

Cite as Det. No. 05-0141, 25 WTD 35 (2006)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition for Review by	)	<u>D E T E R M I N A T I O N</u>
	)	
	)	No. 05-0141
	)	
...	)	Registration No. . . .
	)	Document Nos. . . .
	)	Docket No. . . .

- [1] RULE 238; RCW 82.12.0251, RCW 82.49.020, RCW 88.02.030: USE TAX – WATERCRAFT EXCISE TAX (WET) – NONRESIDENT. A resident for tax purposes is a “person who manifests an intent to live or be located in this state on more than a temporary or transient basis.” Where a person was in the process of moving to Washington from another state, purchased and moved into a home in Washington and obtained a Washington driver’s license and voter registration, that person is a Washington resident.
  
- [2] RULE 178; RCW 82.12.020, RCW 82.12.010: USE TAX – TEMPORARY PRESENCE OF PROPERTY IN STATE. Where a Washington resident’s vessel passed through Washington waters, the vessel is subject to use tax because the taxpayer assumed possession, dominion and control of the vessel while it was within the state.
  
- [3] RCW 82.49.010, RCW 82.49.020: WET – EXEMPTION – REGISTRATION REQUIREMENTS – 60 DAY EXEMPTION. A resident vessel owner is entitled to rely on the 60-day exemption from registration and WET where the vessel had valid U.S. Coast Guard documentation.
  
- [4] RULE 228; RCW 82.32.090, RCW 82.32.105: PENALTIES – WAIVER –LACK OF KNOWLEDGE OR NOTIFICATION –24 MONTH WAIVER. Lack of knowledge or notification of the use tax is not grounds for penalty waiver. Taxpayer does not qualify for the 24-month waiver where taxpayer was not registered and had not engaged in business activities in the state up to the time of the taxable use.

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.

### STATEMENT OF THE CASE

. . . (Taxpayer) received a use tax assessment and watercraft excise tax (WET) assessment for his vessel based on a first taxable use date of May 22, 2003 in Washington. Each assessment also contained penalties and interest.

Taxpayer paid the assessed use tax, but appealed the rest of the assessments on the ground that his vessel could not properly and fairly be subject to tax in Washington until July 2004. Taxpayer also argued that assessing a delinquent penalty in this case would be unfair because of the lack of due notice and process that would allow vessel owners a reasonable opportunity to comply with the tax requirements.

We conclude that the use tax assessment was properly based on the May 22, 2003 taxable use date and sustain the use tax penalties and interest. However, we conclude that the WET assessment was incorrect and therefore reverse the WET assessment (and related penalties & interest).<sup>1</sup>

### ISSUES

- (1) Whether Taxpayer was a Washington resident as of May 22, 2003?
- (2) Whether the use tax assessment was correctly based on a first taxable use date of May 22, 2003, under the circumstances of this case?
- (3) Whether the WET assessment was proper under the circumstances of this case?
- (4) Whether Taxpayer qualifies for a waiver of any penalties or interest?

### FINDINGS OF FACT

Nguyen, A.L.J – Taxpayer was a long-time resident of [State A]. In November 2002, Taxpayer married a resident of Washington. In anticipation of his upcoming marriage, Taxpayer opened a bank account and obtained his Washington driver's license and voter registration in September 2002. Taxpayer exercised his right to vote in Washington in November 2002 and again in February 2003. In February 2003, the couple purchased and lived in a house at . . . , Washington . . . . In September 2003, Taxpayer sold his house in [State A].

Taxpayer, through a revocable trust of which he is now the sole surviving trustee, owned a . . . boat named . . . , which he had purchased in December 1998 in [State B]. The boat had a U.S. Coast Guard certificate of documentation with registration number . . . . After cruising and keeping 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.

boat in Alaska and Canada, Taxpayer relocated the boat to [State A] in 2000. From February 12, 2002, until May 19, 2003, Taxpayer berthed the boat at [State A Location].

