

Cite as Det. No. 19-0083, 40 WTD 183 (2021)

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. 19-0083
)	
... )	Registration No. ...
)	

[1] RCW 82.32.130, RCW 82.32.135(1): ELECTRONIC NOTICE OF ASSESSMENT. A person is deemed to have received information from the Department on the date the Department electronically sends the information to the person or electronically notifies the person that the information is available to be accessed.

[2] RCW 82.32.090; RULE 228: DELINQUENT PAYMENT PENALTY. The Department must impose delinquent payment penalties on any tax due on a return to be filed by a taxpayer that is not received by the Department by the due date.

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.

Farquhar, T.R.O. – An [Out-of-State] development company protests the Department’s assessment of retail sales tax and business and occupation (“B&O”) tax on the grounds that the Department failed to provide the company with timely notice that the Department had issued the assessment, thus rendering the assessment invalid. The company also argues that, even if the assessment is valid, the associated delinquency penalty was improperly assessed because the company filed and paid its monthly tax returns on time. Because the Department’s secure messaging system shows that the Department timely transmitted the assessment to the company, we find that the Department complied with its statutory duty to provide notice and the assessment is valid. We also find that the delinquent penalty was properly assessed. Taxpayer’s petition is denied.<sup>1</sup>

ISSUES

1. Whether sending a taxpayer a tax assessment through the Department’s secure messaging system satisfies the Department’s statutory obligation under RCW 82.32.100 and RCW 82.32.135 to notify the taxpayer that an assessment has been issued.

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

2. Whether the Department properly assessed the delinquent penalty against Taxpayer under RCW 82.32.090 and WAC 458-20-228.

### FINDINGS OF FACT

. . . (“Taxpayer”) was an [Out-of-State] development company that specialized in home building and remodeling. Taxpayer operated in Washington from 2013 to 2017. Taxpayer stopped doing business in 2017.

While Taxpayer was registered to do business in Washington, it maintained an online account with the Department. At all times relevant to this case, the account was linked to an email address belonging to Taxpayer’s account manager . . . (“Manager”).<sup>2</sup> An online account allows a taxpayer to file returns, make payments, and send and receive secure messages between the taxpayer and the Department. Whenever the Department sends a secure message, the message itself is deposited into the taxpayer’s secure inbox on the Department’s website. At the same time, the system sends an email to the email address associated with the account notifying the taxpayer that they have a new message in their secure inbox. To view the message, the taxpayer then logs on to the Department’s website and accesses their secure inbox. Any time a secure message is sent, opened, or deleted, the system records the date and time of the action, as well as the identity of the user that initiated the action.

In September of 2016, the Department’s Audit Division (“Audit”) began a review of Taxpayer’s books and records for the period of May 1, 2013, through December 31, 2016 (“the Audit Period”). Following its review, Audit determined that Taxpayer had incorrectly reported its income and owed retail sales tax and retailing business and occupation (“B&O”) tax. Audit assessed retailing B&O tax on \$ . . . in unreported income and assessed retail sales tax on \$ . . . in unreported sales that occurred during the course of the Audit Period.

On May 11, 2017, Audit issued an assessment in the amount of \$ . . . (“the Assessment”). The Assessment included \$ . . . in retail sales tax, \$ . . . in retailing B&O tax, \$ . . . in delinquency penalties, \$ . . . in interest, and a \$ . . . assessment penalty. The Assessment directed Taxpayer to pay the amount due on or before June 12, 2017. The Department sent an electronic copy of the Assessment to Taxpayer using the secure messaging system and a hardcopy via regular mail. The Department sent the hardcopy to the address the Department had on file for the Taxpayer, which is the same address that appears on Taxpayer’s Review Petition.

Taxpayer failed to pay the Assessment by the due date and, as a result, the Department issued a tax warrant on July 12, 2017, in the amount of \$ . . . .<sup>3</sup> The warrant amount included the amount of the Assessment, plus additional interest and penalties incurred since the due date. Taxpayer failed to pay the warrant by the July 24, 2017, due date and the Department began the process of levying Taxpayer’s bank account on August 7, 2017.

