

Cite as Det. No. 15-0349, 35 WTD 477 (2016)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of) D E T E R M I N A T I O N
Assessment of) No. 15-0349
)
)
...) Registration No. . . .
)

RULE 228; RCW 82.32.090: PENALTIES – PENALTY RATE – EFFECTIVE DATE OF RATE INCREASE. The delinquent penalty rates automatically increased as of August 1, 2015, on all outstanding tax liabilities as of that date.

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.

Yonker, A.L.J. – An out-of-state seller of goods challenges the various penalties assessed in a tax assessment, arguing primarily that (1) that the delinquent penalty should have been assessed at a lower rate . . . As to Taxpayer’s . . . argument, we deny the petition. . .¹

ISSUES

1. Under RCW 82.32.090 and WAC 458-20-228, did the Department properly assess the delinquent penalty and the substantial underpayment penalty against Taxpayer?
 2. Has Taxpayer proven that it is entitled to a waiver of the delinquent penalty or the substantial underpayment penalty under WAC 458-20-228(9)?
 3. . .

FINDINGS OF FACT

[Taxpayer] is [an out-of-state] corporation that sells electronics to retailers, who resell the electronics to end consumers. Taxpayer also sells electronics, and other subscription services associated with those electronics, directly to end consumers.

In 2012, the Department's Compliance Division commenced an investigation after discovering that Taxpayer was conducting business in Washington, but was not registered with the Department. According to the Compliance Division's electronic records, a revenue agent attempted to contact Taxpayer as follows:

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

- On December 19, 2012, the revenue agent sent Taxpayer a Washington Business Activities Questionnaire (WBAQ) instructing Taxpayer to respond by January 8, 2013. The revenue agent did not retain a copy of the materials he sent to Taxpayer.
- On January 16, 2013, after not receiving a response to the first WBAQ, the revenue agent sent Taxpayer a second WBAQ instructing Taxpayer to respond by February 7, 2013. Again, the revenue agent did not retain a copy of the materials he sent to Taxpayer.
- On July 9, 2013, after not receiving a response to either WBAQ, the revenue agent called a telephone number he found for Taxpayer. According to the record made by the revenue agent, “call was answered by automated system, said to wait for next available agent and then was dropped. Called again and same thing happened.”

On July 9, 2013, Taxpayer filed a master business license application online with the Department and obtained its unified business identifier (UBI) number on July 11, 2013, and thereafter began reporting its gross income in Washington.

On March 10, 2015, the Compliance Division sent Taxpayer another WBAQ, requesting information regarding Taxpayer’s business activity in Washington for the time period of January 1, 2008 through June 30, 2013. Taxpayer responded to that WBAQ, stating it had business activity in Washington at least for a portion of the time period at issue. Based on Taxpayer’s responses, the Compliance Division requested a schedule of Taxpayer’s Washington State sales for the time period of March 1, 2011 through June 30, 2013 (review period).

On August 20, 2015, as a result of the Compliance Division’s review, the Department issued a tax assessment against Taxpayer totaling \$. . . , which included \$. . . in tax liability, a delinquent penalty of \$. . . , a substantial underpayment penalty of \$. . . , an unregistered business penalty of \$. . . , and interest of \$ Taxpayer subsequently appealed only the penalties assessed in the tax assessment.

ANALYSIS

1. Delinquent Penalty

Effective August 1, 2015, the legislature increased the statutory rates for delinquent penalties. Prior to that date, RCW 82.32.090(1) stated the following regarding delinquent penalties:

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 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 is assessed a total penalty of fifteen 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-five percent** of the amount of the tax under this subsection. . . .

(Emphasis added). Beginning on August 1, 2015, RCW 82.32.090(1) was amended to read 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. . . .

See Laws of 2015, 3d Spec. Sess., ch. 5, §§ 401, 501 (emphasis added). Essentially, the state legislature increased the graduated delinquent penalty percentages by four percent each.

Here, for the entire review period, which was March 1, 2011 through June 30, 2013, the Department received no tax from Taxpayer on its business activity in Washington. The latest tax reporting period included in the review period was Quarter Two, 2013, the tax return for which would have been due July 31, 2013. *See* 82.32.045(2). Thus, beginning on August 1, 2013, Taxpayer would have incurred a penalty for that last tax reporting period of five percent under the former version of RCW 82.32.090(1). That penalty amount would have increased to fifteen percent beginning on September 1, 2013, and increased yet again to twenty-five percent beginning October 1, 2013.²

Then, on August 1, 2015, the legislature enacted an increase in the maximum delinquent penalty from twenty-five percent to twenty-nine percent. As of August 1, 2015, Taxpayer's tax liability for the tax reporting periods during the review period remained unpaid. As such, the delinquent penalty automatically increased on that date to twenty-nine percent for the entire review period consistent with legislative change to RCW 82.32.090(1). Therefore, the tax assessment, which was issued twenty days after the rate increase, correctly assessed a delinquent penalty of twenty-nine percent over the entire review period.

