Cite as Det. No. 20-0338, 41 WTD 295 (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. 20-0338
. . .	)	Registration No. . . .

[1] RCW 82.32.090(7); WAC 458-20-228(5)(f): EVASION PENALTY - INTENT TO EVADE; PATTERN. Consistent and recurring underreporting of income and claiming deductions that the Department advised, on several occasions, were incorrect supports a finding of intent to evade and imposition of the evasion penalty.

[2] RCW 82.32.090(7); WAC 458-20-228(5)(f): EVASION PENALTY - INTENT TO EVADE; MISTAKE. An assertion that underreporting income and improperly claiming deductions was an honest mistake is not supported where the taxpayer demonstrates a level of knowledge of Washington's tax laws in its tax reporting and payment history and received specific education from the Department regarding its reporting obligations and eligibility for deductions.

[3] RCW 82.32.105; WAC 458-20-228: LATE PAYMENT OF RETURN PENALTY – CIRCUMSTANCES BEYOND THE CONTROL OF THE TAXPAYER – LACK OF KNOWLEDGE OF TAX LIABILITY. Lack of knowledge of a tax liability generally is not considered a circumstance beyond the control of the taxpayer.

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.

Farquhar, T.R.O. – A construction business protests the penalty portion of an assessment issued by the Department following an audit. The subject penalties include an evasion penalty, delinquent payment penalties, and a substantial underpayment penalty. Taxpayer argues that it did not intend to evade payment of its tax liabilities and, instead, the underpayments were the result of its owner's lack of understanding of Washington's tax laws. We conclude that the Department has established by clear, cogent, and convincing evidence that the business knew of the subject tax liabilities, but sought to evade paying the liabilities through deceit, fraud, or intentional wrongdoing. We also

conclude that the business is ineligible for a penalty waiver because the circumstances that led to the penalties were not beyond the control of the business. Petition denied.[1]

ISSUES

1. Whether the Department properly assessed an evasion penalty under RCW 82.32.090 and WAC 458-20-228 where the evidence indicates that a company was aware of its tax liability but engaged in a long-term pattern of actions to avoid paying the full amount of its tax liability.

2. Whether the Department properly assessed delinquent payment penalties and a substantial underpayment penalty under RCW 82.32.105 and WAC 458-20-228 where a company failed to pay its tax liabilities on time, paid less than eighty percent of the amount of tax determined to be due, and the amount of the underpayment exceeded $1,000.

3. Whether a company is entitled to a waiver of delinquent payment, assessment, and evasion penalties under RCW 82.32.105 and WAC 458-20-228 on the grounds that the circumstances that led to the penalties were caused by the company's owner's lack of understanding of Washington's tax laws.

FINDINGS OF FACT

. . . ("Taxpayer") is a construction business based in . . . , Washington. Taxpayer is owned by . . . ("Owner"). Taxpayer began doing business in 2010 and specializes in retail construction and remodeling services. Most of Taxpayer's customers are located in the . . . area. During the periods at issue here, Taxpayer reported its income using paper returns because Taxpayer claimed that it did not have a computer. Prior to April 2015, Taxpayer was required to file quarterly returns; after that date, Taxpayer was required to file monthly returns. Between 2014 and 2019, Taxpayer filed at least one return late every year.

Since Taxpayer began doing business, the Department contacted Taxpayer several times to discuss issues related to deductions and retail sales tax collection. In September of 2012, a Department representative called Owner to discuss an error on Taxpayer's return related to [deductions from gross income] and "tax paid at source" deductions. During the conversation, the representative explained to Owner that the "tax paid at source" deduction generally is not available to businesses, such as Taxpayer, that are engaged in retailing activities.

In November 2014, the Department contacted Owner regarding a large "tax paid at source" deduction Taxpayer claimed. A Department representative informed Owner that some of the purchases included in the amount Taxpayer had deducted were not eligible for the deduction. Owner stated that he understood that he could not claim amounts for items he purchased as an end consumer. In the same conversation, Owner also stated that he understood that the rate of retail sales tax he must collect from customers varies depending on where each sale occurs.

