

Cite as Det. No. 99-291, 19 WTD 182 (2000)

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. 99-291
)	
. . . .)	Registration No. . . .
)	FY. . . /Audit No. . . .
)	

- [1] RULE 228; RCW 82.32.050(1), RCW 82.32.105, RCW 82.32.020; ETA 419.32.99: INTEREST -- WAIVER -- WORKPAPERS. Preliminary Audit workpapers provided to the taxpayer without written payment instructions, and which do not address whether interest will be added to the assessment, are not a basis to waive interest included in the final assessment.
- [2] RULE 228; RCW 82.32.080: TAX -- CANCELLED CHECK. Taxpayers, who verify payment of tax to the Department with a cancelled check endorsed by the Department, will be given credit for payment.

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:

An out-of-state construction contractor protests additional amounts for interest, penalties, and tax in an assessment inconsistent with audit work-papers provided to the taxpayer prior to the issuance of the official assessment.¹

FACTS:

M. Pree, A.L.J. – . . . [[T]axpayer] is an out-of-state construction contractor. The taxpayer built an addition to a college in Washington. The college agreed to pay the taxpayer's costs, including taxes, incurred by the taxpayer in Washington. The taxpayer failed to pay business and occupation (B&O) tax and did not collect sales tax.

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

The Audit Division of the Department of Revenue (Department) reviewed the taxpayer's books and records and provided the taxpayer a set of schedules referred to as a preliminary assessment in May of 1997. The preliminary assessment did not include interest. According to the taxpayer, when asked if the assessment was complete, the auditor replied it was. The auditor does not recall making the statement, and indicates he would never indicate interest was not due on such an assessment.

Relying on the preliminary assessment, the taxpayer requested the college reimburse the taxpayer for these taxes. The taxpayer paid the Department . . . on May 30, 1997. On September 26, 1997 the Audit Division issued the final assessment (. . .) Document No. . . . showed tax of . . . penalties of . . . , and interest of The assessment stated the taxpayer owed . . . , after the total of . . . was reduced by the . . . remitted on May 30, 1997. The Audit Division explains, contrary to the taxpayer's original representations, returns had not been filed for which credits had been allowed in the auditor's preliminary work papers. Also, because the taxpayer had not only failed to file the returns on time, but failed to pay them as well, late payment penalties were assessed under RCW 82.32.090. However, when confronted with the Audit Division's assertion, the taxpayer provided copies of the returns for the period in question with copies of cancelled checks.² The endorsements on the backs of the checks indicate they cleared the department's lock box prior to the audit.

The taxpayer submitted a petition for correction of assessment to the Department on July 9, 1998. The taxpayer protested, "The additional amount added to the audit after final payment was made." The petition specifies

According to the Audit Division, the taxpayer would not have received the official assessment document without interest stated. Our copy of the assessment clearly shows interest due. The Audit Division mailed the assessment to the taxpayer's address on September 26, 1997. The taxpayer states it did not receive the final assessment until August 1998, after it petitioned this office protesting the interest.

The taxpayer contends the auditor stated the preliminary assessment was complete. The Audit Division, and later the Compliance Division of the Department, denied the taxpayer's request to waive the interest. The Audit Division and the taxpayer agree on the amount of tax.

The taxpayer did not pay the taxes due with its returns for the 3rd and 4th Quarters of 1997 until April 28, 1998. The Department's Taxpayer Account Administration Division (TAA) assessed a late-payment penalty on the 4th quarter taxes.³ The taxpayer did not pay these taxes when due because the interest issue was not resolved. The taxpayer did not want the Department to apply its payment for those periods against the audit interest.

² The taxpayer's checks were for . . . - 1994; . . . - 1995; and . . . - 1996. A credit offset the taxpayer's 1993 tax.

³ TAA waived the penalties for the 3rd quarter under RCW 82.32.105(2)(b).

ISSUE:

May we waive the interest on the taxpayer's assessment based upon alleged statements and audit work-papers the auditor submitted to the taxpayer prior to issuance of the official assessment?

