

Cite as Det. No. 17-0269, 37 WTD 130 (2018)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition for Refund of	)	<u>D E T E R M I N A T I O N</u>
	)	
	)	No. 17-0269
	)	
...	)	Registration No. . . .
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...	)	Registration No. . . .
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[1] RCW 82.32.105(1) and WAC 458-20-228 (“Rule 228”) – WAIVER OR CANCELLATION OF PENALTIES OR INTEREST – SERIOUS ILLNESS – FAMILY. A serious illness of a taxpayer or a member of the taxpayer’s immediate family, in certain circumstances, justifies the waiver of delinquent penalties under Rule 228(9)(a)(ii)(C). However, an illness of family members occurring in the past cannot excuse the failure of taxpayers to pay when enough time passed that the taxpayers had reasonable opportunity to arrange their affairs.

[2] RCW 82.04.030 and WAC 458-20-203 (“Rule 203”) – B&O – RETAIL SALES TAX -- RELATED ENTITIES. Each separately organized business entity is a separate “person” within the meaning of the law, and must file a separate excise tax return. Thus, there is no legal basis for treating a sole proprietor taxpayer and its taxpayer-owned corporation as a single entity for tax purposes. This does not result in a double tax when gross income is apportioned to each entity.

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.

Davis, T.R.O. (Successor to Bauer, T.R.O.) – Taxpayers, a sole proprietorship retailing educational materials and a corporation providing training services for teachers and school districts, both owned by the same person, request cancellation of penalties and interest, alleging that their assessment payments were originally late due to errors made by the family member who handled the books and the extended illness of a second family member. Taxpayers also assert that the Department of Revenue (the “Department”) issued the assessments against the two registered businesses in error because they run the same business. We deny the petitions.<sup>1</sup>

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

## ISSUES

1. Under RCW 82.32.105(1) and WAC 458-20-228 (“Rule 228”), is the extended illness of the taxpayer’s family member a basis for canceling the penalties or interest?
2. Under RCW 82.04.030, did the Department issue the tax assessments in error against two registered businesses that run the same business?

## FINDINGS OF FACT

The Taxpayers in this case are . . . (“Taxpayer”) d/b/a . . . , a Washington sole proprietorship, and . . . , (“Taxpayer’s corporation”) a Washington corporation wholly owned by [Taxpayer] (Taxpayer and Taxpayer’s corporation are jointly referred to herein as “Taxpayers”). Taxpayer describes her work as a “teacher of teachers.” In general, Taxpayer sells teaching aids individually and in packages, along with related teaching supplies. Taxpayer’s corporation provides training workshops for teachers and school districts, teaching instructional methods, including the use of visual aids to help with student comprehension. Taxpayer’s corporation conducts these workshops in Washington State and in other locations . . . , necessitating extensive travel.

The Department audited Taxpayers’ books and records for the period of January 1, 2008, through December 31, 2011 (“Audit Period”). As a result of these audits, the Department issued two tax assessments to Taxpayer and Taxpayer’s corporation.

The assessment for Taxpayer, issued October 23, 2012, included a \$ . . . small business tax credit, \$ . . . in retail sales tax, \$ . . . in retailing B&O tax, an \$ . . . credit for service and other activities B&O tax incorrectly reported under this UBI number, interest of \$ . . . , and a five percent assessment penalty of \$ . . . , for a total of \$ . . . .

The assessment for Taxpayer’s corporation, issued October 24, 2012, included a \$ . . . negative adjustment to previously granted small business tax credit, a \$ . . . credit for retail sales tax and retailing B&O tax incorrectly reported under this UBI number, \$ . . . in service and other activities B&O tax, \$ . . . in use tax, interest of \$ . . . , and a five percent assessment penalty of \$ . . . , for a total of \$ . . . .

Taxpayers did not pay these assessments and timely petitioned the Department for correction of the assessments. We issued Determination No. . . . on February 6, 2014, denying Taxpayers’ petitions, but remanding the case to the Department’s Audit Division for adjustment of the assessment issued to Taxpayer (sole-proprietor . . . d/b/a . . . ) due to erroneous inclusion of a family inheritance as business income.

On remand, the Department issued a post-assessment adjustment (PAA) on February 24, 2014. The PAA reduced the total amount assessed against Taxpayer from \$ . . . to \$ . . . , but included additional interest of \$ . . . for the period from November 27, 2012, through March 26, 2014. The due date for payment of the PAA was March 26, 2014. The Department also extended the due date of the assessment against the Taxpayer’s corporation ( . . . ) from November 26, 2012, to April 4, 2014.