According to Taxpayer, because he purchased the boat in [State B] and did not relocate it to [State A] until a couple of years later, Taxpayer did not owe or pay any sales or use tax in [State A]. After bringing the boat to [State A], Taxpayer began paying applicable [State A] property tax on the boat. He paid [State A] property tax on the boat through the end of June 2004.

On May 19, 2003, Taxpayer and his wife began to take the [boat] from [State A] to Canada. As Taxpayer explained, it was not safe to stretch each leg of the journey close to the limit of fuel capacity because of the risk of insufficient reserve if the weather turns bad. Accordingly, Taxpayer chose to stop in Washington rather than heading straight to Canada from [State B]. They stopped overnight at [Washington Location] [on] May 22, 2003 for rest and refueling, and then reached Canada the next day. At the time of entry into Canada, they received Canadian Customs entry number . . . .

Taxpayer arranged to berth the boat [in] . . . [Canada], signing an annual moorage agreement starting May 23, 2003.

For the next several months, Taxpayer did some cruising around [Canada]. In early July 2003, they also stopped at the [Washington Location]. They spent the Fourth of July at [Washington Location], watching the fireworks, and then returned to [Canada] the next day, July 5, 2003. . . .

Taxpayer berthed the boat in [Canada] for the winter of 2003. In 2004, Taxpayer went on an extended cruise to Alaska, came back to Washington for a few days, and then returned the boat to its permanent berth at [Canada Location] in August 2004.

Under his moorage agreement with [Canada Location], Taxpayer has continuously paid three annual invoices with no interruption or gap in his moorage agreement. The current moorage agreement for the [boat] at [Canada Location] goes from April 1, 2005, to March 31, 2006.

A tax discovery agent from the Compliance Division of the Washington Department of Revenue (Department) observed the boat in [Washington] on July 2, 2003. There followed an exchange of correspondence and documentation between the Compliance Division and Taxpayer. Based on available information, in July 2004 the Compliance Division issued use tax and WET assessments based on October 1, 2002 as the date of first taxable use of the boat in Washington. . . .

After some subsequent discussion with Taxpayer and review of additional documentation, the Compliance Division issued amended assessments . . . in August 2004 . . . (based on an estimated value of \$ . . . for the boat and a taxable first use as of May 22, 2003):

Taxpayer promptly paid the amount of assessed state and local use tax, and timely appealed the rest of the assessments.

## ANALYSIS

Taxpayer does not dispute the amount or the assessment of Washington use tax, but argues that any penalties and interest, together with the WET assessment, should be reversed or reduced because the assessments are incorrectly or unfairly based on the first taxable use date of May 22, 2003. According to Taxpayer, the [boat] should not be deemed subject to tax in Washington as of May 2003 for the following reasons:

- Taxpayer should not be deemed to have completed the process of becoming a Washington resident until September 2003, when he sold his home in [State A].
- Taxpayer continued to pay [State A] property tax on the boat through the end of June 2004.
- The temporary transit of the boat through Washington in its 2003 journey should not qualify as a taxable use for Washington excise tax purposes.

Taxpayer notes that as of the present time, the boat is still berthed in Canada and Taxpayer has not had the time or the opportunity to cruise the boat in the Puget Sound or other Washington coastal waters.<sup>2</sup>

### 1. Washington residency for tax purposes.

Under certain conditions of limited use, an out-of-state vessel is not subject to Washington use tax and WET if the owner is a non-resident. *See, e.g.*, RCW 82.12.0251(1) (use tax does not apply to temporary personal use of tangible personal property by a non-resident) and WAC 458-20-238(4) (use tax does not apply to certain temporary use of out-of-state vessel by non-residents); RCW 82.49.020 and 88.02.030(5) and (11) (WET does not apply to vessels exempt from Washington registration requirements, *e.g.*, vessels owned by non-residents and with certain limited or temporary personal use in Washington). Accordingly, the initial focus of our analysis is when Taxpayer became a Washington resident for tax purposes.

