

BEFORE THE BOARD OF TAX APPEALS
STATE OF WASHINGTON

ENERGY TECHNOLOGY)	
COMPANY, INC.,)	
)	
Appellant,)	Docket No. 36889
)	
v.)	Re: Excise Tax Appeal
)	
STATE OF WASHINGTON)	FINAL DECISION
DEPARTMENT OF REVENUE,)	
)	
Respondent.)	
_____)	

	DEPARTMENT OF REVENUE	BOARD OF TAX APPEALS
	<u>DETERMINATION</u>	<u>DETERMINATION</u>
Cancellation of Late Payment Penalties	DENIED	DENIED

This matter came before the Board of Tax Appeals (Board) for an informal hearing on November 20, 1989. The hearing follows the Department of Revenue's Determination No. 89-184 denying a cancellation of late payment penalties associated with taxes collected during the course of the appellant's 1988 business transactions. Thomas G. Erickson, President, represented the appellant, Energy Technology Company, Inc. Randolph E. Okimoto appeared for the respondent, Department of Revenue (Department).

FINDINGS

This appeal involves the denial of a request for waiver of late payment penalties imposed on the late filing of state excise tax returns for the months of February, March, August, September, and December in 1988. These penalties total \$1,371.47. Though the parties discussed late payment penalties for the year of 1989, under the structure of this appeal, the Board has jurisdiction to address only the year of 1988.

The issue before the Board is whether the illness suffered by the taxpayer's spouse had such a debilitating effect on the taxpayer as to create a situation which would allow for a cancellation of penalties under WAC 458-20-228.

The corporation of Energy Technology Company is owned and operated by Thomas G. Erickson, who is its president, administrator, and sole stockholder.¹ Mr. Erickson shoulders the primary responsibility of ensuring that required taxes are paid in full and on time. In this endeavor, he is assisted by a part-time bookkeeper. However, for the five months in question, the payments were from 58 to 86 days late.

Mr. Erickson does not deny taxes were justifiably due nor does he deny that their payment for the five months in question was untimely. Rather, he contends that the serious illness of his wife caused by prescription drug addiction exacerbated by an alcohol dependency established a situation that constituted circumstances under which a cancellation of penalties was proper. He cited RCW 82.32.105 which states, "If the department of revenue finds that . . . 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." Further, he referenced WAC 458-20-228 which states, the Department shall consider the cancellation of penalties when, "[t]he delinquency was caused by . . . serious illness of the taxpayer or his immediate family." His wife's illness, which he considered to be serious, had a significant adverse impact on the immediate family. The environment resulting from these effects created additional stress and responsibilities for Mr. Erickson. One of many adverse effects resulting from the illness was his inability to "take care of business."

In testimony, Mr. Erickson assured the Board that the basis of his appeal did not rest on the question of business hardship but rather on the situation created by the serious illness of his wife. He noted that, despite the improved business climate in the Seattle area, his corporation had been going through a transitional phase and experienced a 75 percent decrease in sales/profits from the averages encountered in 1984. These business downturns generated cash flow hardships in which Mr. Erickson acknowledged that it was necessary at times to forego paying Peter in order to pay Paul. Though his accounting was on a cash basis rather than an accrual basis, he did admit assisting

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For practical purposes, as the interests of Mr. Erickson and of the corporation in this case are one and the same, we will concentrate primarily on the circumstances as they affected Mr. Erickson directly.

his cash flow problems with the tax monies he had collected. He did not condone this practice, but indicated that it was a viable option to help him through the trying times he was experiencing with both his business and his immediate family.

The Department's representative, Mr. Okimoto, agreed with the taxpayer that RCW 82.32.105 and the supporting WAC 458-20-228 do allow for consideration of cancellation of penalties under certain circumstances. Mr. Okimoto did not question the seriousness of the illness of Mr. Erickson's wife nor his relationship to her; rather, Mr. Okimoto argued, the taxpayer had established no basis for a cause and result relationship between the illness of his wife and the delinquency of payment. The Department contended that not only did Mr. Erickson fail to prove this causal relationship, but the following observations support denial of waiver:

1. During the period in question, Mr. Erickson employed a bookkeeper who kept the books and prepared the tax returns.

2. Mr. Erickson's wife was not directly involved in running the business or in filing the tax returns.

3. Of the delinquent taxes due, 95 percent were retail sales taxes which Mr. Erickson had collected from his customers during the previous month.