Taxpayer and Taxpayer's corporation did not pay these assessments, and the Department issued the following warrants against Taxpayers to enforce the collection of taxes due:

Issue Date	Warrant	Due Date	Tax	Audit Interest	Add'l Interest	Add'l Penalty	Warrant Penalty	Warrant Interest
May 29, 2014	...	June 9, 2014	\$ ...	\$ ...	\$ ...	\$ ...	\$ ...	\$ ...
June 2, 2014	...	June 12, 2014	\$ ...	\$ ...	\$ ...	\$ ...	\$ ...	\$ ...

Taxpayers paid off the balances of the warrants in 2016. On November 29, 2016, Taxpayers submitted timely penalty and interest refund requests to the Department's Taxpayer Account Administration Division. On December 1, 2016, the Department denied Taxpayers' requests. On April 4, 2017, Taxpayers petitioned for review of the denial.

Taxpayers again request cancellation of penalties and interest, asserting that their 2012 assessment payments were originally late due to errors made by the family member who handled the books because of a chronic progressive illness, and that the sudden injury and extended recovery of a second family member also impacted Taxpayers' ability to respond properly to the original audit and then pay the original 2012 assessments. Taxpayers further assert that the Department issued the assessments against the two registered businesses in error because they actually run the same business and this represents a "double tax."

#### ANALYSIS

##### *Late Payment of Assessment Penalty, Warrant Penalty, & Interest*

When the Department has determined, as a result of examination, that a taxpayer owes additional taxes, interest, or penalties, it issues an assessment against that taxpayer for the amount owed. [RCW 82.32.100.] If the Department does not receive payment of an assessment by its due date, then the Department must assess a total assessment penalty of fifteen percent. RCW 82.32.090(2). Here, Taxpayer failed to pay the assessment prior to the due date, so the Department added the fifteen percent penalty.

The Department issues warrants to enforce collection of past-due taxes that are not paid within fifteen days after they are due, and if a warrant is issued, must add an additional penalty of ten percent. RCW 82.32.210 authorizes the Department to issue a warrant "[i]f any tax, increase, or penalty or any portion thereof is not paid within fifteen days after it becomes due." RCW 82.32.090(3) provides that if the Department issues a warrant for the collection of taxes, increases, or penalties, "there is added thereto a penalty of ten percent of the amount of the tax, but not less than ten dollars." Here the Department issued warrants and was required to add the penalty.

With respect to extension interest, RCW 82.32.050(1) provides that if the Department determines that a tax or penalty has been paid less than that properly due, the Department shall assess against the taxpayer the additional amount found due and include interest [on the tax only]. . . . The Department was therefore required to add interest here.

[By statute,] assessment of the above tax, penalties and interest is mandatory. [See] Det. No. 01-193, 21 WTD 264 (2002); Det. No. 99-279, 20 WTD 149 (2001). Therefore, the Department was

required to assess the amounts due against Taxpayer plus interest. After these assessment balances remained unpaid fifteen days after the due date, the Department was authorized to and did issue warrants for collection, along with the additional warrant penalty. RCW 82.32.210(1). Having determined that the Department properly imposed the assessed penalties and interest, we now turn to whether the Department can waive them.

### *Penalty Waiver*

The Department has limited authority to waive or cancel penalties. RCW 82.32.105. Here, the only applicable basis for penalty waiver is found under RCW 82.32.105(1), which requires waiver of an assessment penalty imposed under RCW 82.32.090(2) when the penalties were the result of “circumstances beyond the control of the taxpayer.” RCW 82.32.105(1); Rule 228. *See* Det. No. 16-0324, 36 WTD 135 (2017). There is no corresponding possibility of waiver of the warrant penalty. Therefore, we only consider the possibility of waiver for the assessment penalty.

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. Rule 228(9)(a)(i).

Here, Taxpayers represent that payment of the original 2012 assessment was late due to the progression of chronic illness suffered by the family member who handled the books, and further assert that a second family member’s sudden injury and difficult recovery may have impacted Taxpayers’ ability to respond to the audit as it progressed, thus also impacting Taxpayers’ ability to pay the same 2012 assessment.

Rule 228(9)(a)(ii)(C) describes the only circumstance that might possibly be applicable to the situation Taxpayers describe. This Rule provides that the Department will consider waiver or cancellation of penalties imposed under RCW 82.32.090 upon a finding that:

The delinquency was directly caused by death or serious illness of the taxpayer, or a member of the taxpayer's immediate family . . . . This situation is not intended to have an indefinite application. A death or serious illness which denies a taxpayer reasonable time or opportunity to obtain an extension or to otherwise arrange timely filing and payment is a circumstance eligible for penalty waiver.

