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BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition for	)	<u>D E T E R M I N A T I O N</u>
Refund of	)	
	)	No. 21-0206
...	)	
	)	Registration No. . . .
	)	
	)	

RULE 185; RCW 82.26.200: OTHER TOBACCO PRODUCTS – A Taxpayer’s erroneous belief that the OTP tax was the responsibility of the seller of the product and lack of knowledge about the taxes applicable to the sale of these products does not excuse liability for the OTP tax.

RULE 228; RCW 82.32.090, RCW 82.32.105: LATE PAYMENT PENALTY – WAIVER OF PENALTY. A Taxpayer’s mistake about the due date resulted in initiating a payment on the day after the actual due date. This late payment was the result of a misunderstanding or lack of knowledge, which is expressly defined as a circumstance that is not considered to be beyond the control of a taxpayer and so will not support a waiver of 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.

Kreger, T.R.O. An operator of a convenience store protests the assessment of tax attributable to the sale of cigarettes without the correct endorsements and purchasing tobacco products from an unlicensed distributor. The Taxpayer also protests assessment of a late payment penalty as the payment was made the day after the due date. The Taxpayer asserts that the errors made were attributable to inexperience and that the slight delay in payment should be excused as the Taxpayer believed the payment was being made on the due date. The Taxpayer’s lack of experience does not provide a basis to excuse the failure to remit the tax due. The payment at issue was late and properly subject to the penalty assessed. We deny the Taxpayer’s petition.<sup>1</sup>

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

## ISSUES

1. Whether the Taxpayer's lack of knowledge and inexperience with the taxes applicable to the sale of Other Tobacco Products provides a basis to excuse its failure to . . . remit the taxes due on such sales under RCW 82.26.020 and WAC 458-20-185.
2. Whether Taxpayer's belief it was remitting payment for an assessment on the due date after business hours, where the payment was actually remitted on the day after the due date, constitutes a circumstance beyond its control under RCW 82.32.105 and WAC 458-20-228 supporting the waiver of the late payment penalty.

## FINDINGS OF FACT

. . . (Taxpayer) is a Washington corporation engaged in the business of operating a convenience store. The Taxpayer commenced operations in 2017. The Taxpayer's Washington business activities included sale of groceries, beer, wine, tobacco products, cigarettes, and prepared food items.

The Department of Revenue's (Department) Audit Division initiated an audit of the Taxpayer's business activities for the period of January 1, 2016, through September 30, 2018 (audit period). During the course of the audit, the Washington State Liquor & Cannabis Board's Enforcement Division (WSLCB) – Tobacco Tax Unit provided a report to the Audit Division. The WSLCB had conducted an inspection of the Taxpayer's business on July 18, 2017, and found the Taxpayer to be in violation of RCW 82.24.500, selling cigarettes without the cigarette endorsement, and in violation of RCW 82.26.200, purchasing tobacco products from an unlicensed distributor. The report was submitted to the Department and was provided to the auditor on May 12, 2020.

The Department subsequently issued a balance due notice to the Taxpayer in the amount of \$ . . . <sup>2</sup> The Taxpayer timely filed a petition for review contesting the assessment. The tax assessed was attributable to the disallowance of deductions for exempt food sales the Taxpayer had improperly taken against business and occupation (B&O) tax, and the assessment on unreported other tobacco products (OTP) tax. The audit report provided to the Taxpayer included future reporting instructions and a negligence warning of additional penalties if the instructions provided were disregarded. The assessment was due for payment on December 14, 2020. The Taxpayer remitted payment for the assessment on December 15, 2020, at which time an additional late payment penalty of \$ . . . had been added to the balance due.

The Taxpayer does not substantively dispute liability for the tax at issue, but rather attributes the failure to remit the tax due on OTP to its lack of experience and the fact that the applicable regulations and procedures on sales of tobacco products were not clearly explained to the Taxpayer by the Department prior to the audit. When it obtained its license to sell tobacco products, the Taxpayer reviewed the WSLCB's web site and based on that review believed that tax on cigars was paid by the manufacturer and that it did not owe additional tax on those sales.