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

On May 15, 2017, a Department representative contacted Owner because Taxpayer's return indicated that Taxpayer had collected a higher rate of retail sales tax than the actual rate. Owner explained that he had received notice that the tax rate was changing, but misunderstood when the rate change went into effect.

On December 20, 2017, the Department again contacted Owner to discuss Taxpayer's "tax in gross" deductions. Owner stated that tax is included in his invoices to his customers. The representative then explained how to correctly calculate the "tax in gross" deduction.

In April 2018, the Department disallowed a "tax in gross" deduction Taxpayer claimed because the deducted amount was higher than the retail sales tax Taxpayer reported. The following month, the Department adjusted Taxpayer's "tax in gross" deduction for that month because Taxpayer had again miscalculated the deduction amount. Then, in August 2018, the Department contacted Owner about additional incorrect deductions. A Department representative instructed Owner that Taxpayer should not claim the "tax in gross" deduction in the future. Department records indicate that Taxpayer did not claim a "tax in gross" deduction after that date, but continued to claim "tax paid in source" deductions.

On May 13, 2019, the Department's Audit Division ("Audit") began a review of Taxpayer's records and business activities for the period of January 1, 2015, through March 31, 2019 ("Audit Period"). Audit requested that Taxpayer provide sales data and various business records. Taxpayer provided invoices for the work it performed during the Audit Period. The invoices separately stated the amount of retail sales tax owed by the customer.

However, Taxpayer was unable to provide all of the documents Audit requested. In particular, Taxpayer did not provide documentation to support all of the deductions it had claimed. Taxpayer only provided a portion of the receipts needed to support the "tax paid at source" deductions and did not provide any documentation to support the "tax in gross" deductions. Taxpayer also did not provide "summary records" to reconcile the amounts of the deductions it had reported on its returns. Results of Your Audit, . . . ("Audit Report"), ... Without summary records, Audit was unable to determine which purchases Taxpayer had deducted and which were taxable because many of the receipts included taxable and non-taxable items. *Id.*

On November 27, 2020, Audit completed its review and issued the Audit Report. The Audit Report explains that Audit conducted a reconciliation of Taxpayer's income during the Audit Period by comparing the amount of income Taxpayer reported to the amounts it actually earned based on the invoices it provided. The reconciliation revealed that Taxpayer had underreported its retailing income during the Audit Period by $. . . . Audit Report, ... Audit also discovered that Taxpayer had improperly claimed "tax in gross" deductions and that Taxpayer's records were insufficient to support some of the "tax paid at source" deductions it claimed. Audit disallowed those deductions and assessed tax in the same amount.

The Audit Report also describes several penalties that Audit assessed, including late payment penalties, a substantial underpayment penalty, and an evasion penalty. Taxpayer incurred the late payment penalties as a result of its failure to timely pay its full tax liability during various periods included in the Audit Period. Audit assessed the substantial underpayment penalty because Audit

found that Taxpayer had paid just 48% of its total tax liability for the Audit Period and the amount of the underpayment (described below) exceeded $1,000.

Finally, Audit explained that it assessed the evasion penalty, which equals 50% of the tax found to be due for the Audit Period, because it concluded that Taxpayer knew of its tax liability, but attempted to avoid payment of the liability through deceit, fraud, or other intentional wrongdoing. Audit Report, ... Audit provided the following information regarding its decision to assess the evasion penalty:

> During the audit period, [Taxpayer] provided invoices to customers separately stating and collecting retail sales tax. Both invoices provided as well as bank statement deposits show that . . . income was unreported. Taxpayer knowingly did not remit sales tax by not reporting total income earned during [the Audit Period]. Taxpayer submitted a request to the [Department] requesting an exemption from filing electronically as he did not have a computer. During the audit [Taxpayer] provided an email address for communications, a memory card with invoices, and invoices that have been generated from an accounting system or computer software program. Taxpayer took fictitious deductions, tax in gross, even after being contacted by the [Department] several times, as to his inaccurate reporting. Taxpayer also significantly overreported tax paid at source deductions, including provided invoices that could not be tied to any retail jobs for some of his documentation.

