Cite as Det. No. 20-0045, 41 WTD 126 (2022)

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

In the Matter of the Petition for Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 20-0045
. . .	)	Registration No. . . .

[1] WAC 458-20-19402(402); RCW 82.04.462(4); 82.32.090(1); 82.32.105 – DELINQUENT PENALTIES – APPORTIONABLE INCOME – ANNUAL RECONCILIATION – CORRECTED RETURN. The Department is obligated to impose delinquent return penalties against tax amounts owing in connection with a taxpayer's Annual Reconciliation of Apportionable Income returns where the taxpayer reported "no business" or "zero income" on the initial combined excise tax returns that form the subject of that reconciliation.

[2] WAC 458-20-228; RCW 82.32.105 – WAIVER OR CANCELLATION OF PENALTIES – 24-MONTH WAIVER. 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.

L. Roinila, T.R.O. – A broker-dealer that timely filed each of its required excise tax returns, but reported no business in every instance, protests the imposition of late payment and assessment penalties in connection with its annual reconciliation of apportionable income (ARAI) returns, arguing that the Department lacks the authority to impose such penalties in such cases. Petition denied.[1]

ISSUES

1. Whether the Department is obligated, under RCW 82.04.462(4), RCW 82.32.090, WAC 458-20-19402 and WAC 458-20-228, to impose delinquent return penalties against tax amounts owing in connection with a taxpayer's Annual Reconciliation of Apportionable Income returns where the taxpayer reported "no business" or "zero income" on the initial combined excise tax returns that form the subject of that reconciliation.

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

2. Whether a taxpayer qualifies for a waiver of penalties under the twenty-four-month provision of RCW 82.32.105 and WAC 458-20-228.

FINDINGS OF FACT

. . . (Taxpayer) is a federally registered securities broker-dealer . . . . Although the Taxpayer, itself, has no employees in Washington, it performs its services, and has established economic nexus, through its Washington affiliate.

Seeking to verify that Taxpayer had correctly reported its Washington business activities and transactions on its combined excise tax returns, the Department of Revenue's (Department) Audit Division (Audit), initiated an examination of Taxpayer's books and records covering the period January 1, 2010, through December 31, 2013 (audit period). During the course of this investigation, Audit concluded that the Taxpayer had failed to properly apportion certain business receipts to Washington, and, so, issued a business and occupation (B&O) tax assessment against those receipts. In addition, Audit found that, while the Taxpayer had timely filed each of its monthly excise tax returns throughout the audit period, Taxpayer had reported zero Washington apportionable income on each of those returns.[2] Finally, because Taxpayer had failed to file ARAI returns, as required, for each of the years of the audit period, Audit also imposed a twenty-nine percent late payment penalty and a five percent [assessment] penalty against the tax amounts assessed in connection with this failure.

As a result of the adjustments Audit made to the Taxpayer's apportionment methodology during this examination, Taxpayer proactively filed, on October 23, 2017, an ARAI return for calendar year 2016, and paid the tax amounts owing for that year, as calculated on that return. Because the Taxpayer had also initially reported no Washington apportionable income on its combined excise tax returns for each of the months of 2016, however, the Department's Taxpayer Account Administration Division (TAA) likewise imposed late payment and assessment penalties as described above.[3]

Finally, based on the same Audit adjustments, Taxpayer also timely filed its October, November, and December monthly excise tax returns [for 2017], and paid tax in the amount of $. . . in connection with each of these returns. On October 19, 2018, Taxpayer then timely filed an ARAI for the entirety of 2017, and remitted an additional $. . .of tax and interest. In February 2019, however, TAA again determined that, while the Taxpayer had timely filed and paid the taxes due in connection with its 2017 annual reconciliation, Taxpayer had nevertheless incorrectly filed "no business" returns for each of the months of January through September 2017, as well. Accordingly, TAA imposed late payment and assessment penalties against the tax amounts corresponding to those monthly periods, this time totaling $. . . .

Disagreeing with the Department's imposition of penalties in the 2016 and 2017 assessments, Taxpayer timely petitioned us, requesting we review. In support of its petition, Taxpayer argues that the Department acted improperly when it imposed the penalties here at issue for several reasons.

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[2] Such returns are often referred to as "no business" or "zero income" returns.
[3] These penalties total $. . . . An additional $. . . in interest remains outstanding.

First, the Taxpayer notes that, at least with respect to the 2016 and 2017 assessments, it timely filed its ARAI returns and paid all additional tax amounts for which it was responsible in connection with those returns. Taxpayer further contends that the statutory and regulatory provisions mandating the imposition of penalties for a taxpayer's failure to timely file ARAI returns, and to pay any additional tax amounts owed in connection with that return, only apply in situations in which the taxpayer has failed to correct its current tax year reporting, and failed to pay any additional tax, by the due date.[4] Since it did both in this case, Taxpayer believes no penalties ought to apply.

