

In the Matter of the Petition)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u> <u>N</u>
For Refund of)	
)	No. 90-130
)	
. . .)	Registration No. . . .
)	Audit No. . . . /Warrant .
. . .)	
)	

- These 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.

TAXPAYER REPRESENTED BY: . . .
. . .

DATE OF HEARING: November 18, 1987

NATURE OF ACTION:

Taxpayer petitions for a refund of retail sales tax, penalties and interest.

FACTS:

Heller, A.L.J. (successor to Potegal, A.L.J.) -- [Taxpayer] is the sole owner of [ABC] Produce. [ABC] Produce primarily sells fresh fruits and vegetables to the public at retail. The Department of Revenue ("Department") examined the business records of the taxpayer for the period . . . through As a result of this audit, a notice of assessment was issued on . . . , seeking in part, additional retail sales tax.

The additional sales tax resulted from an adjustment by the auditor in the percentage of taxable sales estimated to have occurred during the audit period. The auditor increased the percentage from five percent, as previously reported by the taxpayer, to ten percent. This increase was based upon information contained within a journal maintained by the taxpayer which reflects all purchases made between . . . and The purchase journal was used by the auditor to determine sales of non-food items during the entire audit period because substantially all of the taxpayer's other business records were destroyed in a fire at the taxpayer's place of business on

In response to the notice of assessment, the taxpayer's accountant sent a letter to the Department dated . . . , requesting an appeal of the findings of the audit. Initially, the petition was denied as untimely. The accountant's failure to timely file the petition was later excused by the Department based upon the accountant's illness. The Department requested from the accountant any information which might support the taxpayer's position. When no information was forthcoming, a meeting was held between the accountant and the supervising field auditor on Because neither the taxpayer nor the accountant were able to produce any information in support of the taxpayer's position, the Department denied the petition by letter dated

On . . . , a warrant in the amount of \$. . . was issued against the taxpayer. The taxpayer has satisfied the warrant in full, and seeks relief and refund of a portion of the sales

taxes paid along with the penalties and interest associated with this amount.

TAXPAYER'S EXCEPTIONS

The taxpayer raises two grounds for refund. First, the taxpayer argues that the auditor applied the incorrect percentage of non-food items to the audit period. In support of this claim, the petition states:

The majority of non-food item purchases between . . . and . . . resulted from floral purchases for a floral shop owned by the taxpayer's wife. The floral shop was located at [ABC] Produce. The floral shop was open for two and one-half years between . . . through Use of the auditor's 10% sales tax assessment after the closure of the flower shop is inaccurate. The percentage of taxable non-food sales items was substantially decreased as a result of the flower shop closure for the audit years of . . . and

As additional support, the taxpayer offers his affidavit which states that in . . . he and his wife were divorced and as a result, the flower shop was closed. According to the affidavit, the flower shop was operated exclusively by his ex-wife with no sales of flowers following the divorce.

Second, the Taxpayer seeks a waiver of penalties and interest based upon circumstances beyond the taxpayer's control. The taxpayer argues:

The taxpayer has been assessed \$. . . in interest and \$. . . in penalties since the audit closure in Although the Audit was finalized in . . . , the taxpayer did not receive a delinquent tax assessment notice until RCW 82.32.050 requires that "the Department shall notify the taxpayer by mail of the additional amount (i.e. penalties and interest) and the same shall become due and shall be paid within ten (10) days from the notice, or within such time as the Department may provide". The taxpayer in this case was not notified by mail of the tax delinquency until Thus, any delinquent penalties or interest should not be accrued against the taxpayer as a result of the Department's own failure to notify the taxpayer.

In addition, RCW 82.32.105 provides that the Department can waive or cancel any interest or penalties imposed if the failure of a taxpayer to pay any tax was due to circumstances beyond the control of the taxpayer. WAC 458-20-228 outlines the exclusive list of circumstances which are deemed beyond the taxpayer's control. This section provides that the penalty for a delinquent tax can be waived if unforeseen circumstances unknown to the taxpayer cause the delinquency. The circumstances which the Department considers as unforeseen as outlined in WAC 458-20-228 includes error by the taxpayer's accountant and confusion caused by the communications with the Department. The taxpayer falls within both of these categories.

