

Cite as Det. No. 19-0283, 40 WTD 265 (2021)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Refund of)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 19-0283
)	
...)	Registration No. ...
)	

[1] RCW 84.24.120; WAC 458-20-186: CIGARETTE REMEDIAL PENALTY – IMPOSITION. The Department is required to impose a remedial penalty upon any person subject to chapter 84.24 RCW who fails to affix the required stamp on each package of cigarettes before sale, use, consumption, handling, or removal of the packages, or who fails to pay any tax due.

[2] RCW 84.24.120; WAC 458-20-186: CIGARETTE REMEDIAL PENALTY - WAIVER. Because a taxpayer’s inventory is at all times within its control, a taxpayer seeking a waiver of the remedial penalty cannot claim that an “external circumstance” caused it to retain possession of improperly-stamped cigarettes even if the taxpayer’s distributor failed to properly stamp the cigarettes before selling them to the taxpayer.

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. – A business that operates a convenience store seeks a refund of its payment of an assessment of cigarette taxes, penalties, and interest on the grounds that it unknowingly purchased from its wholesale tobacco supplier cigarettes that lacked the required Washington stamp. Because the business possessed unstamped cigarettes, we find that the Department correctly imposed the subject taxes, penalties, and interest. Furthermore, because the business failed to present evidence that it possessed the unstamped cigarettes due to “external circumstances,” we find that the Department lacks “good reason” to waive the subject penalties. Petition denied.¹

ISSUES

1. Whether a taxpayer that inadvertently possessed unstamped cigarettes owes cigarette tax and remedial penalties under RCW 82.24.020, RCW 82.24.120, and WAC 458-20-186.

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

2. Whether a taxpayer is entitled to a waiver of the remedial penalties under RCW 82.24.120 and WAC 458-20-186(705) because it unknowingly purchased improperly-stamped cigarettes from a wholesale distributor.

FINDINGS OF FACT

. . . (“Taxpayer”) is a business that operates a convenience store in . . . , Washington. On December 29, 2017, Taxpayer purchased three cartons of “Marlboro Box King BP” cigarettes from a distributor See . . . (“the Invoice”). Taxpayer intended to sell the cigarettes at retail at the store.

On January 4, 2018, officers from Washington’s Liquor and Cannabis Board inspected Taxpayer’s tobacco inventory at the store. The officers discovered 28 packs of Marlboro cigarettes affixed with [out-of-state] stamps. One of Taxpayer’s employees explained that Taxpayer had recently purchased the [out-of-state]-stamped cigarettes from the distributor and provided the officers with a copy of the Invoice. [The Invoice indicated that no Washington cigarette tax was charged.] The officers informed the employee that possessing [out-of-state]-stamped cigarettes was not permissible and confiscated all 28 packs.

On September 21, 2018, the Department’s Special Programs Division (“Special Programs”) issued a cigarette tax assessment based on the information provided by the Liquor Control Board officers. The assessment, which totals \$. . . , is comprised of \$. . . in cigarette taxes, a \$. . . penalty, and \$. . . in interest. The penalty amount represents the 10-dollar-per-pack remedial penalty authorized by RCW 82.24.120. Taxpayer has since paid the assessment in full.

On October 16, 2018, Taxpayer submitted a timely petition for review. In it, Taxpayer argues that its possession of the [out-of-state]-stamped cigarettes was unintentional and that it was unaware that the cigarettes lacked the required Washington stamp. Taxpayer asserts that “two of the packages were not even opened” and it “did not notice [the subject cigarettes] had an [out-of-state] stamp since they were in cartons.” Petition, pg. 1. The petition did not specify the relief Taxpayer seeks, but we presume Taxpayer requests we vacate the assessment in full. Because Taxpayer has paid the assessment, Taxpayer’s petition constitutes a refund request.

ANALYSIS

1. Assessment of Cigarette Tax, Remedial Penalties, and Interest

Washington imposes a cigarette tax “upon the sale, use, consumption, handling, possession, or distribution of all cigarettes, in an amount equal to 12.125 cents per cigarette.” RCW 82.24.020(1). See also WAC 458-20-186(101) (“The . . . cigarette tax is due and payable by the first person who sells, uses, consumes, handles, possesses, or distributes the cigarettes in this state.”). To prove that the taxes have been paid, retailers must affix the Department’s stamps on each package of cigarettes before sale, use, consumption, handling, or removal of the packages. RCW 82.24.030(1). Any person in possession of unstamped cigarettes in Washington State, unless specifically exempted, is liable for cigarette tax on those cigarettes. WAC 458-20-186(103)(b)(i). Keeping

unstamped cigarettes is considered “prima facie evidence of intent to violate the provisions of [Chapter 82.24 RCW].” RCW 82.24.120(3).

Chapter 82.24 RCW imposes a remedial penalty upon any person subject to the chapter who fails to affix the required stamp on a container, or fails to pay any tax due. In addition to any tax due, RCW 82.24.120(1) requires the Department to impose penalties and interest as follows:

[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,

RCW 82.24.120(1). *See also* WAC 458-20-186(705).

Whenever the Department issues an assessment for unpaid taxes, it must also include interest. RCW 82.32.050.