Audit Report, ...

In addition to the Audit Report, Audit issued a document entitled "Audit Standards and Procedures Supplement Instructions" ("Supplement"). *See* Letter ID No. . . . . The Supplement was produced by Audit's Standards and Procedures unit following their review of Audit's decision to assess the evasion penalty. The Supplement contains the following information regarding their review of Audit's conclusions:

> A review of the audit report has convinced us that the 50 percent penalty is required and has been added to the unreported total tax amount of $. . . as asserted on Working Paper(s). The following items lead us to the conclusion of intent to evade the tax owing: Taxpayer collected and did not remit retail sales tax and substantially under reported sales and over reported deductions. We concur completely with the audit findings.

Along with the Audit Report and Supplement, Audit issued a Notice of Balance Due ("Assessment") in the amount of $. . . . *See* Letter ID No. . . . . The Assessment is composed of $. . . in taxes, $. . . in penalties, and $. . . in interest.[ ] The tax portion of the Assessment is composed of the following amounts:

Tax/Deduction Type	Amount
Retailing B&O tax	$. . .
State and local retail sales tax	$. . .
Disallowed "tax paid at source" deductions	$. . .
Disallowed "tax in gross" deductions	$. . .
Total	$. . .

The penalty portion of the Assessment includes an $. . . evasion penalty, an $. . . substantial underpayment penalty, and $. . . in delinquent payment penalties. Audit assessed delinquent return penalties on each period within the Audit Period where Taxpayer was found to have submitted its return late and underreported its liability. The penalty rate Audit applied was 9% of the unpaid taxes owed for each delinquent period. Audit assessed the evasion penalty on the entire tax portion of the Assessment and the amount of the penalty is equivalent to 50% of the taxes found to be due.[2]

On December 18, 2019, Taxpayer submitted a timely petition for review, in which it seeks review of "the amount of penalty being assessed." Petition, ... The argument section of the Petition reads, in full, as follows: "Because I have receipts for all my deductions, they just don't count because I was unaware of what deductions I was allowed to take with tax paid at source." Petition, ...

On May 12, 2020, we conducted a hearing with Owner. At the hearing, Owner clarified that he only seeks review of the penalty portion of the Assessment. He explained that his then-girlfriend did his taxes during the Audit Period and that he did not have any training in business finance or accounting. He stated that he preferred to file paper returns because he is not comfortable using computers. Regarding the evasion penalty, the Owner explained that he never intended to avoid paying his taxes and any errors he made were due to a lack of understanding about Washington's tax laws, particularly regarding what amounts he was allowed to deduct.

ANALYSIS

1. Legal Basis for Imposing Penalties

Taxpayers have certain rights and responsibilities under Washington law, including the responsibility to file accurate returns and pay their taxes in a timely manner. Ch. 82.32A RCW. In the event the Department determines that a taxpayer has paid less tax than what was properly due, the Department "shall assess against the taxpayer such additional amount found to be due." RCW 82.32.050(1). RCW 82.32.090 provides various penalties that the Department is required to impose when the conditions for them are met. Here, Taxpayer incurred delinquent payment penalties, a substantial underpayment penalty, and an evasion penalty. We will address the legal basis for each of the penalties in turn before discussing whether we have the authority to waive any of them.

[2] The total taxes found to be due, as described in the table above, were $. . . . That amount multiplied by 50% equals $. . . .

a. Delinquent Payment Penalty

RCW 82.32.090(1) states that the Department shall assess a delinquent payment penalty when it does not timely receive payment of tax due on a return to be filed by a taxpayer. The Department operates under a progressive delinquent payment penalty scheme, outlined in RCW 82.32.090(1) 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.

