

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

In the Matter of the Petition)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u> <u>N</u>
For Correction of Assessment of)	
)	No. 87-66
)	
. . .)	Registration No. . . .
)	Tax Assessment Nos. . .
.	
)	

[1] **RULE 228, RCW 82.32.090 and RCW 82.32.105:** PENALTIES -- WAIVER --UNREGISTERED TAXPAYER. Late payment penalties will be waived only for those circumstances beyond the taxpayer's control as are denominated in Rule 228. Taxpayer's voluntary disclosure of its innocent failure to register is not sufficient grounds for abatement of penalties.

[2] **RULE 228, RULE 230, and RCW 82.32.100:** EXCISE TAX -
- INTEREST -- PENALTIES -- STATUTE OF LIMITATIONS --
UNREGISTERED TAXPAYER. The four-year statute of limitations for the assessment of excise tax does not apply in favor of a previously unregistered taxpayer. Registration just prior to tax assessment does not reactivate the statute of limitations.

[3] **RULE 228, RULE 230, and RCW 82.32.100:** EXCISE TAX -
- INTEREST -- PENALTIES -- STATUTE OF LIMITATIONS --
UNREGISTERED TAXPAYER -- REGISTRATION WITH OTHER
AGENCIES -- ESTOPPEL. The four-year statute of limitations for the assessment of excise tax does not apply in favor of a previously unregistered taxpayer. The Department of Revenue is not estopped from assessing tax outside the statute of limitations by virtue of the taxpayer's registration with other state agencies or offices.

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 28, 1986

NATURE OF ACTION:

Appeal by previously unregistered taxpayer for complete relief of tax, interest and penalties assessed for periods prior to 1981 and for interest relief from 1981 forward.

FACTS AND ISSUES:

Dressel, A.L.J.-- . . . (taxpayer) is a bank. Its books and records were audited by the Department of Revenue for the period January 1, 1979 through March 31, 1985. As a result Tax Assessment No. . . . was issued for excise tax, interest and penalties totaling \$ In addition, Tax Assessment No. . . . was issued for tax, interest and penalties totaling \$ Partial payments have been made on at least one of the two assessments.

The taxpayer commenced its Washington business operations in late 1978. At that time it registered with the Department of Labor and Industries, the Secretary of State, the State Bank Examiner and the Internal Revenue Service. Somehow, it overlooked the Department of Revenue. It continued to do business without filing state excise tax returns or paying state tax until early 1985. At that time a new person assumed command of the bank as its president. This gentleman was a resident president who was familiar with the tax structure in the state of Washington. The bank's previous officers were Colorado residents who were apparently unaware of the corporation's additional responsibility to register with the Department of Revenue. The new president soon discovered the oversight and promptly reported it to the Department. He requested that an audit of the bank's books be conducted to determine exactly what the past due tax liability was. The subject audit and assessments followed.

The taxpayer readily concedes that it owes taxes and interest for the period January 1981 through March 1985. It contests the penalty for that period, however, asserting that there were circumstances beyond the taxpayer's control which support a waiver. Secondly, it contends that no tax, interest or penalty is owing for the pre-1981 period because of the four-year statute of limitations period prescribed by RCW

82.32.050. In support of both positions it suggests that the Department is estopped from collecting the protested amounts because it had notice of the bank's incorporation in 1978. It also alleges that relief is appropriate based on its good faith disclosure of its unregistered status when first discovered in 1985.

DISCUSSION:

Penalties in this case were levied under the authority of RCW 82.32.090 which reads:

Late payment--Penalties. If payment of any tax due is not received by the department of revenue by the due date, there shall be assessed a penalty of five percent of the amount of the tax; and if the tax is not received within thirty days after the due date, there shall be assessed a total penalty of ten percent of the amount of the tax; and if the tax is not received within sixty days after the due date, there shall be assessed a total penalty of twenty percent of the amount of the tax. No penalty so added shall be less than two dollars.á.á.á.
(Emphasis added.)

Under the Department's duly promulgated administrative rule, WAC 458-20-228 (Rule 228), taxes and tax returns are due monthly, quarterly or annually depending upon the frequency assigned to the particular taxpayer. Thus, this taxpayer's taxes started coming due in late 1978 when it opened for business. As the taxes were not paid within the prescribed periods after their due dates,¹ the subject penalties were assessed.

The repeated use of the word "shall" in the above-quoted statute is indicative of the legislature's intent that the penalties be mandatory. There are, however, certain situations in which late payment penalties may be waived. RCW 82.32.105 states:

Waiver or cancellation of interest or penalties. If the department of revenue finds that the payment by a taxpayer of a tax less than that properly due or

¹See Rule 228.

the failure of a taxpayer to pay any tax by the due date was the result of circumstances beyond the control of the taxpayer, the department of revenue shall waive or cancel any interest or penalties imposed under this chapter with respect to such tax. The department of revenue shall prescribe rules for the waiver or cancellation of interest or penalties imposed by this chapter. Notwithstanding the foregoing the amount of any interest which has been waived, canceled or refunded prior to Mayál, 1965 shall not be reassessed according to the provisions of this chapter.

The rules prescribed by the Department for cancellation are found in Rule 228 which says 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.)

