

Cite as Det. No. 15-0062, 34 WTD 419 (2015)

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. 15-0062
)	
...)	Registration No. ...
)	

[1] WAC 458-20-228(9)(a)(iii)(B); RCW 82.32.105(1): PENALTY WAIVER – CIRCUMSTANCES BEYOND CONTROL – ILLNESS OF KEY EMPLOYEE – LACK OF KNOWLEDGE. Law firm’s lack of knowledge regarding Washington tax laws due to the long-term illness and absence of its tax matters partner is not a circumstance beyond the firm’s control that caused the delinquent payment of taxes.

[2] WAC 458-20-228(9)(a)(iii)(D); RCW 82.32.105(1): PENALTY WAIVER – CIRCUMSTANCES BEYOND CONTROL – INVOLUNTARY REGISTRATION. Involuntary registration of law firm is not a circumstance beyond ITS control that caused the delinquent payment of taxes.

[3] WAC 458-20-228(9)(b)(i); RCW 82.32.105(2): 24-MONTH PENALTY WAIVER. Involuntarily registered taxpayer cannot qualify for the 24-month penalty waiver.

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.

Sohng, A.L.J. – Law firm requests waiver of penalties on the grounds that (i) the long-term illness and absence of its tax matters partner was a circumstance beyond its control that caused the delinquency; and (ii) it timely filed and paid its tax returns during the preceding twenty-four months. The petition is denied.¹

ISSUES

1. Is a key employee’s long-term absence from work due to illness constitute a circumstance beyond a company’s control, under RCW 82.32.105(1), sufficient to waive penalties?
2. Is a taxpayer entitled to the twenty-four month penalty waiver under RCW 82.32.105(2) when it was involuntarily registered with the Department?

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

FINDINGS OF FACT

[Taxpayer] is an international law firm headquartered [out of state]. Taxpayer states that it does not maintain offices or employees in Washington, but does provide legal services to clients in Washington. The Compliance Division examined Taxpayer's books and records for the period June 1, 2010, through June 30, 2014 (the "Audit Period"). The Department began its attempts to contact Taxpayer in 2012. On July 25, 2012, the Compliance Division sent Taxpayer an initial contact letter and a Washington Business Activities Questionnaire (the "WBAQ") to obtain information regarding its activities in Washington. The Compliance Division sent Taxpayer another WBAQ on August 17, 2012. Taxpayer did not respond to the WBAQs. The Compliance Division sent Taxpayer three more WBAQs on July 1, 2013; August 27, 2013; and December 11, 2013. Taxpayer did not return the completed WBAQ to the Department.

On July 28, 2014, the Compliance Division received combined excise tax returns for the Audit Period, a Business License Application, payment of tax in the amount of \$. . . , and a letter from . . . , the firm's tax matters partner, indicating that Taxpayer had taxable activities in Washington. On July 28, 2014, the Compliance Division involuntarily registered Taxpayer, retroactive to June 1, 2010, assigning an annual reporting frequency for all years. On August 21, 2014, the Compliance Division issued Assessment No. . . . , in the amount of \$. . . , including \$. . . in business and occupation ("B&O") tax, \$. . . in penalties, and \$. . . in interest. Taxpayer paid the B&O tax due and contests only the penalties, which are comprised of the following:

- \$. . . in delinquent penalties imposed under RCW 82.32.090(1);
- \$. . . in substantial underpayment penalty imposed under RCW 82.32.090(2); and
- \$. . . in unregistered business penalty imposed under RCW 82.32.090(4).

Taxpayer claims that its failure to timely file and pay taxes during the Audit Period are due to the illness and absence of a key employee when Washington enacted its economic nexus law, codified in RCW 82.04.067. In 2010, . . . was the firm-wide tax matters partner, who handled all of Taxpayer's tax functions, including the review of Taxpayer's historic and future state and local tax filings. [The tax matters partner] suffered a stroke in early 2010, resulting in his incapacitation and absence from the firm for the remainder of the year. Taxpayer states:

During [the tax matters partner's] prolonged absence [Taxpayer] experienced difficulty in keeping abreast of all its worldwide tax compliance obligations. As a direct result of [the tax matters partner's] extended hospitalization and inability to perform his duties as the Firm's tax matters partner, [Taxpayer] missed the changes in Washington's state tax law.²

During [the tax matters partner's] absence from the firm in 2010, Taxpayer's tax director and one staff member filled in for him, handling the firm's U.S. and international tax compliance. According to Taxpayer, the tax director was only familiar with international tax compliance issues, not state and local tax compliance issues. [the tax matters partner] returned to the firm in early 2011 and continued his role as the tax matters partner until his retirement. In mid-2013, Taxpayer appointed . . . as its tax matters partner. But [the new tax matter partner] was unaware

² Taxpayer's Appeal Petition, at 2 (Sep. 16, 2014).

of the changes in Washington's tax laws that had occurred in 2010 until the Compliance Division contacted him in late 2013.

ANALYSIS

1. Circumstances Beyond Taxpayer's Control

Taxpayer requests waiver of the penalties on the grounds that [the tax matter partner's] incapacitation and absence from the firm constituted circumstances beyond its control. The authority to waive or cancel penalties or interest is found in RCW 82.32.105. Specifically, RCW 82.32.105(1) provides that if the failure to pay a tax when due is the result of circumstances beyond the control of the taxpayer, the Department shall waive penalties. WAC 458-20-228 ("Rule 228") provides guidance on "circumstances beyond the control of the taxpayer" within the meaning of RCW 82.32.105. The burden is on the taxpayer to show that the circumstances beyond its control directly and actually caused the late payment. Rule 228(9)(a)(i), (ii).

