

Cite as Det. No. 04--268, 26 WTD 105 (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 |) | |
| |) | Det. No. 04-0268 |
| |) | |
| . . . |) | Registration No. . . . |
| |) | Document No. . . . |
| |) | Amount Appealed: . . . |

- [1] RCW 82.24.020, RCW 82.24.080, RCW 82.12.020: CIGARETTE TAX – USE TAX – FIRST POSSESSION – USE. Where a taxpayer purchased cigarettes from an out-of-state vendor and was the first possessor of the cigarettes in Washington, he is liable for the cigarette tax. Where a taxpayer used cigarettes in Washington and did not pay retail sales tax on the purchase of the cigarettes, he is liable for use tax.
- [2] RULE 228; RCW 82.24.120, RCW 82.32.090: CIGARETTE TAX – USE TAX -- PENALTIES – WAIVER –LACK OF KNOWLEDGE –PAYMENT OF TAX AND INTEREST. As an administrative agency, the Department may waive or cancel taxes, penalties and interest, but only under specific circumstances prescribed by law. Lack of knowledge of a tax liability is not grounds for waiver of that liability. The Department can waive the cigarette tax penalty for good cause, but the taxpayer must pay all taxes due and interest thereon. Where the taxpayer has not paid the taxes and interest, the Department cannot waive the penalty.

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.

C. Pree, A.L.J. -- Individual who purchased cigarettes from an out-of-state vendor protests assessment of cigarette tax, sales or use tax, penalties, and interest. We conclude that the assessment was proper and deny the petition.¹

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

ISSUE:

Can the Department of Revenue (Department) waive the assessment of cigarette tax, sales or use tax, penalties, and interest on the taxpayer's purchase of cigarettes from an out-of-state vendor because the taxpayer was unaware of the taxes?

FINDINGS OF FACT:

Prior to April 2004, the taxpayer was reported as a Washington purchaser of cigarettes from an out-of-state vendor. On April 16, 2004, the Miscellaneous Tax Division sent an education letter to the taxpayer that explained the taxes, how to voluntarily report the taxes, and the penalties for noncompliance.

On July 22, 2004, the Department issued a cigarette tax assessment against the taxpayer for the period of May 2004. The assessment resulted from the taxpayer's purchase of 20 cartons of cigarettes. The assessment was comprised of cigarette tax of \$. . . , sales or use tax of \$. . . , a possession penalty of \$. . . , interest of \$. . . , and assessment penalty of \$. . .

The assessment contained the following settlement provision:

The Department will settle this obligation as paid in full if you sign this agreement and return it with payment . . . by If you do not sign this agreement and return it with the settlement amount by . . . , you will be required to pay the total assessed amount shown above plus any additional interest and penalties required by law.

The taxpayer has not paid the assessment. In his petition for correction of the assessment, the taxpayer stated as the reason for relief "Did not know of such laws." Further, in response to a letter the Appeals Division sent to the taxpayer, the taxpayer left a telephone message to the Administrative Law Judge stating he knows nothing about these taxes.

ANALYSIS:

[1] RCW 82.24.020(1)² imposes a cigarette tax upon the possession of cigarettes. The legislative intent is to levy the tax upon the person who first possesses cigarettes in this state. RCW 82.24.080. The taxpayer purchased the cigarettes from an out-of-state vendor and was the first possessor of the cigarettes in Washington. He is therefore liable for the cigarette tax.

RCW 82.12.020³ generally imposes a use tax upon the use of tangible personal property in this state by a consumer where the consumer has not paid retail sales tax on the property. The

² RCW 82.24.020(1) provides in part, "There is levied and there shall be collected as provided in this chapter, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes."

³ RCW 82.12.020(1) provides in part, "There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a consumer: (a) Any article of tangible personal property purchased at retail."

taxpayer used the cigarettes in Washington and did not pay retail sales tax on the purchase of the cigarettes. Accordingly, the taxpayer is liable for use tax.

RCW 82.24.120 authorizes the imposition of interest with respect to the cigarette tax, as well as a penalty of \$10 per package of cigarettes possessed, as follows:

(1) If any person subject to the provisions of this chapter . . . is found to have failed to . . . pay any tax due hereunder . . . there shall be assessed and collected from such person, in addition to any tax that may be found due, a remedial penalty equal to . . . ten dollars per package of unstamped cigarettes . . . plus interest on the amount of the tax

RCW 82.32.090(2) authorizes the assessment penalty, as follows, "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."

[2] The question before us is whether the Department may waive or cancel all or any part of the taxes, interest, and penalties imposed. The legislature, through its use of the word "shall" in the statutes set forth above, has made the assessment of the taxes, penalties, and interest mandatory. *See, e.g.*, Det. No. 99-042, 19 WTD 784 (2000). As an administrative agency, the Department may waive or cancel taxes, penalties and interest, but only under specific circumstances prescribed by law. *See, e.g.*, ch. 82.32A RCW; WAC 458-20-228.

The taxpayer has provided no basis for canceling the tax assessment. The taxpayer does not deny that he was the first possessor of the cigarettes in Washington, which subjected him to the cigarette tax. Further, the taxpayer does not deny that he used the cigarettes in Washington without the payment of retail sales tax, which subjected him to the use tax. Instead, he explains only that he was unaware of the taxes. Lack of knowledge of a tax liability is not grounds for waiver of that liability. Accordingly, we are unable to waive the assessment of use tax and cigarette tax.

With respect to the waiver or cancellation of the cigarette tax penalty, RCW 82.24.120(2) provides:

The department, for good reason shown, may waive or cancel all or any part of the penalties imposed, but the taxpayer must pay all taxes due and interest thereon, at the rate as computed under RCW 82.32.050(2) from the date the tax became due until the date of payment.

With respect to the waiver or cancellation of the assessment penalty, RCW 82.32.105(1) provides:

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.

The taxpayer bears the burden of proving he qualifies for penalty waiver. *See, e.g.*, Det. No. 00-030, 20 WTD 154 (2001); Det. No. 86-261, 1 WTD 209 (1986). The taxpayer has neither alleged nor proven any circumstances that would qualify for waiver of the cigarette tax penalty or the assessment penalty.

As set forth above, the Department may waive the cigarette tax penalty if the taxpayer paid all of the tax and interest imposed. The assessment the taxpayer received gave the taxpayer the opportunity to pay the tax and explicitly stated: “If you do not sign this agreement and return it with the settlement amount [an amount that excluded the cigarette tax penalty] by . . . , you will be required to pay the total assessed amount shown above [which included the cigarette tax penalty].” The taxpayer elected not to pay the tax by the date provided in the assessment, which would have allowed the Department to waive the penalty. Because the taxpayer did not pay the tax as required for cigarette tax penalty waiver, we are unable to waive the penalty.

With respect to the assessment penalty, it is well settled that lack of knowledge is not a circumstance beyond the taxpayer’s control, which would justify penalty waiver. WAC 458-20-228 (Rule 228) (Circumstances that are generally not considered to be beyond the control of the taxpayer and will not qualify for a waiver or cancellation of penalty include “misunderstanding or lack of knowledge of a tax liability.”); Det. No. 03-0152, 22 WTD 278 (2003); Det. No. 99-042. Accordingly, we deny the taxpayer’s petition with respect to waiver of the assessment penalty.

CONCLUSIONS OF LAW AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 22nd day of December, 2004.