Taxpayer incurred delinquent payment penalties because it failed to timely pay its full tax liability for numerous periods within the Audit Period. Because the date that Audit completed its review was beyond the due date for each period contained within the Audit Period, we conclude that Audit was correct to assess the delinquent payment penalties pursuant to RCW 82.32.090(1).

b. Substantial Underpayment Penalty

Additionally, if the Department determines that a taxpayer has substantially underpaid its tax liability, the Department is required to assess a five percent penalty on the underpaid amount. RCW 82.32.090(2). RCW 82.32.090(2) defines "substantially underpaid" as meaning "that the taxpayer has paid less than eighty percent of the amount of tax determined by the department to be due . . . and the amount of underpayment is at least one thousand dollars."

We find that Audit properly assessed the substantial underpayment penalty because the amount of tax that Taxpayer paid during the Audit Period was approximately 48% of its actual tax liability, and the underpayment amount ($ [. . .]) was more than $1,000. Therefore, Taxpayer's underpayment satisfied the two requirements necessary for imposing the penalty under RCW 82.32.090(2).

c. Evasion Penalty

RCW 82.32.090 requires the Department to assess an evasion penalty in certain circumstances and reads as follows: "[i]f the department finds that all or any part of the deficiency resulted from an intent to evade the tax payable hereunder, a further penalty of fifty percent of the additional tax found to be due *must* be added." RCW 82.32.090(7) (emphasis added).

WAC 458-20-228 ("Rule 228") is the Department's administrative rule that explains and illustrates the application of the evasion penalty. It reads, in pertinent part, as follows:

> The evasion penalty is imposed when a taxpayer knows a tax liability is due but attempts to escape detection or payment of the tax liability through deceit, fraud, or other intentional wrongdoing. An intent to evade does not exist where a deficiency is the result of an honest mistake, miscommunication, or the lack of knowledge regarding proper accounting methods. The department has the burden of showing the existence of an intent to evade a tax liability through clear, cogent and convincing evidence.

Rule 228(5)(f).

To impose the evasion penalty, the Department must prove: (1) that the taxpayer knows a tax liability is due; and (2) there was an attempt by the taxpayer to escape detection through deceit, fraud, or other intentional wrongdoing. *See, e.g.*, Det. No. 03-0147, 22 WTD 274, 276 (2003); Det. No. 98-065, 17 WTD 359, 369-370 (1998); Det. No. 94-007, 14 WTD 174, 177 (1995); Rule 228(5)(f). The Department has the burden of proving both elements of evasion by clear, cogent, and convincing evidence. *Id.* Clear, cogent, and convincing evidence has been described as evidence convincing the trier of fact that the fact in issue is "highly probable," or, stated another way, the evidence relied upon must be "clear, positive and unequivocal in [its] implication." *Colonial Imports, Inc. v. Carlton Northwest, Inc.,* 121 Wn.2d 726, 735, 853 P.2d 913 (1993).

To meet this burden, the Department must present objective and credible evidence that clearly demonstrates intent to evade a known tax liability; mere suspicion of intent to evade is not enough to meet this burden. 22 WTD at 276. "Intent is a state of mind. As such, it must usually be proved by circumstantial evidence." *State v. LaRue*, 5 Wn. App. 299, 306, 487 P.2d 255 (1971). Circumstantial evidence of intent may be gathered from the outward manifestations of the person entertaining it, and the facts or circumstances surrounding the alleged offense. *State v. Gaul*, 88 Wash. 295, 301, 152 P. 1029 (1915); *see also* Det. No. 04-0098, 23 WTD 331, 338 (2004).

Generally, merely underreporting collected retail sales tax does not constitute evasion. Det. No. 98-065, 17 WTD 359, 371 (1998) (evasion not found where the taxpayer claimed underreporting was due to dishonest bartenders). However, *substantially* underreporting collected retail sales tax can constitute evasion. Det. No. 97-134R, 18 WTD 163, 167 (1999) (evasion found where the taxpayer filed "no business" returns when it had gross receipts and also failed to remit collected retail sales tax). Similarly, failing to provide access to tax records and failing to file excise tax returns unless pressured by the Department demonstrates evasion. *See* Det. No. 97-238, 18 WTD 215, 218-219 (1999) (evasion found where the taxpayer claimed records were out of state and entered into contracts that stated "retail sales tax" is included but failed to report the collected retail sales tax).

