

Cite as Det. No. 17-0277, 37 WTD 136 (2018)

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. 17-0277
)	
... )	Registration No. ...
)	

[1] RCW 82.04.067; WAC 458-20-194(a): SUBSTANTIAL NEXUS FOR APPORTIONABLE BUSINESS ACTIVITIES – AFFILIATE. The in-state activities of an affiliate create sufficient nexus with the state to impose B&O tax on taxpayer’s apportionable income where the affiliate’s in-state activities created and maintained a network for taxpayer’s services.

[2] RCW 82.04.460(2); WAC 458-20-14601(5); WAC 458-20-19404: THREE FACTOR APPORTIONMENT PRIOR TO JUNE 1, 2010 – FINANCIAL INSTITUTIONS. The Department erred in its assessment by using a single factor apportionment factor, as opposed to the required three factor apportionment factor, for income received by financial institutions prior to June 1, 2010.

[3] RCW 82.32.090; WAC 458-20-228: CIRCUMSTANCES BEYOND THE CONTROL OF THE TAXPAYER – PUBLIC STATEMENT MADE BY DEPARTMENT OFFICIALS. Public statements made by the Department, suggesting that the adoption of economic nexus was necessary to tax credit card companies, did not amount to a circumstance beyond taxpayer’s control that caused its late filing and payment.

[4] RCW 82.32.090; RCW 82.04.462(4); WAC 458-20-228: CIRCUMSTANCES BEYOND THE CONTROL OF THE TAXPAYER – FAILURE TO FILE ANNUAL RECONCILIATION. The Department properly assessed the delinquent penalty where taxpayer failed to file an annual reconciliation by the due date correcting its taxable income.

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.

Stojak (successor to Valentine, T.R.O.), T.R.O. – A commercial bank in the business of originating, managing, and servicing credit cards, as well as promoting a network for its cards, petitions for correction of two assessments of business and occupation (“B&O”) tax. In regards to the first assessment, Taxpayer asserts that it did not have sufficient nexus with the state of

Washington to subject it to the B&O tax prior to the state's adoption of economic nexus. Alternatively, it asserts that the auditor's use of a single factor apportionment formula as opposed to a three factor formula for this period was in error. Finally, Taxpayer argues that the assessment of penalties is inequitable because the Department itself did not believe that sufficient nexus existed to tax the activities of credit card companies prior to the adoption of economic nexus. In regards to the second assessment, Taxpayer argues that the Department's failure to provide it with guidance regarding the proper treatment of cashback bonuses was a circumstance beyond its control that caused its underpayment of tax. We deny Taxpayer's position as it relates to nexus and the assessment of penalties. However, we grant it as it relates to the apportionment formula.<sup>1</sup>

### ISSUES

1. Did the in-state solicitation efforts by Taxpayer's affiliate to establish and maintain a network for its credit cards create sufficient nexus in the state prior to the adoption of economic nexus pursuant to RCW 82.04.067?
2. Did the auditor err in using a single factor apportionment formula under RCW 82.04.460 and WAC 458-20-19404 to apportion Taxpayer's income for the first four months of 2010?
3. [May a taxpayer establish circumstances beyond its control under WAC 458-20-228 for waiver of late payment penalties based on statements the Department made in documents to the Legislature?]
4. Were penalties properly assessed under RCW 82.32.090 based on Taxpayer's failure to file the annual reconciliation required by RCW 82.04.462(4)?

### FINDINGS OF FACT

. . . ("Taxpayer") is [an out-of-state] chartered bank, headquartered in [out-of-state]. Taxpayer has employees [out-of-state]. Taxpayer's business activities include making loans to consumers, including revolving lines of credit ( . . . ), student loans, and personal loans. The approval of loans, disbursement of loans, and the extension of credit are all performed at Taxpayer's headquarters [out-of-state]. Taxpayer also offers certificates of deposits -and money market accounts.

