

Cite as Det. No. 01-163, 21 WTD 235 (2002)

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. 01-163
)	
...)	Registration No. ...
)	CAS ...
)	Docket No. ...

RULE 228; RCW 82.32.090, RCW 82.32.105: PENALTIES – WAIVER – CIRCUMSTANCES BEYOND A TAXPAYER’S CONTROL –LACK OF KNOWLEDGE OF TAX LABILITY – 24 MONTH PROVISION. Lack of knowledge is specifically listed as an example of a circumstance not considered beyond the control of the taxpayer. RCW 82.32.105(2) requires waiver of a late payment penalty if the taxpayer has timely filed and paid its excise tax returns for the 24 month period preceding the period covered by the return for which the waiver is being requested. Where the taxpayer filed no tax returns before filing its late return, there is no record of timely filings against which we may judge, and the taxpayer is not entitled to relief from the penalty under the 24 month provision.

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 corporation appeals late payment penalties and interest assessed for its failure to file excise tax returns in 1999 and 2000, when it was engaged in business in Washington through independent sales representatives.¹

FACTS:

Gray, A.L.J. -- The taxpayer is an out-of-state corporation. Since 1999, it has engaged in business in Washington. The taxpayer manufactures, at sites outside of Washington, specialized

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

equipment The taxpayer has no employees in Washington and has no office or other facility in Washington. The taxpayer makes sales into Washington using local independent agents. The taxpayer delivers its goods to Washington customers from points outside of Washington to points in Washington. The taxpayer is one of several wholly owned subsidiaries of another corporation whose principal offices are in New York. The taxpayer sells its goods in all 50 states. The parent corporation files its subsidiaries' corporate income tax returns on a "consolidated basis" with most other states in the United States. The taxpayer did not pay Washington taxes or register with the state.

A Department of Revenue (Department) employee discovered the taxpayer was engaged in business in Washington and contacted the taxpayer to determine if the taxpayer had nexus with Washington, to register it, and to collect taxes for open periods during which it engaged in business in Washington. The taxpayer completed a Washington Business Activities Statement, leading the Department to conclude that the taxpayer has nexus with Washington because the taxpayer uses independent local agents within Washington to solicit sales and because they delivered goods to Washington customers. Subsequently, the Department received annual tax returns from the taxpayer for the tax years 1999 and 2000 in the amount of the tax only. The Department's Compliance Division issued a tax assessment that included interest (\$. . .) and 20% late penalties (\$. . .).

The taxpayer acknowledges that it had nexus and is not entitled to relief as the law exists. However, the taxpayer argued against a literal application of statutes and administrative rules and urged the Department to use "common sense" to make its decision in this appeal. The taxpayer said that it is not fair to hold it responsible for researching the tax law in all 50 states.

ISSUES:

Whether the taxpayer's lack of knowledge about its duty to register and pay Washington State excise taxes is a basis for waiving or canceling interest and/or the 20% late penalties?

DISCUSSION:

The Department is required to impose late payment penalties if returns or payment on returns are filed after the due date. RCW 82.32.090(1) states:

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 ten percent of the amount of the tax; 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 twenty percent of the amount of the tax. No penalty so added shall be less than five dollars.

The statute uses the word “shall.” The use of the word “shall” imposes a mandatory duty.” *Waste Management of Seattle, Inc. v. Utilities and Transportation Commission*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994). Consequently, the Department had no choice but to impose a 20% late payment penalty because the taxpayer paid the taxes for 1999 and 2000, after the last day of the second month following the due date.

The only general statutory authority for waiving or canceling penalties is found in RCW 82.32.105. . . . The applicable provisions state:

(1) 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 penalties imposed under this chapter with respect to such tax.

(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, 82.14B.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.

As with the use of the word “shall” in RCW 82.32.090, the Department must waive or cancel the late penalty if the Department finds that either subsection (1) or (2) applies in the taxpayer’s case. RCW 82.32.105 also requires the Department to adopt rules “for the waiver or cancellation of penalties and interest imposed by [chapter 82.32. RCW]. The Department did so in WAC 458-20-228 (Rule 228). Rule 228(5)(a) explains the late penalty:

(5) **Penalties.** Various penalties may apply as a result of the failure to correctly or accurately compute the proper tax liability, or to timely pay the tax. Separate penalties may apply and be cumulative for the same tax. Interest may also apply if any tax has not been paid when it is due, as explained in subsection (7) of this rule. Penalties apply as follows.

(a) **Late payment of a return.** [RCW 82.32.090](#)(1) imposes a five percent penalty if the tax due on a return to be filed by a taxpayer is not paid by the due date. A ten percent penalty is imposed if the tax due is not paid on or before the last day of the month following the due date, and a twenty percent penalty is imposed if the tax due is still not paid on or before the last day of the second month following the due date. . . .

Rule 228(9) discusses the waiver or cancellation of penalties:

. . .

None of the circumstances listed [as circumstances beyond the control of the taxpayer] include the circumstance that led the taxpayer to file its return and pay the tax late. As stated in Rule 228(9), circumstances beyond a taxpayer's control "are generally immediate, unexpected, or in the nature of an emergency." In the taxpayer's case, there was no emergency or unexpected circumstance; nor was the circumstance immediate. The taxpayer is a subsidiary of a major corporation that engages in business in all 50 states. It has the ability to ascertain its tax reporting obligations. In fact, all taxpayers are required to know their tax reporting obligations and to file and pay their taxes timely. RCW 82.32A.030(2), (4). Lack of knowledge is specifically listed as an example of a circumstance not considered beyond the control of taxpayers is subsection (9)(a)(iii)(B) of Rule 228. The taxpayer's failure to timely file its tax returns was, therefore, not due to circumstances beyond the taxpayer's control. We cannot grant relief under RCW 82.32.105(1).

Our inquiry does not end there, however. RCW 82.32.105(2) requires us to waive or cancel a late payment penalty if the taxpayer has timely filed and paid its excise tax returns for the 24 month period preceding the period covered by the return for which the waiver is being requested. That means that if the taxpayer timely filed and paid its excise taxes back to the second quarter of 1997, the late penalty assessed for late payment of the second quarter 1999 must be waived.

Reviewing the taxpayer's records, we find that it filed no tax returns before filing its annual 1999 excise tax return. Statutorily there is no record of timely filings against which we may judge. Therefore, the taxpayer is not entitled to relief from the penalty under RCW 82.32.105(2).

There is no other statutory basis for waiving or canceling penalties than those in RCW 82.32.105(1) and (2). Therefore, we must deny the taxpayer's petition for relief from the late payment penalties.

RCW 82.32.105(3) is the only general authority authorizing the Department to waive or cancel interest. . . . This statute provides:

- (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.

Neither of these situations exists under the facts presented in this appeal. Therefore, we have no authority to waive or cancel the assessed interest. The petition for relief must be denied.

Before closing, we note the taxpayer's argument to exercise common sense to waive or cancel penalties and interest rather than a literal reading of the statutes and administrative rules. The legislature and the governor have passed and signed, respectively, the statutes that control our actions here. They have determined the situations in which waiver or cancellation of penalties and/or interest may be granted and required us to do so if we find those situations to exist. We

have found that those situations do not exist in this appeal. The Department is required to administer the laws as adopted by the legislature. Chapter 82.01 RCW. We cannot grant the relief the taxpayer seeks in the absence of authority to do so.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

Dated this 26th day of October, 2001.