

State Ruling

204-472, Special Notice-- Business and occupation-- Business and occupation tax specific businesses-- Service and other business activities-- Scan-down allowances

¶204-472. Special Notice, Washington Department of Revenue, July 1, 2019.

Business and occupation: Business and occupation tax specific businesses: Service and other business activities: Scan-down allowances.— A Washington business and occupation (B&O) tax deduction for scan-down allowances on food and food ingredients begins July 28, 2019.

If a retailer of food and food ingredients receives credits or payments from a manufacturer or wholesaler for scan-down allowances, it may take the deduction under the Service and Other Activities B&O tax classification as "Scan-down Allowances." If a paper return is used, the vendor may use the "Other" category with a scan-down allowance description. A "scan-down allowance" means a payment or credited offered to a seller by a manufacturer or wholesaler, where the following conditions are found:

- The amount of payment or credit is based on the quantity of product to be sold at retail within a specified period.
- The seller knew the terms of the offer before making the sales.
- The seller is not required to provide any services directly or indirectly benefiting the manufacturer or wholesaler.

Cite as Det. No. 18-0116, 38 WTD 197 (2019)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION

DEPARTMENT OF REVENUE

STATE OF WASHINGTON

In the Matter of the Petition for Correction of Assessment of ...

DETERMINATION

No. 18-0116

Registration No. ...

[1] Rule 19402(602); RCW 82.04.462(4); 82.32.090(1); 82.32.105 – DELINQUENT PENALTIES – APPORTIONABLE INCOME – RECEIPTS FACTOR – ANNUAL RECONCILIATION – CORRECTED RETURN – OCTOBER 31 DEADLINE. When taxpayers with apportionable income have the information to determine the receipts factor for an entire calendar year, they must file, no later than October 31st of the following year, a corrected return to reconcile their income, and either obtain a refund or pay any additional tax due. If the corrected return is not filed and paid on or before the October 31st deadline, delinquent penalties and interest will apply to any additional tax that may be due.

[2] Rule 228; RCW 82.32.105 – WAIVER OR CANCELLATION OF PENALTIES – CIRCUMSTANCES BEYOND THE CONTROL OF THE TAXPAYER – 24-MONTH WAIVER. A taxpayer's good faith effort to comply with its reporting obligations, and its misunderstanding or lack of knowledge of its tax liability, are not circumstances beyond its control that allow waiver or cancellation of delinquent penalties. A taxpayer may be entitled to a waiver if it has timely filed and paid all tax returns due for the twenty-four months immediately preceding the period for which it was assessed delinquent 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.

LaMarche, T.R.O. – An online reservation service disputes the assessment of delinquent penalties on additional tax due. The business filed corrected tax returns for three tax periods to report and pay tax on previously unreported apportionable income. However, the business filed the corrected returns after October 31st of the year following the current year for each tax period. We grant the petition in part and deny it in part.¹

ISSUES

1. Under RCW 82.32.090(1), RCW 82.04.462(4), and WAC 458-20-19402(602), are delinquent penalties due on additional taxes that resulted from Taxpayer's filing of corrected returns for tax periods 2012, 2013, and 2014, when Taxpayer failed to file the corrected returns by the October 31st deadline of the following year for each tax period?
2. If delinquent penalties are due, has Taxpayer shown a basis, under RCW 82.32.105 and WAC 458-20-228, for waiver of those penalties?

FINDINGS OF FACT

... (Taxpayer) is an online ... reservation service provider based [out-of-state], that receives service income attributable to Washington. On August 18, 2016, Taxpayer submitted additional information and corrected returns for the periods of January 2012 through June 2016. The corrected returns added previously unreported apportionable income under the Service and Other Activities B&O tax classification, in the amount of \$.... Along with the additional materials and corrected returns, Taxpayer included a payment of \$... towards its liability for those periods, and a request for waiver of the penalties imposed on the additional tax due.

