

Cite as Det. No. 15-0305, 35 WTD 37 (2016)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

[1] RULE 228; RCW 82.32.090, RCW 82.32.105: LATE PAYMENT PENALTY – WAIVER OR CANCELLATION OF PENALTY. The taxpayer appealed the assessment of a late payment penalty. The taxpayer did not contact the Department to discuss providing additional documentation or amending the original assessment until after the original due date. The Department sustained the late payment penalty because the taxpayer's situation did not meet the statutory requirements for waiver or cancellation of a penalty.

[2] RCW 82.32A.020, RCW 82.32A.030: LATE PAYMENT PENALTY – RELIANCE ON ORAL STATEMENTS BY DEPARTMENT PERSONNEL. The taxpayer appealed the assessment of a late payment penalty. The taxpayer alleged that a Department employee stated that it would not be a problem to qualify for a waiver or cancellation of the penalty. The Department sustained the late payment penalty. Pursuant to statute, Taxpayers have the right to rely on written advice or instructions from the Department. There is no such companion statute giving taxpayers the right to rely on oral statements made by Department personnel. Pursuant to statute, taxpayers also have the responsibility to know their tax reporting obligations and to seek instructions from the Department if there is uncertainty. *See also* ETA 3065.

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.

Valentine, A.L.J. – A taxpayer appeals the refund denial of a late payment penalty, contending that payment of the assessment was late because the taxpayer worked with the Department of Revenue (Department) in good faith to correct the amount of tax due. The taxpayer's petition is denied. We conclude that the taxpayer's circumstances in this case do not meet the statutory qualifications for waiver of a late payment penalty.<sup>1</sup>

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

## ISSUE

Pursuant to RCW 82.32.090, RCW 82.32.105, and WAC 458-20-228 (Rule 228), does a taxpayer qualify for waiver of a late payment penalty when the taxpayer did not contact the Department until after an assessment due date to notify the Department of additional records that may affect the assessment amount?

## FINDINGS OF FACT

The Department's Audit Division (Audit) reviewed the business activities of [Taxpayer] for the time-period of January 1, 2010 through June 30, 2014 (audit period). After its review, Audit determined that Taxpayer underreported certain income during the audit period and also owed use tax and/or deferred sales tax on consumable supply purchases and capital asset purchases. The assessment totaled \$ . . . (\$ . . . in tax and \$ . . . in interest). Audit issued the assessment on December 31, 2014. The due date was January 30, 2015.

Taxpayer did not pay the assessment by the due date. Instead, Taxpayer contacted Audit after the due date, on February 2, 2015, to discuss possible amendments to the assessment. Taxpayer subsequently provided Audit with documentation that lowered the assessed amount for use tax and/or deferred sales tax on consumable supply purchases by \$ . . .<sup>2</sup>

Audit issued an amended assessment on February 26, 2015. The amended assessment amount included \$ . . . in tax and \$ . . . in interest, for a total tax and interest due of \$ . . . . The amended assessment, however, also included a late payment penalty of \$ . . .,<sup>3</sup> for a total amended assessment of \$ . . . . Taxpayer made a payment of \$ . . . on February 24, 2016. Therefore, the amended assessment shows a credit due Taxpayer of \$ . . . . The Department refunded the credit amount to Taxpayer.

Taxpayer contacted the Department's Taxpayer Account Administration Division (TAA) on March 19, 2015, and requested a penalty waiver. TAA denied Taxpayer's request on May 15, 2015.

Taxpayer asks that the Department refund the late payment penalty of \$ . . . . Taxpayer contends that it withheld payment on the original assessment because it knew that Audit would make adjustments to the assessment after review of the additional documentation provided. According to written statements on Taxpayer's appeal petition, Taxpayer was in contact with Audit throughout the amendment process and was not told that a late payment penalty would be included on the amended assessment. In addition, Taxpayer contends on its appeal petition that it was told it "would not be a big issue" to get the penalty waived.

