

BEFORE THE APPEALS 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. 98-085
)	
...)	Registration No. . . .
)	FY. . . /Audit No. . . .
)	FY. . . /Audit No. . . .

- [1] RULE 228; RCW 82.32.050: INTEREST – WAIVER – LOSS OF CHECK IN MAIL – LATE PAYMENT OF ASSESSMENT. Because loss of mail is not one of the enumerated grounds for waiver of interest, the loss of a taxpayer’s check in the mail is not sufficient grounds for waiver of interest.
- [2] RULE 228; RCW 82.32.050: INTEREST – WAIVER – INADVERTENCE – FINANCIAL HARDSHIP. Interest that accrued during the audit period and before the issuance of an assessment will not be waived due to financial hardship and lack of intent because lack of intent and financial hardship are not among the enumerated grounds for waiver of interest.
- [3] RULE 228; RCW 82.32.050: INTEREST – WAIVER –DEPARTMENT DELAY IN MAILING ASSESSMENT – DELAY FOR SOLE CONVENIENCE OF THE DEPARTMENT. Where the Department fails to timely respond to a taxpayer’s request for a copy of its assessment, interest will be waived for the period between the time the taxpayer requested a copy of its completed assessment and the time the taxpayer actually received the assessment.

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.

NATURE OF ACTION:

Taxpayer protests assessment of interest with respect to an assessment it claims it did not receive in a timely manner and with respect to a payment to the Department that it claims was lost in the mail. The taxpayer also requests that a refund due to a “defunct” company owned by the taxpayer’s president be transferred to its account.¹

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

FACTS:

C. Pree, A.L.J. -- The taxpayer's appeal relates to interest assessed with respect to two assessments, as well as the transfer of a refund due to another taxpayer to the taxpayer's account.

The 1991 Assessment. The first assessment resulted from the Department's partial audit of the taxpayer's records for the period April 1, 1991, through December 31, 1991 ("the 1991 assessment"). The 1991 assessment included collected but unremitted sales tax of . . . , penalty of . . . , and interest of . . . , for a total assessment of . . . The taxpayer previously appealed the assessment of interest and penalties and began making partial payments of the assessment in 1996. The Department denied the taxpayer's petition in Det. No. 97-66, issued March 31, 1997, and mailed a copy of the determination to the taxpayer.

On April 25, 1997, the Appeals Division mailed a copy of the determination to the taxpayer a second time. The cover letter to the determination notes that it was returned to the Department as unclaimed. The letter stated: "Because of the delay in your receiving this decision, we will extend the due date for payment to May 27, 1997, without adding any additional extension interest."

Det. No. 97-66 included within its decision instructions regarding payment of the assessment. The determination states:

Payment may be sent to Department of Revenue, Cash Management, PO Box 47464, Olympia, Washington 98504-7464. Please attach a copy of this decision to your payment so that your account can be properly credited. If this cannot easily be done, note on payment your Registration No. and Document Nos., or other pertinent information.

On May 24, 1997, the taxpayer mailed a check, along with a cover letter, to the Appeals Division to the attention of the Administrative Law Judge ("ALJ") that decided its case (rather than to Cash Management). The zip code the taxpayer used in mailing the check to the Appeals Division was apparently incorrect. (The cover letter recites the zip code as 98504-7450, rather than 98504-7460.) The check was in the amount of . . . for the remaining balance owing on the 1991 assessment, as set forth in the determination.

On June 17, 1997, the Department sent the taxpayer a letter stating that it had not received payment of the 1991 assessment. The letter stated that the outstanding balance was . . . The taxpayer refers to this letter as its "first notice" that its check was not received by the Department. On June 27, 1997, the taxpayer sent, by certified mail, a replacement check in the amount of . . . along with a cover letter to the Department. The taxpayer provided a copy of the check it previously sent to the Department (dated May 23, 1997), a copy of the stop payment confirmation from the bank, and a bank statement reflecting a gap in its check sequence for the check that was sent to, but not received by, the Department.

Subsequently, apparently in response to a request by the taxpayer, the Taxpayer Accounts Administration Division ("TAA") issued a letter to the taxpayer. The letter, dated July 10, 1997, stated that the Department could waive the "additional penalty," (presumably the late payment of

assessment penalty imposed under RCW 82.32.090), but could not waive the “additional interest.” Thus, the letter concluded, the “additional interest that accrued between the issue date and the payment date of the assessment remains due.” The letter concluded with a request that the taxpayer pay . . . by August 9, 1997.

On August 8, 1997, the taxpayer filed a petition requesting a waiver of the . . . of interest. The taxpayer argues that it mailed to the Department in a timely manner the balance owing on its assessment, but the mail was not received by or not processed by the Department. The taxpayer argues that it should not be penalized for the failure of the postal service to deliver mail in a timely manner. Thus, the taxpayer argues, interest should be waived “for the intervening period to issue a replacement check.”

The 1995 Assessment. The second assessment resulted from the Department’s full audit of the taxpayer’s records for the period of January 1, 1992, through September 30, 1995 (“the 1995 assessment”). Including interest of . . ., the assessment totaled . . . (No penalty was assessed.) The assessment was dated August 21, 1996, with a due date of September 20, 1996.