Once the Department has [made a *prima facie* showing] of each of the elements of evasion, a burden of production is imposed on the taxpayer to come forward with evidence of honest mistake, ignorance of the law, negligence, or some other fact that tends to rebut the Department's evidence. 23 WTD at 338. However, mere subjective and self-serving statements by the taxpayer regarding intent, without more, are insufficient to meet this burden of production. *Id.* [The burden of proof as to evasion still rests with the Department. Det. No. 16-0666, 35 WTD 540, 543 (2016); 23 WTD at 338.]

Here, the first element required to impose the evasion penalty is met. The facts show that Taxpayer was aware of its tax liabilities based on its history of reporting income, paying tax, and remitting some of the retail sales tax it collected. Furthermore, Taxpayer demonstrated an understanding of retail sales tax collection by adjusting the amount it collected based on the location where it performed work (local tax rates vary by jurisdiction) and by changing the amount it collected when rates were changed by statute. Owner also expressed an understanding of Taxpayer's tax liabilities during his numerous telephone calls with Department representatives and, to build on that knowledge, the representatives also provided education on what deductions Taxpayer was allowed to claim and how to calculate the amounts of those deductions. As such, we conclude that Taxpayer's tax reporting history and Owner's conversations with the Department represent clear, cogent, and convincing evidence that Taxpayer had knowledge of its B&O and retail sales tax liabilities and its eligibility (or lack therefore) for the "tax paid at source" and "tax in gross" deductions.

The second element required to impose the evasion penalty is also met. Here, Taxpayer's outward manifestations of intent were: (1) collecting retail sales tax from customers at the correct rate, (2) separately listing retail sales tax on its invoices to its customers, (3) repeatedly failing to report all of its income and remit all of the retail sales tax it collected throughout the Audit Period, and (4) failing to provide documentation to the Department to support all of the deductions it claimed. The effects of Taxpayer's outward manifestations were to reduce Taxpayer's B&O tax liability and retail sales tax liability by concealing from the Department the true amount of its income and retail sales tax it collected, while simultaneously reducing the liability it did report by improperly claiming deductions. Taxpayer's actions evidence its intent to misrepresent its taxable income and avoid paying taxes due.

Federal courts have upheld the federal civil tax fraud penalty, 26 USC § 6663 (IRC § 6663),[3] under circumstances similar to those here, involving substantial underreporting of income over a number of years, overstated deductions, inadequate records, and unconvincing explanations of omitted income. *See Lessman v. Comm'r*, 327 F.2d 990, 994-995 (8th Cir. 1964); *Smith v. Comm'r*, T.C. Memo. 1994-199, 1994 WL 161938 at 7-10 (U.S. Tax Ct. 1994). Over the years, the federal courts have developed a list of certain "indicia of fraud" or circumstantial evidence of fraudulent intent, including, but not exclusive to, the following: (1) intentional understatement of income, substantial in amount or in relation to reported income; (2) intentional overstatement of deductions, substantial in amount or in relation to reported income; (3) recurrence of understatement of income or overstatement of deductions for more than one tax year; (4) failure to file returns; (5) secret bank

[3] The federal civil tax fraud penalty is similar to Washington's evasion penalty in requiring proof, by clear and convincing evidence, of fraudulent intent to evade a known tax liability. *See, e.g., Webb v. Commissioner*, 394 F.2d 366, 377 (5th Cir. 1972). IRC § 6663 provides:

> (a) Imposition of penalty.--If any part of any underpayment of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 75 percent of the portion of the underpayment which is attributable to fraud.
> (b) Determination of portion attributable to fraud.--If the Secretary establishes that any portion of an underpayment is attributable to fraud, the entire underpayment shall be treated as attributable to fraud, except with respect to any portion of the underpayment which the taxpayer establishes (by a preponderance of the evidence) is not attributable to fraud.
> (c) Special rule for joint returns.--In the case of a joint return, this section shall not apply with respect to a spouse unless some part of the underpayment is due to the fraud of such spouse.