Taxpayer's credit card can be used at various merchant locations in Washington and throughout the United States. This merchant network was created and is maintained by employees and third-party representatives of an affiliated entity, . . . ("Affiliate"). Affiliate's employees enroll merchants located in Washington in Taxpayer's merchant network. Affiliate enters into "Merchant Services Agreements" with Washington merchants whereby the merchants agree to accept Taxpayer's credit cards and pay the applicable merchant fees, in exchange for acceptance into Taxpayer's merchant network and all of the benefits therein associated. Employees of Affiliate visit Washington merchants from time to time once they are enrolled in the merchant network.<sup>2</sup> However, neither Taxpayer nor Affiliate maintain a regular place of business in Washington.

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

<sup>2</sup> The extent of Affiliate's visits to Washington in early 2010 is somewhat unclear. However, at a bare minimum, Taxpayer concedes that during this timeframe, 1 or 2 individuals employed by affiliate performed site visits to

In exchange for acceptance into Taxpayer's merchant network, merchants consent to share confidential information with Taxpayer pertaining to their credit card sales. The information shared with Taxpayer pursuant to the merchant agreements allows Taxpayer to target merchants, as well as their customers, to apply for Taxpayer's credit cards. Pursuant to the merchant agreements, Affiliate agrees to only share the merchant's information exclusively with Taxpayer as opposed to other financial institutions.<sup>3</sup>

The Department of Revenue's ("Department") Audit Division ("Audit") reviewed Taxpayer's records for the tax period of January 1, 2010, through December 31, 2013.<sup>4</sup> Taxpayer failed to file excise tax returns for the January 1, 2010, through May 31, 2010, tax period despite performing business activities within the state subject to the B&O tax. Taxpayer did file excise tax returns for the June 1, 2010, through December 31, 2013, tax period.<sup>5</sup> However, Audit made a number of adjustments to the amount of tax reported for this period. Audit's adjustments for this period relate primarily to the disallowance of deductions taken by Taxpayer for miscellaneous expenses, including cash back bonuses.<sup>6</sup>

On October 23, 2015, Audit issued two partial assessments for the January 1, 2010, through December 31, 2013, audit period. The first assessment, number . . . , was for \$ . . . and assessed taxes for the January 1, 2010, through May 31, 2010, tax period ("Assessment 1"). A \$ . . . delinquency penalty and a \$ . . . assessment penalty were included in Assessment 1. The second assessment, number . . . , was for \$ . . . and assessed taxes for the June 1, 2010, through December 31, 2013, tax period ("Assessment 2"). A delinquency penalty of \$ . . . was included in Assessment 2. The Auditor's Detail of Differences and Instructions to Taxpayer that accompanied the assessment stated that Taxpayer's failure to submit an annual reconciliation for 2010 and 2011 resulted in the assessment of the delinquent penalty.

Taxpayer objects to Assessment 1 in its entirety. Taxpayer contends that "[t]he state did not have authority to tax companies without an in-state physical presence prior to the enactment of Washington Rev. Code Section 82.04.067."<sup>7</sup> Taxpayer also contends that irrespective of whether the Department had the authority to tax its activities during the relevant timeframe, Audit used an incorrect apportionment formula when calculating the amount of gross proceeds apportioned to Washington. Furthermore, Taxpayer objects to the assessment of penalties in its case and contends that the "Department's own personnel did not believe [Taxpayer] was subject to tax" and,

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merchants in Washington. Taxpayer stated that if a very large Washington merchant was signed on during this timeframe, the visits from affiliate employees may have been more substantial. However, Taxpayer did not state whether such a large merchant was signed-up during early 2010.

<sup>3</sup> See . . . . These documents were provided pursuant to the audit issued for the January 1, 2003, through December 31, 2009, tax period.

<sup>4</sup> The department previously audited Taxpayer for the tax period of January 1, 2003, through December 31, 2009. Under identical facts, the audit concluded that Taxpayer had substantial nexus with the state of Washington and that it, therefore, failed to file and pay the requisite B&O tax. [Taxpayer] appealed the audit and a Determination was issued upholding the audit assessment. . . . Taxpayer did not appeal this Determination.

<sup>5</sup> Taxpayer filed its tax returns for the second and third quarter of 2010 late. However, Taxpayer applied for and received amnesty under RCW 82.32.052 when it reported and paid taxes for these quarters.

<sup>6</sup> The amounts removed related to cash back bonuses comprise the majority of the total amounts disallowed. However, other less significant amounts were disallowed for amortization expenses, origination expenses, gain on asset sales, and other miscellaneous expenses.