The Department of Revenue's (Department) Taxpayer Account Administration Division (TAA) reviewed the corrected returns, and found that Taxpayer had failed to reconcile its tax returns and pay additional tax due for tax periods 2012, 2013, and 2014 by October 31st of the year following each respective tax period. On that basis, TAA determined that delinquent penalties were due.

The Department issued an assessment totaling \$... on September 28, 2016, Document No...., consisting of \$... in Service and Other Activities B&O tax, \$... in original interest, \$... in reconciliation interest, and \$... in delinquent penalties. TAA applied \$... of Taxpayer's payment toward the assessment, leaving a balance of \$... due on or before October 28, 2016. Taxpayer did not pay the balance due, but timely filed a petition for review.

Taxpayer disputes only the delinquent penalties totaling \$..., which were imposed at the rate of 29 percent in the amounts and for the periods as follows: \$... for the period of January 1, 2012, through December 31, 2012; \$... for the period of January 1, 2013, through December 31, 2013; and \$... for the period of January 1, 2014, through December 31, 2014.

Taxpayer filed all of its monthly combined excise tax returns on time in 2010 and 2011. Taxpayer filed its corrected returns late for tax years 2012, 2013, and 2014.

ANALYSIS

1. Delinquent Penalties

RCW 82.32.090(1) imposes delinquent penalties as follows:

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. No penalty so added may be less

than five dollars.

RCW 82.32.090(1). However, pursuant to RCW 82.04.462(4), the penalties imposed by RCW 82.32.090 will not apply to taxpayers with apportionable income who correct their receipts factor by October 31st of the tax year following the current year. It states:

A taxpayer may calculate the receipts factor for the current tax year based on the most recent calendar year for which information is available for the full calendar year. If a taxpayer does not calculate the receipts factor for the current tax year based on the previous calendar year information as authorized in this subsection, the business must use current year information to calculate the receipts factor for the current year. In either case, a taxpayer must correct the reporting for the current tax year when complete information is available to calculate the receipts factor for that year, *but not later than October 31st of the following tax year*. Interest will apply to any additional tax due on a corrected tax return.... Penalties as provided in RCW 82.32.090 will apply to any such additional tax due *only if the current tax year reporting is not corrected and the additional tax is not paid by October 31st of the following tax year*.

RCW 82.04.462(4) (emphasis added).

The Department implements and interprets RCW 82.04.462(4) in WAC 458-20-19402(602) (Rule 19402). Specifically, Rule 19402(602) provides:

Regardless of how a taxpayer reports its taxable income under ... this rule, when the taxpayer has the information to determine the receipts factor for an entire calendar year, it must file a reconciliation and either obtain a refund or pay any additional tax due. The reconciliation must be filed on a form approved by the department.... If the reconciliation is completed prior to October 31st of the following year, no penalties will apply to any additional tax that may be due.²

Rule 19402(602).

Here, Taxpayer failed to report and pay \$... in Service & Other Activity B&O tax, which was due on Taxpayer's gross income for the tax periods from January 1, 2012, through December 31, 2014. Taxpayer did not report and pay the taxes until August 18, 2016, long after the last day of the second month following the due date for payment for any of the tax periods. In addition, Taxpayer failed to file annual reconciliations for these tax periods by the deadline established by RCW 82.04.462(4). Accordingly, the delinquent penalty under RCW 82.32.090(1) applies to the additional tax that Taxpayer failed to report and pay for those periods. *See also* Rule 19402(602).

Taxpayer disputes the meaning of RCW 82.04.462(4), asserting that a "corrected return" is the same thing as an amended return, and as such, is not subject to RCW 82.32.090(1). As Taxpayer discusses in its petition, the Department's policy generally is to not assess delinquent penalties on additional tax due when the original return was timely filed and paid (with the exception of "no business" or "zero" returns), as discussed on the Department's webpage entitled, "Amend my

³ return." Since the Department does not impose delinquent penalties on some amended returns, Taxpayer argues RCW 82.04.462(4) must be referring to another penalty provision of RCW 82.32.090, none of which, Taxpayer asserts, is applicable under the facts of this case. Therefore, Taxpayer contends, it follows that Taxpayer is not subject to any penalty in RCW 82.32.090 for additional tax due on its late-filed corrected tax returns. We disagree.