deposits; (6) undisclosed sources of income; (7) inadequate records; (8) false record entries; (9) implausible or inconsistent explanations for deficiencies; (10) dealing in cash; or (11) attempting to conceal illegal activity. *Webb v. Comm'r*, 394 F.2d 366, 378 fn 11 (5th Cir. 1972) (citing Howard Balter, *Tax Fraud and Evasion*, pp. 8-54 and 8-55 (3rd ed. 1963)); *Bradford v. Comm'r*, 796 F.2d 303, 307 (9th Cir. 1986); *see also* IRS Internal Revenue Manual (IRM) 25.1.2.3 (listing 65 specific "Indicators of Fraud").[4]

The existence of several "indicia of fraud" is persuasive circumstantial evidence of fraud. *See, e.g., Solomon v. Comm'r*, 732 F.2d 1459, 1461 (6th Cir.1984). That said, although fraud cannot be inferred from the mere understatement of income, *consistent and substantial underreporting* is evidence of fraud, even in the absence of other indicia. *Webb*, 394 F.2d at 379 (citing *Holland v. United States*, 348 U.S. 121, 137, 75 S.Ct. 127, 99 L.Ed. 150 (1954); *Browne v. Comm'r*, 367 F.2d 386, 387 (4th Cir. 1966); *Bahoric v. Comm'r*, 363 F.2d 151, 154 (9th Cir. 1966); *Klassie v. United States*, 289 F.2d 96, 101-102 (8th Cir. 1961); *Cefalu v. Comm'r*, 276 F.2d 122, 129 (5th Cir. 1960)).

Here, Taxpayer substantially understated its income throughout the Audit Period. As noted above, Taxpayer failed to report more than $. . . in income during the Audit Period, which amounts to an underreporting of nearly half of the income Taxpayer earned during that time. The amount and duration of Taxpayer's underreporting, on its own, is evidence of deceit, fraud, or intentional wrongdoing. Additional evidence also exists in that Taxpayer improperly claimed "tax in gross" deductions, kept inadequate records to substantiate its "tax paid at source" deductions, and provided inadequate, and unsupported, explanations for its underreporting.

We conclude that the Department has established by clear, cogent, and convincing evidence that Taxpayer knew to charge and collect retail sales tax, and to report and pay its retail tax liabilities, but substantially underreported its retail sales and associated tax liability. In addition, we conclude that the Department has established by clear, cogent, and convincing evidence that Taxpayer knew to report its gross proceeds of sales and pay retailing B&O tax on the entire amount, but sought to conceal the true amount of its income by substantially underreporting its income and by repeatedly claiming deductions that the Department advised, on several occasions, were incorrect. This evidence supports a finding that the taxpayer intended to evade its known tax liabilities and, therefore, a *prima facie* case of evasion exists. *See* 22 WTD at 276-277 (intent to evade was established where the taxpayer failed to report retail sales on two excise tax returns when it knew from prior audits that the sales were taxable).

Once the Department has clearly established the elements of evasion, a burden of production is imposed on the taxpayer to produce evidence of honest mistake, miscommunication, ignorance of law, lack of knowledge, or some other fact that tends to rebut the Department's evidence. Det. No. 16-0066, 35 WTD 540 (2016). The only evidence Taxpayer has provided to rebut the Department's evidence is Owner's assertion that Taxpayer's underreporting and improper deductions were mistakes caused by his lack of knowledge regarding Washington's tax laws. We find this argument unconvincing given the level of knowledge Taxpayer demonstrated in its tax reporting and payment history, as well as the telephone calls between Owner and the Department. Lacking any additional evidence to support those assertions, we find that Owner's statements amount to mere

[4] The IRM is available on the IRS website at: www.irs.gov/irm/.

subjective and self-serving statements and are insufficient to meet Taxpayer's burden of production. 23 WTD at 338. Accordingly, we sustain the assessment of the evasion penalty.