The taxpayer presented a copy of a letter it sent to the Kirkland office of the Department, dated September 20, 1996. The letter states that the Department informed the taxpayer that its audit was complete, but the taxpayer had not received a copy of it. The letter also references a telephone inquiry the taxpayer made regarding the audit 10 days earlier. The letter concluded with a request that the Department advise the taxpayer of the status of this audit.

In the taxpayer’s letter to the Appeals Division, dated May 24, 1997, the taxpayer states that it still had not received a copy of the 1995 assessment. The letter also notes that the taxpayer advised the ALJ who decided its case, in the telephone conference held on March 18, 1997, that the taxpayer had not received a copy of its 1995 assessment. The letter also references a conversation the taxpayer had with the ALJ subsequent to the taxpayer’s receipt of the determination. The taxpayer contends that in that conversation, the ALJ promised to “refer the matter of [the 1995 assessment] to management in order that [the taxpayer] be provided a copy of that audit after which time [the taxpayer] would be able to decide if an appeal was warranted.”

In a June 27, 1997, letter from the taxpayer to the Department, the taxpayer states that it looks forward to finally receiving a copy of the 1995 assessment.

On July 10, 1997, Taxpayer Accounts Administration (“TAA”) wrote the taxpayer a letter, which states, “It has been brought to my attention that the above referenced tax assessment was not received.” TAA enclosed a copy of the assessment with the letter and noted that the assessment had been given a new due date of August 9, 1997. The letter further stated that the original amount of the assessment of \$. . ., plus additional interest of \$. . . was due by the new due date.

In its petition dated August 8, 1997, the taxpayer requested a waiver of the interest included in the assessment. The taxpayer argued that the error was inadvertent and the penalties and interest

would pose an extreme financial burden that could jeopardize the continued business operations of the taxpayer.

In its petition, the taxpayer also requested a waiver of the \$. . . interest, which accrued between the time the assessment was originally due and its new due date. The taxpayer argues that the Department, despite repeated requests from the taxpayer, never resent the taxpayer a copy of the audit and assessment for the period in question. The taxpayer notes that it made requests to the Department in writing on two occasions and by telephone on three occasions to the Kirkland office responsible for the audit. The taxpayer argues that it should not be penalized for the failure of the Department to provide a copy of the audit and assessment in a timely manner. Thus, the taxpayer argues, interest should be waived “for the period between the time the Department internally prepared the audit/assessment and the time the Department finally provided the taxpayer with the aforementioned items.”

Credit of Refund Due to . . . (“the Company,” Reg. No. . . .). The taxpayer also requests that a refund of taxes due to a “defunct company” owned by the taxpayer’s president be credited against the outstanding balance of its assessments. The taxpayer provided a copy of an audit cover sheet, dated May 28, 1991, which reflects that the Company was audited for the period of July 1, 1986, through December 31, 1990. The cover sheet reflects that the audit was completed on March 29, 1991, and that the Company had tax deficiencies in 1988 through 1990, but overpayments in excess of these deficiencies for 1986 and 1987. A notation on this cover sheet states:

This credit will be refunded. Vouchers are presently being prepared and will be issued shortly. Note: any outstanding liabilities may reduce this refund amount.

The taxpayer provided a copy of a letter, dated February 13, 1991, in which the Department stated that it had received the Company’s request for refund and that the Company’s refund request was being sent to “our Audit Section for an opinion or verification of your request.” The letter continued, “No action will be taken until we receive direction from our Audit Section.”

Apparently no action was taken, because in a letter dated September 20, 1996, the taxpayer requested that “the remaining balance” of the Company be transferred to the taxpayer’s account. On September 5, 1997, the taxpayer’s attorney requested an explanation from the Department regarding what action, if any, had been taken regarding this balance transfer.

In the taxpayer’s teleconference on May 4, 1998, it again requested that the credit balance be transferred to its account. This issue will be remanded to the Audit Division for its determination of whether the taxpayer is entitled to a transfer of the balance. If neither the Company nor the taxpayer previously received credit for the Company’s overpayments and the Company has authorized the balance transfer, the Audit Division should credit the amount to the taxpayer. If a refund or credit is due, the taxpayer is entitled to refund interest on the amount of the refund. See RCW 82.32.060.

ISSUES:

1. Whether interest should be waived for the period between the time the taxpayer mailed its check for payment of the 1991 assessment and the time it re-issued the check because the original check had been lost in the mail.
2. Whether financial hardship and lack of intent are sufficient grounds for waiver of interest that accrued during the audit period and before the issue date of the 1995 assessment.
3. Whether interest should be waived for the period between the time the Audit Division completed its preparation of the 1995 assessment and the time the taxpayer actually received the assessment.

