

Cite as Det. No. 14-0378, 34 WTD 326 (2015)

BEFORE THE APPEALS DIVISION  
 DEPARTMENT OF REVENUE  
 STATE OF WASHINGTON

In the Matter of the Petition For Refund	)	<u>D E T E R M I N A T I O N</u>
	)	
	)	No. 14-0378
	)	
...	)	Registration No. . . .
	)	

[1] RCW 82.32A.020(2) – RIGHTS. RCW 82.32A.020(2) authorizes the Department to waive penalties only when a taxpayer has relied on “specific, official written advice and written tax reporting instructions from the department” to its proven detriment. The taxpayer’s late payment was not caused by the instructions on the Annual Reconciliation of Apportionable Income Form because the form did not instruct the taxpayer that it did not have to pay the additional taxes by the due date. Thus, the taxpayer did not detrimentally rely on the instructions.

[2] Rule 228; RCW 82.32.105 – WAIVER OR CANCELLATION OF PENALTIES OR INTEREST – The taxpayer’s misunderstanding of the instructions to the Annual Reconciliation of Apportionable Income Form is not a circumstance beyond its control that caused the late 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.

Callahan, A.L.J.– A financing company (“Taxpayer”) petitioned for waiver of delinquent and substantial underpayment penalties in an Audit assessment claiming that the late payment of tax resulted from Taxpayer’s reliance on incorrect written instructions contained in a Department of Revenue (the “Department”) form. We deny the petition.<sup>1</sup>

ISSUES

1. Whether the late payment was the result of reliance on specific official written advice and written tax reporting instructions from the Department to the taxpayer such that penalties should be waived under RCW 82.32A.020.

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

2. Whether Taxpayer has met its burden of establishing that its failure to timely pay its tax obligation was caused by a circumstance beyond its control, requiring the Department to waive penalties in accordance with RCW 82.32.105.

#### FINDINGS OF FACT

Taxpayer provides financing services to consumers. The Department's Audit Division ("Audit") examined Taxpayer's books and records for the period of January 1, 2011 through December 31, 2011 ("audit period"). On April 3, 2014, Audit issued an assessment against Taxpayer of \$ . . . , which consisted of service and other activities business and occupation ("B&O") tax of \$ . . . , interest of \$ . . . , a delinquent penalty of \$ . . . , and a 5% substantial underpayment penalty of \$ . . . Taxpayer paid the assessment in full but petitioned the Department's Appeals Division for a refund of the penalties in the assessment.

Taxpayer reports its income under the service and other activities B&O tax classification monthly. Because Taxpayer earns apportionable income taxable in Washington and also taxable in another state, it is required to file an Annual Reconciliation of Apportionable Income form (the "Form") with the Department. The Form must be filed by October 31<sup>st</sup> of the following tax year. The Department received Taxpayer's 2011 Form on October 30, 2012. On the form, Taxpayer reported a total taxable income of \$ . . . and a total previously reported income of \$ . . . However, Taxpayer did not remit the reconciled additional tax when it submitted the Form.

Audit conducted the above referenced audit in 2014 for the audit period. Audit determined that there was a discrepancy of \$ . . . in gross income from what Taxpayer reported previously based on the Form. Audit issued the above referenced assessment on the discrepancy. Audit assessed the delinquent penalty and the 5% substantial underpayment penalty because Taxpayer did not remit the additional tax due (the difference of the total taxable income and the total of previously reported income) when it submitted its 2011 Form on October 30, 2012.

On appeal, Taxpayer contends its late payment was caused by its reliance on the Form's instructions, which requires the Department to cancel the penalties under RCW 82.32A.020. Specifically, Taxpayer argues it did not make a payment when it submitted its 2011 Form because the Form did not have a place for the calculation of a tax due and the Form merely instructed Taxpayer to submit the Form by October 31<sup>st</sup> of the following year. Taxpayer asserts the Form did not require it to make the payment along with the Form because the Form indicated that the Department would notify it of the amount due for 2011. Taxpayer argues the Department did not notify it of its 2011 additional tax until three years later when it was discovered in a compliance audit. The Form, in relevant part, contains the following language:

2. **When should I fill out this form?**

As soon as you have the information needed to determine the receipts factor for a calendar year. To avoid penalties you must send the form to the Department of Revenue by October 31 of the following year.

...

5. **How do I pay?**

**To pay electronically**, go to our website at dor.wa.gov and log into “My Account” in the upper-hand corner. ...Once you’re logged in, click on “Invoices & Payment Options,”...

**To pay by check**, mail this form with supporting documentation, if required to the address listed below.

**6. Will there be interest?**

Interest will apply to both refunds and additional amounts due. The Department will automatically include interest in refunds. If additional tax is due, the Department will notify taxpayers of the amount due.

**7. What if I have questions about my reconciliation?**

**Questions about the form:** Call the Department of Revenue by phone at 1-800-647-7706, or send an email inquiry to communications @dor.wa.gov

**Questions about a submitted form:**

Call (360) 902-7151

Taxpayer alternatively argues that its receipt of misleading or incorrect instructions on the Form is a circumstance beyond the Taxpayer’s control that caused the late payment under RCW 82.32.105.

### ANALYSIS

RCW 82.32.090(1) governs the imposition of penalties for delinquent returns as follows:

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 is 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 is 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 is assessed a total penalty of twenty-five percent of the amount of the tax under this subsection. No penalty so added may be less than five dollars.