<sup>7</sup> Attachment 1 to Appeal Petition for January 1, 2010, through May 31, 2010, Part 4b.

therefore, it is “not equitable to assess a penalty.” Letter from . . . to Brenda Valentine, May 23, 2010, pg. 3 (“May 23 letter”).

Taxpayer does not contest the tax assessed pursuant to Assessment 2. However, Taxpayer does contest the \$ . . . delinquency penalty included in Assessment 2. Taxpayer contends that its underreported tax for this period was the result of the Department’s failure to provide guidance regarding the proper treatment of cashback bonuses. Taxpayer asserts that the Department’s failure to provide guidance in this area was a circumstance beyond its control.

## ANALYSIS

### Nexus

Washington imposes a B&O tax “for the act or privilege of engaging in business” in this state. RCW 82.04.220. The tax rate varies based on the type of business activity the taxpayer engaged in and chapter 82.04 RCW provides numerous classifications of activities. Taxpayers engaging in business activities that are not otherwise classified are subject to the service and other activities B&O tax. RCW 82.04.290(2). The B&O tax is “extensive and is intended to impose . . . tax upon virtually all business activities carried on in the State.” *Analytical Methods, Inc. v. Dep’t of Revenue*, 84 Wn. App. 236, 241, 928 P.2d 1123 (1996) (quoting *Palmer v. Dep’t of Revenue*, 82 Wn. App. 367, 371, 917 P.2d 1120 (1996)). “Business is defined broadly to include “all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly.” RCW 82.04.140.

Notwithstanding the broad definition of “business” in RCW 82.04.140, which essentially includes all business activities that benefit a taxpayer, a state cannot tax [business activities] that do not have sufficient connection or “nexus” with the state. *See Complete Auto Transit v. Brady*, 430 U.S. 274 (1977); *Tyler Pipe Indus., Inc. v. Washington Dep’t of Revenue*, 483 U.S. 232 (1987); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); Det. No. 05-0376, 26 WTD 40 (2007).

In *Complete Auto*, the U.S. Supreme Court repudiated the “underlying philosophy that interstate commerce should enjoy a sort of ‘free trade’ immunity from state taxation” and developed a four-pronged test that a state tax must satisfy to withstand a Commerce Clause challenge to its jurisdiction to tax. *Id.* at 278-79. The Court held that the Commerce Clause requires that the tax: (1) be applied to an activity with “substantial nexus” with the taxing state, (2) be fairly apportioned, (3) not discriminate against interstate commerce, and (4) be fairly related to the services provided by the state. *Id.* at 279.

For [the tax period associated with Assessment 1] (“Tax Period 1”), WAC 458-20-194 (“Rule 194”) articulates the Department’s interpretation of substantial nexus for apportionable business activities, including Taxpayer’s service and other activities. Rule 194(2)(a) defines “nexus” as follows:

That minimum level of business activity or connection with the state of Washington which subjects the business to the taxing jurisdiction of this state. Nexus is created when a taxpayer is engaged in activities in the state, either directly *or through a representative*, for

the purpose of performing a business activity. It is not necessary that a taxpayer have a permanent place of business within a state to create nexus.

(Emphasis added.)

Effective June 1, 2010, Washington adopted the “economic nexus” standard for determining whether substantial nexus exists through the enactment of RCW 82.04.067, but only with respect to apportionable activities. RCW 82.04.067(6).<sup>8</sup> Pursuant to RCW 82.04.067, a person engaging in business in the state is deemed to have substantial nexus so long as it has “[m]ore than two hundred fifty thousand dollars of receipts” in this state. RCW 82.04.067(1)(c)(iii).<sup>9, 10</sup> There is no requirement that a taxpayer performing apportionable activities have a physical presence in the state in order to have substantial nexus. See RCW 82.04.067(6). The express purpose of the economic nexus legislation is to require businesses that earn significant income from Washington residents from providing services to “pay their fair share of the cost of services that this state renders and the infrastructure it provides.” Laws of 2010, ch. 23, § 101.

