Cite as Det. No. 01-165, 22 WTD 5 (2003)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 01-165[1]
	)	
. . .	)	Registration No. . . .
	)	Use Tax Assessment
	)	Docket No. . . .

[1] RULE 178; RCW 82.12.020: USE TAX – EXEMPTION FOR PERSONAL PROPERTY OF NONRESIDENT TEMPORARILY IN WASHINGTON – VACATION CABIN KIT. The personal property of a nonresident must be in Washington only temporarily if its use is to be exempt from use tax. A cabin kit brought into Washington by Canadians and used by them as a permanent vacation home is subject to use tax.

[2] RULE 228; RCW 82.32.105: LATE PAYMENT OF RETURN PENALTY – CIRCUMSTANCES BEYOND THE CONTROL OF THE TAXPAYER – LACK OF KNOWLEDGE OF TAX LIABILITY. Lack of knowledge of a tax liability generally is not considered a circumstance beyond the control of the taxpayer. This general rule applies even when the taxpayer made inquiries of private parties it expected to be familiar with the tax ramifications of such a transaction, and those parties failed to alert the taxpayer.

[3] RULE 228; RCW 82.32.105: LATE PAYMENT OF RETURN PENALTY – CANCELLATION – FINANCIAL HARDSHIP. That paying a penalty would create a financial hardship, or receiving a refund of a penalty would relieve a financial hardship, is not a basis for waiving, canceling, or refunding penalties.

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.

[1] The reconsideration determination, Det. No. 01-165R, is published at 22 WTD 11 (2003).

NATURE OF ACTION:

Two Canadian couples who formed a partnership to import into the state a recreation cabin kit, which they set up and used as a vacation cabin, request cancellation of a delinquency penalty and interest added to a use tax assessment, contending their lack of awareness of the use tax liability should be considered a circumstance beyond their control under the specific facts of this case. [2]

FACTS:

Prusia, A.L.J. -- The taxpayer, . . . , is a partnership of Mr. and Mrs. [F] and Mr. and Mrs. [M]. Mrs. [F] and Mrs. [M] are sisters. All four partners are Canadian citizens and long-time residents of [Canada].

The two couples formed the partnership in 1997 to erect a recreation cabin at . . . , Washington. . . . . After shopping around, the partners decided to buy a cedar cabin kit from a [Canadian] dealer that previously had sold half a dozen similar kits to Canadians for use at [the same Washington location]. They chose that dealer because the partners had never imported anything into the U.S., and wanted to deal with someone who was experienced in such matters. The partners asked the salesman about taxes and duties, and were told no provincial tax was due because the kit was being exported, but a small federal duty would have to be paid. The salesman said nothing about Washington taxes. The partnership borrowed the funds to purchase and erect the cabin from a bank in . . . , Washington, granting a mortgage on the . . . property. The partners explained to the . . . bank exactly what they intended to do. The partners do not recall the bank saying anything about Washington taxes. The partnership purchased the cabin kit from the [Canadian] dealer in June 1997. They paid no provincial tax, because the purchase was for export. In July 1997, the dealer transported the kit across the international border to [Washington]. The dealer arranged for trucking, handled paperwork, fees, and duty at the border crossing, and billed the partnership. The partnership assumed everything had been properly taken care of. The partnership paid a contractor to erect the cabin. The two families have since used the cabin on weekends and holidays. Both families continue to reside in Canada.

Prior to the notification described in the next paragraph, none of the partners knew that Washington had a use tax, and assumed all taxes and duties related to the recreation cabin had been paid. They did not contact the Department regarding Washington tax obligations prior to being contacted by the Department as described in the next paragraph.

In April 2001, the Compliance Division of the Department of Revenue contacted the partnership to inquire whether the partnership had paid sales or use tax on the cabin kit the partnership had erected at [Washington]. The partnership told the Compliance Division that neither sales tax nor use tax had been paid. On April 17, 2001, the Compliance Division issued a Washington use tax assessment against the partnership on its use of the cabin kit in Washington. The assessment was based on a value of $ . . . and included the following amounts:

[2] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

State use tax (6.5% of value)	. . .
Local use tax (1.3% of value)	. . .
Use tax subtotal (tax due)	. . .
20% delinquent penalty	. . .
Interest	. . .
Total assessed	. . .

The partnership asked the Compliance Division to waive the penalty, stating the partners were misled by the . . . dealer, had no knowledge of the tax obligation, and felt it was unfair to assess a penalty under the circumstances. The Compliance Division denied the waiver request.

