

Cite as 3 WTD 67 (1987)

BEFORE THE INTERPRETATION AND APPEALS SECTION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u>
<u>N</u>	
For Correction of Assessment of)	No. 87-136
)	
)	
)	Registration No. . . .
. . .)	Tax Assessment Nos. . .
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)	

- [1] **RULE 164:** RCW 82.04.260 -- INSURANCE AGENT -- COMMISSION INCOME. Commission income earned by insurance agents is taxable under the insurance agents and brokers classification unless the agent is a bona fide employee of the insurance company. Accord: 1 WTD 291 (1986).
- [2] **RULE 105:** RCW 82.04.360 -- INSURANCE AGENT -- INDEPENDENT CONTRACTOR STATUS. An insurance agent is not considered an employee under the Revenue Act if not construed to be an employee under the State Employment Security Act or the Federal Social Security Act. Accord: 1 WTD 291 (1986).
- [3] **RULE 228:** RCW 82.32.100 -- RCW 82.32.050 -- RCW 82.32.090 -- PENALTIES -- INTEREST -- UNREGISTERED TAXPAYER. Washington law provides that the Department shall add interest and late payment penalties if a person fails to make any return required by the Revenue Act. Accord: 1 WTD 287 (1986).
- [4] **RULE 228:** RCW 82.32.105 -- INTEREST -- WAIVER -- ORAL INSTRUCTIONS -- ETB 419. The Department of Revenue has no authority to abate a tax or cancel interest owing on the basis of a taxpayer's recollection of oral instructions given by a

department employee. Accord: 1 WTD 133 (1986) and 1 WTD 93 (1986).

- [5] **RULE 228:** RCW 82.32.105 -- PENALTIES -- WAIVER -- ORAL INSTRUCTIONS. The Department will consider a waiver of delinquent penalties where a taxpayer was unregistered because of claimed oral advice from a Department employee, only if the weight of the evidence supports such a claim.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: April 7, 1987

NATURE OF ACTION:

The taxpayer, an insurance agent, protests the assessment of interest and penalties added to an assessment for unpaid B&O taxes.

FACTS AND ISSUES:

Frankel, A.L.J.--The taxpayer's records were examined for the period January 1, 1979 through June 30, 1986. The audit disclosed taxes and interest owing in the amount of \$ Because the taxpayer had been unregistered, delinquent penalties in the amount of \$. . . were added. Two tax assessments, Nos. . . . , for the total amount due, \$. . . , were issued on September 30, 1986.

The taxpayer has been an insurance agent since 1976. He and another agent located in the same office were audited and both protest the assessment of interest and penalties. They both stated that they had contacted the local revenue office in 1977 and were told they did not have B&O tax liability. They stated they were told that if that position changed, the Department would notify them.

The agents stated they again contacted the local office in 1983 when they moved into an office located within the city limits. Again they both stated that they were informed by the Department that they were not required to be registered with the Department, and that they would be contacted if they did have B&O tax liability.

They also stated that neither their insurance company nor their accountants informed them of their B&O tax liability. Also, they were paying license fees to the State Insurance

Commissioner and making payments to the State Department of Labor and Industries for their employees. Neither of these departments informed them of their B&O tax liability. They contend that 98% of the insurance agents working for the same company for which they work were not registered because they also believed their business was not subject to this state's B&O tax.

The auditor's comments included a statement that the taxpayer was cooperative and agreeable. The auditor stated late penalties should not be assessed for the Q2-86 tax return, because the taxpayer registered in June of 1986 but his registration form was not processed until the audit was completed. The taxpayer was not supplied with the proper forms in time to complete the Q2-86 return. Accordingly, no penalties were assessed on the taxes owing for that quarter.

DISCUSSION:

[1] Washington's business and occupation tax is imposed on every person for the act or privilege of engaging in business activities in this state. The tax is measured by the application of rates against the value of products, gross proceeds of sales, or gross income of the business. RCW 82.04.220. RCW 82.04.320 states, in pertinent part:

This chapter shall not apply to any person in respect to insurance business upon which a tax based on gross premiums is paid to the state: Provided, that the provisions of this section shall not exempt any person engaging in the business of representing any insurance company, whether as general or local agent, or acting as broker for such companies: . . . (Emphasis added.)