[1] The applicable statute and administrative rules do not define resident or non-resident for purposes of the use tax and watercraft excise tax. Consistent with the ordinary meaning of the word, the Department has defined a resident for tax purposes as “a person who manifests an intent to live or be located in this state on more than a temporary or transient basis.” *See, e.g.*, Det. No. 04-0121, 23 WTD 349 (2004); Det. No. 96-049, 16 WTD 177 (1996).

The above definition of residency implies some degree of permanency, but does not require that a taxpayer has no permanent home elsewhere. The Department has long held that a person may have more than one residence for tax purposes. [*See, e.g.*] WAC 458-20-178(7)(c)(i); [Det No.

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<sup>2</sup> Because Taxpayer decided in the summer of 2004 that he would use the boat in Washington, he has paid the assessed use tax. However, he timely appealed the rest of the assessment.

03-0315, 24WTD 468 (2005); Det No. 96-049, 16 WTD 177 (1996)]. In other words, residence can include the legal home or domicile of a person, but can also include a secondary residence of a person if there is a sufficient degree of permanency.

An individual taxpayer is generally presumed to be a resident of this state if he has declared himself a resident for the purpose of obtaining state licenses, registering to vote, or obtaining public assistance in Washington. *Cf.* RCW 46.16.028 (defining resident for purposes of the motor vehicle registration), which specifically states the above three factors as non-exclusive evidence of residency. We also consider various other factors that provide evidence of intent to

be in Washington on more than a temporary or transient basis. Such factors include, but are not limited to: maintaining a residence in this state for personal use; using a Washington address for federal or state income tax purposes; location of bank accounts; address used to obtain financing, insurance, or other benefits; location of professional service providers; employment; active business involvement; active involvement in clubs and organizations; vehicle, aircraft and watercraft registrations; nature and level of any telephone and utility services; address used to receive mail; citations as to domicile in wills and other legal documents; length of time spent in this state compared to time spent out of this state; and nature and use of property maintained in this state. *See, e.g.,* Det. No. 96-049, *supra*; Det. No. 93-223, 13 WTD 361 (1994).

From about September 2002 until about September 2003, Taxpayer was in the process of moving from [State A] to Washington. Taxpayer did not complete the process of moving until September 2003, when he sold his [State A] house, which had been his primary residence before his marriage. During this year-long process, Taxpayer may be considered, at different times and for different purposes, as either a resident of [State A] or Washington or both.

We conclude that by May 22, 2003, (the date that the [boat] stopped at [Washington Location]), Taxpayer was already a resident of Washington for tax purposes. By that time, Taxpayer and his wife had purchased and moved into a new home in Washington that they intended to be their permanent family home. Taxpayer had established his legal ties to Washington by his driver license and voter registration, and Taxpayer had exercised his right to vote in Washington on two prior occasions. Although Taxpayer would not complete his move until September 2003, he had sufficient permanent ties with Washington by May 22, 2003 to qualify as a Washington resident for tax purposes.

Taxpayer owns the boat as the sole remaining trustee of a revocable trust. However, for use tax purposes, we generally do not distinguish between the trust and the trustee in the case of a standard revocable living trust made to avoid probate, where the trustee is also a principal life-time beneficiary. *See* Det. No. 01-002R, 22 WTD 65 (2003).

2. Assessment of use tax.

Taxpayer also argues that, even if he is deemed a Washington resident as of May 2003, the temporary passage of the [boat] through Washington coastal waters at that time was not sufficient to justify the imposition of Washington use tax. Taxpayer argues that the use tax should not have been assessed until July 2004 at the earliest, because Taxpayer still paid [State A] property tax on the boat through the end of June 2004, and he did not have any plan or intention of keeping or using the boat in Washington until after July 2004.

Washington imposes a use tax “for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail, or acquired by lease, gift, repossession, or bailment. . . . RCW 82.12.020(1). As explained in the applicable administrative rule, WAC 458-20-178(1) (Rule 178)(1):

The use tax supplements the retail sales tax by imposing a tax of like amount upon the use within this state as a consumer of any article of tangible personal property purchased at retail . . . where the user . . . has not paid retail sales tax under chapter 82.08 RCW with respect to the property used.