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<sup>2</sup> The balance due notice consists of a tax adjustment of \$ . . . with \$ . . . of that tax being attributable to disallowed deductions and the balance being other tobacco products tax, interest of \$ . . . , and a penalty adjustment of \$ . . .

The Taxpayer asserts that its mistake was not willful but rather was an inadvertent error based on its lack of knowledge regarding the sale of tobacco products. The Taxpayer also notes that it did not retain or profit from the failure to remit the OTP tax liability. However, the invoices provided by the Taxpayer did not include tax[,] and prior to the audit the Taxpayer had never reported tobacco sales to the Department of Revenue.

The Taxpayer also protests the additional late payment penalty of \$ . . . that was added to the balance due because the assessment was paid a day late. The Taxpayer believed that the due date was December 15, 2020, and that it was paying the assessment on the due date after 5:00 p.m. The due date on the assessment was December 14, 2020. Department records show that the payment was initiated on December 15, 2020, as an electronic transfer and that the funds were received by the Department on December 17, 2020. The Taxpayer seeks waiver of this additional penalty amount as it believed that it was making a payment on the due date.

### ANALYSIS

The Washington tax system is based largely on voluntary compliance. Because of that, the Washington [L]egislature has placed upon taxpayers the responsibility to know their tax reporting obligations, and to seek instructions from the Department when they are uncertain about those obligations. RCW 82.32A.005(2) and RCW 82.32A.030(2). Taxpayers also have a legal duty to maintain their records in such a manner that their tax liabilities can be determined. RCW 82.32.070.

Washington imposes a tax upon tobacco product distributors for the sale, handling, or distribution of tobacco products in this state.<sup>3</sup> RCW 82.26.020; *see also* RCW 82.26.030 (“It is the intent and purpose of this chapter to levy a tax on all tobacco products sold, used, consumed, handled, or distributed within this state and to collect the tax from the distributor as defined in RCW 82.26.010.”). As the term “tobacco products” refers to tobacco products other than cigarettes, this tax is commonly referred to as OTP tax. WAC 458-20-185(1).

The OTP tax is imposed only once, upon the “distributor” of the OTP. RCW 82.26.020(2); RCW 82.26.030; WAC 458-20-185(102). The OTP tax is in addition to all other taxes owed, such as retailing or wholesaling business and occupation tax, retail sales tax, and litter tax. WAC 458-20-185(1). There are also additional record keeping obligations applicable to the sales of tobacco products.<sup>4</sup> *See* RCW 82.26.060; [RCW 82.26.080; WAC 458-20-185(401)].

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<sup>3</sup> “Tobacco product” is statutorily defined as:

. . . cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco, snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking, and any other product, regardless of form, that contains tobacco and is intended for human consumption or placement in the oral or nasal cavity or absorption into the human body by any other means, but does not include cigarettes as defined in RCW 82.24.010.

RCW 82.26.010(21).

A tobacco products “retailer” is defined under RCW 82.26.010(17) as “any person engaged in the business of selling tobacco products to ultimate consumers.” A tobacco products “distributor” includes “any person engaged in the business of selling tobacco products in this state who handles for sale any tobacco products that are within this state but upon which tax has not been imposed.” RCW 82.26.010(8)(d).

When a tobacco products retailer handles untaxed tobacco products for sale, it becomes a tobacco products distributor, liable for the tobacco products tax on such items. RCW 82.26.010(8)(d); RCW 82.26.020. *See also* WAC 458-20-185 (205) (“For example, if a retailer buys tobacco from an Indian retailer or an out-of-state wholesaler who does not have a tobacco distributor license, the retailer must obtain a distributor license and pay the tobacco tax due. . .”).

