

Cite as Det. No. 01-103, 21 WTD 128 (2002)

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. 01-103
)	
...)	Registration No. . . .
)	Docket No. . . .
)	Notice of Balance Due . . .

...

[2] RULE 22802: EFT PAYMENT – NOTIFICATION THAT REQUIRED TO PAY BY EFT. Inability of the Department to prove it notified a taxpayer that the taxpayer was required to pay by electronic funds transfer (EFT) at least three months prior to the start of the EFT payment requirement, does not excuse the taxpayer from the EFT payment deadline if the taxpayer received actual notice of the EFT requirement reasonably prior to the EFT payment due date. A taxpayer who has been notified that it is EFT-mandatory, who pays by mail instead of by EFT, will be assessed a late penalty if the payment is not in the Department’s bank by the EFT payment due date.

[3] RULE 22802: EFT PAYMENT -- NOTIFICATION TO TAXPAYER. Generally, Department notification of a taxpayer need only be addressed to the address of the taxpayer as shown by the records of the Department. Notification that a taxpayer is required to pay by electronic funds transfer (EFT) is not an exception to that general principle.

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.

NATURE OF ACTION:

Taxpayer protests the assessment of a late payment of return penalty with respect to a payment the Department received after the electric funds transfer (“EFT”) payment due date. The

taxpayer contends it was not required to pay by EFT, because the Department did not notify it as provided in WAC 458-20-22802(3)(c), and that it timely paid by mail.¹

FACTS:

Prusia, A.L.J. -- The taxpayer is a large construction company headquartered [outside Washington]. The taxpayer has engaged in construction activity in Washington since about 1966, and has an office in . . . , Washington.

The taxpayer files its Washington state excise tax returns monthly. Under Department statute and rule, the taxpayer was required to pay its excise taxes with an electronic funds transfer (EFT) during 2000. "Electronic funds transfer," or "EFT," is defined by statute as "any transfer of funds, other than a transaction originated by check, drafts, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account." RCW 82.32.085.

EFT payments for the October 2000 tax period had to be received by the Department by November 28, 2000. The taxpayer mailed its return and payment for October 2000 to the Department on November 27, 2000. The Department received the payment on November 30, 2000. On that date, the Department assessed a five-percent late payment penalty, in the amount of \$. . . , for late payment of the tax due on the October return.

On December 8, 2000, the Department issued notice of balance due number . . . , in the amount of the late payment penalty for October 2000. The notice was mailed to the taxpayer at its . . . , Washington, address. The notice stated the following reason for the penalty:

EFT taxpayers must allow sufficient time so that collectible U.S. funds are received in the state bank by the EFT payment due date. The EFT due date is 5:00 PM, Pacific Time, on the next banking day following the tax return due date. Penalty has been assessed since your check was not received timely.

The taxpayer petitions for correction of the penalty assessment, contending the penalty should be cancelled. The taxpayer concedes it was required by WAC 458-20-22802 (Rule 22802) to pay by EFT for October 2000. However, it argues, that rule provision did not apply to the taxpayer, because the Department failed to comply with another section of the same rule, which requires three months advance notification to a taxpayer that the taxpayer is required to pay by EFT. The taxpayer argues that unless the Department can show it provided advance notification as provided by Rule 22802, the taxpayer was subject to the deadline for submitting payment by mail, rather than the EFT deadline, and it met the mailing deadline for October 2000 taxes.

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

The Department's Taxpayer Account Administration (TAA) Division has responded that it cannot locate records showing it sent this taxpayer a notice of the taxpayer's EFT responsibility at least three months prior to the date the taxpayer became EFT mandatory, but it was the Department's practice to send all affected taxpayers actual notice of their EFT responsibility. Department records show the Department set up the taxpayer as EFT mandatory at the end of 1991, and the Department would have sent the taxpayer a prior notice. TAA also provided copies of the Department's "Tax Topics" publications numbers 27 (for October-December 1992) and 31 (for October-December 1993), showing the Department advised taxpayers generally of who was required to pay by EFT.