For purposes of the use tax, “use” means “the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include installation, storage, withdrawal from storage, distribution, or any other act preparatory to subsequent actual use or consumption within this state.” RCW 82.12.010(4)(a). . . .

[2] Under the presently applicable definition, the passage of the [boat] through Washington waters in May 2003 qualifies as taxable use because Taxpayer clearly assumed possession, dominion and control of the boat while it was within the state, stopping overnight at [Washington Location] for rest and refueling.<sup>3</sup>

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<sup>3</sup> More than ten years ago, Taxpayer could marshal significant legal support for his position that the use tax does not apply to a transitory passage of a vessel from out-of-state. The use tax statute formerly provided that:

This tax will not apply with respect to the use of any article of tangible personal property purchased, extracted, produced or manufactured outside this state until the transportation of such article has finally ended or until such article has become commingled with the general mass of property in this state.

Former RCW 82.12.010(4)(a).

In *Pope & Talbot v. Department of Rev.*, 90 Wn.2d 191, 580 P.2d 262 (1978), the Washington Supreme Court concluded, based on the above statutory language, that an airplane owned by an out-of-state corporation and based in Portland, Oregon was not subject to the Washington use tax on account of brief stops and overnight stays at Washington airports. However, the legislature repealed the above statutory language in 1994. As a result of the repeal, there is no longer any general use tax exemption for property in transit.

Taxpayer expressed surprise that the boat, which had been in his possession for some years, would be subject to use tax the moment he brought it to Washington. As noted earlier, certain limited and temporary use by a non-resident is not subject to the use tax. Because Taxpayer was already a resident as of the time the boat reached Washington in May 2003, the non-resident exemption does not apply. The use tax statute also exempts “household goods, personal effects, and private motor vehicles” owned by a Washington resident if the resident acquired and used such items in the state of his former residence more than 90 days before he entered Washington. RCW 82.12.0251(3). However, this exemption does not apply to vessels.<sup>4</sup>

The state of Washington allows a credit for retail sales or use tax that a taxpayer has paid to another state in computing the Washington use tax. RCW 82.12.035; Rule 178(12). Because Taxpayer never paid sales or use tax on the [boat] to another state, that credit does not apply. Although Taxpayer paid annual [State A] property tax on the boat, the use tax statute does not allow a credit for such property tax, which is imposed on the property itself rather than its retail sale or use.

Just as a person can be deemed to be a resident of more than one state for tax purposes, a moveable tangible property can be subject to a variety of different taxes in several states at the same time. The fact that [Taxpayer] paid [State A] property tax on the boat through the end of June 2004 may support his contention that [he] did not yet have any definite intention or plan to use the boat in Washington as of May 2003. Nonetheless, the applicable definition of taxable use does not depend on actual intent. Moreover, because there is no temporary or limited use exemption for residents, Taxpayer became subject to the Washington use tax the moment he brought the boat to Washington.

For the reasons discussed above, we conclude that the use tax assessment was properly based on the May 22, 2003 first use date.

### 3. Assessment of WET.

RCW 82.49.010 imposes an excise tax on the privilege of using a vessel upon the waters of Washington, “except vessels exempt under RCW 82.49.020.” WET is an annual tax, and it is imposed for a twelve-month period, including the month in which the vessel is registered. RCW 82.49.010(3).

Taxpayer argues that his boat should not be subject to WET as of May 2003, when it was en route to [a Canada Location].