Taxpayer’s objection to Assessment 1 is rooted primarily in its contention that Washington adopted the economic nexus standard in order to *expand* the net of the B&O tax beyond activities previously captured.<sup>11</sup> It is Taxpayer’s position that nexus did not exist in its case under Washington law prior to this expansion. Specifically, Taxpayer contends that “the Department believed a physical presence standard existed prior to the 2010 law change and that it had a clear intention to target credit card issuers by extending the statute.”<sup>12</sup> Taxpayer relies on a series of legislative documents and statements surrounding the enactment of the economic nexus legislation in support of this contention. For example, Taxpayer points to “Department of Revenue legislative documents from 2009” stating that “Washington does not tax businesses that conduct business in the state unless they have a physical presence in the state . . . .”<sup>13</sup> Taxpayer also relies on a series of statements made by Department employees to the effect that adopting economic nexus would substantially increase the state’s revenue by capturing revenue from the credit card industry.<sup>14</sup>

Taxpayer’s reliance on statements made during the legislative process surrounding the adoption of economic nexus fails to consider Former Rule 194, which was in effect prior to the adoption of the economic nexus standard in 2010. Former Rule 194(2)(a) defined nexus to include the *minimum*

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<sup>8</sup> See: Laws of 2010, 1<sup>st</sup> Sp. Sess., ch 23, § 104. The law was amended in 2016 to extend economic nexus to persons making wholesale sales under RCW 82.04.257(1) or RCW 82.04.270. See Laws of 2016, ch. 137, § 2. The law was once again amended in 2017 to extend the economic nexus standard to persons making retail sales. See Laws of 2017, ch. 28, §302.

<sup>9</sup> Substantial nexus also exists if a person has more than fifty thousand dollars of property or payroll in the state or if twenty-five percent of the person’s total property, payroll, or receipts is in the state.

<sup>10</sup> RCW 82.04.067(5)(a) requires the Department to review “the cumulative percentage change in the consumer price index” each December, and adjust the nexus threshold amounts to reflect the change in the consumer price index. As a result of this statutory requirement, the Department adjusted this threshold upward to \$267,000 for the 2013 calendar year. See ETA 3195.2016.

<sup>11</sup> Although the Taxpayer’s Petition suggests that sufficient nexus for subsequent tax periods may still be lacking in its case, it voluntarily began filing B&O tax returns for all periods subsequent to May 2010.

<sup>12</sup> May 23 letter, pg. 1.

<sup>13</sup> *Id.* at pg. 2. Taxpayer did not provide a citation for where this statement may be found in the relevant legislative documents.

<sup>14</sup> *Id.* pg. 1-2.

*level* of activity necessary to subject a business to the state’s taxing jurisdiction. This threshold can be met “when a taxpayer is engaged in activities in the state, either directly *or through a representative*[.]” *Id.* (emphasis added). . . .

That the minimal level of activity necessary to subject a business to Washington’s taxing jurisdiction could include activity performed by a taxpayer’s representative was also well established pursuant to case-law and Department determinations prior to 2010. *See, e.g., Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987) (holding that a showing of sufficient nexus cannot be defeated by the argument that the seller’s representative was characterized as an independent contractor versus an agent); *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960) (holding that nexus was established by a seller’s in-state solicitation performed through independent contractors despite the lack of a physical presence on the part of the taxpayer); Det. No. 05-0376, 26 WTD 40 (2007) (finding substantial nexus in the case of an out-of-state corporation that provides independent contractor physicians to hospitals in Washington); Det. No. 01-074, WTD 531 (2001) (upholding the finding that nexus exists in the case of an out-of-state manufacturer who pays commissions to its Washington independent distributors based on sales made to new distributors).

Taxpayer does not dispute that in the beginning of 2010, Affiliate engaged in business activities in Washington. Taxpayer does not dispute that Affiliate solicited merchants to honor Taxpayer’s credit card. Taxpayer also does not dispute that Affiliate sent employees into the state to perform site visits at merchant locations. These visits allowed Taxpayer to maintain its relationship with Washington merchants. Without Washington merchants to honor Taxpayer’s credit cards in the state, Taxpayer’s card would seldom be useful to its customers, and Taxpayer would realize little, if any, interest or other fee income related to the use of its cards. Affiliate’s activities, as Taxpayer’s representative, were necessary for the Taxpayer to establish and maintain a market for its credit cards in Washington. Accordingly, we conclude that Taxpayer had substantial nexus with Washington and that therefore, Audit correctly assessed B&O tax for January 1, 2010, through May 31, 2010.