The taxpayer's accountant failed to advise the taxpayer that the tax assessment had become final and was due in As a result, the taxpayer believed the audit was still open and payment of any taxes due was still outstanding. Likewise, the Department failed to advise the taxpayer that the assessment was final in According to the Department, the taxpayer's file was simply misplaced. It was not until . . . that the taxpayer was officially notified of the delinquent tax assessment. Such confusion was directly caused by the Department pursuant to WAC 458-20-228, and the taxpayer should not be punished with penalties as a result.

Although WAC 458.20.228 does not outline an exclusive list of circumstances which allows interest to be waived, the regulation does allow interest to be waived if payment of a tax was due to circumstances beyond the control of the taxpayer. The same analysis regarding the penalty waiver can be applied to an interest waiver, and should be done in this case.

During the hearing, the taxpayer's accountant indicated that he received a letter from the Department on or about . . . , notifying him of the denial of the appeal, but did not forward this on to the taxpayer. According to the accountant, his failure to provide a copy of the notice to the taxpayer was due to severe illness brought on by grief as the result of the deaths of his daughter in the fall of . . . and his son a year earlier. The accountant stated that he became gravely ill

following the death of his son and was hospitalized in In the fall of . . . following his daughter's death, he gave up his practice.

DISCUSSION

RCW 82.08.020 imposes a tax upon every retail sale within the state. The sale of food products for human consumption is made expressly exempt from the retail sales tax, provided the food products are not for immediate consumption at the place where the products are sold. RCW 82.08.0293. In the present case, the business operated by the taxpayer involved the sale of exempt food items along with the sale of taxable items.

RCW 82.32.300 provides that the Department shall, by rule, provide for the effective administration of the excise tax laws. WAC 458-20-244 is the administrative rule dealing with the food products exemption from the retail sales tax. This rule provides in part: "retailers of food products are required to keep adequate records to demonstrate that any sales claimed tax exempt in fact qualify for the exemption under this rule and the law." WAC 458-20-244.

In the present case, because of the fire, the only relevant business record which is available to establish the amount of non-food sales is the journal detailing the taxpayer's purchases for the six months ending The auditor determined that in light of the absence of other business records, the purchase journal was the best evidence of the amount of sales qualifying for exemption under RCW 82.08.0293 and WAC 458-20-244. Apparently, the taxpayer agrees with the use of the purchase journal for this purpose, but disagrees with the conclusions reached by the auditor.

According to the taxpayer's affidavit, the flower business conducted by the taxpayer's ex-wife constituted a portion of the sales subject to the retail sales tax. The flower business, as the taxpayer points out, was discontinued during . . . when the taxpayer filed for divorce. The purchase journal does not reflect the discontinuance of flower sales because it relates to a period prior to the commencement of divorce proceedings. It is not clear from the record whether the information concerning the divorce and the ex-wife's role in the flower business was made available to the auditor. Nevertheless, this information should be taken into account.

An inquiry into the degree to which the flower business contributed to the amount of taxable sales during the audit

period is essentially a factual determination. Factual determinations such as this are more appropriately resolved at the audit level. The auditor reviewed the business records of the taxpayer and is in a much better position to accept or reject the evidence presented by the taxpayer, and if applicable, make a revised determination of sales subject to tax. The petition should be remanded in part to the auditor for a determination of the amount of taxable sales unrelated to the flower business as reflected in the purchase journal. This percentage should be used to determine the amount of taxable sales occurring after . . . through the end of the audit period.

[1] Next we turn to the taxpayer's contention that interest and penalties should be waived. RCW 82.32.050 governs the imposition of penalties and interest on assessments resulting from audits. This statute provides as follows:

If upon examination of any returns or from other information obtained by the department it appears that a tax or penalty has been paid less than that properly due, the department shall assess against the taxpayer such additional amount found to be due and shall add thereto interest at the rate of nine percent per annum from the last day of the year in which the deficiency is incurred until the date of payment. The department shall notify the taxpayer by mail of the additional amount and the same shall become due and shall be paid within thirty days from the date of the notice, or within such further time as the department may provide. If payment is not received by the department by the due date specified in the notice, or any extension thereof, the department shall add a penalty of ten percent of the amount of the additional tax found due . . .
(Emphasis added.)