The partnership then paid the Department $ . . . on the assessment, and appealed the penalty and interest portions. The Department applied the payment first to interest, then to penalties, and then to the tax portion of the assessment. The Department has continued to assess interest on the balance remaining. The appeal of penalty and interest is now before this division.

As grounds for appeal, the partnership asserts the following. 1) None of the partners knew about Washington use tax until contacted by the Compliance Division in 2001. The tax was not made known to the partnership by either the . . . dealer, the . . . bank, or U.S. Customs. 2) The partners are not in the business of importing things, so inquired of, and relied upon, persons they reasonably believed to be experienced in such matters. 3) The partnership did not hide or attempt to evade taxation, and had no intent to avoid or delay paying any tax. . . . . The partnership would have paid the tax when it imported the kit if the partners had had any inkling the tax was owed. 4) The tax, penalty, and interest constitute a financial hardship for the partnership, as they did not build these amounts into their budget for the recreation cabin.

ISSUE:

May the Department waive the penalty or interest under the circumstances presented?

DISCUSSION:

RCW 82.12.020(1) imposes a use tax on "the privilege of using within this state as a consumer: (a) Any article of tangible personal property purchased at retail . . . ." Use tax liability arises upon first use as a consumer in this state. RCW 82.12.010(2); WAC 458-20-178(3) (Rule 178(3)). The use tax is levied and collected in an amount equal to the value of the article used multiplied by the rate in effect for the retail sales tax. RCW 82.12.020(4). A credit is allowed against the use tax imposed, in the amount of any sales tax or use tax previously paid to another state or foreign country. RCW 82.12.035. Use tax is due in the month following the month in which tax liability arises. RCW 82.32.045; WAC 458-20-228(16) (Rule 228(16)).

Building materials or a kit home are tangible personal property, and are subject to sales tax if purchased in Washington by a consumer, or use tax if brought into Washington and used by a consumer. *See* RCW 82.04.050(2)(b).

[1] The use tax applies to all persons in this state whether a resident or a nonresident, unless a statutory exemption is granted. RCW 82.12.0251 provides an exemption from use tax for use by a nonresident "while temporarily in Washington." The Department interprets that provision as meaning the personal property of a nonresident must be here only temporarily if its use is to be exempt from use tax.

Thus, the partnership incurred use tax liability when it first took possession of the cabin kit in Washington, in July 1997. Because it did not pay sales tax or use tax in Canada, use tax was owed on the full value of the kit. The use tax was due in August 1997.

The partnership did not timely pay the use tax due. When taxes are not timely paid, the Department is required to assess penalties and interest. Concerning interest, RCW 82.32.090 provides, in pertinent part:

> (1) If 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 and shall add thereto interest on the tax only.

[Emphasis added.]

Concerning penalties, RCW 82.32.090 provides, in pertinent part:

> (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 shall be 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 shall be assessed a total penalty of ten percent of the amount of the tax; and if the tax is not received on or before the last day of the second month following the due date, there shall be assessed a total penalty of twenty percent of the amount of the tax.

[Emphasis added.] Thus, the Compliance Division properly assessed use tax, a 20% delinquency penalty, and interest.

The Department has limited authority to waive or cancel penalties or interest, set out in chapters 82.32 and 82.32A RCW. As an administrative agency, the Department is given no discretionary authority to waive or cancel taxes, interest, or penalties. Det. No. 98-85, 17 WTD 417 (1998); Det. No. 99-285, 19 WTD 492 (2000). The Department has only the authority granted by statute.

RCW 82.32A.020 and RCW 82.32.105 set out the circumstances when the Department may waive or cancel a late payment of return penalty or interest. RCW 82.32A.020 permits waiver of penalty or interest if the late payment was due to the taxpayer's reliance on specific, official [written] Department advice or instructions. That is not what happened in this case. The partnership relied upon a dealer and a bank it believed had the experience to properly advise it, not upon [written] advice from the Department.

RCW 82.32.105(1) permits waiver of penalties if the late payment was the result of "circumstances beyond the control of the taxpayer." Subsection (3) of the same statute permits waiver of interest in more limited circumstances -- only if the failure to timely pay was the direct result of [written] Department instructions to the taxpayer, or the Department extended the due date.