With respect to the substantial underpayment penalty, RCW 82.32.090(2) provides:

If the department of revenue determines that any tax has been substantially underpaid, there is assessed a penalty of five percent of the amount of the tax determined by the department to be due. If payment of any tax determined by the department to be due is not received by the department by the due date specified in the notice, or any extension thereof, there is assessed a total penalty of fifteen percent of the amount of the tax under this subsection; and if payment of any tax determined by the department to be due is not received on or before the thirtieth day following the due date specified in the notice of tax due, or any extension thereof, there is assessed a total penalty of twenty-five percent of the amount of the tax under this subsection.

(Emphasis added). The statute defines the term “substantially underpaid” as

[T]he taxpayer has paid less than eighty percent of the amount of tax determined by the department to be due for all of the types of taxes included in, and for the entire period of time covered by, the department's examination, and the amount of underpayment is at least one thousand dollars.

*Id.*

A taxpayer that does not timely file and make a payment on its annual reconciliation form is subject to the penalties in RCW 82.32.090, quoted above. A taxpayer that has apportionable income from “apportionable activities” must calculate its receipts factor for the current tax year and must correct the reporting for the current tax year when the complete information is available to avoid penalties. RCW 82.04.462(4). RCW 82.04.462(4), in relevant part, provides:

[A] taxpayer must correct the reporting for the current tax year when complete information is available to calculate the receipts factor for that year, but not later than October 31st of the following tax year. Interest will apply to any additional tax due on a corrected tax return. Interest must be computed and assessed as provided in RCW 82.32.050 and accrues until the additional taxes are paid. Penalties as provided in RCW 82.32.090 will apply to any such additional tax due only if the current tax year reporting is not corrected and the additional tax is not paid by October 31st of the following tax year.

The Department adopted the Form to implement this statute. “Apportionable activities” specifically include those taxed under RCW 82.04.290, the service and other activities B&O tax classification. RCW 82.04.460(4)(a)(vi). Here, Taxpayer reports its income under the service and other activities B&O tax classification. Therefore, it has income from an apportionable activity and thus it was required to file its 2011 Form and pay the additional tax due by October 31, 2012. When Taxpayer failed to remit its additional tax owed by October 31, 2012, Audit properly assessed the penalties. Taxpayer does not dispute the tax is owed, but it argues that the Department should waive the penalties because the late payment was caused by its reliance on the Form’s instructions.

RCW 82.32A.020(2) authorizes the Department to waive penalties in tax deficiency assessments if the late payment is caused by a taxpayer’s reliance on the Department’s specific, official written advice. The statute in relevant part, provides:

The taxpayers of the state of Washington have:

...

(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;

RCW 82.32A.020(2).

The counter part of this statute is RCW 82.32A.030, which provides that taxpayers have the responsibilities to “[k]now their tax reporting obligations, and when they are uncertain about their obligations, seek instructions from the department of revenue;” and to “[f]ile accurate returns and pay taxes in a timely manner;” RCW 82.32A.030(2) &(4).

Here, Taxpayer argues that its late payment was caused by its reliance on the Department’s instructions contained on the Form. RCW 82.32A.020(2) authorizes the Department to waive penalties only when a taxpayer has relied on “specific, official written advice and written tax reporting instructions from the department” to its proven detriment. *See* Det. No. 13-0397, 33 WTD 424 (2014). The Form did not instruct Taxpayer that it did not have to pay the additional tax by October 31, 2012. The instructions on the Form explain how to make a payment. The instructions also state that interest will apply to additional amounts due; accordingly, the Department will contact Taxpayer if the interest calculation results in additional amounts owing. The Form does not state that no payment is due. Because Taxpayer did not detrimentally rely on the instructions, we do not need to address whether the instructions are specific written advice or instructions under 82.32A.020.

RCW 82.32.105 is another statute that authorizes the Department to waive penalties in the assessment. Under RCW 82.32.105(1), the Department can waive penalties where the failure to pay tax by the due date was the result of “circumstances beyond the control of the taxpayer.” The Department is authorized to issue rules regarding the waiver of penalties and interest. RCW 82.32.105(4). It has done that in WAC 458-20-228 (Rule 228).

Rule 228(9)(a)(i) provides that “. . . [t]he taxpayer bears the burden of establishing that the circumstances were beyond its control and directly caused the late payment . . . .” Rule 228(9)(a)(ii) explains what is meant by “circumstances beyond the control of the taxpayer” as follows:

The circumstances beyond the control of the taxpayer must actually cause the late payment. 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.

(Emphasis added).

RCW 82.32.105 authorizes the Department to waive penalties if the taxpayer’s failure to pay timely was due to a circumstance beyond its control that prevents it from obtaining an extension from the Department. Rule 228(9)(iii)(B) specifically provides that “[a] misunderstanding or lack of knowledge of a tax liability” is not a circumstance beyond a taxpayer’s control that warrants the Department to waive the penalties. In this case, Taxpayer knew it owed the Department additional tax for 2011 but it waited for three years to pay the tax due when it was audited by the Department. Taxpayer argues that the Department prepared the Form and caused its confusion on its tax obligation. Taxpayer’s misunderstanding of the instructions to the Form is not a circumstance beyond its control that caused the late payment. Rule 228; *see* Det. No.08-0197, 28 WTD 76 (2009). Therefore, we conclude that Taxpayer has not established it is entitled to a penalty waiver under RCW 82.32.105. We deny the petition.

DECISION AND DISPOSITION

We deny Taxpayer's petition.

Dated this 1<sup>st</sup> day of December 2014.