

Cite as Det. No. 14-0404, 34 WTD 337 (2015)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for) DETERMINATION
Correction of Assessment of)
)
 No. 14-0404
)
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 Registration No. . . .
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[1] RULE 102; RCW 82.32.291: RESELLER PERMITS – 50% PENALTY FOR IMPROPER USE. A taxpayer's claim that it was acting in good faith when it made the error of using a reseller permit when purchasing materials for use in a U.S. Navy contract is not sufficient to merit a waiver of the penalty for improper use of a reseller permit, because the misuse was not due to circumstances beyond the taxpayer's control.

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.

Munger, A.L.J. – A Taxpayer, acting as a subcontractor on a federal government dock building contract, incorrectly used its reseller permit when making purchases of materials. As a result it did not pay any retail sales tax on this project, and it also did not subsequently pay any use tax. Because the Taxpayer's basis for requesting a waiver of the reseller permit misuse penalty was that it was unaware of its proper usage in this type of contract, there is no basis under RCW 82.32.291 for waiver of the penalty.¹

ISSUE

Whether, under RCW 82.32.291 and WAC 458-20-102(13), the reseller permit misuse 50% penalty should be waived when the Taxpayer [mistakenly] used its reseller permit to make purchases free of the retail sales tax

FINDINGS OF FACT

[Taxpayer] manufactures sells, and installs marine dock systems from its facility in . . . Washington. The Taxpayer was audited by the Department of Revenue (the Department) for the period of January 1, 2010 through March 31, 2014. In 2011 the Taxpayer manufactured and installed a floating dock system for the U.S. Navy as a subcontractor. . . . The Taxpayer installed the dock at the Naval Base . . . , connecting it to existing piling. Inspections and

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

necessary maintenance were performed at six and twelve month periods subsequent to installation. When purchasing materials for this contract, the Taxpayer describes that it did as it always did as a subcontractor, "...issuing our Reseller Permit and paying no sales/use tax."

As a result of the audit, the Department issued a tax assessment that included \$... in use tax, interest of \$..., and the 50% reseller permit misuse penalty of \$. . . . When issued August 6, 2014, the assessment totaled \$. . . . The use tax represented the amount of retail sales tax that the Taxpayer should have paid on materials for the . . . contract. Under RCW 82.04.190(6) and WAC 458-20-17001, government contractors and subcontractors are treated as the consumers of the materials they use in performing the work, and as such, should pay retail sales tax when making purchases.² The Taxpayer in this case is not disputing the use tax assessed.

The Taxpayer paid \$. . . of the assessment in August of 2014. The balance remains unpaid, and the Taxpayer timely appealed the 50% reseller permit misuse penalty of \$. . . .

ANALYSIS

The 50% reseller permit misuse penalty imposed in this case is authorized by RCW 82.32.291. This statute provides that the Department *must* assess this penalty for improper use of a reseller permit when certain conditions are met. RCW 82.32.291(1) states:

- (1) Except as otherwise provided in this section, if any buyer improperly uses a reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 to purchase items or services at retail without payment of sales tax that was legally due on the purchase, the department must assess against that buyer a penalty of fifty percent of the tax due, in addition to all other taxes, penalties, and interest due, on the improperly purchased item or service.

The Department adopted WAC 458-20-102 (Rule 102) to administer RCW 82.32.291. Rule 102(9) mirrors the language in RCW 82.32.291(1) in respect to the improper use of a reseller permit, and states that the penalty can be imposed even when the taxpayer was not intending to evade paying retail sales tax. Rule 102(9) states:

- (9) **Penalty for improper use of reseller permit.** If any buyer improperly uses a reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 to purchase items or services at retail without payment of sales tax that was legally due on the purchase, the department must assess against that buyer a penalty of fifty percent of the tax due on the improperly purchased item or service. See RCW 82.32.291. This penalty is in addition to all other taxes, penalties, and interest due, and *can be imposed even if there was no intent to evade the payment of retail sales tax*. The penalty will be assessed by the department and applies only to the buyer. However, see subsection (13) of this section for situations in which the department must waive the penalty.

(Emphasis added.) The present Taxpayer requests a waiver of this penalty, asserting that it was unaware that it should have paid sales tax on materials in the case where it acted as a

² The Government Contracting B&O tax rate is the same as the Wholesaling tax rate as reported by the Taxpayer.

subcontractor on a government contract. RCW 82.32.291(2) addresses circumstances where the Department [must] waive the penalty:

(2) The department must waive the penalty imposed under subsection (1) of this section if it finds that the use of the reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 was *due to circumstances beyond the taxpayer's control* or if the reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 was properly used for purchases for dual purposes. *The department must define by rule what circumstances are considered to be beyond the taxpayer's control.*

(Emphasis added.) Rule 102(13) addresses penalty waivers, and repeats the statutory standard that the Department will waive the penalty where the misuse was due to circumstances beyond the control of the buyer. Rule 102(13) in pertinent part states:

(13) **Waiver of penalty for misuse of reseller permits.** The department will waive the penalty imposed for misuse of reseller permits upon finding that the use of the reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 to purchase items or services by a person not entitled to use the reseller permit for that purpose *was due to circumstances beyond the control of the buyer* or if the reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 was properly used for purchases for dual purposes and the buyer made a good faith effort to report deferred sales tax. However, the use of a reseller permit to purchase items or services for personal use outside of the business does not qualify for the waiver or cancellation of the penalty. *The penalty will not be waived merely because the buyer was not aware of either the proper use of the reseller permit or the penalty. In all cases the burden of proving the facts is upon the buyer.*

(Emphasis added.) In the present case, the Taxpayer used its reseller permit when it purchased materials for use in the US Navy contract with [the subcontractor]. As a result, it did not pay the retail sales tax, and it also did not pay use tax. While we have no reason to dispute the Taxpayer's claim that it was acting in good faith when it made the error of using its reseller permit when it should not have, the penalty cannot be waived because the buyer was unaware of its proper use in this case.³ Because, by statute and administrative rule, the Taxpayer has not shown that the misuse was due to circumstances beyond its control, we deny the penalty waiver request.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 19th day of December, 2014.

³ It has also been long standing law that penalty waivers for late payment of taxes are also not granted when the basis for the waiver is the Taxpayer's claim that it was unaware of its tax obligations. WAC 458-20-228(9)(iii)(B).