

Cite as Det. No. 17-0309, 37 WTD 218 (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. 17-0309
)	
...)	Registration No. . . .
)	

[1] RULE 19402; RCW 82.04.460, RCW 82.04.462: B&O TAX – APPORTIONMENT -- CONSTITUTIONALITY OF STATUTES – COMMERCE CLAUSE. We reject Taxpayer’s claim that the B&O tax assessed against Taxpayer discriminates against interstate commerce, regardless of whether Taxpayer is subject to out-of-state taxes measured by the same gross receipts.

[2] RULE 228; RCW 82.32.105: PENALTIES AND INTEREST WAIVER - CIRCUMSTANCES BEYOND THE CONTROL OF THE TAXPAYER – LACK OF KNOWLEDGE. Taxpayer’s alleged lack of knowledge does not justify waiver of penalties or interest.

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.

Margolis, T.R.O. – An out-of-state franchisor of . . . yogurt stores (Taxpayer) protests the assessment of business and occupation (B&O) tax on grounds that the assessment discriminates against interstate commerce in violation of the Commerce Clause of the U.S. Constitution. We deny the petition.¹

ISSUES

1. Whether the [B&O tax] discriminated against interstate commerce in violation of the Commerce Clause of the U.S. Constitution by assessing Taxpayer B&O tax on the same gross receipts subject to tax by [out-of-state].
2. Whether, under RCW 82.32.105, Taxpayer qualifies for waiver of penalties and interest on grounds that it was unaware of its tax obligations.

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

FINDINGS OF FACT

Taxpayer is a franchisor of . . . yogurt stores, including stores in Washington. It receives royalties and advertising fees from the Washington stores. It also makes sales to the Washington stores, including retail sales of items such as signage and uniforms and wholesale sales of items such as spoons and cups.

The Department of Revenue’s (Department) Audit Division (Audit) examined the Taxpayer’s account for the period January 1, 2011, through December 31, 2015, and assessed Taxpayer \$ The assessment is comprised of (\$. . .) in Small Business Credit, \$. . . in Retail Sales tax, \$. . . in Retailing B&O tax, \$. . . in Wholesaling B&O tax, \$. . . in Service and Other Activities B&O tax, \$. . . in Royalties B&O tax, \$. . . in 29 percent Delinquent Penalty, \$. . . in interest, \$. . . in 5 percent Assessment Penalty, and \$. . . in 5 percent Unregistered Business Penalty. Audit attributed receipts among states based on identifying the contribution amount of income paid by each franchisee and determining the amounts received from only Washington franchisees.

Taxpayer petitions for correction of the assessment on grounds that both [out-of-state] and Washington tax the same, identical interstate transactions, and they both use the same measure (gross receipts) to impose the tax, exposing Taxpayer to unconstitutional multiple taxation absent exemption or offset for taxes paid to other states. In support of this position, Taxpayer provided . . . Renewal Confirmations showing on-line payments and Profit and Loss Statements with figures linked to the on-line payments. Taxpayer explains that it pays gross receipts tax on retail sales under . . . , wholesale sales under . . . , and other gross receipts under

Taxpayer provided a Renewal Confirmation evidencing payment of \$. . . submitted and received on March 2, 2015. It lists the taxable activities as follows:

Business Activity	Basis for Tax
Wholesale Sales (. . .)	[\$] . . .
Retail Sales (. . .)	[\$] . . .
Prop/Coll/Sport/Vend/Freight (. . .)	[\$] . . .
Miscellaneous Services (. . .)	[\$] . . .
Professions/Occupations (. . .)	[\$] . . .

A spreadsheet titled “Profit & Loss Jan – Dec 2014” was attached, which shows the computation of tax liability. The liability is based on the sum of amounts associated with four categories, each multiplied by a unique factor. The four categories, which are associated with various income accounts, are: in-state sales (wholesale), in-state sales (retail), professions/OCC (including income from franchise fees and royalties), and miscellaneous services (including income from the sale of “lic partnerships and cops” and breakage income.)

Taxpayer provided a Renewal Confirmation evidencing payment of \$. . . submitted and received on February 29, 2016. It lists the taxable activities as follows:

Business Activity	Basis for Tax
Prop/Coll/Sport/Vend/Freight (. . .)	[\$] . . .
Miscellaneous Services (. . .)	[\$] . . .
Professions/Occupations (. . .)	[\$] . . .
GrossReceiptFund/ . . .	[\$] . . .
GrossReceiptFund/ . . .	[\$] . . .