[3] WET does not apply to “vessels exempt from the registration requirements of chapter 88.02 RCW.” RCW 82.49.020(1). Chapter 88.02 exempts, among other things, “vessels that have been issued a valid number under federal law or by an approved issuing authority of the state of

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<sup>4</sup> The use tax statute also exempts watercraft used in interstate commerce. RCW 82.12.0254(1). Because Taxpayer was using his boat for personal purposes, that exemption does not apply.

principal operation. However, a vessel that is validly registered in another state but that is removed to this state for principal use is subject to registration under this chapter. The issuing authority for this state shall recognize the validity of any numbers previously issued for a period of sixty days after arrival in this state.” RCW 88.02.030(4). See also WAC 308-93-055(1) (“the current foreign registration is valid for the first sixty days of operation.”)

The Compliance Division confirmed that the [boat] had a valid U.S. Coast Guard certificate of documentation and registration number for the entire period at issue under the WET assessment, *i.e.*, May 22, 2003, to June 30, 2004. However, the Compliance Division argued that the above 60-day exemption does not apply if the owner of the vessel is a Washington resident. Upon review of the vessel registration statute, we disagree with the Compliance Division for the following reasons.

First, the plain language of the 60-day exemption does not have any non-residency requirement for the vessel owner. The same statutory section that contains the 60-day exemption also enumerates some specific exemptions for vessels owned by non-residents in other subsections. *See, e.g.*, RCW 88.02.030(5), (11). The specific mention of a non-residency requirement in other exemptions in the same statutory section suggests that a non-residency requirement would be expressly stated if it were applicable. *See State v. Jackson*, 137 Wn.2d 712, 724, 976 P.2d, 1229 (1999) (citing case law in support of the rule that “where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent”).

Second, there is a similar exemption for non-residents but with a longer exemption period of up to six months. RCW 88.02.030(11) specifically exempts vessels owned by a non-resident individual if the vessel is brought into the state for strictly personal use for not more than 6 months in any continuous twelve months period, provided that: (a) the vessel has been issued a valid number under federal law or by an issuing authority of the state of principal operation, and (b) on or before the 61<sup>st</sup> day of use, the owner must obtain an identification document from the Washington Department of Licensing indicating when the vessel first came into the state. *See also* WAC 308-93-055 (requiring a vessel owner, when applying for a temporary identification document, to provide: (i) proof of non-residency; (ii) copy of current foreign registration or U.S. Coast Guard documentation; (iii) date the vessel first came into Washington; and (iv) applicable fees). For an individual owner who plans to bring his boat to Washington for temporary personal use, this exemption is similar to the 60-day exemption, except that: (i) the exemption period is longer, and (ii) the owner must be a non-resident. If we also read the 60-day exemption as requiring the vessel owner also to be a non-resident, we effectively render the 60-day exemption redundant. *See Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002) (statute should not be construed in a way that yields unlikely, absurd or strained consequences).

[3] For the above statutory considerations, we believe that a resident vessel owner is still entitled to rely on the 60-day exemption.

In this case, Taxpayer has presented sufficient evidence that the [boat] had valid U.S. Coast



Guard documentation for the period from May 22, 2003 to June 30, 2004, and that the boat was in Washington on the following occasions during that period: (a) on May 22-23., 2003 during its trip from [State A] to [Canada]; and (b) in early July, 2003 on a visit to the [Washington Location] for the Fourth of July festivities. Therefore, we find the [boat] was not in Washington for more than sixty days during the period at issue.<sup>5</sup>

Accordingly, we conclude that the [boat] qualifies for the 60-day exemption from registration under RCW 88.02.030(4) during the period May 22, 2003 to June 30, 2004, and hence the boat is not subject to WET during that period under RCW 82.49.020(1).

Of course, if the vessel at some point is removed to Washington for principal use or operation, or if it stays in Washington beyond the 60-day exemption period, the vessel will be subject to registration and WET at that time.

4. Interest and penalties.

Taxpayer also asked that the penalties or interest be waived. With respect to any penalties and interest on the WET assessment, such penalties and interest will automatically be eliminated because we conclude that WET does not apply.

