, the rental late fee is subject to the retail sales tax and retailing B&O tax, as required under Rule 250(9). We remand to Audit to make adjustments to Taxpayer's assessment consistent with this decision, subject to the verification of Taxpayer's records. Taxpayer must provide originals, paper or electronic copies of all of Taxpayer's invoices for waste disposal services during the period of January 1, 2014, through June 30, 2017.

#### Waiver of Penalties

RCW 82.32.105 allows the Department to waive penalties if it finds that the late payment of taxes due resulted from circumstances beyond the control of the taxpayer. Rule 228 is the administrative regulation addressing the waiver of penalties and interest. Rule 228(9)(a)(ii) explains that "[c]ircumstances 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." The circumstances must directly cause the late payment or substantial underpayment. *Id.*

Rule 228(9)(a)(iii)(B) expressly states that late payment of taxes resulting from a taxpayer's "misunderstanding or lack of knowledge of a tax liability" are not circumstances beyond the control of the taxpayer and will not qualify for a waiver or cancellation of penalty.

Taxpayer requests a reduction in penalties on the basis that the Department failed to inform Taxpayer that it was reporting its sales improperly. However, lack of knowledge of a tax liability is not a circumstance beyond a taxpayer's control. Rule 228(9)(a)(iii)(B). Because of the nature of Washington's tax system, the burden of becoming informed about tax liability falls upon the taxpayer, and it is the taxpayer who bears the consequences of a failure to be correctly informed. Det. No. 01-165R, 22 WTD 11 (2003). Taxpayers are responsible to know their tax reporting obligations, and when they are uncertain about their obligations, to seek instructions from the Department. RCW 82.32A.030(2); *see also* Det. No. 01-165R, 22 WTD 11 (2003).

#### Waiver of Interest

Regarding the interest assessed, the Department may only waive or cancel interest in two limited circumstances: (1) The failure to timely pay the tax was the direct result of written instructions given to the taxpayer by the Department; or (2) the extension of a due date for payment of an assessment of deficiency was not at the request of the taxpayer and was for the sole convenience of the Department. RCW 82.32.105(3); Rule 228(10).

Here, there is no evidence that Taxpayer's failure to timely pay the tax was due to any written instructions Taxpayer received from the Department. Therefore, the first circumstance under RCW 82.32.105(3) does not apply here.

Regarding the second circumstance under RCW 82.32.105(3), the issuance of the tax assessment was not delayed. Our review of the record indicates that Audit was in continuing correspondence with, and gathering documentation from, Taxpayer at least up to November 22, 2017, and timely issued the tax assessment on December 19, 2017.

#### DECISION AND DISPOSITION

Taxpayer's petition is denied in part and granted in part and remanded in part. We deny the petition with respect to Taxpayer's request for an abatement in penalties and interest. We grant the petition with respect to the hauling fee being characterized as a waste collection activity subject to service and other activities B&O tax, and not subject to retail sales tax and retailing B&O tax . . . .

Dated this 3rd day of January 2019.