TAA also responded that the taxpayer knew it was required to pay by EFT. TAA provided as evidence, copies of Department computerized records, and copies of March 1999 correspondence between TAA and a bookkeeper in the taxpayer's . . . , Washington office, [bookkeeper]. The computerized records show the Department received the taxpayer's excise tax payment for December 1998 late, and assessed a late penalty. The Department sent the penalty notice to the taxpayer at its . . . , Washington, address. A computerized note generated March 3, 1999, indicates TAA received correspondence from [bookkeeper], a bookkeeper in the taxpayer's . . . office, requesting waiver of that penalty on the basis the taxpayer did not know it was EFT mandatory. The records show TAA waived the penalty for that late payment on a one-time basis. The copies of correspondence include a faxed letter from [bookkeeper] to a TAA employee, dated March 9, 1999, requesting waiver of the penalty for December 1998, and stating, in part: "You stated we are required to use the ACH payment method and have only stopped using it at our Home Office Request. I did not know we were mandatory."

ISSUE:

May the Department cancel the late payment of return penalty for the October 2000 tax period under the circumstances presented?

DISCUSSION:

Except as otherwise provided by statute or Department rule, excise tax returns and payments on those returns are due monthly, within twenty-five days after the end of the month in which the taxable activities occur. RCW 82.32.045. If the date for the payment of the tax due on a tax return falls upon a Saturday, Sunday, or legal holiday, the filing is considered timely if performed on the next business day. WAC 458-20-228(4)(a) (Rule 228).

RCW 82.32.080 requires taxpayers to pay excise tax by EFT when the amount of tax due in a calendar year exceeds a specified dollar figure. When payment is by EFT, the EFT "is to be completed so that the state receives collectible funds on or before the next banking day following the due date." RCW 82.32.085. The EFT requirement went into effect in 1991, and was expanded effective with the 1992 calendar year. *See* WAC 458-20-22802(3) (Rule 22802).

Rule 22802(7) explains the EFT process. It states:²

(7) Due date of EFT payment.

(a) The EFT payment is due on or before the banking day following the tax return due date. An EFT is timely when the state receives collectible U.S. funds on or before 3:00 p.m., Pacific time, of the EFT payment due date. The ACH system, either ACH debit or ACH credit, requires that the necessary information be in the originating bank's possession on the banking day preceding the date for completion. Each bank generally has its own transaction deadlines and it is the responsibility of the taxpayer to insure timely payment.

(b) The tax return due date shall be the next business day after the original due date if the original due date falls on a Saturday, Sunday or legal holiday. Legal holidays are determined under state of Washington law and banking holidays are those recognized by the Federal Reserve System in the state of Washington.

(i) Example. The tax return due date is December 25th, a legal and banking holiday, which, for the example, falls on a Friday. The next business day would be Monday, December 28th, and this is the new tax return due date. EFT must be completed by 3:00 p.m., Pacific time, Tuesday, December 29th, which is the next banking day after the new due date. For an ACH debit user, the department's bank must have the appropriate information by 3:00 p.m., Pacific time, on Monday, December 28th.

Rule 22802(3)(c) provides:

In the interest of efficient tax administration, the department will notify those taxpayers required to pay by EFT at least three months prior to the start of their EFT payment requirement.

A taxpayer may pay by mail, if not required to pay by EFT. For mailed returns and payments, the postmark date as shown by the post office cancellation mark stamped on the envelope will be considered conclusive evidence by the department in determining if a tax return or payment was timely filed or received. Rule 228(4)(b).

RCW 82.32.090(1) provides that "[I]f 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 [plus additional penalties if the delinquency continues for specified periods]." (Emphasis added.) The legislature, through its use of the word "shall" in RCW 82.32.090, has made the assessment of the penalty mandatory. Det. No.

² The acronym "ACH" in the rule is defined in Rule 22802(2)(b). It states: "'ACH' or 'automated clearing house' means a central distribution and settlement system for the electronic clearing of debits and credits between financial institutions." There are two types of ACH transfers, "ACH debit" and "ACH credit," defined in the rule. In the former, the funds transfer is generated by the taxpayer instructing the Department's bank to charge the taxpayer's account and deposit the funds in the Department's account, while in the latter, the funds transfer is generated by the taxpayer instructing its own bank to charge the taxpayer's account and deposit the funds to the Department's account.