RCW 82.32.050. The use of the word shall in the statute is indicative of the legislature's intent that the penalty be mandatory. The taxpayer cites us to RCW 82.32.105 which authorizes the waiver of penalties where late payment is due to circumstances beyond the taxpayer's control. This statute authorizes the Department to issue rules regarding the waiver of penalties and interest. The Department has done that in WAC 458-20-228 ("Rule 228") for penalties imposed under RCW 82.32.090 and interest imposed under RCW 82.32.050. The taxpayer cites this rule as authority for the waiver of penalties and interest here. Rule 228 reads in part:

The department will waive or cancel the penalties imposed under RCW 82.32.090 and interest imposed under RCW 82.32.050 upon finding that the failure of a taxpayer to pay any tax by the due date was due to circumstances beyond the control of the taxpayer.

The present case involves a tax assessment as opposed to a regular tax return. Rule 228 applies only to the waiver of penalties imposed under RCW 82.32.090 for failure to timely file a tax return. The seven circumstances set forth in Rule 228 do not apply to this type of penalty. The rule applies to the interest charged under RCW 82.32.050 but not to penalties under the same statute. Because the administrative rule is not controlling, we revert to the statutory authority for waiver of penalties which is RCW 82.32.105. This statute provides in part:

If the department of revenue 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, the department of revenue shall waive or cancel any interest or penalties imposed under this chapter with respect to such tax.

. . .

RCW 82.32.105. The statute does not provide any guidance as to what constitutes "circumstances beyond the control of the taxpayer." We are left to make this determination on the facts of each case. According to the taxpayer, the accountant's failure to notify the taxpayer of the denial of the petition constitutes circumstances beyond his control. We do not agree.

[2] The illness of a taxpayer's accountant may, under certain circumstances, justify a waiver of penalties. Where an accountant suffers a serious and unexpected illness and there is insufficient time to meet filing deadlines or similar requirements of the Department, penalties may be waived. Under such circumstances, relief is available because the taxpayer does not have an adequate time to react. However, where an illness continues over a period of time, the taxpayer is not prejudiced because there is time to make other arrangements.

Taxpayers are charged with the responsibility of monitoring their consultants and keeping themselves informed as to their

business affairs. Here, a reasonable inquiry would have alerted the taxpayer to the fact that the petition had been denied. Because of the extended nature of the accountant's health problems, the taxpayer was surely on notice of the possibility that the accountant may not be able to adequately discharge his duties. The taxpayer apparently made no attempt in the two and one-half years following the denial of the appeal to determine the status of the assessment. Therefore, while the accountant's illness may have been a sufficient basis for excusing the filing of an untimely petition, it was not the cause of the taxpayer's late payment. The accountant's illness and consequent failure to keep the taxpayer adequately apprised of the status of an appeal, when coupled with the taxpayer's own failure to keep himself informed, does not justify the waiver of penalties or interest. While we sympathize with the terrible tragedy suffered by the accountant, we conclude that the failure to timely pay the assessment was directly within the taxpayer's control.

[3] As an additional reason for the waiver of penalties and interest, the taxpayer argues that the Department failed to properly notify the taxpayer of the assessment. According to the taxpayer, he was not notified by the Department that the assessment was delinquent until This is incorrect. The taxpayer's accountant, who was authorized to receive taxpayer's communications from the Department, received both the notice of assessment and the denial of the petition in a timely manner. The Department did exactly what the taxpayer instructed it to do. In fact, the Department had been furnished the accountant's address as the taxpayer's business address. As far as the Department was concerned, all notices were being sent directly to the taxpayer. The taxpayer cannot now be heard to complain that his decision to have all notices sent to one other than himself has deprived him of proper notice.

Once the notice of the denial of the appeal was sent to the accountant, it became the taxpayer's duty to keep himself informed as to his tax liability. We do not find the taxpayer's argument persuasive in light of the fact that he made no attempt to determine the outcome of the appeal or the status of the assessment until the Department took collection action two and one-half years later.

DECISION AND DISPOSITION

The taxpayer's petition for refund is granted in part and denied in part.

DATED this 27th day of March 1990.