Here, Taxpayer does not contest that it possessed 28 packs of cigarettes that were missing the tax stamp required under RCW 82.24.030. Taxpayer has presented no evidence to suggest that it is exempt from Washington’s cigarette tax; therefore, we conclude that Taxpayer is liable for the cigarette tax included in the assessment under RCW 82.24.020(1) and WAC 458-20-186(103)(b)(i). Taxpayer’s argument that it inadvertently purchased [out-of-state]-stamped cigarettes does not alter our analysis because the relevant statutes and rules impose the tax “upon the sale, use, consumption, handling, possession, or distribution of all cigarettes” and do not provide exemptions for accidental or inadvertent possession of [cigarettes not affixed with a Washington stamp]. *See generally* RCW 82.24.020 and WAC 458-20-186.

For the same reasons, we also find that Taxpayer is liable under RCW 82.24.120(1) and WAC 458-20-186(705) for the remedial penalties included in the assessment. Because Taxpayer was in possession of 28 packs of unstamped cigarettes, Special Programs properly applied the 10-dollar-per-pack remedial penalty in the amount of \$

Finally, we find that the Special Programs properly included interest in the assessment pursuant to RCW 82.32.050. Because Taxpayer was assessed unpaid cigarette taxes, Special Programs was required to include interest. RCW 82.32.050; RCW 82.24.120(1).

Having determined that Special Programs properly assessed the tax, penalties, and interest at issue, our analysis will now turn to whether the Department can waive the penalties.

2. Waiver of Remedial Penalty

The Department may waive or cancel the remedial penalty “*for good reason shown . . . 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.*” RCW 82.24.120(2) (emphasis added). WAC 458-20-186 (“Rule 186”), the Department’s administrative rule regarding cigarettes taxes, similarly states that the Department may, “in its sole discretion, cancel all or part

of the penalty *for good cause.*” Rule 186(705) (emphasis added). Taxpayer bears the burden of proving that it qualifies for a penalty waiver. Det. No. 04-0268, 26 WTD 105 (2007); *see also* Det. No. 13-0278, 33 WTD 472 (2014); Det. No. 04-0268 (citing Det. No. 00-030, 20 WTD 154 (2001), Det. No. 86-261, 1 WTD 209 (1986)).

Rule 186(705) uses the phrase “good cause,” which we equate to “good reason” (the actual phrase used in RCW 82.24.120(2)). *See* Det. No. 13-0278, 33 WTD 472, 478 (2014); Det. No. 13-0367, 33 WTD 578, 581 (2014). Washington courts have addressed the notion of what constitutes “good cause.” For example, in *Cowles Publishing Co. v. Employment Security Dep’t*, 15 Wn. App. 590, 594-95, 550 P.2d 712 (1976), the court provided the following analysis of the phrase “good cause” in the context of determining whether the claimant was entitled to unemployment benefits:

Unemployment was forced upon the claimant by these *external circumstances*, thereby creating *good cause* for voluntary unemployment and entitling the claimant to benefits under RCW 50.20.050.

(Emphasis added). *See also Matison v. Hutt*, 85 Wn.2d 836, 539 P.2d 852 (1975) (finding that external circumstances forced workers to voluntarily quit, thus their voluntary unemployment was for good cause, thereby entitling them to unemployment benefits).

We have employed the “external circumstances” reasoning in prior cases dealing with whether a taxpayer had “good cause” to possess unstamped cigarettes. *See* Det. No. 13-0367, 33 WTD 578 (2014) (finding no evidence of “good cause” where an individual failed to demonstrate that her possession of 4,000 packs of unstamped cigarettes was “forced upon her by external circumstances”); Det. No. 13-0278, WTD 33 WTD 472 (2014) (external circumstances did not cause the taxpayer to be financially unable to pay the remedial penalty, thus there was no “good cause” to waive the penalty).

Here, we interpret Taxpayer’s argument to be that it has shown “good reason” or “good cause” for possessing the unstamped cigarettes, which would therefore qualify it for a waiver of the remedial penalties. Read in the context of the “external circumstances” analysis discussed above, Taxpayer is effectively arguing that the distributor’s error [in providing out-of-state stamped cigarettes] was an “external circumstance” that provides the Department with the good cause necessary to waive the penalties. We disagree. Even if we assume that the distributor did indeed sell Taxpayer incorrectly-stamped cigarettes – a fact that we note cannot be confirmed – it was Taxpayer’s responsibility to inspect the cigarettes it received and confirm that they were properly stamped. Taxpayer had possession of the cigarettes for approximately one week between the date of purchase and the Liquor Control Board inspection and even opened one of the cartons, which would have exposed the [out-of-state] stamps to plain view. Taxpayer’s inventory was at all times within its control, thus Taxpayer cannot claim that an “external circumstance” caused it to retain possession of improperly-stamped cigarettes.

Per RCW 82.24.120(3), Taxpayer’s possession of unstamped cigarettes is *prima facie* evidence of Taxpayer’s intent to violate the provisions of Chapter 82.24 RCW, and Taxpayer has not provided proof to rebut this evidence. As such, we find that Taxpayer has failed to meet its burden of showing good cause to waive the remedial penalty imposed under RCW 82.24.120(1). In the

absence of a showing of good cause, the Department does not have the authority to waive the penalties. RCW 82.24.120(2).

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 5th day of November 2019.