A spreadsheet titled “Profit & Loss January through December 2015” was attached, which shows the computation of tax liability. The liability is based on the sum of amounts associated with six categories, multiplied by various factors. The six categories, which are associated with various income accounts, are: in-state sales (wholesale), in-state sales (retail), out-of-state (wholesale), out-of-state (retail), professions/OCC, and miscellaneous services (comprised of leased team member income). We note that this computation, in contrast to that for 2014, appears to include income from out-of-state wholesaling and retailing.

Taxpayer asserts that it was taxed twice on receipts from royalties and franchise fees, and starting in 2015, also taxed twice on receipts from wholesaling and retailing, and that such multiple taxation is prohibited by the U.S. Constitution.

ANALYSIS

Washington imposes a B&O tax “for the act or privilege of engaging in business” in this state on “every person that has a substantial nexus with this state.” RCW 82.04.220. The B&O tax “is measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.” *Id.* The B&O tax rate varies according to the nature, or classification, of the business activity. *See generally*, Ch. 82.04 RCW. Business activities other than those classified elsewhere in Chapter 82.04 RCW fall under the catch-all Service and Other Activities B&O tax classification. RCW 82.04.290(2). To the extent that Taxpayer’s gross income is taxable in Washington, Taxpayer does not dispute that its various business activities were classified properly by Audit.

Effective June 1, 2010, “. . . any person earning apportionable income taxable under this chapter and also taxable in another state must, for the purpose of computing tax liability under this chapter, apportion to this state, in accordance RCW 82.04.462, that portion of the person’s apportionable income derived from business activities performed within this state.” RCW 82.04.460. “Apportionable income” includes gross income of the business generated from engaging in “apportionable activities.” RCW 82.04.460(4)(a). “Apportionable activities” includes those taxed under RCW 82.04.290 and RCW 82.04.2907. WAC 458-20-19402 (Rule 19402) is the Department’s administrative rule implementing RCW 82.04.462. Rule 19402(301)(a)(i) provides the following additional information regarding the attribution of apportionable income (in pertinent part):

If a taxpayer can reasonably determine the amount of a specific apportionable receipt that relates to a specific benefit of the services received in a state, that apportionable receipt is attributable to the state in which the benefit is received. When a customer receives the benefit of the taxpayer's services in this and one or more other states and the amount of gross income of the business that was received by the taxpayer in return for the services received by the customer in this state can be reasonably determined by the taxpayer, such amount of gross income must be attributed to this state. This may be shown by application of a reasonable method of proportionally attributing the benefit among states. The result determines the receipts attributed to each state.

See also, WAC 458-20-19403 (providing for attribution of apportionable royalty receipts).

The Commerce Clause of the U.S. Constitution provides that certain requirements must be satisfied for a state to subject an individual to taxation in that state. The four Commerce Clause requirements for a state tax on interstate commerce are set forth in the seminal case of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 278-82, 97 S.Ct. 1076, 1078-1080, 51 L.Ed. 326 (1977): (1) There must be sufficient connection or nexus between the interstate activities and the taxing state; (2) the tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to the services provided by the state. *Chicago Bridge & Iron Co. v. Dep't. of Revenue*, 98 Wn.2d. 814, 826, 659 P.2d 463 (1983).

Taxpayer asserts that the B&O tax as assessed against Taxpayer discriminates against interstate commerce. A tax on interstate commerce is not discriminatory unless it affords a “different tax treatment of interstate and intrastate commerce” that is detrimental to interstate commerce. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618 (1981); *Associated Industries of Missouri v. Lohman*, 511 U.S. 641, 652, N. 4 (1994); *Chicago Bridge & Iron Co. v. Dep't of Revenue*, 98 Wn.2d 814, 830, 659 P.2d 463 (1983). We find no such treatment in the applicable statutes. A plain reading of RCW 82.04.220 reveals that the B&O tax is imposed “for the act or privilege of engaging in business” in Washington, regardless of the location of a taxpayer. The broad definition of “business” under RCW 82.04.140 makes no distinction regarding the location of a taxpayer. We find no language declaring a discriminatory tax treatment for a taxpayer located outside of Washington in the implementation of apportionment under RCW 82.04.462.

Taxpayer . . . relies upon *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939)[, as support for its discrimination claim.]. We interpret Taxpayer’s argument as a facial challenge to the constitutionality of RCW 82.04.462. We have no authority to rule on such facial constitutional challenges and decline to make any ruling in that regard. *Bare v. Gorton*, 84 Wn2d 380, 526 P.2d 379 (1974). However, we note that single-factor sales apportionment has been held constitutional under the Commerce Clause. *See Mooreman Mfg. Co. v. Blair*, 437 U.S. 267, 273, 98 S.Ct. 2340 (1978). In conclusion, we reject Taxpayer’s claim that the B&O tax as applied by Audit and assessed against Taxpayer discriminates against interstate commerce, regardless of whether Taxpayer is subject to [out-of-state] taxes measured by the same gross receipts. Further, to the

extent that Taxpayer implies that double taxation is prohibited, Taxpayer has provided no legal authority for such a notion.²

