Cite as Det. No. 21-0055, 41 WTD 371 (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. 21-0055
. . .	)	Registration No. . . .

[1] WAC 458-20-19402; RCW 82.04.462: BUSINESS & OCCUPATION TAX – APPORTIONMENT – ATTRIBUTION – NOT A SPECIFIC KNOWN LOCATION. A genealogical research company's services are directed at uncovering customer's ancestry and the research into a known location only occurs because the location plays a role in such ancestry. The benefit that the customer receives is the information about the customer's ancestry that is yielded by Taxpayer's research. Taxpayer's customer does not experience this benefit of increased knowledge about their family history in the locations that Taxpayer focused its research.

[2] WAC 458-20-228; RCW 82.32.105: PENALTIES – GOOD FAITH. A taxpayer's good faith actions do not constitute a basis to waive penalties because it is not a circumstance beyond its control.

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.

Ryan A. Johnson, T.R.O. – An out-of-state genealogical research company protests the assessment of tax, asserting that it does not have substantial nexus with Washington, and that the Department incorrectly apportioned its income to Washington. Taxpayer further contests the assessment of penalties on the basis that it acted in good faith. We deny the petition.[1]

ISSUES

1. Whether, under RCW 82.04.462 and WAC 458-20-19402, a genealogical research company's receipts are properly attributed to Washington State, based upon the location of the customer's residence, or to the locations that are the subject of the company's research services.

2. Whether a taxpayer is entitled to waiver of penalties under RCW 82.32.105 and WAC 458-20-228, when the taxpayer took its tax position in good faith.

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

FINDINGS OF FACT

. . . (Taxpayer), provides professional genealogical research services to individuals located in the United States and foreign countries. Such services are primarily performed online by researchers based . . . [out of state].

The Department's Audit Division (Audit) became aware of Taxpayer during audits of a pair of Taxpayer's affiliated entities. Taxpayer was not registered with the Department at the time. Audit reviewed Taxpayer's books and records for the period from January 1, 2013, through September 30, 2019 (Audit Period). Audit requested detail of Taxpayer's sales during the Audit Period arranged by customer residence, which Taxpayer provided. Audit reviewed that data and concluded that, based upon its gross receipts, Taxpayer established a substantial nexus with Washington beginning January 1, 2015. In arriving at that conclusion, Audit attributed Taxpayer's gross receipts to the state of each customer's residence because Audit determined that to be the location where the customer receives the benefit of Taxpayer's research services. By apportioning Taxpayer's gross receipts in this manner, Audit found that Taxpayer's income apportioned to Washington during the Audit period was $. . . in 2015, $. . . in 2016, $. . . in 2017, $. . . in 2018, and $. . . in 2019.

. . . Audit and Taxpayer held a conference to discuss issues of disagreement. Taxpayer disputed Audit's method of apportioning Taxpayer's gross receipts based upon the state of the customer's residence. Taxpayer contends that Audit was incorrect when it concluded that its customer receives the benefit of its services at the customer's residence. Rather, Taxpayer maintains that its customer receives the benefit of its services at the location of the items or ancestors that Taxpayer researches for the customer because the research services relate to "specific, known location(s)" within the meaning of WAC 458-20-19402 (Rule 19402)(303)(d)(ii).

On December 30, 2019, Audit sent Taxpayer an email to clarify Audit's position on the apportionment of Taxpayer's receipts. In the email, Audit explains that it disagrees that Taxpayer's services relate to a specific, known location as contemplated by Rule 19402(303)(d)(ii). Audit states the purpose behind apportioning income is to attribute it to where the customer actually receives the benefit. Audit goes on to state that, although Taxpayer's specific research activities may be based on a particular location, it is not within the meaning of Rule 19402 to conclude that the customer receives the benefit of that research in its subject location. Audit states that Taxpayer's customer receives the benefit of Taxpayer's research services where the customer receives such research, at their residence under Rule 19402(303)(d)(iii). Audit contends, therefore, that Taxpayer's gross receipts should be apportioned to each customer's residence.

