

Cite as Det. No. 06-0088, 26 WTD 201 (2007)

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. 06-0088
)	
...)	
)	Registration No. . . .
)	Doc. No. . . . /Audit No. . . .
)	Docket No. . . .
)	

RULE 228; RCW 82.32.090: PENALTIES – NEGLIGENT PENALTY – IMPOSITION – SPECIFIC WRITTEN INSTRUCTIONS. The negligent penalty, RCW 82.32.090(5), was not properly assessed where a prior assessment clearly set forth, in writing, the nexus and receipt requirements for Washington taxable sales but did not explain that these instructions were “specific written instructions” and that failure to follow the instructions may subject the taxpayer to penalties.

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.

STATEMENT OF THE CASE:

C. Pree, A.L.J – Out-of-state manufacturer that was on active nonreporting status petitions for waiver of penalties because it was unaware it continued to have nexus with Washington and failed to qualify for that status. We conclude that lack of knowledge of Washington tax obligations is not grounds for waiver of the late payment and assessment penalties and deny the petition with respect to those penalties. However, we conclude that the negligent penalty does not apply and grant the petition with respect to that penalty.¹

ISSUE:

May we waive penalties where a taxpayer, who was on active nonreporting status and did not qualify for that status, failed to pay its taxes because it was unaware tax was due?

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

FINDINGS OF FACT:

The taxpayer is an out-of-state manufacturer that makes wholesale sales to Washington customers. The taxpayer made taxable wholesale sales into Washington in excess of \$28,000² each year, but did not pay wholesaling B&O tax, for the period of January 1, 2002, through March 31, 2005. Accordingly, the Taxpayer Accounts Administration Division of the Department of Revenue (“TAA”) issued an assessment of wholesaling B&O tax of \$. . . delinquent penalty of \$. . ., negligent penalty of \$. . ., assessment penalty of \$. . ., and interest of \$. . . . The assessment, which was issued on August 11, 2005, assessed wholesaling B&O tax well in excess of \$4,800 for each year.³ The taxpayer paid \$. . . and petitions for waiver of the penalties.

The taxpayer had been audited previously, for the period of January 1, 1998, through December 31, 2001. The taxpayer was assessed wholesaling B&O tax as a result of that audit, as well. In that audit, the Department recognized that the taxpayer delivered its products into Washington by its own truck and by common carrier and detailed the nexus and receipt requirements for Washington taxable sales, as set forth in WAC 458-20-193 (Rule 193). . . . The assessment explained, “Any out-of-state seller, either directly (resident and/or nonresident employee) or by an agent or other representative (not an employee), who performs services to establish or maintain a sales market in Washington is subject to the B&O tax.” The assessment did not explain that these instructions were “specific written instructions” or that failure to follow the instructions may subject the taxpayer to penalties.⁴

The taxpayer filed “no tax due” returns for 2002; as a result, the Department placed the taxpayer on active nonreporting status.

In its petition for correction of the assessment under review here, the taxpayer explained it began using a common carrier for delivery of its products to Washington customers effective January 1, 2003, and the taxpayer’s former controller believed that because it no longer used its truck to make deliveries, it was relieved from Washington tax liability.

² As will be discussed below, RCW 82.32.045 provides that the Department may relieve a person of the requirement to file returns if, in addition to other conditions, the person’s Washington gross proceeds of sales are less than \$28,000 per year.

³ Generally, if a taxpayer’s estimated annual tax liability exceeds \$4,800 per year, it is required to file monthly returns.

⁴ See RCW 82.32.090(5).

ANALYSIS:

RCW 82.32.045 explains that excise tax returns are generally due monthly within twenty days after the end of the month in which the taxable activities occur.⁵ Thus, during the audit period, absent instructions from the Department to the contrary, the taxpayer should have been filing monthly excise tax returns. There is no question that the taxpayer continued to have nexus during the audit period, that it continued to make Washington taxable sales, and that those sales resulted in an estimated annual tax liability in excess of \$4,800 (the threshold for monthly filing).

The fact that the Department . . . placed the taxpayer on active nonreporting status⁶ in 2003 does not relieve the taxpayer from the responsibility for filing returns. The Department placed the taxpayer on active nonreporting status based on erroneous returns the taxpayer filed for 2002, and the taxpayer had a duty to inform the Department that it did not qualify for active nonreporting status. WAC 458-20-101 (Rule 101)(3)(c) explains:

Persons placed on an active nonreporting status by the department are required to timely notify the department if their business activities do not meet any of the conditions [for qualification for active nonreporting status]. These persons will be removed from an active nonreporting status, and must file tax returns and remit appropriate taxes to the department, beginning with the first period in which they do not qualify for an active nonreporting status.

See also RCW 82.32.045. Thus, Rule 101 makes it clear that it is a taxpayer's responsibility to inform the Department that it did not qualify as an active nonreporter. *See also* Det. No. 01-0193, 21 WTD 264 (2002). However, the taxpayer did not inform the Department that it did not qualify for active nonreporting status, and it did not file returns.

RCW 82.32.090 sets forth the penalties imposed in this case:

⁵ However, the Department may relieve a taxpayer from the obligation of filing monthly and may require the return to cover other longer reporting periods if the taxpayer's income does not exceed certain thresholds. Generally, a taxpayer will be placed on a quarterly filing basis if its estimated annual tax liability is between \$1,050 and \$4,800 per year; if its estimated annual liability exceeds this amount, generally it will be required to file monthly. A quarterly taxpayer must file its returns on or before the last day of the month next succeeding the end of the period covered by the return. RCW 82.32.045.