We next address Taxpayer's argument that penalties and interest should be waived. The Washington tax system is based largely on voluntary compliance. The Revenue Act imposes on taxpayers the responsibility to inform themselves about applicable tax laws, register with the Department, and accurately and timely pay taxes. Ch. 82.32A RCW. The Department is an administrative agency and has no [implied] discretionary authority to waive penalties or interest. Det. No. 01-165, 22 WTD 5 (2003) (citing Det. No. 98-85, 17 WTD 417 (1998); Det. No. 99-285, 19 WTD 492 (2000)). The Department only has the authority granted by statute to waive penalties and interest, which is set out in RCW 82.32.105.³

Under RCW 82.32.105(1), the Department can waive penalties where the late payment is due to "circumstances beyond the control of the taxpayer." The Department is authorized to issue rules regarding the waiver of penalties and interest. RCW 82.32.105(4). It has done that in WAC 458-20-228 (Rule 228).

Rule 228(9)(a)(i) provides that ". . . [t]he taxpayer bears the burden of establishing that the circumstances were beyond its control and directly caused the late payment . . ." Rule 228(9)(a)(ii) explains what is meant by "circumstances beyond the control of the taxpayer" as follows:

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.

Examples of what constitutes such circumstances are provided in Rule 228(9)(a)(ii), none of which apply to the situation here where Taxpayer asserts that penalties should be waived because it was unaware of its liability.⁴ Rule 228(9)(a)(iii) gives examples of circumstances that are *not* considered to be a basis for waiving penalties.⁵ Specifically, Example (B) includes "a

² With regards to royalties B&O tax, Taxpayer asserts that the tax is not fairly apportioned because Washington is taxing all interstate income of intangible property whose situs is at the domicile or residence of the owner, which in this case would be outside Washington. [Taxpayer's assertion is incorrect.] In this matter, Taxpayer was assessed royalties B&O tax on [an apportioned share of its royalty] income [under the single-factor sales apportionment method provided for in RCW 82.04.462. Taxpayer cites no relevant authority suggesting that the single factor sales method impermissibly discriminates against interstate commerce]. [Consequently,] we find no grounds for concluding that the receipts were unfairly apportioned to Washington.

³ The Legislature also provides, in RCW 82.32A.020, that taxpayers may be entitled to a waiver of penalties in the limited circumstance where the taxpayer has relied upon written advice from the Department. That provision, however, is not applicable to this determination.

⁴ Examples of circumstances beyond the control of the taxpayer in Rule 228(9)(a)(ii) include:

(A) The return payment was mailed on time but inadvertently sent to another agency.

(B) Erroneous written information given to the taxpayer by a department officer or employee caused the delinquency

(C) The delinquency was directly caused by death or serious illness of the taxpayer, or a member of the taxpayer's immediate family

⁵ Examples in Rule 228(9)(a)(iii) of circumstances that are generally not beyond the control of the taxpayer and will not qualify for waiver or cancellation of penalty include:

misunderstanding or lack of knowledge of a tax liability,” and Example (E) includes mistakes on the part of employees. Because the circumstances alleged in this matter are not immediate, unexpected, or in the nature of an emergency, are unlike those circumstances described in Rule 228(9)(a)(ii), and are instead like those described in Rule 228(9)(a)(iii), we conclude that the circumstances alleged by Taxpayer are not “beyond the control of the taxpayer” and are not grounds for waiver of penalties.

RCW 82.32.105(3) and Rule 228(10) provide that the Department will waive or cancel interest imposed under Chapter 82.32 RCW only where the failure to pay the tax prior to the issuance of the assessment was the direct result of written instructions given the taxpayer by the department, or the extension of the due date for payment of an assessment was not at the request of the taxpayer and was for the sole convenience of the Department. Since we find no evidence of either of these circumstances in the petition or record, we sustain the assessment of interest.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 27th day of December 2017.

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- (A) Financial hardship;
 - (B) A misunderstanding or lack of knowledge of a tax liability;
 - (C) The failure of the taxpayer to receive a tax return form, EXCEPT where the taxpayer timely requested the form and it was still not furnished in reasonable time to mail the return and payment by the due date, as described in (a)(ii)(G) of this subsection;
 - (D) Registration of an account that is not considered a voluntary registration, as described in subsection (5)(a)(iii) and (b) of this section;
 - (E) Mistakes or misconduct on the part of employees or other persons contracted with the taxpayer (not including conduct covered in (a)(ii)(F) of this subsection); and
 - (F) Reliance upon unpublished, written information from the department that was issued to and specifically addresses the circumstances of some other taxpayer.