Circumstances that are generally considered beyond the control of a taxpayer are "immediate, unexpected, or in the nature of an emergency." Rule 228(9)(a)(ii). 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. *Id.* Examples include the death or serious illness of the taxpayer, the tax preparer, or members of their immediate family. Rule 228(9)(a)(ii)(C) explains that waiver of penalties as a result of the death or serious illness of the taxpayer (or the tax preparer) is "not intended to have an indefinite application."

The Department's Appeals Division examined this issue in Det. No. 88-288, 6 WTD 231 (1988), denying a penalty waiver when a two and one-half month period elapsed between a serious injury and the due date of the delinquent return. That determination stated:

Had the injury to the accountant's brother occurred in reasonable proximity, time-wise, to the due date of the subject tax return, we could consider waiver under [Rule 228(9)(a)(ii)(C)] as cited above. Here, however, there was more than a two and one half month gap between the brother's injury and the due date of the tax return.

* * *

The cited provision of Rule 228 is not intended to have indefinite application. It is meant to give relief in emergency situations where death or serious illness has occurred at a point much nearer to the due date than is the case here. How near is a question that may vary according to the situation presented. Two and one-half months, however, is an interval which exceeded the emergency nature intended by the rule.

(Emphasis added.) Here, [the tax matter partner's] illness did not occur in reasonable proximity, temporally, to the due date of the excise tax return for the first year of the Audit Period (2010). [the tax matter partner's] stroke occurred in early 2010. Taxpayer's annual 2010 excise return was due on January 31, 2011. RCW 82.32.405(2). This interval of time (approximately one year) exceeded the emergency nature that Rule 228(9)(a)(ii)(C) is intended to cover. One year is ample time for Taxpayer to have adjusted to [the tax matter partner's] absence and take appropriate steps to bring the firm's tax affairs into order. Taxpayer failed to do so. The failure to pay the

taxes in question was not the result of circumstances beyond Taxpayer's control, and, therefore, the Department cannot waive the penalty on these grounds.

Moreover, Rule 228(9)(a)(iii) provides examples of circumstances that are *not* considered to be beyond a taxpayer's control and will not qualify for a waiver or cancellation of the penalty. Rule 228(9)(a)(iii)(B) provides that a misunderstanding or lack of knowledge of tax liability is not a circumstance beyond a taxpayer's control and does not qualify for the waiver. And Rule 228(9)(a)(iii)(D) provides that the involuntary registration of a taxpayer is not a circumstance beyond its control and does not qualify for the waiver. We conclude that both Rule 228(9)(a)(iii)(B) and 228(9)(a)(iii)(D) apply here. Taxpayer claims that it was unaware of the change in Washington's tax laws that occurred in 2010, as a result of [the tax matter partner's] illness. This lack of knowledge does not qualify for the waiver. In addition, Taxpayer was involuntarily registered by the Department, which also does not qualify for the waiver. Taxpayer's petition is denied with respect to this issue.

2. Twenty-Four Month Waiver

Taxpayer also claims that it qualifies for the penalty waiver provision of RCW 82.32.105(2), which provides:

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, 82.14B.061, 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.

Rule 228(9)(b)(i) provides:

If the late payment of return penalty is assessed on a return but is not the result of circumstances beyond the control of the taxpayer, the penalty will still be waived or canceled if the following two circumstances are satisfied:

- (A) The taxpayer requests the penalty waiver for a tax return which was required to be filed under RCW 82.32.045 (taxes reported on the combined excise tax return), RCW 82.23B.020 (oil spill response tax), RCW 82.27.060 (tax on enhanced food fish), RCW 82.29A.050 (leasehold excise tax), RCW 84.33.086 (timber and forest lands), RCW 82.14B.030 (tax on telephone access line use); and
- (B) The taxpayer has timely filed and paid all tax returns due for that specific 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).

If a taxpayer has obtained a tax registration endorsement with the department prior to engaging in business within the state 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. As a result, the taxpayer's very first return due can qualify for a waiver under the twenty-four month review provision. . . . 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.

(Emphasis added.) Taxpayer claims that it is entitled to waiver under this provision because it was in compliance with Washington tax laws for the 24-month period preceding the Audit Period. However, the underscored language in Rule 228(9)(b), above, makes clear that a taxpayer's very first return qualifies for the waiver *only* if the taxpayer registered with the Department *prior* to engaging in business activities in Washington. Here, because Taxpayer was involuntarily registered by the Department in July 2014, after it began conducting business in Washington, it does not qualify for the 24-month waiver.³ Taxpayer's petition is denied.

DECISION AND DISPOSITION

[The petition is denied.]

Dated this 10th day of March 2015.

³ Note that Rule 228(9)(b)(iv) explains that the 24-month waiver is only applicable to a penalty imposed on the late payment of tax due *on a return* under RCW 82.32.090(1), the delinquent penalty. It does not apply to waive any other penalties, such as the substantial underpayment penalty or the unregistered business penalty.