

Cite as Det. No. 16-0225, 35 WTD 639 (2016)

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

In the Matter of the Correction of Assessment	)	<u>D E T E R M I N A T I O N</u>
of	)	
	)	No. 16-0225
	)	
...	)	Registration No. ...
	)	

[1] RULE 228; RCW 82.32.590: ANNUAL SURVEY – FAILURE TO TIMELY FILE. A taxpayer’s failure to update its contact information with the Department of Revenue is not a circumstance beyond the taxpayer’s control for purposes of granting an extension to file the annual survey.

[2] RCW 82.32.590: ANNUAL SURVEY – FAILURE TO TIMELY FILE. The Department of Revenue may not assess a penalty under RCW 82.32.090 against a Taxpayer for failing to timely file a required annual survey.

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.

Fisher, T.R.O. – A taxpayer seeks an extension to file its annual survey to qualify for a high technology tax credit after the Department of Revenue (“Department”) disallowed the taxpayer’s use of the credit and issued an assessment.<sup>1</sup> Taxpayer also requests the penalties imposed in the assessment be waived. Taxpayer’s petition is denied in part and granted in part.<sup>2</sup>

ISSUES

1. Whether Taxpayer qualifies for an extension of the due date to file the annual survey for the RCW 82.04.4452 high technology tax credit, as provided by RCW 82.32.590 and WAC 458-20-228.
2. Whether Taxpayer qualifies for waiver of penalties under RCW 82.32.590.

FINDINGS OF FACT

Taxpayer was in the business of system assessment and development consulting services to various government agencies. At the end of 2014, Taxpayer’s member . . . (Member) decided to

<sup>1</sup> Taxpayer requests we waive the assessment; however, an extension of the time to file the annual survey would effectively waive the assessment provided that Taxpayer completed and filed the annual survey.

<sup>2</sup> Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

shut down Taxpayer and move [out-of-state]. Member updated her physical address with the Department, but failed to update the e-mail address, which was associated with Taxpayer. After Taxpayer dissolved in 2014, Member stopped checking the e-mail associated with Taxpayer.

On March 4, 2015, Taxpayer filed its 2014 taxes. Taxpayer reported a tax liability of \$ . . . after applying a high technology credit and a small business credit.

On April 1, 2015, the Department sent Taxpayer a secure message stating that the 2014 annual survey was due April 30, 2015. When the Department sends a secure message to a taxpayer, an e-mail is sent to the email address on file for that taxpayer providing notice that the secure message is available to be read. The Department did not receive an annual survey from Taxpayer on or before April 30, 2015. On May 21, 2015, the Department sent another secure message to Taxpayer stating the annual survey had not been received, and advised Taxpayer of its options to request an extension. No request for an extension was made in 2015.

On November 24, 2015, the Department sent Taxpayer a secure message stating that the high technology credit was being disallowed as a result of Taxpayer's failure to file the 2014 annual survey. The message stated Taxpayer had thirty days to remit payment, or else an invoice would be issued which would include interest and additional penalties. The Department did not receive payment on or before December 24, 2015.

On December 29, 2015, the Department issued Document No. . . . , which assessed \$ . . . in taxes (which represented the amount of the high technology credit Taxpayer claimed in 2014), \$ . . . in a delinquent payment penalty, and \$ . . . in interest.

Taxpayer timely appealed, requesting waiver of the tax liability and penalties, or alternatively an extension to file the survey to be allowed the high technology credit. In the petition, Member explains she did not check the e-mail associated with the secure messaging account after dissolving Taxpayer so she did not see the secure messages and as a result did not know about the missing survey or the tax liability.

#### ANALYSIS

RCW 82.04.4452 authorizes a [business and occupation (B&O)] tax credit for qualified high technology spending.<sup>3[4]</sup> To claim the credit, a person must file a complete annual survey with the Department as required by RCW 82.32.585. RCW 82.04.4452(6). The annual survey must be filed by April 30<sup>th[5]</sup> of the year following any calendar year in which a person becomes eligible to claim the credit. RCW 82.32.585(1)(a)(i); *see also* WAC 458-20-268(3). RCW 82.32.590 provides two exceptions to the annual survey filing deadline: (1) the Department must extend the time for filing the survey if the failure to file the survey by the due date was the result

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<sup>3</sup> Whether or not Taxpayer's activities qualify for the high technology credit is not at issue in this administrative review; accordingly, we assume Taxpayer's activities would qualify for the high technology credit but for the failure to timely file the annual survey.

<sup>4</sup> [This credit expired January 1, 2015.]