[1] None of the listed waiver situations coincides with that of the taxpayer in the instant case. Consequently, cancellation of the penalties cannot be made. Here, the taxpayer simply neglected, albeit innocently, to register. Regardless of its degree of culpability, such circumstance is not acceptable for waiver because it is not on the list. To grant waiver here would be to exceed the authority of the Department's own administrative rule, not to mention the statute which lists "circumstances beyond the control of the taxpayer." Lack of knowledge is not such a circumstance.

The taxpayer urges that tax, interest, and/or penalties be abated because of its voluntary disclosure that it was not registered. While that is appreciated it is also, in effect, required. Had the taxpayer not come forth when it realized

its state tax obligation, it would have been subject to the 50 percent evasion penalty of RCW 82.32.050. It is not meant to belittle the taxpayer's honesty, but it only did what it was legally compelled to do. There is no authority for tax, interest or penalty abatement based on voluntary disclosure.

As to the penalty issue, the taxpayer's petition is denied.

With respect to the tax assessed for periods prior to 1981, RCW 82.32.100 is pertinent. It reads in part:

No assessment or correction of an assessment may be made by the department more than four years after the close of the tax year, except (1) against a taxpayer who has not registered as required by this chapter, (2) upon a showing of fraud or of misrepresentation of a material fact by the taxpayer, or (3) where a taxpayer has executed a written waiver of such limitation. (Emphasis added.)

[2] This taxpayer was unregistered during a significant period in which it was engaging in business in this state. Because it was engaging in business it was required to register. RCW 82.32.030. It had not done so when this audit action was initiated so the four year limitation imposed by RCW 82.32.100 does not apply. The fact that the taxpayer may have technically become registered prior to the dates on which the assessments were actually issued is of no assistance to the taxpayer vis a vis the pre-1981 taxes. The fact remains that it was still not registered as required by chapter 82.32 RCW for a period in excess of six years. RCW 82.32.100 does not specifically tie a taxpayer's registration status at the moment a tax assessment is issued to the subject exception to the four-year limitation. It simply imposes the exception against one who has not registered when required to do so. We decline to construe the exception as narrowly as the taxpayer urges us to do. We doubt the legislature intended that the exception not apply to a business which rushed right down to the local Revenue office to register and that it apply to a business which let the Department take care of the registration concomitant with the assessment. The important thing is the period of unregistration which is substantially the same in either case.

[3] It has been suggested also by the taxpayer's representative that the Department should have been estopped from collecting the pre-1981 taxes for the reason that the

Department knew or should have known that the taxpayer was operating without being registered. The taxpayer is under the impression that because the Secretary of State, Department of Labor and Industries, State Bank Examiner and Internal Revenue Service knew of the bank's existence when it started in 1978, that the Department of Revenue should have known as well. Unfortunately, there is not the pipeline between these various offices that the taxpayer seems to think there is. We presume that the audit section of Revenue periodically checks with other agencies or offices to track down unregistered enterprises. For some reason or other, however, this taxpayer's status went undetected until revealed by its new president. We do not know why it took that long. It may be that Revenue had too many other audits and investigations to complete such that this taxpayer was overlooked. Given the great volume of businesses in this state, that explanation is entirely conceivable. Regardless, however, it is not the responsibility of the Department of Revenue to make inquiries to the other offices. Indeed, the taxes imposed by the Revenue Act are of a self-assessing nature. The burden is placed upon each taxpayer or would-be taxpayer to correctly inform itself of its obligations under the Act. Information in that regard is freely available without charge from any Revenue office.

The Washington Supreme Court addressed the topic of estoppel in Kitsap-Mason Dairymen's Association v. State Tax Commission, 77 Wn.2d 812, 818 (1970), when it said, "The doctrine of estoppel will not be lightly invoked against the state to deprive it the power to collect taxes." In Harbor Air Service, Inc. v. Board of Tax Appeals, 88 Wn.2d 359, 366-67 (1977) it set out the elements of estoppel as follows:

Three elements must be present to create an estoppel: (1) an admission, statement, or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

If the Department had made inquiries of other offices, learned of the taxpayer's existence, and done nothing about it, that would be grounds for at least considering estoppel in that such inaction could be construed as implicit condonation of the taxpayer's unregistration. There is no evidence other than pure hearsay in the record, however, that such inquiries

were ever made or such knowledge ever garnered by the Department.² Without same and without an affirmative statement by the Department to the effect that the taxpayer was not required to register, there is no "admission, statement, or act inconsistent with the claim afterwards asserted." Consequently, the key first element for estoppel is absent which fact invalidates the entire theory.

As to the second issue, tax assessed for the years 1979 and 1980, the taxpayer's petition is also denied.

DECISION AND DISPOSITION:

The taxpayer's petition is denied. Because the due date has been extended for the sole convenience of the Department, interest will be waived for the period from May 28, 1986 through the new due date. The balance of Tax Assessment No. . . . in the amount of \$. . . plus unwaived statutory interest of \$. . . for a total of \$. . . is due for payment by March 26, 1987. The balance of Tax Assessment No. . . . in the amount of \$. . . plus unwaived statutory interest of \$. . . for a total of \$. . . is also due for payment by March 26, 1987.

DATED this 6th day of March 1987.

²Hopefully, in the future registration by a business with some but not all of the required authorities will be less likely. Effective January 2, 1987 the Unified Business Identifier program was instituted whereby such a business can register with all required agencies at one stop on one form. Among others, the one-stop registration service is offered by all field offices of the Departments of Revenue, Employment Security, and Labor and Industries.