2. Penalty Waiver

Having determined that the Department properly imposed the subject penalties, we now turn to whether we may waive them. The Department has limited authority to waive or cancel penalties. RCW 82.32.105. Generally, the Department may cancel penalties only in the following situations: (1) where the penalties were the result of "circumstances beyond the control of the taxpayer;" and (2) in the case of the delinquent payment penalty only, where the taxpayer has a good payment history. RCW 82.32.105(1); RCW 82.32.105(2)(b).

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*" and "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) (emphasis added). Such circumstances must directly cause the underlying act giving rise to the subject penalty. Rule 228(9)(a)(i).

Rule 228(9)(a)(ii) lists examples of circumstances that are generally considered to be beyond a taxpayer's control such that they are sufficient to justify a penalty waiver:

- Taxpayer's return payment was mailed on time but inadvertently sent to another agency;
- Erroneous written information given to the taxpayer by the Department;
- The death or serious illness of the taxpayer, a member of the taxpayer's immediate family, the taxpayer's accountant or tax preparer, or a member of the accountant or tax preparer's immediate family;
- Unavoidable absence of the taxpayer or key employee, prior to the filing date, not including absences related to business trips, vacations, personnel turnover, or terminations;
- Destruction of the business or records by fire or other casualty; or
- An act of fraud, embezzlement, theft, or conversion by the taxpayer's employee or contract helper, which the taxpayer could not immediately detect or prevent, provided that reasonable safeguards or internal controls were in place.

Rule 228(9)(a)(iii) lists examples of situations that are generally *not* considered to be beyond the control of a taxpayer, such as:

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

Here, none of the examples listed in Rule 228(9)(a)(ii) apply, nor does the general proposition that the payments were late because the subject circumstances were "immediate, unexpected, or in the nature of an emergency." Taxpayer has not provided any evidence that any outside event or circumstance caused its late payments or substantial underpayment. Instead, Owner claims that the underpayments were caused by his lack of sufficient understanding of Washington's tax laws. However, a misunderstanding or lack of knowledge of a tax liability is not a circumstance beyond

the control of a taxpayer. Rule 228(9)(a)(iii). Because of the nature of Washington's tax system, the burden of becoming informed about tax liability falls upon the taxpayer, and it is the taxpayer who bears the consequences of a failure to be correctly informed. Det. No. 01-165R, 22 WTD 11 (2003). Taxpayers are responsible for knowing their tax reporting obligations and, when they are uncertain about their obligations, for seeking instructions from the Department. RCW 82.32A.030(2); *see also* Det. No. 01-165R, 22 WTD 11 (2003). Furthermore, as we discussed above, Taxpayer's tax reporting and payment history, as well as Owner's calls with the Department, indicate that Owner *did* have an adequate understanding of Taxpayer's tax liabilities. As such, we conclude that Taxpayer is not entitled to a "circumstances beyond the control of the taxpayer" penalty waiver.

RCW 82.32.105(2) and Rule 228 also provide for a waiver of a late payment penalty in instances where the taxpayer has a good payment history ("the 24-month waiver"). Rule 228 explains that a taxpayer is eligible for this provision when it requests a penalty waiver and "has timely 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).

Here, Taxpayer made late payments in 2014, as well as in every year of the Audit Period. Therefore, Taxpayer did not have the requisite 24-month history of on-time payments preceding the subject periods and is ineligible for a 24-month waiver of any of the delinquent penalties included in the Assessment.

Finally, we find no basis for waiving the evasion penalty. As discussed above, the Department assessed the evasion penalty because it found that Taxpayer's underpayment was willful and intentional. Because the actions that led to the evasion penalty were willful, by definition they cannot be considered "beyond the control of the taxpayer." As such, there is no basis for waiving the evasion penalty based on the criteria set forth in Rule 228.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 17th day of December 2020.