99-302, 19 WTD 497 (2000); Det. No. 87-300, 4 WTD 101 (1987); Det. No. 86-238, 1 WTD 125 (1986).

Rule 22802(13)(a) provides:

There are no special provisions for penalties when payment is made by EFT. The general provisions for all taxpayers apply. To avoid the imposition of penalties, it is necessary for both the filing of the tax return and the payment to be timely. Penalties may be waived only when the circumstances causing delinquency were beyond the control of the taxpayer. See: WAC 458-20-228.

The taxpayer's excise tax payment due date for the October 2000 tax period was Monday, November 27, 2000. Whether the taxpayer's payment for October 2000 was timely depends upon whether the payment was required to be made by EFT. The taxpayer mailed the payment on November 27, so the payment was timely if the taxpayer was not required to pay by EFT. Rule 228(4)(b). However, the payment was not timely if the taxpayer was required to pay by EFT. To be timely, an EFT payment for the October 2000 tax period had to be received by the Department by November 28, 2000. The Department did not receive the taxpayer's payment for October 2000 until November 30, 2000. Rule 22802.

The taxpayer does not dispute that the amount of taxes due brought it under the EFT requirement for the October 2000 tax period. The questions before us are: 1) would failure of the Department to comply with Rule 22802(3)(c) have excused the taxpayer from the EFT requirement for the October 2000 tax period; 2) does the evidence establish the Department complied with Rule 22802(3)(c) with respect to the payment due for the October 2000 tax period?

[2] . . . Rule 22802(3)(c) states the Department will notify taxpayers at least three months prior to the start of their EFT payment requirement. RCW 82.32A.020 provides, in part:

The taxpayers of the state of Washington have . . . (2) The right to rely on specific, official written advice and written tax reporting instructions from the department of revenue to that taxpayer, and to have interest, penalties, and in some instances, tax deficiency assessments waived where the taxpayer has so relied to their proven detriment.

[3] The taxpayer has been EFT mandatory since 1992. The Department is unable to show it notified the taxpayer of the taxpayer's EFT payment requirement at least three months prior to the start of the requirement. However, the Department has shown it notified the taxpayer of the taxpayer's EFT requirement on or before March 9, 1999, which was more than three months prior to the payment due date for the October 2000 payment. The letter from [bookkeeper] to the Department, faxed March 9, 1999, and the Department's computerized notes, confirm the Department informed the taxpayer of the EFT requirement when it penalized the taxpayer for the late payment for December 1998.

We conclude the 1999 notification satisfies the Rule 22802(3)(c) requirement. We do not need to, and do not, reach the question whether evidence of a routine Department practice of notifying all affected taxpayers of their EFT requirement, or Department publications such as “Tax Topics,” would be sufficient to satisfy the Rule 22802(3)(c) provision. We note, however, that Washington Rule of Evidence 406 (ER 406) provides as follows with respect to evidence of routine business practice:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

At hearing, the taxpayer argued that the notification referenced in [bookkeeper]’s March 9, 1999 letter did not satisfy the rule’s notification provision, because notice was not to someone having management authority or responsibility. It stated the only persons having management authority or responsibility were in the company headquarters [outside Washington] Texas, and argued the notice had to have been sent to the company headquarters to be effective. The taxpayer stated [bookkeeper] did not have management responsibility, and argued she may not have understood the EFT requirement. The taxpayer argued the company obviously was still unaware of the EFT requirement after the Department’s interaction with [bookkeeper], because it continued to mail its tax payments rather than pay by EFT. It argued the purpose of Rule 22802(3)(c) was that the company actually receive notice, and notifying someone like [bookkeeper] was not the notification required by the provision.