4. The delinquent payment for the period in question is but a portion of a general pattern of delinquency that began as early as 1984 and has continued through late 1989.

In conclusion, the Department, without supporting documentation by the taxpayer to show a cause and effect relationship between his wife's serious illness and the delinquency of payment, could not find support for the taxpayer under RCW 82.32.105 or WAC 458-20-228.

ANALYSIS AND CONCLUSIONS

The appellant and respondent were each given full opportunity to place their arguments before the Board. The Board, having considered all the testimony and documentary evidence submitted by the parties in support of their respective positions, hereby enters the following analysis and conclusions:

RCW 84.36.865 authorizes the Department of Revenue to make rules and regulations to permit effective administration of the exemption statutes.

"The burden rests upon the one claiming exemption to show clearly that the property is within the exempting statute." (Citations omitted.) WAC 458-16-100(5).

Taxation is the rule and exemption is the exception. Department of Revenue v. Schaake Packing Co., 100 Wn.2d 79, 84, 666 P.2d 367 (1983); Student Housing v. Department of Revenue, 41 Wn.App. 583, 705 P.2d 793 (1985).

The basic facts in this case are not in dispute; rather, it is the interpretation of the law and the determination and application of the appropriate statutes. The Board, not unlike the Department, has no problem in accepting the serious nature of Mrs. Erickson's illness during the time in question. Nor will we experience trepidation in favorably considering cancellation of penalties, if the taxpayer were to establish a cause and effect relationship between the illness and the reason for the delinquencies. However, such was not the case. The majority of the taxes involved are not those that a business would have to struggle to pay. Monies do not have to be generated or found in order to cover these taxes as one might have to in the payment of taxes on real or personal property.

Approximately 95 percent of all the delinquent taxes in question were attributable to retail sales taxes. The law requires that these taxes be billed separately, collected, and held in trust by the company for remittance to the Department. In this instance, the company is simply a conduit. The company in essence is a trustee and it may not use monies for its own purpose. RCW 82.08.050 is quite clear on this point,

The tax required by this chapter, to be collected by the seller, shall be deemed to be held in trust by the seller until paid to the department, and any seller who appropriates or converts the tax collected to his own use or any use other than the payment of tax to the extent that the money required to be collected is not available for payment on the due date as prescribed in this chapter shall be guilty of a gross misdemeanor.

Our point here is not to highlight the effect of using the money for other purposes, but rather that the money cannot be used for other purposes and must be available for payment on the due date. The appellant freely admitted that the due dates were not simply overlooked because of the circumstances surrounding his family;² that the money was not in an account available for

payment of the required taxes; and that he used the monies to alleviate his cash flow problems. Though Mr. Erickson testified he informally sought help from professional acquaintances to help him through the depression he experienced during the time in question, there was no evidence to indicate the level of depression or the level and result of the counseling. Neither was there any evidence to suggest that the family situation caused other adverse aberrations in Mr. Erickson's normal routine.

Based on the facts that no cause and effect relationship was established, that the money collected and available was used for other purposes, and that no apparent effort was exercised to overcome what appears to be a chronic delin-quency pattern, this Board reaches the following

DECISION

Determination No. 89-184 (Registration No. C600 524 841), issued on March 29, 1989, by the State of Washington Department of Revenue, is affirmed.

The Department of Revenue is hereby directed to abide by and give full effect to the provisions of this decision.

DATED this _____ day of _____, 1989.

BOARD OF TAX APPEALS

RICHARD A. VIRANT, Vice Chair

MATTHEW J. COYLE, Member

* * * * *

A timely Petition for Reconsideration may be filed to this Final Decision pursuant to WAC 456-09-955, a copy of which was provided to you earlier.

His action of filing payments without enclosing a remittance supports the premise that he had knowledge of the requirement to file the tax returns on a timely basis.

