

Cite as 4 WTD 375 (1987)

BEFORE THE INTERPRETATION AND APPEALS DIVISION
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)	
)	No. 87-372
)	
. . .)	Registration No. . . .
)	
)	

RULE 228 AND RCW 82.32.090: PENALTY -- WAIVER --
SITUATION (6).

The Department will consider a waiver of penalties where a taxpayer makes a timely application in writing for the proper forms and they are not furnished in sufficient time to file the return before delinquent. An out-of-state business which began doing business in this state in 1986 not found to have made timely application for proper forms by registering in 1982 but not requesting 1986 excise tax returns when it began doing business here.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: December 8, 1987

NATURE OF ACTION:

The taxpayer protests the assessment of late payment penalties.

FACTS AND ISSUES:

Frankel, A.L.J. -- The taxpayer's records were examined for the period January 1, 1984 through December 31, 1986. The audit disclosed taxes, interest, and a 10 percent late payment penalty owing in the total amount of \$ X . Assessment No. .

. . in that amount was issued on April 7, 1987 with a due date of May 7, 1987.

The taxpayer is an out-of-state drilling contractor. It registered with this state in 1982, but had no business in Washington until 1986. In 1986, the taxpayer entered into two contracts in this state. The larger contract was with the City of The work commenced on that contract in June of 1986 and was completed in January of 1987. The other contract was a small subcontract for the rental of equipment with operator.

The taxpayer did not file a 1986 tax return. Before the taxpayer could get its retainage for the City of . . . contract, its records were audited. At that time the taxpayer was advised of the taxes owing.¹

The taxpayer does not dispute the assessment of taxes, but does protest the late payment penalty. The taxpayer contends that since it had registered with this state in 1982, it should not be penalized because the state never sent it the forms for reporting the taxes due. The taxpayer's controller is new and thought that obtaining the contractor's license was all that was required. She stated that if this state had sent excise tax returns to the taxpayer for 1986, that she would have sent them to the taxpayer's accountant to review for payment. Because the state sent no forms, she was not aware of the tax liability.

DISCUSSION:

1) The taxpayer objects to the imposition of a penalty for late payment since it did not know of the obligation to pay Washington taxes. The late payment penalty, however, does not

¹The Notice of Completion of the Public works contract includes the following figures:

Contract amount	\$ <u>X</u>
Additions	<u>X</u>
Deductions	(X)
Sales tax	<u>X</u>
Total	\$ X

Using those figures, the taxpayer's income from the contract was \$ X . The auditor assessed sales tax at 7.8 percent (\$ X) on that amount. After the audit, the city paid the additional \$ X in sales tax owing.

hinge on deliberate or willful delinquency. Late payment penalties have been mandated since 1965 when the legislature specifically amended the law to limit the Department's discretion to waive penalties.

RCW 82.32.100 provides that if a taxpayer fails to make any return as required, the Department shall proceed to obtain facts and information on which to base its estimate of the tax. As soon as the Department procures the facts and information upon which to base the assessment, "it shall proceed to determine and assess against such person the tax and penalties due, . . . To the assessment the department shall add, the penalties provided in RCW 82.32.090." RCW 82.32.100. (Emphasis added.)

RCW 82.32.090 provides that if any tax due is not received by the Department of Revenue by the due date, there shall be assessed a penalty. The penalty for returns which are not received within 30 days after the due date is 10 percent of the amount of the tax. A 20 percent penalty is mandated for returns which are not received within 60 days after the due date.

Penalty provisions for the late payment of taxes are common. See, e.g., I.R.C. 6651. Imposition of the late penalty is viewed as a means to partially compensate the state for the additional expense in collecting taxes that are late or not paid rather than solely as a punitive measure. The state does recognize the difference between nonpayment due to lack of knowledge of a tax obligation and tax evasion. In the case of intentional tax evasion, the Department is required to impose a penalty of 50 percent of the additional tax found due. RCW 82.32.050. No evasion penalty is assessed unless misrepresentation or fraud is specifically found. No such intent was found in the present case.

The only authority to cancel penalties or interest is found in RCW 82.32.105. That statute allows the Department to waive or cancel interest or penalties if the failure of a taxpayer to pay any tax on the due date was the result of circumstances beyond the control of the taxpayer. The statute also requires the Department to prescribe rules for the waiver or cancellation of interest and penalties.

The administrative rule which implements the above law is found in WAC 458-20-228 (Rule 228, . . .). Rule 228 lists the situations which are clearly stated as the only

circumstances under which a cancellation of penalties and/or interest will be considered by the Department.

The only situation that could be considered to apply in this case is situation No. 6:

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.

The taxpayer suggests that by registering in 1982, it did make timely application for the proper forms. We do not find the rule should be construed so broadly. Once the taxpayer began doing business in Washington it had the obligation to determine its tax liability. One engaging in business in Washington reasonably could expect to pay Washington taxes.

The state does try to provide accessible taxpayer information. There are 17 regional offices around the state to assist taxpayers. The state also maintains an office of taxpayer information.² The ultimate responsibility for properly reporting and paying taxes, however, rests on persons in business. The state is not required to make sure a business knows its tax obligation before it can assess taxes, interest, or penalties.

If the taxpayer had requested forms from the Department for reporting its taxes when it began doing business in this state in 1986, and the forms had not been provided in sufficient time, we would agree situation No. 6 would apply. Instead, the taxpayer did business in this state and collected retail sales tax that had been remitted by the City of . . . during 1986, but failed to report or pay the tax to the state. We find that the assessment of the late payment penalty was valid.

DECISION AND DISPOSITION

The taxpayer's petition is denied.

DATED this 28th day of December 1987.

²The toll-free number from states other than Washington is 1-800-233-6349.