## ANALYSIS

RCW 82.32.090(2) requires the assessment of a penalty if "payment of any tax determined by the department to be due is not received by the department by the due date specified in the

<sup>2</sup> The original assessment was based sampling.

<sup>3</sup> This amount represents a 15 percent penalty on the amended tax due of \$ . . . .

notice, or any extension thereof . . . ” The penalty ranges from fifteen to twenty-five percent of the amount of the tax depending on when the Department receives payment.

The Department has limited authority to waive or cancel penalties. The Department may cancel penalties and, in some cases, the tax itself, in the following situation: The assessment of tax and penalties was due to reliance on written instructions given the taxpayer by the Department to the proven detriment of the taxpayer. RCW 82.32A.020(2). The Department may also waive penalties if the penalties were the result of “circumstances beyond the control of the taxpayer.” RCW 82.32.105(1). Only an analysis of the second basis for waiving penalties is needed here.

Rule 228 explains what types of scenarios constitute “circumstances beyond the control of the taxpayer.” It provides that “[c]ircumstances beyond the control of the taxpayer are generally those which are immediate, unexpected, or in the nature of an emergency.” Rule 228(9)(a)(ii). “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.” *Id.*

Rule 228(9)(a)(ii) lists examples of situations that are beyond a taxpayer’s control sufficient to cancel penalties, including:

- 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) lists examples of situations that are generally not considered beyond the control of the taxpayer, including:

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

There is no documentation in the record to suggest that Taxpayer’s failure to timely pay its tax obligation to Washington was due to circumstances beyond its control.

We note that the due date of the original assessment was January 30, 2015. The assessment was issued December 31, 2014. Taxpayer did not contact Audit until after the due date had passed to discuss any possible amendments to the assessment. In addition, the assessment was not cancelled, it was amended. A considerable amount due, dating back to 2010, was still outstanding even after the adjustment. The late payment penalty was based only on the amended amount of tax due, not the original amount due.

We conclude, therefore, that Taxpayer’s circumstances do not meet the statutory requirements necessary to qualify for a late payment penalty waiver under RCW 82.32.105(1).

Regarding Taxpayer's contention that it was told by a Department employee that it would not be an issue to get the penalty waived, we note that, as persons doing business in Washington, taxpayers have certain responsibilities, some of which are outlined in RCW 82.32A.030, including the responsibility to "[k]now their tax reporting obligations, and when they are uncertain about their obligations, seek instructions from the department of revenue." RCW 82.32A.030(2). In addition to the responsibilities listed in RCW 82.32A.030, certain taxpayer rights are stated in RCW 82.32A.020, including:

- (2) The right to rely on specific, official *written* advice and *written* tax reporting instructions from the department of revenue to that taxpayer, and to have interest, penalties, and in some instances, tax deficiency assessments waived where the taxpayer has so relied to their proven detriment;

(Emphasis added.) This right does not include the right to rely on oral advice. The Department has issued an advisory statement that explains the Department's position regarding oral instructions. Excise Tax Advisory (ETA) 3065 reads, in part:

The Department of Revenue gives consideration, to the extent of discretion vested in it by law, where it can be shown that failure of a taxpayer to report correctly was due to written instructions from the department or any of its authorized agents. The Department cannot give consideration to claimed misinformation resulting from telephone conversations or personal consultations with a Department employee.

There are three reasons for this ruling:

- (1) There is no record of the facts which might have been presented to the agent for his consideration.
- (2) There is no record of instructions or information imparted by the agent, which may have been erroneous or incomplete.
- (3) There is no evidence that such instructions were completely understood or followed by the taxpayer.

Thus, we cannot give weight to Taxpayer's assertions regarding what it was told about the penalty waiver.

#### DECISION AND DISPOSITION

Taxpayer's petition for refund is denied.

Dated this 9th day of November, 2015.