

Cite as Det. No. 17-0249, 38 WTD 60 (2019)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS 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. 17-0249
)	
...)	Registration No. . . .
)	

[1] RCW 84.24.120; WAC 458-20-186: CIGARETTE REMEDIAL PENALTY - WAIVER. Neither Taxpayer’s lack of knowledge of its tax liability nor the misconduct of Taxpayer’s employees constitute external circumstances sufficient to waive the cigarette remedial penalty.

[2] RCW 82.24.090(1); RCW 82.24.280(3): ESTIMATION OF ASSESSMENT. The estimate of Taxpayer’s sales of single-stick cigarettes was reasonable where Taxpayer failed to provide detailed records of single-stick sales and where the estimate was based on a thorough review of the available records and other information.

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.

Simons, T.R.O. – A corporation protests the amount of estimated cigarette remedial penalty imposed for sale of single-stick cigarettes, asserting that the sales estimated by the Liquor and Cannabis Board (LCB) are too high. Taxpayer’s petition is denied.¹

ISSUES

1. Did Taxpayer sell cigarettes outside of the Washington-stamped container and violate RCW 84.24.030 and WAC 458-20-186(101), subjecting it to the cigarette remedial penalty?
2. Was the LCB’s estimate of Taxpayer’s sales of single-stick cigarettes reasonable to issue the assessment of the remedial penalty under RCW 82.24.120?

FINDINGS OF FACT

. . . (Taxpayer) is a Washington corporation operating a convenience store. On October 10, 2016, during an inspection by the LCB, the LCB agent found one cigarette pack of a particular brand

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

under the cash register. The store clerk told the LCB agent that they sell single-stick (individual) cigarettes. The LCB agent asked for Taxpayer's purchase invoices for its cigarettes for a six-month period, which indicated that Taxpayer bought approximately 10 cartons of this brand monthly. Based on visual observations of shelf stock versus stock under the register, the LCB estimated that Taxpayer sold one carton (ten packs) of single-stick cigarettes monthly.

Taxpayer obtained a cigarette retailer license endorsement in February 2013 and began reporting gross revenue on its combined excise tax return in March 2013. Based on records provided, visual observations, and history, the LCB estimated that [T]axpayer sold [the equivalent in single-stick cigarettes of one carton (ten packs) of cigarettes monthly]. On April 18, 2017, the Department issued an estimated assessment for \$. . . , which represented the \$. . . per pack cigarette remedial penalty as described in the . . . RCW 82.24.120 multiplied by 420, the estimated number of packs of single-stick cigarettes Taxpayer sold during the relevant time period.

Taxpayer petitioned for review on May 5, 2017. On review, Taxpayer asserted that the amount due was much higher than expected, and stated that she paid \$. . . four years ago. Taxpayer did not provide detailed purchase and sales records needed to adjust the estimate.

Taxpayer's owner appeared at the hearing personally According to Taxpayer, employees were told that they cannot sell individual cigarettes, but Taxpayer stated that they often operate the stores without supervision, as Taxpayer owns four stores. Taxpayer also requested a waiver of penalty based on Taxpayer's good faith and the misconduct of its employees.

ANALYSIS

1. Cigarette Remedial Penalty Waiver

Chapter 82.24 RCW requires a cigarette tax stamp, designed by the Department, to be affixed to the smallest container or package of cigarettes that will be sold, distributed, or consumed. RCW 82.24.030(1); RCW 82.24.060(1). Sales of single-stick cigarettes, removed from the original, unopened container with tax stamp affixed, are prohibited under RCW 70.155.040. A standard pack of 20 cigarettes is, therefore, the smallest unit of cigarettes that a retailer may sell. By selling single-stick cigarettes removed from the pack to which the tax stamp was affixed, Taxpayer violated not only RCW 70.155.04, but also RCW 82.24.030, for selling a smaller unit of cigarettes without a tax stamp affixed.