Audit also asserts in the email that the examples in Rule 19402(303)(d)(ii) of services properly apportioned to the "specific, known location(s)" to which they relate are distinguishable from Taxpayer's services. These examples include wedding reception and party planning, travel agent and tour operator services, and preparing or filing state and local tax returns. Rule 19402(303)(d)(ii). Audit states in the email that it finds Taxpayer's services to be fundamentally different . . . [and] explains its reasoning as follows:

> In the case of wedding reception and party planning, the location is provided by the customer. In the case of travel agents and tour operators it is a location the customer is planning to visit. In the case of state tax returns it is a location that the customer is specifically tied to either directly through residence or by virtue of business activities undertaken on behalf of the customer. . . .

On January 22, 2020, the Department issued an excise tax assessment against Taxpayer for the Audit Period (the Assessment). The Assessment is in the amount of $. . . and comprises service and other activities business and occupations (B&O) tax of $. . . , interest of $. . . , twenty-nine percent delinquent payment penalties of $. . . , a five percent unregistered business penalty of $. . . , and a five percent substantial underpayment penalty of $. . . . Taxpayer has not paid the Assessment.

Taxpayer timely filed a petition for administrative review of the Assessment. In its petition, Taxpayer asserts that Audit incorrectly apportioned its gross receipts and that, when correctly apportioned, Taxpayer does not have substantial nexus with Washington. Taxpayer contends that its gross receipts should be apportioned to the location of the items or ancestors that Taxpayer researches for each customer. Additionally, in the event that we determine Taxpayer has substantial nexus with this state, Taxpayer requests a waiver of the penalties assessed in the Assessment.

Apportionment of Taxpayer's Gross Receipts

Taxpayer asserts that its proposed method of apportionment is supported by Rule 19402(303)(d)(ii). Taxpayer states that Rule 19402(303)(d) applies to define where Taxpayer's customer receives the benefit of its services because those services do not relate to real or tangible personal property, and are not provided to customers engaged in business. Taxpayer contends that Rule 19402(303)(d)(ii) applies because Taxpayer's services do not require the customer to be physically present, but do relate to specific, known locations.

Taxpayer explains that its research service teams comprise professional genealogists and family history experts with extensive experience. The team members are primarily located . . . [out of state], but some are located in other states[2] and foreign countries. Taxpayer explains that most of its research services are performed online, with a minor amount performed in specific locations, such as records archives.

Taxpayer's research services are billed hourly and conducted in a minimum of 20-hour blocks of time. Taxpayer bills $. . . [to] $. . . per customer on average. Taxpayer explains that each research project begins with an in-depth conversation with the customer and the development of a research plan. Taxpayer states that each research plan accounts for the time period to be researched, the area where the customer's ancestors lived, and the likely availability of records and documents. Taxpayer avers that, throughout each research project, it uses project management software to track the type of research conducted, the country or territory, the specific state, province, or region, and the relevant time period.

[2] None are based in Washington.

Taxpayer asserts that the process it follows in its research shows that its services relate to both specific locations and known locations. Taxpayer maintains that this is so because Taxpayer and their customers identify specific locations to direct their focus at the outset of each research project, and Taxpayer tracks the locations at which research activity is directed in its project management software. Taxpayer maintains that, while it sometimes is unsure where a customer's ancestors lived, Taxpayer knows in advance the location where it will focus its research.

Taxpayer goes on to assert that Example 27 in Rule 19402 is analogous to the circumstances at issue in this matter and supports Taxpayer's position that its gross receipts should be apportioned under Rule 19402(303)(d)(ii). Example 27 reads:

> Washington accountant prepares a Nevada couple's Arizona and Oregon state income tax returns as well as their federal income tax return. The benefit of the accountant's service associated with the state income tax returns is attributed to Arizona and Oregon because these returns relate to specific locations (states). The benefit associated with the federal income tax return is attributed to the couple's residence. The fees for the state tax returns are attributed to Arizona and Oregon, respectively, and the fee for the federal income tax return is attributed to Nevada.

Rule 19402(304)(d).