Rule 228(9)(a)(ii)(C) (emphasis added). However, . . . the present review is limited to events following the issuance of the PAA in 2014 (when the non-payment of re-issued assessment, collection warrants, and [when the] associated interest and penalties were incurred). The delinquencies for which Taxpayers may seek waiver in this review occurred more than two years after the original 2012 assessments. The delinquencies here were a result of the Department’s 2014 issuance of tax warrants to enforce collection of re-issued assessments, following the resolution of Taxpayers’ first petition and review. The family illness and injury on which Taxpayers base their waiver request occurred long before the PAA was issued in 2014. Therefore, we conclude that these family illnesses cannot qualify as a circumstance beyond Taxpayers’ control directly causing

Taxpayers' failure to pay the 2014 assessments, as Taxpayers had reasonable opportunity to arrange their affairs. *See* Det. No. 98-114, 18 WTD 37 (1998); *see also* Det. No. 88-288, 6 WTD 231 (1988). Thus, we are unable to waive the penalties under Rule 228(9)(a)(ii)(C).

Taxpayers also assert the penalties cause financial hardship. However, financial hardship is not considered a situation beyond control of a taxpayer. Rule 228(9)(a)(iii)(A).

Accordingly, we cannot waive the assessed penalties as there were no "circumstances beyond Taxpayer's control." RCW 82.32.105(1); Rule 228(9)(a).

### *Interest Waiver*

Finally, RCW 82.32.105(3) and Rule 228(10) provide that the Department shall waive or cancel interest only 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.

*See* Det. No. 15-0344, 35 WTD 497 (2016). Here, the Department gave Taxpayers neither written instructions nor an extension of the due date for payment of the taxes assessed. Under these circumstances, we have no authority to waive the extension interest.

### *Separate Entities*

Taxpayers also contend that the Department issued the tax assessments in error against two registered business entities that are actually running as one business.

It is well settled that affiliated entities are each a person within the meaning of Washington's Revenue Act. In general, transactions between them are fully subject to tax. *Dep't of Revenue v. Nord Northwest Corp*, 164 Wn. App. 215, 230 (2011); *Washington Sav-Mor Oil Co. v. State Tax Commission*, 58 Wn.2d 518, 364 P.2d 440 (1961); RCW 82.04.030; *See also* WAC 458-20-203 (regarding affiliated corporations); WAC 458-20-106 (regarding capital contributions). It is also settled law that a parent and subsidiary are generally treated as separate entities. *Nord*, 164 Wn. App. at 230; 28 WTD 076; Det. No. 10-0062, 30 WTD 40 (2011). The fact that Taxpayer (. . .) wholly owned the Taxpayer's corporation (. . .), does not provide an exception to the general rule that each business entity is a separate taxpayer. *Nord*, 164 Wn. App. at 230. Once the sole-proprietorship was registered it became a separate legal entity, and there is no legal basis in the record for disregarding the separate legal existence of the Taxpayer and the Taxpayer's corporation and treating them as one entity for tax purposes.<sup>2</sup>

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<sup>2</sup> Washington Courts have respected the different persons engaging in business in Washington State, even though those persons may be affiliated with each other. *See, e.g., Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 841 P.2d 752 (1992) (independent contractor insurance agents affiliated with broker are not one "person" for B&O tax purposes and not "group of individuals acting as a unit" under RCW 82.04.030.); *Nordstrom Credit, Inc. v. Dep't of Revenue*,

Taxpayers contend they intended to register the sole-proprietorship as a “doing business as” (d/b/a) name of the corporation rather than as a separate new business, but made a mistake and filed incorrect registration paperwork. Taxpayers also argue they had been unaware of the mistake until the audit, and had operated as if the two were a single entity. Taxpayers’ registration mistake does not provide the Department with legal authority to disregard the actual legal status of these entities as they existed during the audit period and afterwards.<sup>3</sup>

Accordingly, we deny the petitions.

#### DECISION AND DISPOSITION

Taxpayer's petitions are denied.

Dated this 3rd day of November 2017.

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120 Wn.2d 935, 845 P.2d 1331 (1993) (subsidiary formed by parent to finance parent’s accounts receivable engaged in arm’s length transaction with parent and was a separate “person” for B&O tax purposes); *American Sign & Indicator Corp. v. State*, 93 Wn.2d 427, 429, 610 P.2d 353 (1980) (“The tax liability of a corporation must be considered without regard to its relationship to a parent or subsidiary company or to the existence of common officers, employees, facilities, or stock ownership.”). Washington law treats affiliated entities as different persons, each subject to B&O tax on their taxable activities. *See* RCW 82.04.220.

<sup>3</sup> We note that, because taxes are calculated by the use of percentage rates, the division of taxable income between two entities did not result in a double tax. Applying applicable tax rates to smaller, divided balances results in the same tax as would be calculated using the same rate applied to a large single balance in an undivided entity.