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<sup>2</sup> The Manager attended the hearing held on this matter, on September 5, 2018, and confirmed that the email address the Department had on file was hers. The same email address appears on the data contained in the secure messages discussed below, as well as on Taxpayer’s registration with the Secretary of State.

<sup>3</sup> Tax Warrant No. . . . .

On September 11, 2017, an employee (“the CPA”) from . . . contacted the Department and stated that he had been hired by Taxpayer to assist with the audit. The CPA provided Audit with additional information regarding Taxpayer’s business activities and Audit agreed to issue an adjustment to the Assessment.<sup>4</sup>

On January 11, 2018, Audit issued a post-assessment adjustment (“PAA”), which reflected a \$ . . . reduction in Taxpayer’s tax liability. The PAA included additional interest and penalties incurred since the Assessment’s due date. The total amount due was \$ . . . , which included \$ . . . in retail sales tax, \$ . . . in retailing B&O tax, \$ . . . in delinquency penalties, \$ . . . in interest, a \$ . . . assessment penalty, and a \$ . . . late payment penalty.

On April 13, 2018, Taxpayer submitted a timely petition for review of the PAA.<sup>5</sup> Taxpayer argues that it never received the electronic copy or hardcopy of the notice of the Assessment. Therefore, Taxpayer argues that the entire Assessment – including taxes, penalties, and interest – is invalid and must be cancelled because the Department failed to notify Taxpayer that it had issued the Assessment. Taxpayer also argues that, even if the Assessment is valid, the delinquency penalties were improperly assessed because “[a]ccording to [Taxpayer’s] bookkeeper, [Taxpayer] filed monthly tax returns and paid the amounts due on those returns. Therefore, it was improper to assess the delinquency penalty under RCW 82.32.090(1) and it should be removed.” *See* Taxpayer’s Review Petition, Page 3.

During our review of Taxpayer’s claims, we obtained a copy of the secure message containing the Assessment notice that was sent to Taxpayer. The timestamp on the message shows that it was sent on May 10, 2017, at 1:29 PM. The message consists of a single line of text that reads as follows: “Your audit results are attached.” Attached to the message were electronic copies of the Assessment invoice, the audit narrative (a written explanation of the audit procedures and results), and Audit’s Excel workbook. Technical data provided by the Department’s Information Services division (“IS”) confirms that Audit transmitted the message on the date and time referenced in the message. The data also shows that Taxpayer never opened the message. On August 30, 2018, IS confirmed that the message remained, unread, in Taxpayer’s secure inbox. IS was unable to provide data regarding the notification email sent to Taxpayer but confirmed that the email address on file matched the address the Manager admitted to using.

IS also provided data regarding nine other secure messages the Department sent to Taxpayer between October 4, 2013, and June 7, 2017.

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<sup>4</sup> Between November 2017 and January 2018, the Department also requested the CPA submit a financial statement for Taxpayer and confirm whether or not Taxpayer was still doing business. The CPA failed to respond to those requests, despite responding to other communications with the Department during that time. Due to the CPA’s failure to respond, the Department initiated a business license revocation proceeding. The Department sent the revocation hearing notice to Taxpayer via first class mail, but Taxpayer never responded. Taxpayer failed to appear at the revocation hearing held on January 3, 2018, and Taxpayer’s business license was revoked on February 5, 2018. The Department closed its account on the same day.

<sup>5</sup> The Department granted Taxpayer an extension on the deadline to file its petition. Thus, pursuant to WAC 458-20-100(3)(a), the petition was considered timely.

The messages, along with the Assessment message sent on May 10, 2017, are summarized in the following table:

Date Sent	Date Opened	Opened By	Message Type
10/04/2013	01/23/2014	[Manager]	Notice of Delinquency
11/04/2013	01/23/2014	[Manager]	Notice of Delinquency
01/07/2014	01/23/2014	[Manager]	Notice of Delinquency
11/07/2014	N/A	N/A	Notice of Delinquency <sup>6</sup>
07/06/2015	07/21/2015	[Manager]	Reseller Permit Expiration
09/03/2015	09/03/2015	[Manager]	Notice of Delinquency
02/08/2016	02/16/2016	[Manager]	Notice of Delinquency
05/06/2016	05/02/2017	[Manager]	Notice of Delinquency
<b>05/10/2017</b>	<b>N/A</b>	<b>N/A</b>	<b>Your Audit Results</b>
06/07/2017	06/07/2017	[Manager]	Notice of Delinquency

