

Cite as Det. No. 03-0152, 22 WTD 278 (2003)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

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| 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. 03-0152 |
| |) | |
| ... |) | Registration No. . . . |
| |) | Notice of Balance Due No. . . . |
| |) | Docket No. . . . |

RULE 101, RULE 228; RCW 82.32.045, RCW 82.32.105: PENALTY—WAIVER—ACTIVE NONREPORTER –TWENTY-FOUR MONTH PROVISION. Where a taxpayer ceases to qualify for the active non-reporting status but fails to file and pay tax, it qualifies for waiver under the twenty-four month provision for the first period in which it ceases to qualify for active nonreporting status, provided it had no late returns in the preceding twenty-four months.

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.

STATEMENT OF THE CASE:

C. Pree, A.L.J -- A taxpayer, who was on active nonreporting status, received income in excess of \$28,000 in 1999, but failed to pay tax on its income because it was unaware of its Washington tax obligations. The taxpayer does not protest its liability for the tax, but protests the assessment of penalties and interest with respect to the taxes it failed to timely pay. [The taxpayer had no prior late returns.] We conclude that the taxpayer qualifies for waiver of the penalty, but not interest.¹

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

ISSUE:

May we waive penalties and interest where a taxpayer, who [had no prior late returns and] was on active nonreporting status, [but] no longer qualified for that status, failed to pay its taxes because it was unaware tax was due?

FINDINGS OF FACT:

The taxpayer last reported and paid Washington excise tax in the fourth quarter of 1991. On July 1, 1996, the Department of Revenue (Department) changed the taxpayer's reporting status to active nonreporter.

On February 19, 2003, the Taxpayer Account Administration (TAA) Division of the Department sent the taxpayer an "Active Non-Reporter Questionnaire" for the period January 1, 1999, through December 31, 2002. On March 10, 2003, the taxpayer returned the questionnaire and reported that its "gross annual income earned from [its] Washington business activity" for 1999 was in excess of \$36,000² and that it had no income for 2000 through 2002.

In response to the taxpayer's completion of the questionnaire, TAA issued a notice of balance due for 1999, reflecting tax due of \$. . . , penalty of \$. . . , and interest of \$. . . , for a total of \$. . .

In response to the notice, the taxpayer filed an appeal. It has not paid the amounts shown in the balance due notice. In its appeal, the taxpayer did not protest the assessment of tax,³ but protested the assessment of interest and penalties. In its appeal, the taxpayer explained, "We had no idea that we owed tax for that year, and did not receive documentation stating that there was a limit of \$28,000.00 per year until notified with this tax bill."

ANALYSIS:

WAC 458-20-101 (Rule 101) addresses the "active nonreporting status" and requirements for filing returns. In pertinent part, it states:

Persons registered with the department must file tax returns and remit the appropriate taxes to the department, unless they are placed on an "active nonreporting" status by the department.

(a) The department may relieve any person of the requirement to file returns by placing the person in an active nonreporting status if all of the following conditions are met:

² The exact figure was illegible on the copy the Appeals Division received.

³ The taxpayer did, however, request information regarding "what percent [the tax] is based on."

(i) The person's value of products (RCW 82.04.450), gross proceeds of sales (RCW 82.04.070), or gross income of the business (RCW 82.04.080), from all business activities taxable under chapter 82.04 RCW (business and occupation tax), is . . . less than twenty-eight thousand dollars per year

(b) The department will notify those persons it places on an active nonreporting status. (A person may request to be placed on an active nonreporting status if the conditions of (a) of this subsection are met.)

(c) Persons placed on an active nonreporting status by the department are required to timely notify the department if their business activities do not meet any of the conditions explained in (a) of this subsection. These persons will be removed from an active nonreporting status, and must file tax returns and remit appropriate taxes to the department, beginning with the first period in which they do not qualify for an active nonreporting status.

(Emphasis added.) Thus, Rule 101 makes it clear that it is the taxpayer's responsibility to inform the Department when it no longer qualifies as an active nonreporter. The taxpayer did not inform the Department that it no longer qualified for active nonreporting status when its income exceeded \$28,000 in 1999. The taxpayer does not dispute that it owes the tax, but argues that it should not be liable for interest and penalties.

RCW 82.32.090(1) addresses the imposition of the late payment penalty. It provides in part:

If payment of any tax due on a return to be filed by a taxpayer 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.

RCW 82.32.050(1) addresses the imposition of interest. It provides in part:

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.

WAC 458-20-228 (Rule 228) specifically addresses application of the late payment penalty to active nonreporting status taxpayers: "The late payment of return penalty will be imposed if any tax due from unreported business activities while on active-nonreporting status is not paid by the due dates used for taxpayers that are on an annual reporting basis."

