

Cite as Det. No. 18-0062, 38 WTD 181 (2019)

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

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. 18-0062
)	
...)	Registration No. . . .
)	

[1] RULE 19402; RCW 82.32.090; RCW 82.04.462(4): B&O TAX – APPORTIONMENT – ANNUAL RECONCILIATION – DELINQUENT PENALTY. A taxpayer that fails to timely file and pay its annual reconciliation is subject to the delinquent penalty.

[2] RULE 228; RCW 82.32.105: WAIVER OF PENALTIES – CIRCUMSTANCES BEYOND THE CONTROL OF THE TAXPAYER – TWENTY-FOUR MONTH PAYMENT HISTORY. A taxpayer does not qualify for waiver of penalties on grounds of lack of knowledge, nor on grounds of good filing and payment history when Taxpayer did not timely file reconciliations for a period of twenty-four months immediately preceding the periods covered by the reconciliations for which the waiver is being requested.

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.

Margolis, T.R.O. – A broker/dealer that distributes exchange-traded funds and underwrites mutual funds protests the assessment of penalties on the grounds that it is was unaware of the requirement to file annual reconciliations and that it qualifies for waiver under the 24-month rule. We deny the petition.¹

ISSUES

1. Were penalties properly assessed under RCW 82.32.090, based on Taxpayer’s failure to file annual reconciliations as required by RCW 82.04.462(4)?
2. Can the Department waive the penalties at issue under RCW 82.32.105?

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

FINDINGS OF FACT

Taxpayer is a provider of security brokerage services based [out-of-state]. It is a member of the Financial Industry Regulatory Authority (FINRA) and Securities Investor Protection Corporation (SIPC), and operates as a subsidiary of It registered with the Department of Revenue (Department), effective January 1, 2010, and began filing tax returns in 2010. It reported [business and occupation] (B&O tax) under the insurance producers/title insurance agents/surplus line broker commissions (Insurance Producers) B&O tax classification, and did not file reconciliations. The Department's Audit Division (Audit) examined Taxpayer's records for the period January 1, 2012, through December 31, 2015, and, on January 4, 2017, assessed Taxpayer \$ The assessment is comprised of \$. . . in service and other activities . . . B&O tax, a credit of (\$. . .) in Insurance Producers B&O tax, a 29% delinquent penalty of \$. . . , \$. . . in interest, an interest reconciliation of \$. . . , and a 5% assessment penalty of \$

Audit found that Taxpayer had been reporting all commissions under the Insurance Producers B&O tax classification instead of the service and other activities B&O tax classification. Audit gave Taxpayer credit for amounts reported under this B&O tax classification, and assessed service and other activities B&O tax. Audit assessed the 29% delinquent payment penalty on the difference between the amount Taxpayer paid in Insurance Producers B&O tax and the amount Audit assessed in service and other activities B&O tax for 2012, 2013, and 2014.

Taxpayer timely filed its monthly tax returns based on current monthly revenue data. It asserts that it was unaware that it was filing under the incorrect classification, subject to service and other activities B&O tax apportioned to Washington, and required to file annual reconciliations. Further, Taxpayer seeks waiver on the grounds that it timely filed and remitted payment on all tax returns due for 24 months immediately preceding each tax year's return.

ANALYSIS

RCW 82.32.090(1) states the following regarding the delinquent payment penalty:

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

RCW 82.32.090(1) (emphasis added).

A taxpayer that does not timely file and pay its annual reconciliation is subject to the delinquent payment penalty in RCW 82.32.090(1). RCW 82.04.462(4). To avoid the penalty, a taxpayer that has apportionable income from "apportionable activities" must correct the reporting for the current tax year when the complete information is available, but not later than October 31 of the following tax year. *Id.* "Apportionable activities" specifically include those taxed under the service and other activities B&O tax classification. RCW 82.04.290; RCW 82.04.460(4)(a)(vi).

WAC 458-20-19402 is the administrative rule regarding the general application of apportionment under RCW 82.04.462. Rule 19402 Part 6 provides reporting instructions. The instructions are as follows:

(601) General.