For the following reasons, we cannot waive the penalties and interest on the use tax assessment. The Department is an administrative agency, and its authority to waive or cancel interest and penalties is restricted to the authority granted by the legislature. In cases of general excise taxes, the legislature has granted the Department certain limited authority to waive or cancel interest and penalties, set out in RCW 82.32.105 and RCW 82.32A.020. Beyond the statutory grant of authority, the Department has no discretion to waive or cancel penalties or interest. *See, e.g.*, Det. No. 04-0098, 23 WTD 331 (2004).

The use tax assessment contains a 25 percent delinquent (late payment of tax due on a return) penalty, interest, and a five percent assessment penalty.

(a) Delinquent penalty for late payment of tax due on a return:

RCW 82.32.090 requires the Department to impose a penalty for failure to pay any tax due with a return to be filed:

(1) If 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; and if the tax is not received on or before the last day of the month following the due date, there shall be assessed a total penalty of fifteen percent of the amount of the tax under this subsection; and if the tax is not received on or before the last day of the second month following the due date, there shall be assessed a total penalty of

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<sup>5</sup> Even if we assume that the boat was continuously in Washington from May 22, 2003 through July 5, 2003, that was still a period of less than 60 days.

twenty-five percent of the amount of the tax under this subsection. No penalty so added shall be less than five dollars.

Thus, by law, the Department is required to add an additional penalty for late payment on any past due amount, unless there is an applicable waiver, or unless the payment was timely under the circumstances.

As discussed above, the use tax assessment was correctly based on a first use date of May 22, 2003. Under Washington law, a taxpayer is generally required to report and pay the use tax due within 20 days after the end of the month of the taxable use, unless provided otherwise by law, or as prescribed by the Department. RCW 82.32.045(1),(2). In cases where a person is not required to be registered with the Department, but owes use tax, the person must file the return and pay the tax within 15 days after the end of the month of the taxable use. Rule 178(16). By the time Taxpayer paid the overdue tax at the end of August 2004, the tax payment was more than 14 months late. Accordingly, the use tax assessment correctly included the maximum delinquent penalty of 25 percent. RCW 82.32.090(1).

Taxpayer argued that the delinquent penalty is unfair in this case because of the lack of due notice and process that would allow vessel owners a reasonable opportunity to comply with the use tax requirements.

Although we appreciate the difficult position that a vessel owner may find himself in in a relatively new jurisdiction, we sustain the application of the delinquent penalty for the following reasons.

First, the plain language of the statute does not require any element of intent or knowledge for the delinquent penalty to apply.

Second, the law does not allow the Department to treat a late payment as timely simply because a taxpayer was not aware of its tax obligation. Washington state law grants certain rights as well as imposes certain responsibilities on taxpayers. In particular, RCW 82.32A.030 (Responsibilities) provides:

To ensure consistent application of the revenue laws, taxpayers have certain responsibilities under chapter 82.32 RCW, including, but not limited to, the responsibility to:

- (1) Register with the department of revenue;
- (2) **Know their tax reporting obligations, and when they are uncertain about their obligations, seek instructions from the department of revenue;**
- (3) Keep accurate and complete business records;
- (4) **File accurate returns and pay taxes in a timely manner. . . .**

(Emphasis added.) This statute codifies, for tax law purposes, the well-known common law

principle that all persons are charged with knowledge of the laws of the state in which they find themselves. *See also Leschner v. Department of Labor & Indus.*, 27 Wn.2d 911, 926, 185 P.2d 113 (1947) (quoting the universal maxim that “ignorance of the law excuses no one”); Excise Tax Advisory 310.32.101 (initially issued January 20, 1967) (“failure [by the Department of Revenue] to notify a particular taxpayer of his correct tax liability for unreported taxes does not relieve him from the assessment resulting from a misunderstanding of his correct tax liability”).