The legislature, through its use of the word "shall" in RCW 82.32.050 and .090, has made the assessment of the late payment penalty and interest mandatory. See, e.g., Det. No. 99-042, 19 WTD 784 (2000). As an administrative agency, the Department is given no discretionary authority to waive or cancel penalties or interest. Id. The mere fact of nonpayment within a specified period requires the penalty and interest provisions of RCW 82.32.050 and .090 to be applied. Id.

The Department's authority to waive or cancel penalties and interest is set forth in RCW 82.32.105. That statute provides in pertinent part as follows:

(1) If the department of revenue finds that the payment by a taxpayer of a tax less than that properly due or the failure of a taxpayer to pay any tax by the due date was the result of circumstances beyond the control of the taxpayer, the department of revenue shall waive or cancel any penalties imposed under this chapter with respect to such tax.

(2) The department shall waive or cancel the penalty imposed under RCW 82.32.090(1) when the circumstances under which the delinquency occurred do not qualify for waiver or cancellation under subsection (1) of this section if:

(a) The taxpayer requests the waiver for a tax return required to be filed under RCW 82.32.045 . . . and

(b) The taxpayer has timely filed and remitted payment on all tax returns due for that tax program for a period of twenty-four months immediately preceding the period covered by the return for which the waiver is being requested.

(3) The department shall waive or cancel interest imposed under this chapter if:

(a) The failure to timely pay the tax was the direct result of written instructions given the taxpayer by the department; or

(b) The extension of a due date for payment of an assessment of deficiency was not at the request of the taxpayer and was for the sole convenience of the department. . . .

Thus, the late payment penalty can be waived or canceled if the late payment was the result of circumstances beyond the taxpayer's control, or if the taxpayer has been current in its tax obligations during the 24 months preceding the period covered by the return for which the waiver is being requested. We are not permitted to waive penalties where a taxpayer has acted in good faith but has failed to pay tax due to inadvertence. See WAC 458-20-228 (Rule 228) (Circumstances that are generally not considered to be beyond the control of the taxpayer and will not qualify for a waiver or cancellation of penalty include "misunderstanding or lack of knowledge of a tax liability."); Det. No. 99-042. None of the other circumstances considered to be beyond the taxpayer's control is present here. Accordingly, we are unable to waive the late payment penalty under RCW 82.32.105(1).

However, RCW 82.32.105(2) provides for waiver where the circumstances were not beyond the taxpayer's control, but "the taxpayer has timely filed and remitted payment on all tax returns due for that tax program for a period of twenty-four months immediately preceding the period covered by the return for which the waiver is being requested." In this case, because the taxpayer's late return was for 1999, it must have "timely filed and remitted payment on all tax returns due for that tax program" for 1997 and 1998 (the twenty-four months immediately preceding 1999). However, the taxpayer was on active nonreporting status for this period, and, thus, was not required to file returns. We find that the taxpayer nonetheless qualifies for waiver. This situation is similar to the following situations considered in Rule 228:

If a taxpayer has obtained a tax registration endorsement with the department and has engaged in business activities for a period less than twenty-four months, the taxpayer is

eligible for the waiver if the taxpayer had no delinquent tax returns for periods prior to the period covered by the return for which the waiver is being requested. . . .

A return will be considered timely for purpose of the waiver if there is no tax liability on it when it is filed.

We find the taxpayer's situation to be similar to the first quoted situation because the taxpayer had obtained a tax registration endorsement with the Department and it did not engage in business activities (which subjected it to the requirement to file returns) during the twenty-four month period preceding its 1999 return, and it had no delinquent tax returns for this period. The taxpayer's situation is similar to the second quoted situation because the taxpayer was relieved of the obligation to file its returns because no tax liability would have been reflected had they been filed. In this case, the taxpayer was relieved of its obligation to file returns while it was on active nonreporting status during the twenty-four months preceding 1999, and it had no delinquent returns during this period. Accordingly, we conclude that the taxpayer qualifies for one waiver under the 24-month provision (RCW 82.32.105(2)).

As noted above, interest may be waived only where the taxpayer's failure to timely pay the tax was the direct result of written instructions given the taxpayer by the department or the extension of a due date for payment of an assessment of deficiency was not at the request of the taxpayer and was for the sole convenience of the department. Neither of these circumstances is present here. Accordingly, we are unable to waive the interest.

CONCLUSIONS OF LAW AND DISPOSITION:

The taxpayer's petition is granted with respect to the penalty but is denied with respect to interest.

Dated this 30th day of April 2003