DISCUSSION:

RCW 82.32.050 requires the Department to add interest to late payments. The statute provides in pertinent part as follows:

If upon examination of any returns or from other information obtained by the department it appears that a tax or penalty has been paid less than that properly due, the department shall assess against the taxpayer such additional amount found to be due and shall add thereto interest

As we stated in Det. No. 87-344, 4 WTD 261 (1987), the legislature, through its use of the word "shall," has made the assessment of interest mandatory. The mere fact of nonpayment within a specified period of payment requires the interest provisions of RCW 82.32.050 to be applied. As an administrative agency, the Department of Revenue is given no discretionary authority to waive interest. The only authority to waive interest is found in RCW 82.32.105. That statute requires the Department to waive interest if the taxpayer's failure to pay tax by the due date was due to circumstances beyond its control. The statute also requires the Department to adopt rules to implement the statute. WAC 458-20-228 (Rule 228) provides that the Department will waive interest if

- (a) The failure to timely pay the tax was the direct result of written instructions given the taxpayer by the department; or
- (b) The extension of a due date for payment of an assessment of deficiency was not at the request of the taxpayer and was for the sole convenience of the department.

1. The first issue is whether interest should be waived for the period between the time the taxpayer mailed its check for payment of the 1991 assessment and the time it re-issued the check because the original check had been lost in the mail. This precise issue was addressed in Det. No. 89-481, 8 WTD 289 (1989). In that determination, the taxpayer's attorney mailed a check for real estate excise tax on July 1, 1987. When neither the check for the excise tax nor the check for the recording fee were cashed, the taxpayer's attorney called the County on or about October 30th and was advised that the checks had never been received. The taxpayer then stopped payment on the two checks which had not been received and forwarded a copy of the original cover letter and new checks on November 18, 1987, which were received on November 23, 1987. After considering

RCW 82.32.105 and Rule 228, the Department concluded, "the loss of a real estate excise tax payment in the mail will not excuse the payment of interest."

Similarly, because loss of mail is not one of the enumerated grounds for waiver of interest, we must conclude here that the loss of the taxpayer's check in the mail is not sufficient grounds for waiver of interest. Thus, the taxpayer's petition is denied on this issue.

2. The next issue is whether financial hardship and lack of intent are sufficient grounds for waiver of interest that accrued during the audit period and before the issue date of the 1995 assessment. As we concluded in Det. No. 97-66, inadvertence and financial hardship are not sufficient grounds for waiver of interest. See also, Det. No. 94-16, 14 WTD 184 (1994) ("Financial hardship is not a basis for forgiving a taxpayer's tax liability, penalties, and/or interest imposed thereon").

Because lack of intent and financial hardship are not among the enumerated grounds for waiver of interest, we must deny the taxpayer's petition with respect to this issue.

3. The final issue is whether interest should be waived for the period between the time the Audit Division completed its preparation of the 1995 assessment and the time the taxpayer actually received the assessment. In Det. No. 86-31ER, 13 WTD 1 (1993), we addressed a similar situation involving the Department's failure to timely respond to a taxpayer's request. In that determination, the taxpayer made a settlement offer to the Department in March of 1989. The Department did not institute settlement negotiations until November of 1992. We held that the Department's failure to timely respond to this settlement offer constituted an "extension of the due date for payment of an assessment . . . for the sole convenience of the department." Accordingly, we waived interest for the period between the time the taxpayer made its settlement offer and the time the Department acted on this offer.

Similarly, we will waive the interest on the 1995 assessment for the period between the time the taxpayer asked for a copy of the completed assessment (September 20, 1996), through the date the Department actually mailed the assessment (July 10, 1997). Because the Department did not respond to the taxpayer's request for a copy of its assessment, we find that the extension of the due date for payment of the assessment was for the sole convenience of the Department.

We note that this situation stands in contrast to the situation addressed in Det. No. 87-344, 4 WTD 261 (1987). In that determination, the taxpayer protested the late payment penalty on the basis of nonreceipt of the tax assessment. The late payment penalty had already accrued prior to the taxpayer being notified by the Department that its payment was late. The Department had mailed the assessment to the taxpayer's address of record, but the taxpayer apparently did not receive it. In denying the taxpayer's petition, we relied in part on RCW 82.32.130, which in pertinent part provides:

Notwithstanding any other law, any notice or order required by this title to be mailed to any taxpayer . . . shall be addressed to the address of the taxpayer as shown by the records of the department of revenue. . . . Failure of the taxpayer to receive such notice or order whether

served or mailed shall not release the taxpayer from any tax or any increases or penalties thereon.

Thus, in Det. No. 87-344, the imposition of the late payment penalty resulted from the taxpayer's failure to receive the assessment by mail, and the taxpayer had not yet contacted the Department regarding the nonreceipt of the assessment at the time the penalty was imposed. We reasoned that RCW 82.32.130 precluded the taxpayer from denying liability for the late payment penalty or additional interest based on its claim that the tax assessment was not received by mail. Accordingly, we sustained the delinquent penalty and additional interest. In contrast, the interest at issue here was imposed after the taxpayer had informed the Department that it had not received the assessment, and the Department failed to act on the taxpayer's request for a copy of the assessment.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part.

Dated this 13th day of May, 1998.