In response to this contention, TAA argues that Taxpayer's reliance upon RCW 82.04.462(4) proves misplaced. According to TAA, this statutory provision is "directly related to the expectation that the taxpayer originally reported using actual Washington receipts *or* the prior year's receipts factor."[5] In addition, TAA further maintains that the "provision was not intended to provide an effective due date extension"[6] for taxpayers to report and pay B&O tax. Finally, TAA asserts that the Department "has a long-standing history of assessing delinquent return penalt[ies] when taxpayers erroneously indicate they had no business activities, then subsequently report liability for the same period."[7]

Second, Taxpayer further asserts that the Department's policy directly contradicts the plain language of RCW 82.04.462(4). Third, Taxpayer argues that this "internal, unpublished Department policy upon which the Department apparently has relied for the imposition of penalties constitutes an invalid regulation."[8] And, finally, Taxpayer requests that, if we find that the Department possessed the authority to impose the late payment penalties in this case, we should nevertheless consider waiving these penalties under the law's so-called twenty-four-month waiver.

We address these contentions below.

ANALYSIS

1. Annual Reconciliations of Apportionable Income

RCW 82.04.460 requires businesses that earn taxable income derived from the performance of apportionable services in Washington, and elsewhere, to apportion that income for purposes of computing their tax liability in the state. More specifically, "any person earning apportionable income taxable under this chapter and also taxable in another state must, for the purpose of computing tax liability under this chapter, apportion to this state, in accordance with RCW 82.04.462, that portion of the person's apportionable income derived from business activities

[4] *See* RCW 82.04.492(4); *see also* WAC 458-20-19402; RCW 82.32.090; WAC 458-20-228. We discuss these previsions at greater length, below.
[5] Operating Division Response, p. 2 (April 26, 2019) (emphasis in original).
[6] *Id*.
[7] *Id*.
[8] Indeed, in Taxpayer's view, because it represents an agency directive of general applicability that subjects taxpayers to penalties, this policy proves tantamount to a "rule" under the Administrative Procedure Act (APA). Taxpayer Petition, p. 2 (March 14, 2019). The APA is codified in Washington in Chapter 34.05 RCW.

performed within this state." RCW 82.04.460(1). To do so, a taxpayer must multiply its total apportionable income by a fraction referred to as the "receipts factor." RCW 82.04.462(3)(a). The numerator of the receipts factor is equal to the taxpayer's Washington apportionable receipts, while the denominator includes the totality of the taxpayer's worldwide apportionable receipts, minus certain "throw-out income." *Id.*; [RCW 82.04.262(3)(c)]; WAC 458-20-19402(402) (Rule 19402).

Because a taxpayer may not have access to all of the information necessary to calculate its receipts factor when it files its current combined excise tax returns, RCW 82.04.462(4) requires taxpayers to "true up" their apportionable income each year by completing and filing an Annual Reconciliation of Apportionable Income (ARAI) return by October 31 of the following year. More specifically:

> 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. . . .

RCW 82.04.462(4). If a taxpayer fails timely to pay any additional tax due as a result of the reconciliation, the penalties set forth in RCW 82.32.090 apply, but "*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).[9]

In the present case, Taxpayer timely filed its combined excise tax returns (CETRs) for each month of 2016 and 2017, but claimed zero Washington apportionable receipts in every instance, with the exception of its October, November, and December 2017 returns. Taxpayer then filed ARAI

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[9] As relevant here, for instance, these penalties include the delinquent payment penalty, which is imposed with the following language:

> 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) (emphasis added). RCW 82.32.090(2) likewise imposes [a] penalty as follows:

> If the department of revenue determines that any tax has been substantially underpaid, there is assessed a penalty of five percent of the amount of the tax determined by the department to be due. 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 notice, or any extension thereof, there is assessed a total penalty of fifteen percent of the amount of the tax under this subsection; and if payment of any tax determined by the department to be due is not received on or before the thirtieth day following the due date specified in the notice of tax due, or any extension thereof, there is assessed a total penalty of twenty-five percent of the amount of the tax under this subsection.

returns for each of those years, again in timely fashion, and paid the additional tax amounts that arose in connection with those returns. Because all of the CETRs Taxpayer originally filed in 2016, and later reconciled, reflected no business, however, TAA imposed a late payment penalty, as well as an assessment penalty, against the corresponding tax amounts. TAA did the same with respect to the January through September 2017 period. The Taxpayer, however, argues on appeal that, because of the timely nature of these ARAI filings, as well as its ARAI related payments, the late payment and assessment penalties at issue should not apply. Taxpayer, moreover, further contends that the Departmental policy imposing penalties in such situations both runs counter to the plain meaning of RCW 82.04.462, as well as represents an invalid exercise in administrative rulemaking. For the following reasons, we disagree.