Penalties

Taxpayer requests waiver of the unregistered business penalty, substantial underpayment penalty, and delinquent payment penalties on the basis that each was caused by circumstances beyond its control. Taxpayer asserts that such circumstances beyond its control are that it took a reasonable and good faith tax position by apportioning its gross receipts under Rule 19402(303)(d)(ii), and that it received erroneous written information from a Department officer or employee.[3]

ANALYSIS

In Washington, "there is levied and collected from every person that has a substantial nexus with this state a tax for the act or privilege of engaging in business activities." RCW 82.04.220. This is the B&O tax. The B&O tax measure is "the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be." *Id.* The rate used is determined by the type of activity in which a taxpayer engages. *See generally* Chapter 82.04 RCW. Income from any business activity that is not explicitly taxed in Chapter 82.04 RCW is taxed under the service and other activities B&O tax classification. RCW 82.04.290(2). There is no dispute that research services, such as those performed by Taxpayer, are subject to service and other activities B&O tax.

[3] Taxpayer further asserts that its affiliates have historically filed and paid their Washington tax liability timely and have always acted in good faith. However, it is well settled that affiliated entities are each a person within the meaning of Washington's Revenue Act. RCW 82.04.030; s*ee also* WAC 458-20-203; Det. No. 17-0269, 37 WTD 130 (2018). As such, the actions of Taxpayer's affiliates do not impact our analysis and this assertion is not addressed further in this determination.

Whether Taxpayer[’s income was correctly apportioned to] Washington

A state cannot tax business activity that does not have sufficient connection or “nexus” with the state. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076 (1977); *Tyler Pipe Indus., Inc. v. Dep’t of Revenue*, 483 U.S. 232, 107 S. Ct. 2810 (1987); Det. No. 05-0376, 26 WTD 40 (2007). The idea of “nexus” flows from limits on a state’s jurisdiction to tax found in the Due Process and Commerce Clause provisions of the United States Constitution. Det. No. 01-188, 21 WTD 289 (2002); *see also* RCW 82.04.4286. The U.S. Supreme Court has held that the Commerce Clause requires that the transaction being taxed have “substantial nexus” with the taxing state. *Complete Auto Transit, Inc.*, 430 U.S. at 279.

RCW 82.04.067 sets out substantial nexus standards consistent with the Due Process and Commerce Clauses of the United States Constitution. It states that if a person engaging in business is a nonresident that is organized or commercially domiciled outside of this state, and meets certain gross receipts thresholds, it is deemed to have taxable nexus. RCW 82.04.067(1)(c). During the Audit Period, the Department was required to make adjustments to the gross receipts threshold each December, based on the consumer price index. *See* RCW 82.04.067(5)(a) (2010); Laws of 2010, ch. 23, § 104.4. WAC 458-20-19401 (Rule 19401) is the Department’s administrative rule pertaining to minimum nexus thresholds. Rule 19401(3)(d) explains that the Department will publish changes to the nexus threshold amounts in Excise Tax Advisory (ETA) 3195.5. Relevant here, for calendar years 2015 through 2017, nonresident entities who earn more than $267,000 in gross receipts from Washington per year, are deemed to establish substantial nexus with Washington. *See* RCW 82.04.067(1)(c)(iii) (2017); ETA 3195.2020. The figure was increased to $285,000 for the calendar years of 2018 and 2019. *See* RCW 82.04.067(1)(c)(iii) (2018 and 2019); ETA 3195.2020.

RCW 82.04.460 addresses the taxation of apportionable income. Apportionable income refers to income a person earns from an apportionable activity, which is both taxable in Washington and in at least one other state. RCW 82.04.460(1), (4)(a). RCW 82.04.460(4)(a) and Rule 19401(2)(a) set out a list of activities which constitute “apportionable activities.” Here, it is undisputed that Taxpayer’s research services are an apportionable activity. For the purpose of computing a person’s Washington tax liability from apportionable income, RCW 82.04.460(1) requires that the person must “apportion to this state, in accordance with RCW 82.04.462, that portion of the person’s apportionable income derived from business activities performed within this state.”