RCW 82.04.260(14) enacted in 1983 and effective July 1, 1983, created a new classification applicable to insurance agents, brokers, or solicitors licensed under chapter 48.17 RCW. Upon such licensed activity, the tax is imposed at the rate of .011. RCW 82.04.260(14); 82.04.2904.

An insurance company can choose whether to utilize employees or independent agents to sell insurance. When a company chooses to create the relationship of principal and independent contractor, the agent is liable for business and occupation tax. RCW 82.04.360 only provides an exemption from the B & O tax for income earned in respect to employment in

the capacity of an employee or servant as distinguished from that of an independent contractor.

WAC 458-20-164 (Rule 164) is the Department of Revenue's duly adopted rule governing the taxability of insurance agents, brokers, and solicitors. Rule 164 states:

Every person acting in the capacity of agent, broker, or solicitor is presumed to be engaging in business and is taxable under the insurance agents and brokers classification upon the gross income of the business unless such person is a bona fide employee. The burden is upon such person to establish the fact of his status as an employee. (See WAC 458-20-105 - Employees.)

[2] Rule 105 states in pertinent part:

The Revenue Act imposes taxes upon persons engaged in business but not upon persons acting solely in the capacity of employees or servants.

. . .

EMPLOYEES AND SERVANTS. An employee or servant is an individual whose entire compensation is fixed at a certain rate per day, week or month, or at a certain percentage of the business obtained by such employee or servant, payable in all events; one who has no direct interest in the income or profits of the business other than a wage or commission; one who has no liability for the expenses of maintaining an office or place of business, for other overhead or for compensation of employees; one who has no liability for losses or indebtedness incurred in conducting the business; one whose conduct with respect to services rendered, obtaining of, or transacting business, is supervised or controlled by the employer. A corporation, joint venture, or any group of individuals acting as a unit, is not an employee or servant.

. . .

The fact that a person is construed to be an employee under the provisions of the State Employment Security Act or the Federal Social Security Act, does not conclusively establish such persons as an employee within the provisions of the

Revenue Act. However, where a person is not construed to be an employee under the State Employment Security Act or the Federal Social Security Act, such person will not be considered an employee under the Revenue Act. (Emphasis supplied.)

In the present case, the taxpayer does not meet the Rule 105 distinction between an employee and an independent contractor because his insurance contract states he serves in the status of an independent contractor and that he is to be responsible for all taxes. The taxpayer has agreed to the assessment of the taxes owing, but protests the assessment of interest and penalties.

[3] The Department has limited authority to waive penalties and interest. RCW 82.32.100 provides that when a taxpayer fails to make any return as required, the Department shall proceed to obtain facts and information on which to base its estimate of the tax. As soon as the Department procures the facts and information upon which to base the assessment, "it shall proceed to determine and assess against such person the tax and penalties due, . . . To the assessment the department shall add, the penalties provided in RCW 82.32.090." (Emphasis added.)

RCW 82.32.090 provides that if any tax due is not received by the Department of Revenue by the due date, there shall be assessed a penalty. The penalty for returns which are not received within 60 days after the due date is 20 percent of the amount of the tax. RCW 82.32.050 provides that if a tax or penalty has been paid less than properly due, the Department shall assess the additional amount due and shall add interest at the rate of nine percent per annum from the last day of the year in which the deficiency is incurred until the date of payment.

[4] The only authority to cancel penalties or interest is found in RCW 82.32.105. That statute allows the Department to waive or cancel interest or penalties if the failure of a taxpayer to pay any tax on the due date was the result of circumstances beyond the control of the taxpayer. The statute also requires the Department to prescribe rules for the waiver or cancellation of interest and penalties.

The administrative rule which implements the above law is found in the Washington Administrative Code 458-20-228 (Rule 228). Rule 228 lists the situations which are clearly stated

as the only circumstances under which a cancellation of penalties and/or interest will be considered by the Department. A rule duly adopted by the Department has the same force and effect as if specifically included in the Revenue Act, unless declared invalid by the court. RCW 82.32.300. Rule 228 has not been declared invalid and we find it controlling in the present case.