In this case the Taxpayer erroneously believed that the tax liability for the OTP resided with the sellers from whom it purchased the products. Taxpayer asserts that it did not understand or appreciate that it was purchasing products on which tax had not been imposed triggering its liability for the tax at issue. While the Taxpayer did conduct some preliminary research and erroneously believed the OTP tax liability to be the obligation of others, the fact that it made purchases where no such tax was included on the invoices should have triggered additional inquiry. The Taxpayer had an obligation to become informed about its tax obligations related to the sale of tobacco products and did not do so. *See* RCW 82.32A.030(2). The fact that it was inexperienced with the taxes applicable to the sales of these products provides an explanation for the error but does not excuse the liability for the tax at issue.

Lack of knowledge simply is not a basis for excusing the nonpayment of taxes or for waiving statutorily imposed penalties and interest on such delinquencies. Det. No. 91-313R, 12 WTD 45 (1993); Det. No. 89-266, 7 WTD 349 (1989). The Department has a corresponding responsibility to provide tax information and assist taxpayers in understanding their tax liabilities; however, the duty of inquiry is squarely upon the taxpayer. RCW 82.32A.030. The Taxpayer’s inexperience and misunderstanding regarding its liability for the OTP taxes at issue does not provide a basis to waive liability for the taxes properly due[,] and we deny the Taxpayer’s petition on this issue.

With regard to the late payment penalty under . . . [RCW 82.32.090(2)], the Taxpayer erroneously believed that it was remitting the payment on the due date.<sup>4</sup> The Department is given no discretionary authority to waive or cancel penalties. Det. No. 87-300, 4 WTD 101 (1987). The Department’s . . . authority to waive or cancel [late payment] penalties is set forth in RCW

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<sup>4</sup> . . . [RCW 82.32.090(2) provides in relevant part:

If the department of revenue determines that any tax has been substantially underpaid, there is assessed a penalty of five percent of the amount of the tax determined by the department to be due. 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 is assessed a total penalty of fifteen percent of the amount of the tax under this subsection; and if payment of any tax determined by the department to be due 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 is assessed a total penalty of twenty-five percent of the amount of the tax under this subsection. No penalty so added may be less than five dollars.]

82.32.105(1), which provides that the Department may waive penalties if it finds that the late payment of taxes due resulted from circumstances beyond the control of the taxpayer.

WAC 458-20-228 addresses the waiver of penalties and provides additional information on the type of circumstances that are considered beyond the taxpayer's control and thus sufficient to support a waiver of penalties. The rule notes that the taxpayer bears the burden of establishing that the circumstances were beyond its control and directly caused the late payment. WAC 458-20-228(9)(a)(i). The circumstances beyond the control of the taxpayer must actually cause the late payment and are generally those which are immediate, unexpected, or in the nature of an emergency. WAC 458-20-228(9)(a)(ii).

In this case the Taxpayer mistakenly believed the due date was the day after the real due date. Taxpayer's payment was initiated on the day after the due date. In this case the Taxpayer has not offered any information that establishes that its failure to timely pay was caused by circumstances beyond its control or that there were conditions that prevented it from timely remitting the payment by the due date stated on the balance due notice. The late payment at issue here is attributable to the Taxpayer having the due date wrong, which resulted in the payment being initiated on the day after the due date. The failure to timely pay is due to a misunderstanding on the Taxpayer's part and not circumstances beyond its control. Because Taxpayer has not shown that circumstances beyond its control caused its late payment, we lack the authority to waive the assessed penalties under RCW 82.32.105(1).

The Taxpayer has failed to substantiate a basis to adjust the assessment or provided a basis to waive the disputed late payment penalty. We sustain the assessment and subsequent late payment penalty and deny the Taxpayer's petition.

#### DECISION AND DISPOSITION

Taxpayer's petition is denied, and the assessment and additional penalty are sustained as issued.

Dated this 15<sup>th</sup> day of December 2021.