#### Apportionment Formula

RCW 82.04.290 and RCW 82.04.460 require businesses earning taxable income from services rendered in Washington and elsewhere to apportion their income for purposes of computing their tax liability in the state. Pursuant to RCW 82.04.460(2), if a business meets the definition of a financial institution and the business is taxable under RCW 82.04.290, and is also taxable in another state, the financial institution shall allocate and apportion its income under WAC 458-20-14601 (“Rule 14601”). In this case, there is no dispute that Taxpayer is a financial institution subject to apportionment under Rule 14601.

Rule 14601(2)(b) provides the applicable method for determining the apportionment percentage to be used in apportioning the gross income of a financial institution before June 1, 2010. It provides:

The apportionment percentage is determined by adding the taxpayer’s receipts factor (as described in subsection (4) of this section), property factor (as described

in subsection (5) of this section), and payroll factor (as described in subsection (6) of this section) together and dividing the sum by three. If one of the factors is missing, the two remaining factors are added together and the sum is divided by two. If two of the factors are missing, the remaining factor is the apportionment factor. A factor is missing if both its numerator and denominator are zero, but is not missing merely because its numerator is zero.

Taxpayer did not file excise tax returns for January 1, 2010, through May 31, 2010. Accordingly, Taxpayer did not calculate an apportionment factor to be applied to its income for this period. In calculating Taxpayer's tax liability for this period, Audit used the apportionment factor applicable to the subsequent tax period of June 1, 2010, through December 31, 2013. The apportionment factor applicable for this period was a single factor formula based on receipts in accordance with RCW 82.04.460 and WAC 458-20-19404.

Taxpayer asserts that use of a single factor receipts formula for the January 1, 2010, through May 31, 2010, tax period is not in accordance with the applicable law for this period. Taxpayer also asserts that because it had zero property and payroll in the state for this period, the correct apportionment factor is derived by dividing the factor used, 1.5599%, by three, for a resulting factor of .5200%.

Taxpayer is correct that Rule 14601 required application of a three factor formula for apportioning income. During the administrative review process, Audit acknowledged that a three factor formula was the correct methodology to be employed. However, Audit expressed concern that Taxpayer did not raise this argument during the course of the audit, and therefore, Audit was unable to examine documentation related to the property and payroll factors. Specifically, Audit asserted that Taxpayer has credit card receivables related to Washington cardholders that should be included in the property factor numerator.

Rule 14601(5) provides the rule pertaining to computation of the property factor. It provides that the numerator of the property factor should include "[t]he average value of the taxpayer's loans and credit card receivables that are located within this state during the taxable period." Credit card receivables are treated as loans for purposes of determining their location. Rule 14601(5)(g). Rule 14601(5)(f)(i)(A) clarifies that a loan is located within this state for purposes of the property factor when it is "properly assigned to a regular place of business of the taxpayer within this state." Rule 14601(5)(f)(i)(B) outlines the test for assigning a location to loans. It states:

(B) A loan is properly assigned to the regular place of business with which it has a majority of substantive contacts. A loan assigned by the taxpayer to a regular place of business outside the state shall be presumed to have been properly assigned if:

- (I) The taxpayer has assigned, in the regular course of its business, such loan on its records to a regular place of business consistent with federal or state regulatory requirements;
- (II) Such assignment on its records is based upon substantive contacts of the loan to such regular place of business; and
- (III) The taxpayer uses said records reflecting assignment of loans for the filing of all state and local tax returns for which an assignment of loans to a regular place of business is required.

Neither Taxpayer nor Affiliate maintain a regular place of business in Washington. Accordingly, there is no regular place of business within the state for which its receivables can have a majority of substantive contacts. Taxpayer is headquartered [out-of-state] where it has over 900 employees. Taxpayer assigns its receivables [out-of-state] for all regulatory purposes. The approval of loans, disbursement of loans, and the extension of credit are all performed [out-of-state]. Accordingly, there appears to be no basis for assigning Taxpayer's receivables to Washington for purposes of calculating the property factor.

