

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. 98-066
	)	
...	)	Registration No. . . .
	)	FY. . . /Audit No. . . .
	)	
	)	

RULE 228; RCW 82.32.105: B&O TAX -- DELINQUENCY PENALTY --  
WAIVER -- PRIOR AUDIT -- AFFILIATE. Failure by the Department to  
recognize and notify taxpayers of their obligations when auditing affiliates or  
related entities is not a basis for waiving penalties, even though the taxpayers'  
records were available for review.

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:

A partnership, affiliated with a corporation the Department had audited, requests a waiver of late  
payment penalties.<sup>1</sup>

FACTS:

M. Pree, A.L.J. -- . . . (taxpayer) purchased, traded, and developed property in Washington.  
Several affiliates or related entities, owned by many of the same individuals, performed similar  
activities in other parts of Washington.

It contracted with loggers to clear land for development. The taxpayer did not register with the  
Department of Revenue (Department), and did not report any revenue from the sale of logs.

The Department's Audit Division reviewed the taxpayer's books and records for the period  
January 1, 1993 through December 31, 1996. In 1997 the Audit Division assessed business and  
occupation (B&O) tax on the taxpayer's logging revenues, plus \$ . . . interest. Because the

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

taxpayer had not filed returns and paid the tax when it would have been due, the Audit Division added a . . . delinquent penalty under RCW 82.32.090.

The taxpayer paid the tax and requests a waiver of the . . . penalty. The taxpayer feels the comprehensive audit was aggressive, and the penalty excessive. The taxpayer does not contest the tax.

The Department audited an affiliate of the taxpayer several times in the last fifteen years. The last audit of an affiliate occurred in 1994, which according to the taxpayer, resulted in no change.<sup>2</sup> During that audit, the taxpayer left its financial statements on the table for the auditor to review. The auditor audited the affiliate only, and not the taxpayer. The auditor did not provide directions regarding the taxpayer's activities or taxes.

The taxpayer states the affiliate is a responsible and cooperative tax paying entity. The owners of the affiliate, many of whom also own taxpayer, have tried to be fair, honest, and straightforward taxpayers. Considering the affiliate's reporting history, the taxpayer requests abatement of the penalty.

#### ISSUE:

Does the Department have authority to waive a penalty based upon the good conduct of an affiliate when during a prior audit of the affiliate, the Department did not provide the taxpayer instructions?

#### DISCUSSION:

If payment of any tax is not received within sixty days after the due date, the Department must assess a penalty of twenty percent. RCW 82.32.090. The Department may waive the penalty if circumstances beyond the control of the taxpayer caused the delinquency.<sup>3</sup> RCW 82.32.105. That statute also requires the Department to prescribe rules for the waiver or cancellation of penalties.

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<sup>2</sup> The taxpayer acknowledges the affiliate made reporting adjustments to comply with requests from the 1994 audit.

<sup>3</sup> Effective January 1, 1997, subsection (2) of RCW 82.32.105 provides an additional basis for relief:

(2) The department shall waive or cancel the penalty imposed under RCW 82.32.090(1) when the circumstances under which the delinquency occurred do not qualify for waiver or cancellation under subsection (1) of this section if:

(a) The taxpayer requests the waiver for a tax return required to be filed under RCW 82.32.045, 82.23B.020, 82.27.060, 82.29A.050, or 84.33.086; and

(b) 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.

We note while this new section affords relief for a history of compliance with tax laws, this taxpayer had not filed any returns until the Audit Division assessed the penalties at issue.

The administrative rule that implements the above law is found in the Washington Administrative Code 458-20-228 (Rule 228). Rule 228 clearly lists the situations that are the only circumstances under which the Department will consider a waiver or cancellation of penalties. A rule duly adopted by the Department has the same force and effect as if specifically included in the Revenue Act, unless declared invalid by a judgment of the court of record. RCW 82.32.300. No court has declared Rule 228 invalid. Det. No. 87-136, 3 WTD 067 (1987).

Subsection (6) of Rule 228 lists the only circumstances under which the Department will waive a delinquent payment penalty on grounds, "the failure of a taxpayer to pay any tax by the due date was due to circumstances beyond the control of the taxpayer." Det. No. 94-229, 15 WTD 073 (1994). Lack of knowledge of a tax obligation, or voluntary compliance once an obligation is known, are not identified by statute or rule as a basis for abating interest or penalties. Det. No. 86-266, 1 WTD 067 (1986). Rule 228(6) states: "Penalties will not be canceled merely because of ignorance or a lack of knowledge by the taxpayer of the tax liability." Similarly, a good faith belief that one is not conducting a taxable business is not identified by statute or rule as a basis for abating penalties. Det. No. 86-280, 1 WTD 295 (1986). As an administrative agency, the Department does not have the discretion to change the law and grant relief. *Id.* at 298.

Failure by the Department to recognize and notify taxpayers of their obligations is not a basis for waiving penalties. The Department may not waive penalties even when the taxpayer's records were available for review when the Department audited an affiliate or related entity. The Department is not estopped from assessing tax despite a prior audit, which failed to advise taxpayer that tax was due. Kitsap-Mason Dairymen Ass'n. v. Washington State Tax Comm'n, 77 Wn.2d 812, 467 P.2d 312 (1970); Det. No. 90-340, 11 WTD 81 (1990); and Det. No. 87-299, 4 WTD 97 (1987). A taxpayer is not relieved of an obligation to pay taxes simply because the Department has failed to assess the tax correctly against other taxpayers. Laxity in enforcement as to some is not of itself a defense to enforcement against others. Frame Factory v. Department of Ecology, 21 Wn.App. 50, 57, 583 P.2d 660 (1978).

The Audit Division properly assessed the late payment penalty. We are without authority to waive the penalty.

#### DECISION AND DISPOSITION:

We deny the taxpayer's petition. . . .

Dated this 23rd day of April, 1998.