[3] We conclude notice to personnel in the taxpayer’s [Washington] office was sufficient notice to the taxpayer. Even formal notices and orders mailed to a taxpayer need only be addressed to the address of the taxpayer as shown by the records of the Department. *See* RCW 82.32.130. The Department mailed the late payment penalty assessment for December 1998 to the taxpayer at its . . . , Washington address. That was the address of the taxpayer shown by the records of the Department. [Bookkeeper]’s March 9, 1999 letter shows personnel in the [Washington] office then understood that the taxpayer was required to pay by EFT. Moreover, the evidence does not suggest [bookkeeper] was without authority to act on behalf of the taxpayer. [Bookkeeper] was the person who made the waiver request for December 1998 on the taxpayer’s behalf.

In sum, we conclude the Department satisfied the provisions of Rule 22802(3)(c) with respect to the EFT payment for October 2000.

The taxpayer has not requested waiver of cancellation of the late payment penalty on any other basis. We note the Department’s only authority to cancel penalties, other than that set out in RCW 82.32A.020(2), is RCW 82.32.105. RCW 82.32.105(1) provides the Department shall waive or cancel penalties if it finds that the failure to pay any tax by the due date was “the result of circumstances beyond the control of the taxpayer.” Subsection (2) of the same statute provides that when the circumstances do not qualify under subsection (1), the Department shall cancel the penalty if the taxpayer has timely filed and remitted payment on all tax returns due for that tax program for a

period of twenty-four months immediately preceding the period covered by the return for which the waiver is being requested.

Subsection (2) of RCW 82.32.105 would not apply in this case because of the above-referenced late payment for December 1998.

A Department rule, WAC 458-20-228 (Rule 228), set out examples of circumstances that may be considered beyond the control of the taxpayer, and provides that the taxpayer bears the burden of establishing that the circumstances were beyond its control and directly caused the late payment. The taxpayer has not alleged any of the listed circumstances.³ As an administrative agency, the Department is given no discretionary authority to waive or cancel penalties. *See* Det. No. 87-300, *supra*; Det. No. 86-238, *supra*.

The Department has no authority to cancel the late payment of return penalty under the circumstances presented. Therefore, the penalty assessment is sustained.

³ The listed circumstances are:

(A) The return payment was mailed on time but inadvertently sent to another agency.

(B) Erroneous written information given to the taxpayer by a department officer or employee caused the delinquency. A penalty generally will not be waived when it is claimed that erroneous oral information was given by a department employee. The reason for not cancelling the penalty in cases of oral information is because of the uncertainty of the facts presented, the uncertainty of the instructions or information imparted by the department employee, and the uncertainty that the taxpayer fully understood the information given. Reliance by the taxpayer on incorrect advice received from the taxpayer's legal or accounting representative is not a basis for cancellation of a penalty.

(C) The delinquency was directly caused by death or serious illness of the taxpayer, or a member of the taxpayer's immediate family. The same circumstances apply to the taxpayer's accountant or other tax preparer, or their immediate family. This situation is not intended to have an indefinite application. A death or serious illness which denies a taxpayer reasonable time or opportunity to obtain an extension or to otherwise arrange timely filing and payment is a circumstance eligible for penalty waiver.

(D) The delinquency was caused by the unavoidable absence of the taxpayer or key employee, prior to the filing date. "Unavoidable absence of the taxpayer" does not include absences because of business trips, vacations, personnel turnover, or terminations.

(E) The delinquency was caused by the destruction by fire or other casualty of the taxpayer's place of business or business records.

(F) The delinquency was caused by an act of fraud, embezzlement, theft, or conversion on the part of the taxpayer's employee or other persons contracted with the taxpayer, which the taxpayer could not immediately detect or prevent, provided that reasonable safeguards or internal controls were in place. *See* subsection (9)(a)(iii)(E).

(G) The taxpayer, prior to the time for filing the return, made timely application to the Olympia or district office for proper forms and the forms were not furnished in sufficient time to permit the completed return to be paid before its due date. In this circumstance, the taxpayer kept track of pending due dates and reasonably fulfilled its responsibility by timely requesting replacement returns from the department.

DECISION AND DISPOSITION:

The taxpayer's petition for correction of penalty assessment is denied.

Dated this 20th day of July, 2001.