DISCUSSION:

[1.] Interest. The law, RCW 82.32.050(1), requires the Department to assess interest on amounts found past due. The Audit Division assessed interest on the assessment, and the computation of the amount is not at issue. Rather, the taxpayer indicates the auditor told them the assessment was complete without interest. The Audit Division disputes the claim that the auditor made, or would have made, any such statement. It is not necessary to resolve this hotly contested factual issue to determine whether we can waive the interest.

Two statutory provisions offer authority for us to waive interest. First, RCW 82.32.105 states in part:

- (3) The department shall waive or cancel interest imposed under this chapter if:
 - (a) The failure to timely pay the tax was the direct result of written instructions given the taxpayer by the department; or
 - (b) The extension of a due date for payment of an assessment of deficiency was not at the request of the taxpayer and was for the sole convenience of the department.
- (4) The department of revenue shall adopt rules for the waiver or cancellation of penalties and interest imposed by this chapter.

The failure to timely pay the tax did not result because the Department instructed the taxpayer in writing not to pay the tax. The preliminary assessment does not provide any payment instructions. It did not address interest, only tax. Therefore, the failure to timely pay the tax was not the result of written instructions given the taxpayer by the Audit Division.

Nor did the Department extend the tax due date for its sole convenience. WAC 458-20-228(7) (Rule 228) repeats these two circumstances under which the Department may waive interest.

Second, RCW 82.32A.020 provides Washington taxpayers have:

- (1) The right to a written explanation of the basis for any tax deficiency assessment, interest, and penalties at the time the assessments are issued;
- (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;

The Audit Review section of the Audit Division in Olympia, Washington mailed the assessment in the form of Document No. FY. . . to the taxpayer on September 26, 1997. Document No. FY. . . states the interest due. After the taxpayer stated the document was not received, the Audit Division provided another copy on August 2, 1998.

Subsection (2) of RCW 82.32A.020 authorizes the waiver of interest provided the taxpayer relied⁴ on official *written* advice or *written* instructions from the Department. The Audit Division did not advise the taxpayer in *writing* the assessment was complete and no interest was due. We cannot rely on the disputed oral statement.

Excise Tax Advisory 419.32.99 (“ETA 419”) states the Department’s policy regarding claims of estoppel⁵ based upon conversations with Department employees. The policy in ETA 419 is that the Department cannot give consideration to claimed misinformation resulting from telephone conversations or personal consultations with a Department employee. The underlying policy reasons that are stated in ETA 419 apply to the disputed statement:

- (1) There is no record of the facts which might have been presented to the agent for his consideration.
- (2) There is no record of instructions or information imparted by the agent, which may have been erroneous or incomplete.
- (3) There is no evidence that such instructions were completely understood or followed by the taxpayer.

The law required the Audit Division to assess the interest. We are without authority to waive this interest.

[2.] Penalties and tax. The Audit Division assessed late payment penalties because the taxpayer failed to pay any tax when due during the audit period. However, based upon our review of the cancelled checks and returns, we find the tax was paid. Because the audit assessment was upon this erroneous fact, the tax paid should be credited to the assessment, and the penalties cancelled.

DECISION AND DISPOSITION:

⁴ The taxpayer must also prove detriment, which we need not address in this determination, because the alleged statement was not in writing.

⁵ The taxpayer also asserts Washington common law provides another doctrine to support waiver of the amounts due. *See Sunnyside Valley v. Roza Irrig. Dist.* 124 Wn.2d 312, 877 P.2d 1283 (1994). The Court considered one party’s failure to object to routine written billings over an eight year period, to constitute assent by the receiving party in the absence of express agreement. We note, under the circumstances before us, the Audit Division actually mailed the official assessment on September 26, 1997. The Department received the taxpayer’s single payment on May 30, 1997. We do not consider this agreement by the Department to any amount, but will analyze it as an estoppel claim based on the taxpayer’s alleged detrimental reliance regarding the correctness of this amount.

We remand the file to the Audit Division to credit the tax paid, and remove the penalties. Interest, however is due.

Dated this 29th day of October, 1999.