Taxpayer is correct that a three factor apportionment percentage applied for the applicable period under Rule 14601. Taxpayer's position that its credit card receivables should not be assigned to Washington for purposes of computing the applicable property factor also appears correct. However, this argument was not raised during the course of the audit. Therefore, Audit did not have an opportunity to examine Taxpayer's records to ensure that all of Taxpayer's payroll and property was correctly assigned to a location outside of Washington for purposes of Assessment 1. Accordingly, Taxpayer's claim regarding the apportionment factor applied for Assessment 1 is remanded to Audit for further examination.

### Penalties

Washington law penalizes taxpayers that fail to timely remit taxes. Pursuant to RCW 82.32.090(1), if "payment of any tax due on a return to be filed by a taxpayer . . . is not received on or before the last day of the second month following the due date, there *is assessed* a total penalty of twenty-nine percent of the amount of the tax under this subsection." (emphasis added).

RCW 82.32.090(2) states "[i]f the department . . . determines that any tax has been substantially underpaid, there *is assessed* a penalty of five percent of the amount of the tax determined by the department to be due." (emphasis added). A tax is "substantially underpaid" when a taxpayer has paid less than 80% of the tax due and the amount of the underpayment is at least \$1,000. RCW 82.32.090(2).

The Department's authority to waive or cancel penalties is restricted to the authority granted by the Legislature. Otherwise, the assessment of penalties is mandatory when the conditions for imposing them are met. The Legislature has granted the Department limited authority to waive or cancel penalties pursuant to RCW 82.32.105. Pursuant to this statute, the Department is required to waive penalties when it finds that the underlying act giving cause to the assessment of the penalty, i.e., delinquent payment, was due to circumstances beyond the control of the taxpayer. RCW 82.32.105.

"Circumstances beyond the control of the taxpayer" is defined in WAC 458-20-228(9) ("Rule 228"), which states:

The circumstances beyond the control of the taxpayer must actually cause the late payment. Circumstances 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.



Rule 228(9) goes on to provide a non-exclusive list of circumstances that generally will and will not be considered circumstances beyond the control of the taxpayer. As relevant here, a misunderstanding or lack of knowledge of a tax liability is generally not considered a circumstance beyond the control of the taxpayer and will not qualify for a waiver of the penalty. Rule 228(9)(a)(iii)(B). Det. No. 01-096, 22 WTD 126 (2003) (“‘Lack of knowledge’ is not a ‘circumstance beyond the control of the taxpayer’ because the law, regulations, and Department publications explaining all tax laws are publicly available . . .”).

Taxpayer failed to pay any taxes for the period covered by Assessment 1. Accordingly, because Taxpayer’s delinquency exceeded two months following the applicable due date, a twenty-nine percent delinquency penalty was properly assessed under RCW 82.32.090(1). Because Taxpayer failed to pay any taxes for this period and its underpayment exceeded twenty percent, a five percent assessment penalty was also assessed under RCW 82.32.090(1). Taxpayer’s failure to pay taxes for Tax Period 1 was due to its belief that it did not have substantial nexus with the state of Washington. An analysis of why this belief was incorrect has been amply addressed and will not be repeated. For purposes of addressing the penalties, it is sufficient to note that the circumstances surrounding Taxpayer’s failure to pay taxes for this period were consistent with a misunderstanding or lack of knowledge of its tax liability and, therefore, do not equate to a circumstance beyond its control.

Taxpayer’s assertion that there was significant doubt whether Washington’s B&O tax applied to its in-state activities is based on a misapplication of statements made by Department employees to the facts of its case. However, assuming *arguendo* that the statements relied upon did suggest that the Department believed its activities were not subject to tax, there would be no basis for relief from the penalties. Taxpayer has not asserted that its failure to file and pay taxes was a result of its reliance on these statements at that time. Furthermore, even if Taxpayer *had* relied on these statements in deciding not to file and pay taxes, there would still be no basis for relief. [RCW 82.32A.020(2) (taxpayers have the right to rely on specific, official written advice from the Department “to that taxpayer”). Nothing the Department employees said to the Legislature was specific advice to the Taxpayer. Also,] Rule 228 provides that “[e]rroneous written information given to the taxpayer by a department employee” may be a circumstance beyond the taxpayer’s control, but that “[r]eliance upon unpublished, written information from the department that was issued to and specifically addresses the circumstances of *some other taxpayer*,” is generally not a circumstance outside of the taxpayer’s control. Rule 228(9)(a)(ii)(B), Rule 228(9)(a)(iii)(F) (emphasis added).