Neither circumstance permitting waiver of interest under RCW 82.32.105 was present under the facts of this case. Before moving to the penalty provisions, we should note that interest is not considered a type of penalty. Rather, it is a charge for the use of money. When a taxpayer fails to timely remit taxes due, the State of Washington loses the use of the tax money, while the taxpayer has use of the funds or avoids borrowing money to pay the taxes. Statutory interest merely serves to compensate the state for the loss of the use of those funds.

For purposes of a penalty waiver under RCW 82.32.105, WAC 458-20-228 (Rule 228) states what the phrase "circumstances beyond the control of the taxpayer" means. Rule 228 sets out circumstances that generally are considered beyond the control of the taxpayer, and circumstances that generally are not. . . . . The circumstance the partnership asserts is lack of knowledge of the tax liability. With respect to that circumstance, subsection (9)(iii) of Rule 228 states that "lack of knowledge of a tax liability" is a circumstance that generally is "not considered to be beyond the control of the taxpayer and will not qualify for a waiver or cancellation of penalty." Also, at subsection (1), Rule 228 incorporates legislative findings (from RCW 82.32A.005) that the Washington tax system is based largely on voluntary compliance, and taxpayers have a responsibility to inform themselves about applicable tax laws. While the Department has implemented programs to inform and assist taxpayers, the ultimate responsibility for knowing its tax obligations rests upon the taxpayer.

The partnership asks the Department to consider Rule 228's use of the word "generally," and argues its circumstances should be considered an exception to the general rule regarding ignorance. The partners argue they took reasonable care to make sure the importation of the cabin was properly handled, including asking about customs duties and who was responsible for paying what, and reasonably relied on persons who should have known about those matters.

[2] The modifier "generally" was added to Rule 228's listing of circumstances in February 2000. Before then, the rule listed "the only" circumstances under which cancellation of penalties would be considered, and with respect to ignorance or lack of knowledge of the tax liability stated: "Penalties will not be cancelled merely because of ignorance or a lack of knowledge by the taxpayer of the tax liability." We are not aware of any Department interpretation of the

effect of adding the modifier "generally" to the lack of knowledge circumstance. Therefore, we will address it as a question of first impression. We do not believe the partnership's circumstance, which might be described as ignorance or lack of knowledge despite inquiries of private parties the average person would expect to be familiar with such matters, could be considered an exception to the general rule. To recognize that as an exception would excuse late payment by any taxpayer who inquires of its seller or lender and receives incorrect or insufficient information. Such a large exception would be incompatible with a system of voluntary compliance, such as Washington's.

The Department acknowledges there is no suggestion in this case of intent to evade payment of tax. Had the Department believed the partnership intended to evade payment of taxes, it could have assessed an additional penalty, under RCW 82.32.090(5)(a), of 50% of the tax found to be due. The Department acknowledges, and appreciates, the partnership's cooperation with the Compliance Division after it was contacted in April 2001. However, such cooperation is not a basis for the Department to cancel or even reduce statutory penalties.

[3] The taxpayer also requests waiver of penalty and interest on the basis of financial hardship. The Department has consistently held that financial hardship is not a basis for waiving a taxpayer's tax liability, penalties, or interest. *See* Det. No. 87-189, 3 WTD 223 (1987); Det. No. 87-300, 4 WTD 101 (1987) ("The legislature . . . has not chosen good faith or financial hardship as a basis under the law for relief from the penalty."); Det. No. 94-16, 14 WTD 184 (1994) ("Financial hardship is not a basis for forgiving a taxpayer's tax liability, penalties and/or interest imposed thereon."); Det. 99-083E, 19 WTD 70 (2000). Rule 228, revised effective February 24, 2000, now expressly provides that financial hardship is an example of circumstances that are generally not considered beyond the control of the taxpayer.[3]

In sum, the penalties and interest were properly assessed, and the Department has no authority to cancel or reduce them under the circumstances presented. Therefore, we must deny the partnership's petition.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

Dated this 29th day of October, 2001.

[3] RCW 82.32.105(2) additionally authorizes the Department to waive or cancel penalties if the taxpayer timely filed and remitted payment on all tax returns due for that tax program of a period of 24 months immediately preceding the period covered by the return for which the waiver is requested. The 24-month provision does not apply in this case, because the taxpayer was not registered with the Department and engaging in business prior to incurring the use tax obligation. No returns were due during the previous 24 months, so there is no history of timely filing and remitting. *See* Rule 228(9)(b)(i)(B).