Taxpayer argues that because the Compliance Division's review was pending prior to August 1, 2015, and related to a time period prior to the enactment of the delinquent penalty rate changes, the former version of RCW 82.32.090(1), with its lower delinquent penalty rates, should apply to the taxes due during the review period. We disagree. RCW 82.32.090(1) requires only that the tax be at least two months past due to receive the maximum delinquent penalty rate. As we have already concluded, the taxes at issue here were all more than two months past due, so the maximum rate clearly applies. Had Taxpayer chosen to pay its tax liability for the review period up through July 31, 2015, it would have incurred the prior maximum rate of twenty-five percent. However, because Taxpayer continued to wait to pay its tax liability for the review period beyond that date, it incurred the new maximum rate of twenty-nine percent.³ Thus we conclude

² We note that all earlier tax reporting periods during the review period would have necessarily had earlier due dates, and the delinquent penalties on those earlier tax reporting periods would have reached the maximum of twenty-five percent on earlier dates. Thus, the maximum penalty of twenty-five percent would have been reached for all tax reporting periods during the review period by October 1, 2013.

³ Taxpayer also argued that the Department "never notified [Taxpayer] of the state's increase in penalty rate, effective August 1, 2015. If we had been made aware of the 4% increase, we could have attempted to close the desk audit prior to the increase." We note that the Department issued a Special Notice on July 27, 2015, informing the public of the rate change. Further, Taxpayer was in no way precluded or restricted from paying any amount toward its tax liability for the review period prior to August 1, 2015 before or during the Compliance Division's review.

that the Compliance Division correctly assessed the delinquent penalty at \$. . . , which was twenty-nine percent of the tax liability, when it issued the tax assessment on August 20, 2015.

Taxpayer also requests a waiver of the delinquent penalty. RCW 82.32.105, which provides the circumstances under which the Department may generally waive a delinquent penalty, requires waiver when the Department finds that a taxpayer's failure to pay the proper amount or to pay timely was the result of "circumstances beyond the control of the taxpayer." RCW 82.32.105(1).

"Circumstances beyond the control of the taxpayer," in turn, is defined in WAC 458-20-228 (Rule 228), which states the following:

Circumstances 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). Taxpayer offers no specific evidence of circumstances which were "immediate, unexpected, or in the nature of an emergency." Instead, Taxpayer states that "[g]iven [its] timely filing history, cooperation with the department, and voluntary registration," Taxpayer should receive a penalty waiver.⁴ These actions by Taxpayer, while commendable, do not constitute "circumstances beyond the control of the taxpayer" justifying waiver of the delinquent penalty under Rule 228(9)(a).

We also considered the additional waiver possibility of RCW 82.32.105(2), which allows waiver of delinquent penalties for taxpayers who have timely filed and paid all taxes due for a 24-month period prior to the tax period at issue. However, to be eligible for this waiver, a taxpayer must have "obtained a tax registration endorsement with the department prior to engaging in business within the state." WAC 458-20-228(9)(b)(i). Here, Taxpayer did not register with the Department until July 9, 2013, but engaged in business in Washington well before that, since at least since 2011. As such, Taxpayer cannot qualify for this waiver. Taxpayer has offered no other basis for waiver of the penalties issued. As such, we affirm the Compliance Division's assessment of penalties in this case.

2. Substantial Underpayment Penalty

Pursuant to RCW 82.32.090(2), if the Department "determines that any tax has been substantially underpaid, there is assessed a penalty of five percent of the amount of the tax" determined to be due. "Substantially underpaid" means that (1) the taxpayer has paid less than eighty percent of the amount of tax determined by the Department to be due for all taxes included in the Department's examination and (2) the amount of underpayment is at least one thousand dollars. *Id.* Here, Taxpayer paid nothing in taxes during the review period, which is less than eighty percent of Taxpayer's actual tax liability during the review period as determined by the Compliance Division. We, therefore, find the Department properly assessed a five percent assessment penalty of \$

⁴ We conclude that Taxpayer's registration was not "voluntary" due to previous contact attempts the Compliance Division made before Taxpayer actually registered. *See infra* Part 3.

However, Taxpayer requests a waiver of the substantial underpayment penalty. RCW 82.32.105(1), discussed above, provides the only circumstance under which the Department may generally waive a substantial underpayment penalty, requiring waiver if a taxpayer's failure to pay the proper amount was the result of "circumstances beyond the control of the taxpayer." Taxpayer has asserted no specific circumstance that it claims was beyond its control in support of its waiver request. To the extent that Taxpayer has implied that it failed to pay the proper amount of taxes based on a misunderstanding of its tax liability in Washington, such misunderstanding is specifically included as a circumstance that is *not* beyond the control of Taxpayer. Rule 228(9)(a)(iii)(B). *See also* Det. 01-096, 22 WTD 126 (2003) (holding that lack of knowledge of a taxpayer's tax liability "is not a 'circumstance beyond the control of the taxpayer' because the law, regulations, and Department publications explaining all tax laws are publicly available not only to taxpayer's, but to the tax professionals who support them.") As such, we do not have authority to waive the substantial underpayment penalty here.

...

DECISION AND DISPOSITION

We deny in part

Dated this 22nd day of December, 2015.