In summary, Taxpayer’s failure to pay taxes for the period covered by Assessment 1 was not the result of circumstances beyond its control. As such, there is no basis for relief and the assessed penalties are sustained. However, the penalties must be adjusted on remand in accordance with any adjustment to the underlying tax for Assessment 1.

For Assessment 2, pursuant to RCW 82.04.462(4), the penalties imposed by RCW 82.32.090 will not apply to taxpayers with apportionable income that correct their receipts factor by October 31 of the tax year following the current year. It states:

A taxpayer may calculate the receipts factor for the current tax year based on the most recent calendar year for which information is available for the full calendar year. If a taxpayer does not calculate the receipts factor for the current tax year based on the previous calendar year information as authorized in this subsection, the business must use current year information to calculate the receipts factor for the current year. In either case, a taxpayer must correct the reporting for the current tax year when complete information is available to calculate the receipts factor for that year, but not later than October 31<sup>st</sup> of the following tax year. Interest will apply to any additional tax due on a corrected tax return. . . . Penalties as provided in RCW 82.32.090 will apply to any such additional tax due only if the current tax year reporting is not corrected and the additional tax is not paid by October 31<sup>st</sup> of the following tax year.

RCW 82.04.462(4).

The Department implements and interprets this statute pursuant to Rule 19402(602). This rule provides:

Regardless of how a taxpayer reports its taxable income under . . . this rule, when the taxpayer has the information to determine the receipts factor for an entire calendar year, it must file a reconciliation and either obtain a refund or pay any additional tax due. The reconciliation must be filed on a form approved by the department. . . . If the reconciliation is completed prior to October 31<sup>st</sup> of the following year, no penalties will apply to any additional tax that may be due.

The total service & other activity B&O tax due on Taxpayer's income for the June 1, 2010 through December 31, 2011, tax periods remained unpaid long after the last day of the second month following the due date for payment. In addition, Taxpayer failed to file annual reconciliations for these tax periods by the deadline established by RCW 82.04.462(4). Accordingly, the delinquent penalty under RCW 82.32.090(1) applied to its deficient tax payments.

Taxpayer argues that the Department's failure to provide guidance regarding the proper treatment of cashback bonuses amounts to a circumstance beyond its control that caused its delinquency. However, as discussed, Rule 228(9)(a)(iii)(B) excludes "lack of knowledge of a tax liability" from those circumstances generally considered beyond a taxpayer's control. As noted by Audit, RCW 82.04.080 provides that the B&O tax applies to the gross income of a business "without any deduction on account of . . . discount . . . or any other expense whatsoever paid or accrued and without any deduction on account of losses." Despite this provision, Taxpayer deducted an amount for cashback bonuses from the gross income it reported and upon which it paid tax. In light of Rule 228(9)(a)(iii)(B) and the clear language of RCW 82.04.080, we find that the Department's failure to provide specific guidance in the area of cashback bonuses is not a circumstance beyond Taxpayer's control that caused its underpayment.

In summary, Taxpayer failed to timely pay all of the tax due for the June 1, 2010, through December 31, 2011, tax period. Taxpayer also failed to file annual reconciliations correcting the amount of tax due for the June 1, 2010, through December 31, 2011, tax periods as required by RCW 82.04.462(2). Accordingly, the delinquent penalty applied to the additional amounts

determined to be due by the Department. Thus, we deny Taxpayer's petition as it relates to the delinquent penalty included in Assessment 2.

#### DECISION AND DISPOSITION

Audit's determination that Taxpayer's activities were subject to the B&O tax for the January 1, 2010, through May 31, 2010, tax period is sustained. However, we are remanding Assessment 1 to Audit to recalculate the tax due based on a three factor apportionment formula consistent with this decision. The applicable penalty for Assessment 1 must be recalculated in accordance with any adjustment to the tax. In regards to Assessment 2, we sustain the assessment of penalties.

Dated this 8th day of November 2017.