First, Taxpayer's position mischaracterizes the nature of the penalties at issue, as well as the returns against which they apply. RCW 82.04.462(4) plainly states that a taxpayer must calculate its receipts factor for a given year "based on the most recent calendar year for which information is available for the full calendar year." Here, the Taxpayer possessed all of the information necessary to correctly calculate its receipts factor for the entirety of 2014, and possibly 2015, well in advance of the February 25, 2016, due date for its January 2016 monthly excise tax return, as well as each subsequent monthly return of that year. Likewise, Taxpayer possessed all of the information necessary to calculate its receipts factor for 2015, and possibly 2016, for use in preparing its January 2017 monthly CETR. Rather than correctly interpreting this data and calculating its receipts factor, however, Taxpayer chose incorrectly to assume that it had no Washington apportionable income and filed no business returns throughout the entirety of one, and the majority of the other, of the years at issue, and paid nothing against its tax liability as a result.

Taxpayer now appears to suggest that, because this failure to pay arose from its good faith belief that it had no receipts properly attributable to Washington, somehow no penalties ought to apply. We note in this regard, however, that WAC 458-20-228 (Rule 228), the Department's rule governing the administration of tax penalties, specifically states that a taxpayer's mistake, misunderstanding or lack of knowledge regarding its tax liabilities generally will not justify a waiver of penalties. *See* Rule 228(9)(a)(iii). And we now decline to hold that such mistakes or misunderstandings preclude their imposition here.[10]

Second, contrary to the Taxpayer's contention, the plain language of RCW 82.04.462 specifically provides that the Department must impose penalties against *any additional amounts* not paid by a taxpayer in connection with an ARAI by October 31 of the following year. In interpreting this provision, we find particularly telling the Legislature's inclusion of the word "additional." For when read in conjunction with the receipts factor discussion that immediately precedes the word's inclusion, it becomes abundantly clear that the penalty provision of RCW 82.04.462(4)

[10] Because Washington's tax system relies on taxpayers' voluntary compliance, the Department makes every effort to provide its taxpayers with current tax reporting information and makes available significant resources to assist taxpayers in fulfilling their obligations to report correctly. However, the Department is not required by law to individually notify taxpayers of their tax reporting obligations, and ultimate responsibility for correctly reporting remains at all times with the taxpayer. RCW 82.32A.030(2) codifies this requirement and charges taxpayers with:

> Know[ing] their tax reporting obligations, and when they are uncertain about their obligations, seek[ing] instructions from the department of revenue . . . .

. . .

presupposes situations in which a taxpayer has paid at least *some tax* contemporaneously with its original excise tax return filings. Therefore, to avail oneself of the limitation on penalties for additional amounts due, RCW 82.04.462 plainly requires that a taxpayer report some income to Washington on its CETRs based on information that is at its disposal. Because Taxpayer did not follow the instructions of RCW 82.04.462 in reporting its income on its CETRs, the subsequent benefit of the RCW 82.04.462(4) penalty limitation does not apply.

In so concluding, moreover, we do nothing more than follow the "cardinal rule" of statutory interpretation that holds a statute must be read as a whole, "since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hospital*, 502 U.S. 215, 221, 112 S.Ct. 570, 116 L.Ed.2d 576 (1991); . . . *Gorre v. City of Tacoma*, 184 Wn.2d 30, 37, 357 P.3d 625 (2015). [RCW 82.04.462 relates to apportionment issues, but it does not purport to trump or replace the requirement in RCW 82.32.045 that taxpayers must file returns and pay taxes monthly.] . . .

Finally, for the reasons just discussed, we find that the Departmental decision to impose penalties in cases such as this does not rise to the level of a rule, or even a formal policy. Rather, it merely represents the plain meaning interpretation of RCW 82.04.462(4) and RCW 82.32.090. Accordingly, Taxpayer's allegation of invalid rulemaking must likewise fail.

2. Twenty-Four Month Penalty Waiver

Taxpayer also requests that, should we find that the Department possessed the authority to impose the late payment penalties in this case, as we have, we nevertheless consider waiving these penalties under the law's so-called twenty-four-month waiver.

In addressing the waiver or cancellation of penalties, RCW 82.32.105 provides that the Department must waive or cancel any penalties in cases in which "a taxpayer *has timely filed and remitted payment* on all tax returns due for that tax program for a period of twenty-four months immediately preceding the period covered by the return for which the waiver is being requested." RCW 82.32.105(2)(b) (emphasis added); *see also* WAC 458-20-228(9)(b).

As discussed above, a Departmental audit of this Taxpayer's books and records, covering the period 2010 through 2013, established that the Taxpayer had derived income properly apportionable to Washington and, consequently, Washington tax liability in connection with that income throughout the audit period. This liability extended into the years that followed. As it did throughout the audit period, however, Taxpayer initially filed each of its excise tax returns in 2014 and 2015 reporting zero income. To date, however, the Taxpayer has not made any subsequent filings to correct these returns or pay the tax amounts due. And because the Taxpayer did not, and has not, timely filed and remitted payment in connection with the tax program here at issue, and the program for a waiver is sought for a period of twenty-four months preceding the waiver period, we are unable to authorize the waiver of the penalties here.

DECISION AND DISPOSITION

We deny the Taxpayer's petitions.

Dated this 28th day of February 2020.