[4] Under RCW 82.32.105(1), the Department must waive any penalties if the Department finds that “the payment by a taxpayer of a tax less than that properly due or the failure of a taxpayer to pay any tax by the due date was the result of circumstances beyond the control of the taxpayer.” “Circumstances beyond the control of the taxpayer are generally those which are immediate, unexpected, or in the nature of an emergency. Such circumstances result in the taxpayer not having reasonable time or opportunity to obtain an extension of the due date or otherwise timely file and pay.” WAC 458-20-228(9)(a)(ii) (Rule 228(9)(a)(ii)). However, “a misunderstanding or lack of knowledge of a tax liability” is generally not regarded as a circumstance beyond the control of the taxpayer. Rule 228(9)(a)(iii)(B). Any oversight in tax compliance, even if in good faith, is not in the nature of unexpected emergency that would delay or prevent timely filing or tax payment.

In cases of late payment of tax due on a return to be filed, RCW 82.32.105(2) requires the Department to waive or cancel the delinquent penalty upon request if the taxpayer has a 24-month record of timely filing and payment. Specifically, the Department must grant taxpayer request for waiver of such a delinquent penalty if “[t]he 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.” RCW 82.32.105(2)(b). *See also* Rule 228(9)(b) (Waiver of the late payment of return penalty).

In addition to taxpayers who have timely filed tax returns for more than 24 months, the Department only applies the above waiver to the following situation:

If a taxpayer has obtained a tax registration endorsement with the department and has engaged in business activities for a period less than twenty-four months, the taxpayer is eligible for the waiver if the taxpayer had no delinquent tax returns for periods prior to the period covered by the return for which the waiver is being requested. ... This is the only situation under which the department will consider a waiver when the taxpayer has not timely filed and paid tax returns covering an immediately preceding twenty-four month period.

Rule 228(9)(b)(i) (emphasis added).

In light of the cited administrative rule, the Department will only waive the delinquent penalty on a use tax assessment if the taxpayer has timely filed and paid excise tax returns for 24-months immediately preceding the date of taxable use, or if the taxpayer has registered with the Department and has no prior delinquent tax returns. Because Taxpayer meets neither

requirement, Taxpayer is not eligible for the waiver, even if the taxable use in question is the first instance that requires any reporting. *See* Det. 01-037, 21 WTD 21 (2002) (taxpayer was assessed use tax and delinquent penalty on account of its yacht in Washington; held: taxpayer did not qualify for the 24-month waiver because taxpayer was not registered and had not engaged in business activities in the state up to the time of the taxable use).

In addition, RCW 82.32A.020(2) gives taxpayers the right to a waiver of penalties and interest where they have relied, to their detriment, on specific, official written advice from the Department. There is no detrimental reliance on written advice from the Department in this case.

Because the limited conditions for penalty waiver do not apply in this case, we affirm the delinquent penalty.

(b) Interest:

RCW 82.32.105(3), the statute regarding waiver of interest provides, in pertinent part:

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.

Neither of the grounds for waiver of interest applies in this case, and consequently we cannot waive the interest.

(c) Assessment penalty:

The 5 percent penalty in question is imposed by RCW 82.32.090(2), which applies to all assessments originally issued after June 30, 2003. In relevant part, the statute provides as follows:

- (2) If the department of revenue determines that any tax is due, there shall be assessed a penalty of five percent of the amount of the tax determined by the department to be due . . . . No penalty so added shall be less than five dollars.

As the statutory language suggests, the assessment penalty applies to the tax due balance of any assessment as a matter of course and does not depend on any conduct or failure on the part of the taxpayer. For reasons similar to the delinquent penalty discussion above, the limited conditions for penalty waiver do not apply in this case.<sup>6</sup> Accordingly, we cannot waive the assessment

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<sup>6</sup> We note that by its statutory term, the penalty waiver for 24 months of timely filing and payment is limited to late payments on a return. RCW 82.32.105(2) (referring to penalty imposed under RCW 82.32.090(1), which is the statutory penalty for late payment on a return). *See also* Rule 228(9)(b) (Waiver of the late payment of return penalty). It does not apply to the five percent assessment penalty or to late payment on an assessment.

penalty.

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**DECISION AND DISPOSITION**

For the reasons stated in this determination, the taxpayer's petition is denied in part and granted in part.

Dated this 15th day of July, 2005.