WAC 458-20-228 (Rule 228), the administrative rule that addresses returns and penalties, defines a "return" as: "[A]ny paper or electronic document a person is required to file by the state of Washington in order to satisfy or establish a tax or fee obligation which is administered or collected by the department, *and that has a statutorily defined due date*. RCW 82.32.045." Rule 228(2) (emphasis added). Although a taxpayer may be required to file an amended return to meet its duty to report and pay taxes pursuant to provisions in chapter 82.32 RCW, an amended return, because it may be filed at any time when a taxpayer discovers an underpayment, does not have a statutorily defined due date.

In contrast, a “corrected return” is mandated by RCW 82.04.462(4), which requires that a “taxpayer must correct the reporting for the current tax year when complete information is available ... but not later than October 31st of the following tax year.” RCW 82.04.462(4) then clearly states, “Penalties as provided in RCW 82.32.090 *will apply to any such additional tax due* only if the current tax year reporting is not corrected and the additional tax is not paid by October 31st of the following tax year.” (Emphasis added.) RCW 82.04.462(4) refers to a “corrected return” and gives a statutorily defined due date for that return. Therefore, a “corrected return” is a “return” for purposes of Rule 228(2). See also RCW 82.32.045.

The plain language of the statute shows that the Legislature explicitly intends penalties to apply to additional tax due on corrected returns required to be filed pursuant to RCW 82.04.462(4), when those returns are filed late. The applicable penalty under RCW 82.32.090, for taxes not timely reported and paid, is the delinquent penalty under RCW 82.32.090(1). Here, because Taxpayer failed to timely reconcile its apportionable income, file a corrected return, and pay the additional tax due, it does not meet the requirements under RCW 82.04.462(4) to avoid delinquent penalties.

Taxpayer's representative asserts that its other clients were not assessed delinquent penalties in situations similar to those of Taxpayer here and that by imposing penalties on Taxpayer, the Department is not consistent in its treatment of similarly situated taxpayers. However, Taxpayer has not disclosed the particular facts and circumstances of those assessments, and, moreover, they cannot serve as a basis for waiver of penalties in Taxpayer's case here. It is also not clear whether Taxpayer's representative in those cases similarly confused the Department's treatment of amended returns with its treatment of “corrected” returns.

Furthermore, if the Department erred and did not impose the penalties on those taxpayers, as required under RCW 82.32.090(1) and RCW 82.04.462(4), the Department is not bound to continue making that error for the benefit of Taxpayer—even if the Department made the error in previous audits of Taxpayer itself. *See, e.g., Dep't of Revenue v. Martin Air Conditioning*, 35 Wn. App. 678, 687-88, 668 P.2d 1286 (1983); *Kitsap-Mason Dairymen's Assoc. v. Tax Commission*, 77 Wn.2d 812, 818, 467 P.2d [312] (1970).

We conclude that the Department properly assessed the delinquent penalty in RCW 82.32.090(1) on Taxpayer's untimely paid additional tax, as required under RCW 82.04.462(4) and Rule 19402(602).

2. Penalty Waiver

The Department has limited authority to waive or cancel penalties. RCW 82.32.105; Rule 228(9). The Department can waive or cancel penalties in the following situations: (1) the penalties were the result of “circumstances beyond the control of the taxpayer;” or (2) in the case of the delinquent payment penalty, the Department may also waive the penalty if the taxpayer has a good payment history. RCW 82.32.105(1) and (2)(b); Rule 228(9)(a) and (b)(i).

First, Rule 228 explains that “[c]ircumstances beyond the control of the taxpayer are generally those which are immediate, unexpected, or in the nature of an emergency. Such circumstances result in the taxpayer not having reasonable time or opportunity to obtain an extension of the due date or otherwise timely file and pay.” Rule 228(9)(a)(ii). The circumstances must directly cause the late payment or substantial underpayment. *Id.*

Rule 228(9)(a)(ii) lists examples of circumstances that are beyond a taxpayer's control that are a sufficient basis for a penalty waiver:

- Erroneous written information from the Department;
- An act of fraud or conversion by the taxpayer's employee or contract helper which the taxpayer could not immediately detect or prevent;
- Emergency circumstances around the time of the due date, such as the death or serious illness of the taxpayer or a family member or accountant; or

- Destruction of the business or records by fire or other casualty.