⁶ RCW 82.32.045 provides that the Department may relieve a person of the requirement to file returns if, in addition to other conditions, the person's Washington gross proceeds of sales are less than \$28,000 per year. This is known as "active nonreporting status." *See* WAC 458-20-101 (Rule 101). The taxpayer's gross proceeds of sales exceeded \$28,000 each year of the audit period; thus, the taxpayer never qualified for active nonreporting status.

(1) If payment of any tax due on a return to be filed by a taxpayer 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 on or before the last day of the month following the due date, there shall be assessed a total penalty of fifteen percent of the amount of the tax under this subsection; and if the tax is not received on or before the last day of the second month following the due date, there shall be assessed a total penalty of twenty-five percent of the amount of the tax under this subsection. No penalty so added shall be less than five dollars.

(2) If the department of revenue determines that any tax is due, there shall be assessed a penalty of five percent of the amount of the tax determined by the department to be due; and if payment of any tax determined by the department to be due is not received by the department by the due date specified in the notice, or any extension thereof, there shall be assessed a total penalty of fifteen percent of the amount of the tax under this subsection; and if the tax is not received on or before the thirtieth day following the due date specified in the notice of tax due, or any extension thereof, there shall be assessed a total penalty of twenty-five percent of the amount of the tax under this subsection. No penalty so added shall be less than five dollars. . . .

(5) If the department finds that all or any part of a deficiency resulted from the disregard of specific written instructions as to reporting or tax liabilities, the department shall add a penalty of ten percent of the amount of the additional tax found due because of the failure to follow the instructions. A taxpayer disregards specific written instructions when the department of revenue has informed the taxpayer in writing of the taxpayer's tax obligations and the taxpayer fails to act in accordance with those instructions The department shall not assess the penalty under this section upon any taxpayer who has made a good faith effort to comply with the specific written instructions provided by the department to that taxpayer. Specific written instructions may be given as a part of a tax assessment, audit, determination, or closing agreement, provided that such specific written instructions shall apply only to the taxpayer addressed or referenced on such documents. Any specific written instructions by the department of revenue shall be clearly identified as such and shall inform the taxpayer that failure to follow the instructions may subject the taxpayer to the penalties imposed by this subsection.

The legislature, through its use of the word "shall" in RCW 82.32.090 has made the assessment of penalties mandatory. *See, e.g.*, Det. No. 99-042, 19 WTD 784 (2000); Det. No. 98-047, 17 WTD 186 (1998); Det. No. 88-168, 5 WTD 253 (1988); Det. No. 87-300, 4 WTD 101 (1987); Det. No. 86-238, 1 WTD 125 (1986). As an administrative agency, the Department is given no discretionary authority to waive or cancel penalties. *See, e.g.*, Det. No. 99-042; Det. No. 87-300; Det. No. 86-238.

We will first address whether the taxpayer was liable for the various penalties that were imposed; we will then address whether the taxpayer qualifies for waiver of any of the penalties. RCW 82.32.090(1) imposes the delinquent penalty. The taxpayer was liable for the 25%

delinquent penalty for the entire audit period because the taxpayer failed to timely pay its taxes throughout the period.⁷ The assessment penalty, RCW 82.32.090(2), is due whenever the Department issues an assessment; accordingly, this penalty was properly due.

However, we conclude that the negligent penalty, RCW 82.32.090(5), was not properly assessed. The taxpayer had been audited previously, and the assessment resulting from that audit clearly set forth, in writing, the nexus and receipt requirements for Washington taxable sales. However, the assessment did not explain that its instructions were “specific written instructions” and that failure to follow the instructions may subject the taxpayer to penalties. RCW 82.32.090(5) mandates that the instructions be clearly identified. WAC 458-20-228 (Rule 228) further explains, “A taxpayer is considered to have received specific written instructions when the department has informed the taxpayer in writing of its tax obligations and specifically advised the taxpayer that failure to act in accordance with those instructions may result in this penalty being imposed.” Because the Department failed to explain to the taxpayer in this case that its failure to follow the audit instructions may result in a penalty, the Department is precluded from imposing the penalty.

The Department’s authority to waive or cancel penalties is set forth in RCW 82.32.105. That statute provides in pertinent part as follows:

If the department of revenue finds that the payment by a taxpayer of a tax less than that properly due or 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 penalties imposed under this chapter with respect to such tax. . . .⁸

. . .

(Footnote added.) The taxpayer explained it did not willfully or intentionally avoid paying the tax due. It was simply unaware of its Washington tax obligations. Rule 228 is an administrative rule that explains “circumstances beyond the control of the taxpayer” and provides a list of examples of circumstances considered to be beyond the control of the taxpayer. Rule 228 specifically provides that “[a] misunderstanding or lack of knowledge of a tax liability” is not a circumstance beyond the control of the taxpayer and will not qualify for waiver or cancellation of a penalty. Accordingly, we are unable to waive the penalties on the basis of the taxpayer’s lack of knowledge.

CONCLUSIONS OF LAW AND DISPOSITION:

Taxpayer's petition is granted in part and denied in part.

⁷ Had the taxpayer been an annual filer, the late payment penalty would not have applied to the first quarter of 2005; however, as discussed above, the taxpayer should have been filing its returns monthly, absent instructions from the Department to the contrary.

⁸ We note that the “one-time” waiver provision set forth in RCW 82.32.105(2) is inapplicable because the taxpayer had previous late payments.

Dated this 4th day of May 2006