Violations of Chapter 82.24 RCW subjects the person to a remedial penalty:

- (1) If any person, subject to the provisions of this chapter or any rules adopted by the department of revenue under authority of this section, is found to have failed to affix the stamps required, or to have them affixed as provided in this section, or to pay any tax due under this section, **or to have violated any of the provisions of this chapter or rules adopted by the department of revenue in the administration of this chapter**, there must be assessed and collected from such person, in addition to any tax that may be found due, **a remedial penalty equal to the greater of ten dollars per package of unstamped cigarettes** or ten dollars per

twenty roll-your-own cigarettes, or two hundred fifty dollars, plus interest on the amount of the tax at the rate as computed under RCW 82.32.050(2) from the date the tax became due until the date of payment, and upon notice mailed to the last known address of the person or provided electronically as provided in RCW 82.32.135. The amount is due and payable in thirty days from the date of the notice. If the amount remains unpaid, the department or its duly authorized agent may make immediate demand upon such person for the payment of all such taxes, penalties, and interest.

(2) The department, **for good reason shown**, may waive or cancel all or any part of the penalties imposed, but the taxpayer must pay all taxes due and interest thereon, at the rate as computed under RCW 82.32.050(2) from the date the tax became due until the date of payment.

(3) The keeping of any unstamped articles coming within the provisions of this chapter is prima facie evidence of intent to violate the provisions of this chapter.

RCW 82.24.120 (emphasis added).

Therefore, the Department must assess the remedial penalty, even where no tax is due. Taxpayer asks for waiver of the imposed penalty.

WAC 458-20-186 (Rule 186), the Department's administrative rule regarding tax on cigarettes, similarly states that "[t]he department may, in its sole discretion, cancel all or part of the penalty for **good cause**." Rule 186(705) (emphasis added). Here, we interpret Taxpayer's argument to be that it has shown "good reason" or "good cause" for waiver of the penalties imposed. We have previously held that "good cause" requires the existence of some "external circumstances" that caused the taxpayer to possess unstamped cigarettes. Det. No. 13-0367, 33 WTD 578 (2014); Det. No. 13-0278, WTD 33 WTD 472 (2014).

Here, Taxpayer's lack of knowledge of tax liability, or the misconduct of Taxpayer's employees, are not "external circumstances." Taxpayer was responsible to know its tax obligations. RCW 82.32A.030(2). The fact that employees sold single-stick cigarettes in violation of the law and contrary to Taxpayer's directions do not constitute "good reason" under RCW 82.24.120(2) or "good cause" under Rule 186. Accordingly, the Department cannot waive the cigarette remedial penalty.

2. Recordkeeping and Estimate Adjustment

RCW 82.24.090(1) requires retailers of cigarettes like Taxpayer to "keep and preserve for a period of five years an accurate set of records." See also WAC 458-20-186(701). Taxpayer declined to provide the detailed records of single-stick sales required to determine if an adjustment to the estimate is appropriate.

In the absence of detailed records, Taxpayer does not dispute the Department's authority to estimate the penalty amount; instead, Taxpayer questions the reasonableness of that estimate. In RCW 82.24.280(3), "[i]f 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.” Here, based on the information obtained from LCB, the Department issued an assessment of the remedial penalty that it determined was due.

We have previously held that the Department may make “reasonable” estimates. Det. No. 15-0350, 35 WTD 291 (2016). We have previously held that an estimate based on a thorough review of the available records and other available information constituted a “reasonable” estimate. *Id.*

Here, the LCB agent reviewed six months of cigarette inventory purchases, reviewed the amounts of inventory on the shelves, spoke to the employee about how many single-sticks were usually sold, and estimated [the equivalent of] one carton (ten packs) a month [of single-stick cigarettes] based on all of that information. This is the amount, multiplied by the months which Taxpayer had a cigarette retailer license, that was the basis for the estimate. In light of the lack of records pertinent to these particular sales, and the review of available records and other information by the LCB, we find this estimate to be reasonable. Accordingly, we affirm the assessment of penalties as originally issued.

DECISION AND DISPOSITION

Taxpayer’s petition is denied.

Dated this 19th day of October 2017.