<sup>5</sup> [Effective for annual surveys due in 2017, the due date for filing annual surveys is May 31<sup>st</sup> of the year following any calendar year in which a person becomes eligible to claim the tax preference requiring the filing of the annual survey. See Engrossed Substitute House Bill (ESHB) 2540 (section 2, chapter 175, Laws of 2016).]

of “circumstances beyond the control of the taxpayer,” as described by WAC 458-20-228(9) (Rule 228(9)) (RCW 82.32.590(1)-(2)); and (2) a taxpayer is entitled to a one-time 90-day extension of the deadline to file an annual survey where the taxpayer files a timely written request for extension and the taxpayer was timely in filing prior annual surveys, beginning in 2010 (RCW 82.32.590(3)).<sup>6</sup>

“Circumstances beyond the control of the taxpayer” are generally those that are immediate, unexpected, or in the nature of an emergency, which prevent the taxpayer from the reasonable opportunity to obtain an extension of the due date or otherwise timely file. Rule 228(9)(a). Examples include: an act of fraud by a taxpayer’s employee; death or serious illness of the taxpayer, family member, or accountant; or the destruction of business records by fire or other casualties. Rule 228(9)(a)(ii)(C), (E) and (F). Rule 228 also provides specific examples considered *not* to be circumstances beyond the control of the taxpayer, including where the late filing resulted from a taxpayer’s misunderstanding or lack of knowledge of a tax liability, and where late filing resulted from mistakes on the part of employees or other persons contracted with the taxpayer. Rule 228(9)(a)(iii)(B), (E). In this case, Taxpayer argues that it qualifies for extension of the filing deadline because not receiving the emails notifying it of the need to file the annual survey was a circumstance beyond its control.

RCW 82.32.135(3) provides “[a]ny assessment, notice, or other information provided by the department electronically to a person is deemed to be received by the taxpayer on the date that the department electronically sends the information to the person . . . .” Here, Taxpayer is deemed to have received the secure messages on the day the Department sent them. Taxpayer’s lack of knowledge of the tax liability due to Taxpayer’s failure to update the e-mail associated with the secure messaging system is not beyond the control of the taxpayer. WAC 458-20-228(9)(a)(iii)(B).

The penalty for claiming the credit under RCW 82.04.4452 but failing to timely file a complete annual survey is that the amount of credit claimed for the previous calendar year is immediately due. RCW 82.32.585(6)(a). The taxpayer failed to file the annual survey required for its claimed 2014 credit by the April 30, 2015, due date; therefore, the Department correctly assessed the taxpayer the amount of its claimed credit for 2014.<sup>7</sup> The taxpayer’s petition is denied as to the issue of waiving the imposition of the B&O Tax.

Taxpayer next asks that we waive the penalties imposed in the assessment. RCW 82.32.[585](6) provides as follows:

- (a) Except as otherwise provided by law, if a person claims a tax preference that requires an annual survey under this section but fails to submit a complete annual survey by the due date of the survey or any extension under RCW 82.32.590, the

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<sup>6</sup> The ninety-day extension would have extended the due date from April 30, 2015, to July 30, 2015. See RCW 82.32.590(3)(c). Because Taxpayer did not file the annual survey before July 30, 2015, this provision cannot provide Taxpayer relief from the tax.

<sup>7</sup> [Beginning with annual surveys due after July 1, 2017, the “penalty” for failing to file an annual survey by the due date is reduced to 35 percent of the tax preference claimed. However, if a taxpayer has previously been penalized for the late filing of an annual survey for the same tax preference, the penalty is 50 percent of the tax preference claimed. See ESHB 2540 (section 2, chapter 175, Laws of 2016).]

department must declare the amount of the tax preference claimed for the previous calendar year to be immediately due. If the tax preference is a deferral of tax, twelve and one-half percent of the deferred tax is immediately due. If the economic benefits of the deferral are passed to a lessee, the lessee is responsible for payment to the extent the lessee has received the economic benefit.

(b) The department must assess interest<sup>[8]</sup>, **but not penalties**, on the amounts due under this subsection. The interest must be assessed at the rate provided for delinquent taxes under this chapter, retroactively to the date the tax preference was claimed, and accrues until the taxes for which the tax preference was claimed are repaid. . . .

RCW 82.32.590(6) states that penalties may not be assessed where a taxpayer takes a credit that requires filing of an annual survey but fails to actually file the survey. Here, Taxpayer took the high technology credit under RCW 82.04.4452(1) but failed to file the survey as required by RCW 82.04.4452(6). The Department correctly assessed tax against Taxpayer in the amount of the claimed credit, but also assessed a delinquent payment penalty against Taxpayer. RCW 82.32.590(6)(b) prohibits assessing penalties in this situation; accordingly, the penalties must be waived.

Taxpayer's petition is denied as to the imposition of the B&O tax, and granted as to the cancellation of the penalty.

#### DECISION AND DISPOSITION

Taxpayer's petition is denied in part and granted in part.

Dated this 15th day of July, 2016.

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<sup>8</sup> [ESHB 2540 also eliminated interest on amounts due for failing to file an annual survey by the due date, beginning with annual surveys due after July 1, 2017.]