

Cite as 3 WTD 281 (1987)

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

In the Matter of the Petition) D E T E R M I N A T I O N
For Correction of Assessment of)
) No. 87-214
)
)
 . . .) Registration No. . . .
) Tax Assessment No. . . .
)

- [1] **RULE 108 and RCW 82.04.4283:** BUSINESS AND OCCUPATION TAX (B&O) -- DEDUCTION -- CASH DISCOUNTS. Cash discounts given buyers by sellers may be deducted from the measure of the latter's business and occupation tax.
- [2] **RULE 103, RULE 110 and RCW 82.04.070:** B&O TAX -- DEDUCTION -- FREIGHT CHARGES. Freight charges recovered by sellers are part of gross sales proceeds and may not be deducted from the measure of the Seller's business and occupation tax.
- [3] **RULE 228:** B&O TAX -- LATE PAYMENT -- PENALTIES -- WAIVER OF. Failure of attorneys and accountants to advise taxpayer of Washington tax liability is not a circumstance beyond the taxpayer's control so as to justify waiver of late payment penalties.

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.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: February 12, 1986

NATURE OF ACTION:

Petition by previously unregistered taxpayer for reduction of assessment based on discounts granted and freight charges incurred as well as for abatement of late payment penalties.

FACTS AND ISSUES:

Dressel, A.L.J.¹-- . . . (taxpayer) sells paper and plastic food service products. An investigation by the Department of Revenue (Department) revealed that the taxpayer was doing business in Washington without being registered with the Department. After receipt of sales figures from the taxpayer, the Department issued the above-captioned assessment for excise tax, interest, and late payment penalties in the total amount of \$ The assessment covered the period January 1, 1982 through December 31, 1984. On the latter date, ownership of the taxpayer corporation was changed to . . . Corporation which successor organization is the . . . entity that has been conducting business in Washington since January 1, 1985. The successor company has a separate Washington tax number, and a separate tax assessment was issued against it simultaneously with this one. In this Determination only the appeal of the captioned predecessor corporation will be discussed. The successor has appealed as well, but its protest will be considered in the separate Determination.

The taxpayer does not contest whether Washington has the jurisdiction to tax it, but it does raise several issues which, if decided favorably for the taxpayer, would result in a reduction of its assessment. First of all, it claims the measure of its business and occupation (B&O) tax should be reduced to the extent of bona fide cash discounts given to its Washington customers. Second of all, it argues that the tax measure should be further reduced by that portion of gross income attributable to freight charges incurred in getting the company's products to its Washington customers. The taxpayer states that all sales are F.O.B manufacturer's plant. Third of all, the taxpayer requests abatement of the late-payment penalties. As justification, the taxpayer cites circumstances beyond its control in that its "outside" accountants and attorneys failed to advise the company of its responsibility to file Washington tax returns. Upon discovering that it had nexus in Washington, the taxpayer hired new counsel to help it comply with Washington law. These, then, are the three issues to be decided.

DISCUSSION:

¹Successor to retired Administrative Law Judge, M. Clark Chandler.

Cash Discounts

RCW 82.04.4283 relates to cash discounts as does WAC 458-20-108 (Rule 108), an administrative rule promulgated for the purpose of implementing the cited statute and others as well. The former authority reads:

RCW 82.04.4283 Deductions--Cash discount taken by purchaser. In computing tax there may be deducted from the measure of tax the amount of cash discount actually taken by the purchaser. This deduction is not allowed in arriving at the taxable amount under the extractive or manufacturing classifications with respect to articles produced or manufactured, the reported values of which, for the purposes of this tax, have been computed according to the provisions of RCW 82.04.450.

Rule 108 states in part:

DISCOUNTS. The selling price of a service or of an article of tangible personal property does not include the amount of bona fide discounts actually taken by the buyer and the amount of such discount may be deducted from gross proceeds of sales providing such amount has been included in the gross amount reported.

[1] In its petition, the taxpayer has included cash discounts in its gross sales figures and then listed the discounts separately. Inasmuch as the taxpayer's business and occupation classification is wholesaling and it has complied with the additional requirement of Rule 108, we see no reason that the cash discounts should not be excluded from taxable sales. Indeed, we are confident that those amounts would not have been included in the assessment by the Audit section in the first place had it known about them. The cash discounts portion of the taxpayer's appeal is granted.