## ANALYSIS

### *1. Notice of the Assessment*

After issuing an assessment against a taxpayer, the Department must “notify the taxpayer by mail, or electronically as provided in RCW 82.32.135, of the total amount of such tax, penalties, and interest.” RCW 82.32.100(2). Under RCW 82.32.135(1), whenever the Department is required to send “any assessment, notice, or any other information to persons by regular mail” it must instead provide the document or information electronically. If the document or information is subject to confidentiality provisions, the Department must “use methods reasonably designed to protect the information from unauthorized disclosure.” RCW 82.32.135(2). [The Department does not have the responsibility of sending the information both electronically and by regular mail.]

When the Department sends information or documents to a taxpayer electronically, the taxpayer is deemed to have received the information “on the date that the department electronically sends the information to the person [or electronically notifies the person that the information is available to be accessed by the person.]” RCW 82.32.135(3); *see also* Det. No. 16-0225, 35 WTD 639 (2016) (taxpayer found to have received secure messages on the day the Department sent them, even though taxpayer failed to update the email address associated with the secure messaging system). “Failure of the taxpayer to receive such notice or order whether served, mailed, or provided electronically as provided in RCW 82.32.135 shall not release the taxpayer from any tax or any increases or penalties thereon.” RCW 82.32.130.

Here, the Department transmitted the Assessment to Taxpayer on May 10, 2017, via the Department’s secure messaging system. The evidence provided to us by IS confirms that the message was sent on May 10, 2017, and as of August of 2018 the message still exists in Taxpayer’s inbox. Therefore, Taxpayer is deemed to have received the Assessment on May 10, 2017, pursuant to RCW 82.32.135(3).

<sup>6</sup> This message was deleted, but not opened, by the Manager’s login ID.

While the Department is only required to send the Assessment in order to comply with RCW 82.32.130 and 82.32.135, we note that the evidence here suggests Taxpayer actually saw a message [had been received]. The data from IS shows that the Manager opened secure messages from the Department on May 2, 2017, and June 7, 2017 – eight days before and one month after the Assessment was issued, respectively. This shows that Taxpayer had access to its account and was checking the secure inbox both before and after the Assessment results arrived. Whether Taxpayer ever opened or read the message is immaterial. Failure to open the message is no different than if Taxpayer received the assessment by mail and chose not to open the envelope. Moreover, in this case, the Department also sent notice of the assessment to Taxpayer’s physical address. Therefore, because the Department has shown that it sent the Assessment to the Taxpayer, we find that the Department complied with its obligations under RCW 82.32.100 and, pursuant to RCW 82.32.135(3), Taxpayer is deemed to have received the Assessment regardless of whether Taxpayer actually read the message. Thus, the Assessment was properly issued.

## *2. Delinquent Penalty*

The Department operates under a progressive delinquent penalty scheme, outlined in RCW 82.32.090(1):

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 nine 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 nineteen 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-nine percent of the amount of the tax under this subsection.

The Department must impose interest and penalties when the conditions for imposing them are met. RCW 82.32.090(1); Det. No. 01-193, 21 WTD 264 (2002); Det. No. 99-279, 20 WTD 149 (2001).

Here, as of the Assessment’s issue date (May 10, 2017), Taxpayer had paid none of the \$ . . . in retail sales tax and \$ . . . in retailing B&O tax Audit determined to be due during the Audit Period. The issue date was well beyond the “last day of the second month following the due date” for all periods within the Audit Period (the latest due date was for the December 2016 return, which was due January 25, 2017). Thus, Audit properly assessed the 29% delinquent penalty required by RCW 82.32.090(1). Whether Taxpayer “filed monthly tax returns and paid the amounts due on those returns” [as Taxpayer argues] is irrelevant; the penalty was assessed on the amounts Taxpayer failed to timely report and pay.

## DECISION AND DISPOSITION

Taxpayer’s petition is denied.

Dated this 14th day of March 2019.