Rule 228(9)(a)(iii) also lists examples of situations that are generally *not* beyond the control of a taxpayer:

- Financial hardship
- A misunderstanding or lack of knowledge of a tax liability
- Mistakes or misconduct on the part of employees or other persons contracted with the taxpayer

Here, Taxpayer asserts that it made a good faith effort to comply with its reporting obligations. Taxpayer stated in its August 15, 2016, letter to the Department, “[Taxpayer] has made a corporate decision to voluntarily come into full compliance with the laws and regulations of the state.” Taxpayer argues that by imposing the delinquent penalty on additional tax due as a result of correcting their tax returns, the Department discourages taxpayers from making such corrections.

However, taxpayers have the duty to know their tax obligations, and to comply with the laws and regulations of this state.⁴ RCW 82.32A.030. Taxpayer's good faith effort to comply with its reporting obligations is not a circumstance beyond Taxpayer's control under RCW 82.32.105 or Rule 228. Because Taxpayer has not shown that its failure to timely file its corrected returns and to pay the associated taxes was due to circumstances beyond its control, it has not shown a basis for waiver of the delinquent penalties on that basis. RCW 82.32.105(1); Rule 228(9)(a).

Next, pursuant to RCW 82.32.105(2)(b), Rule 228(9)(b)(i)(B) provides for a waiver of delinquent penalties if the taxpayer “has timely filed and paid all tax returns due for that specific tax program for a period of twenty-four months immediately preceding the period covered by the return for which the waiver is being requested.”

Here, Taxpayer filed all of its monthly combined excise tax returns on time in tax periods 2010 and 2011, but did not timely file and pay its corrected returns for tax periods 2012, 2013, and 2014. Taxpayer is entitled to a waiver of delinquent penalties for tax year 2012, but not for the remaining periods, pursuant to RCW 82.32.105(2)(b) and Rule 228(9)(b). Because Taxpayer has shown a basis for waiver of some penalties, we grant the petition in part and deny it in part. TAA has agreed that the total of \$... in delinquent penalties should be reduced by the \$... penalty attributable to tax year 2012.

DECISION AND DISPOSITION

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

Dated this 4th day of May 2018.

Footnotes

1	Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.
2	We note that, although Rule 19402 uses the phrase “completed <i>prior to</i> October 31 st of the following year,” the statute actually uses the phrase “ <i>not later than</i> October 31 st of the following tax year,” indicating that corrected returns filed on October 31 st still meet the deadline. Rule 19402(602) (emphasis added) and RCW 82.04.462(4) (emphasis added), respectively.

	<p>³ See http://dor.wa.gov/content/fileandpaytaxes/fileoramendmyreturn/AmndRetrn.aspx (last accessed April 19, 2018). The Department's webpage gives instructions to taxpayers on how to amend their combined excise tax returns, and states in relevant part:</p> <p>The Department will review the amended returns you file. In addition, the following penalties may apply to underreported amounts:</p> <ul style="list-style-type: none"> • Late payment return penalties up to 29 percent if you originally filed no business or zero returns, were on active non-reporting status, or your original returns were filed late. • 5 percent assessment penalty for substantially underpaid tax if the underreported tax is underpaid by at least 20 percent. WAC 458-20-228.
	<p>⁴ Because of the nature of Washington's tax system, the burden of becoming informed about tax liability falls upon the taxpayer. RCW 82.32A.030; <i>see also</i> Det. No. 01-165R, 22 WTD 11 (2003). Taxpayers have the responsibility to know their tax reporting obligations, and when they are uncertain about their obligations, to seek instructions from the Department. RCW 82.32A.030; 22 WTD 11.</p>