(a) Taxpayers required to use this rule's apportionment method may report their taxable income based on their apportionable income for the reporting period multiplied by the receipts factor for the most recent calendar year the taxpayer has available.

(b) If a taxpayer does not calculate its taxable income using (a) of this subsection, the taxpayer must use actual current calendar year information.

(602) Reconciliation. Regardless of how a taxpayer reports its taxable income under subsection (601)(a) or (b) of 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. . . . 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.

Rule 19402(601) (emphasis in original).

Here, it is not disputed that Taxpayer's income is subject to apportionable B&O tax under the service and other activities classification. Thus, Taxpayer was required to file a reconciliation for each tax year and pay any additional tax due by October 31 of the following year. Taxpayer did not file its 2012, 2013, and 2014 reconciliations within 60 days of October 31 in the years 2013, 2014, and 2015, despite owing additional tax.² Therefore, Audit was required to assess the 29 percent delinquent payment penalty on the amount of tax due for those tax years.

The Department's authority to waive or cancel penalties is restricted to the authority granted by the Legislature. Otherwise, the assessment of penalties is mandatory when the conditions for imposing them are met. RCW 82.32.090; Det. No. 01-193, 21 WTD 264 (2002); Det. No. 99-279, 20 WTD 149 (2001). The Legislature has granted the Department limited authority to waive or cancel penalties pursuant to RCW 82.32.105. RCW 82.32.105(1) provides that the Department is required to waive penalties when it finds that the underlying act giving cause to the assessment of the penalty, i.e., delinquent payment, was due to circumstances beyond the control of the taxpayer.

WAC 458-20-228 is the administrative rule regarding penalties. Rule 228(9) defines "circumstances beyond the control of the taxpayer." It states:

The circumstances beyond the control of the taxpayer must actually cause the late payment. 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.

² We recognize that Taxpayer may have filed no change reconciliations because it was reporting on a current basis. However, because Rule 19402(602)(b) requires taxpayers to file reconciliations even when they use actual current calendar year information under Rule 19402(601)(b), taxpayers must file reconciliations regardless.

Rule 228(9) goes on to provide a non-exclusive list of circumstances that generally will and will not be considered circumstances beyond the control of the taxpayer. As relevant here, a misunderstanding or lack of knowledge of a tax liability is generally not considered a circumstance beyond the control of the taxpayer and will not qualify for a waiver of the penalty. Rule 228(9)(a)(iii)(B). Det. No. 01-096, 22 WTD 126 (2003) (“‘Lack of knowledge’ is not a ‘circumstance beyond the control of the taxpayer’ because the law, regulations, and Department publications explaining all tax laws are publicly available . . .”).

In this matter, Taxpayer argues that penalties should be waived because it thought that it was correctly reporting taxes under the Insurance Producers classification, and was unaware of its requirement to file reconciliations. Because such lack of knowledge is not a circumstance beyond the control of the taxpayer, we find that Taxpayer does not qualify for waiver under RCW 82.32.105(1).³

RCW 82.32.105(2) provides that the Department may waive the delinquent penalty if the taxpayer has a good filing and payment history. Rule 228(9)(b)(i)(B) explains that a taxpayer is eligible for this provision when it requests a penalty waiver and “. . . 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.” Rule 228(9)(b)(i)(B).

Here, Taxpayer requested a penalty waiver in its petition, citing its monthly excise tax return payment history. However, because Taxpayer did not timely file reconciliations for a period of 24 months immediately preceding the periods covered by the reconciliations for which the waiver is being requested, it does not qualify for waiver under this provision.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 6th day of March 2018.

³ The Washington tax system is based largely on voluntary compliance. The Revenue Act imposes on taxpayers the responsibility to inform themselves about applicable tax laws, register with the Department, and accurately and timely pay taxes. Ch. 82.32A RCW. The Department has repeatedly held that it is the taxpayer's responsibility to inform itself of its tax obligations. Det. No. 91-313R, 12 WTD 45 (1993).