The taxpayer's primary argument for objecting to the imposition of interest and penalties is his contention that he contacted the local revenue office on two different occasions and was told that as an insurance agent he was not required to register with the Department and pay B&O taxes. He stated he was assured that the Department would contact him if this position changed.

Rule 228 provides that the Department will consider a waiver of interest upon assessments if, "[t]he failure to pay the tax prior to issuance of the assessment was the direct written result of written instructions given the taxpayer by the department." (Emphasis added.) The Department's position is that it cannot cancel a tax or interest on the basis of a taxpayer's claimed misinformation resulting from telephone conversations or personal consultations with a Department employee. This position was set forth in Excise Tax Bulletin 419.32.99, "Oral Instructions Relating to Tax Liability," which was issued April 30, 1971. The bulletin states three reasons for the Department's position:

- (1) There is no record of the facts which might have been presented to the agent for his consideration.
- (2) There is no record of instructions or information imparted by the agent, which may have been erroneous or incomplete.
- (3) There is no evidence that such instructions were completely understood or followed by the taxpayer.

Accordingly, the Department cannot waive the interest assessed because of the claimed misinformation. Interest is routinely assessed, and as stated above is mandated by law, to compensate the state for the use of its money.

[5] A closer question is whether the Department has the authority to cancel penalties because of the claimed oral assurances by a revenue employee that the taxpayer did not

have to register and pay B&O taxes. Rule 228 lists seven situations which constitute the only circumstances under which a cancellation of penalties will be considered. Situation number two is:

The delinquency was due to erroneous information given the taxpayer by a department officer or employee.

For the same reasons as stated in ETB 419, the Department's position is that it cannot waive penalties on the basis of claimed misinformation given to a taxpayer by a Department employee unless documented in writing. An exception is only made if there is other evidence supporting the taxpayer's claim, and the weight of that evidence supports the taxpayer's position. For example, if the Department was aware that revenue employees had been giving incorrect advice which the taxpayer alleged he had received, that could constitute a circumstance for waiver of the penalties.

In this case, however, the only evidence is another insurance agent's similar testimony in protest to his tax assessment. The Department has no records or reason to believe that insurance agents were told they need not register, since there was a published rule relating to the tax liability of insurance agents that stated otherwise. Clearly under that rule, Rule 164, an insurance agent has B&O tax liability when his status is that of an independent contractor. As there is no record of the facts which might have been presented by the taxpayer to the Department employee, we must deny relief.

We have no reason to doubt that had the taxpayer known of his tax obligation earlier, he would have paid the amount owing. Lack of knowledge or a good faith belief that one is not conducting a taxable business, though, is not identified by statute or rule as a basis for abating interest or penalties. As an administrative agency, the Department does not have discretion to change the law and grant relief.

Penalty provisions for the late payment of taxes are common. See, e.g., I.R.C. + 6651. Imposition of the late penalty is viewed as a means to partially compensate the state for the additional expense in collecting taxes that are late or not paid rather than solely as a punitive measure. The state does recognize the difference between nonpayment due to lack of knowledge of a tax obligation and tax evasion. In the case of intentional tax evasion, the Department is required to impose

a penalty of 50 percent of the additional tax found due. RCW 82.32.050. No such intent was found in the present case.

No statute of limitations exists for taxpayers who were unregistered. RCW 82.32.100 only imposes a four-year statute of limitations for taxpayers who have registered. Because the Department does recognize, however, that many persons have failed to register and pay B&O taxes because of a good faith belief they were not conducting a taxable business, the policy is not to assess back taxes for more than seven years. The Department policy, therefore, affords some relief for taxpayers who have failed to register because they did not believe they were conducting a taxable business.

The State does recognize that many new businesses have had to register separately with the Department of Revenue, Licensing, Labor & Industries, Employment Security, and the Secretary of State's office. This often requires visits to separate offices and imposes additional burdens for the business person. Because of this problem, the above five state agencies have joined together to provide new businesses with a "one-stop business registration" service. A new business applicant, other than one requiring a special license endorsement, can now go to one location and get a common number to be used by all state agencies. Although this does not afford any relief to the taxpayer for the assessment at issue, the State is attempting to help businesses and make government more efficient.

DECISION AND DISPOSITION:

The taxpayer's petition for correction of Tax Assessment Nos. . . . is denied.

DATED this 29th day of April 1987.