Freight Changes

The specific statute which imposes the business and occupation tax is RCW 82.04.220, which says:

Business and occupation tax imposed. There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the

application of rates against value of products, gross proceeds of sale, or gross income of the business, as the case may be.

In the case of a wholesaler of tangible personal property, the proper tax measure is gross proceeds of sales. "Gross proceeds of sales" is statutorily defined in RCW 82.04.070 which states:

"Gross proceeds of sales". "Gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property and/or for services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses. (Emphasis added.)

There is also an administrative rule on the subject of freight and delivery costs. It reads in part:

WAC 458-20-110 Freight and delivery charges. Amounts received by a seller from a purchaser for freight and delivery costs incurred by the seller prior to completion of sale constitute recovery of costs of doing business and must be included in the selling price or gross proceeds of sales reported by the seller regardless of whether charges for such costs are billed separately and regardless of whether the seller is also the carrier.

According to WAC 458-20-103 (Rule 103), a sale is not completed until the delivery is accomplished. The rule says in 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.

[2] Thus, the fact that the taxpayer's products are sold F.O.B. manufacturer's plant is irrelevant in terms of determining a seller's business and occupation tax liability. If Washington has nexus to tax, it is the place of delivery, in the case of tangible personal property, that dictates

whether the sale is subject to Washington business and occupation tax. And, according to RCW 82.04.070 and Rule 110, the costs of delivery for a sale that is otherwise business and occupation taxable and which are incurred prior to the completion of the sale may not be deducted from the measure of that tax. The freight charges portion of the taxpayer's appeal is denied.

Late-Payment Penalties

The taxpayer argues that its late tax payments were the result of circumstances beyond its control and that waiver of the penalties assessed for late payment is justified by RCW 82.32.105. The specific circumstances urged are that the taxpayer's attorneys and accountants did not advise the company of its duty to be registered with and paying taxes to the Washington Department of Revenue. While it is true that RCW 82.32.105 permits waiver of penalties where there are circumstances beyond the control of the taxpayer, those circumstances are narrowly defined in WAC 458-20-228 (Rule 228). It states in part:

The department will waive or cancel the penalties imposed under RCW 82.32.090 and interest imposed under RCW 82.32.050 upon finding that the failure of a taxpayer to pay any tax by the due date was due to circumstances beyond the control of the taxpayer. The department has no authority to cancel penalties or interest for any other reason.

The following situations will constitute the only circumstances under which a cancellation of penalties will be considered by the department:

1. The return was filed on time but inadvertently mailed to another agency.
2. The delinquency was due to erroneous information given the taxpayer by a department officer or employee.
3. The delinquency was caused by death or serious illness of the taxpayer or his immediate family, or illness or death of his accountant or in the accountant's immediate family, prior to the filing date.

4. The delinquency was caused by unavoidable absence of the taxpayer, prior to the filing date.

5. The delinquency was caused by the destruction by fire or other casualty of the taxpayer's place of business or business records.

6. The taxpayer, prior to the time for filing the return, made timely application to the Olympia or district office, in writing, for proper forms and these were not furnished in sufficient time to permit the completed return to be paid before its delinquent date.

7. The delinquent tax return was received under the following circumstances:

a. The return was received by the department with full payment of tax due within 30 days after the due date; i.e., within the five percent penalty period prescribed by RCW 82.32.090, and

b. The taxpayer has never been delinquent filing a tax return prior to this occurrence, unless the penalty was excused under one of the preceding six circumstances, and

c. The delinquency was the result of an unforeseen and unintentional circumstance, not immediately known to the taxpayer, which circumstances will include the error or misconduct of the taxpayer's employee or accountant, confusion caused by communications with the department, failure to receive return forms timely, and delays or losses related to the postal service.

d. The delinquency will be waived under this circumstance on a one-time basis only. (Emphasis added.)

[3] The circumstance advanced by the taxpayer is not listed. The seventh situation is not applicable, in particular, because all pertinent due dates were missed by more than 30 days², and because the taxpayer is deemed delinquent for every due date it misses. The penalty portion of the taxpayer's

² See Rule 228.

appeal is denied except that the penalty amounts will have to be adjusted as a function of the discount credit authorized above.

DECISION AND DISPOSITION:

The taxpayer's petition is substantially denied with the exceptions noted. The Department's Audit Section will make the adjustments indicated and then issue an amended assessment which will be due on the date stated thereon. Because the due date will have been extended for the sole convenience of the Department, interest will be waived for the period from August 12, 1986 through the new due date.

DATED this 24th day of June 1987.