To determine taxable income in such cases, a taxpayer’s total apportionable income is multiplied by a fraction referred to as the “receipts factor.” RCW 82.04.462(3)(a). “The numerator of the receipts factor is the total gross income of the business of the taxpayer attributable to this state during the tax year from engaging in an apportionable activity.” RCW 82.04.462(3)(a). The denominator is the total, worldwide, gross income of the business of the taxpayer from engaging in apportionable activity, minus any “throw-out income.” *See id.*; Rule 19402(402). In essence, the receipts factor becomes the percentage by which a taxpayer’s gross income is multiplied to derive the portion of that taxpayer’s total gross income that is taxable in Washington.

[4] This requirement was removed, effective January 1, 2020. Laws of 2019, ch. 8, § 102.
[5] Excise Tax Advisories are interpretive statements authorized by RCW 34.05.230.

Here, Taxpayer had apportionable income from providing genealogical research services. Audit calculated and applied a receipts factor to Taxpayer's worldwide apportionable income (less throw-out income) to calculate Taxpayer's Washington gross receipts. Then, Audit determined that Taxpayer had established substantial nexus with Washington because the gross receipts apportioned to Washington exceeded the gross receipts threshold in RCW 82.04.067. Taxpayer disputes that it established substantial nexus with Washington and, therefore, contends that it is generally not subject to B&O tax in Washington. More specifically, Taxpayer disputes Audit's calculation of Taxpayer's gross income attributable to Washington, the numerator of the receipts factor. Taxpayer asserts that, when its gross receipts are properly attributed to Washington and the receipts factor is corrected, the gross receipts apportioned to Washington under RCW 82.04.462 and Rule 19402 will be less than the thresholds set forth in RCW 82.04.067 and Rule 19401.

Attributing receipts is governed by RCW 82.04.462(3)(b). It provides a series of cascading steps for attributing apportionable income to Washington and reads, in pertinent part, as follows:

> . . . [F]or purposes of computing the receipts factor, gross income of the business generated from each apportionable activity is attributable to the state:
>
> (i) **Where the customer received the benefit of the taxpayer's service** or, in the case of gross income from royalties, where the customer used the taxpayer's intangible property.
>
> (ii) If the customer received the benefit of the service or used the intangible property in more than one state, gross income of the business must be attributed to the state in which the benefit of the service was primarily received or in which the intangible property was primarily used. . . .

(Emphasis added.)

In sum, if a taxpayer can reasonably determine the amount of a specific apportionable receipt that relates to a specific benefit of the service received in a state, the apportionable receipt is attributable to the state in which the benefit is received. Rule 19402(301). However, if the location where the benefit of the service is received cannot be determined, use of this method is not appropriate. In such cases, the taxpayer should look to the other methods described in RCW 82.04.462(3)(b)(iii) – (vii), in descending order. *See* Det. No. 13-0319, 34 WTD 452 (2015).

Rule 19402 is the Department's administrative rule that applies RCW 82.04.462. Rule 19402(301) further explains how to attribute apportionable receipts:

> . . . Receipts are attributed to states based on a cascading method or series of steps. **The department expects that most taxpayers will attribute apportionable receipts based on (a)(i) of this subsection** because the department believes that either the taxpayer will know where the benefit is actually received, or a "reasonable method of proportionally attributing receipts" will generally be available. These steps are:

> (a) Where the customer received the benefit of the taxpayer's service . . . ;
>
> (b) If the taxpayer is unable to attribute an apportionable receipt under (a) of this subsection, the apportionable receipt must be attributed to the state from which the customer ordered the service.
>
> . . .
>
> (g) The taxpayer may not use an attribution method that distorts the apportionment of the taxpayer's apportionable receipts.

(Emphasis added.)

Here, both Taxpayer and Audit agreed that Taxpayer's apportionable receipts should be attributed to the location where Taxpayer's customer received the benefit of Taxpayer's services under Rule 19402(301)(a). Taxpayer and Audit differ on the location of the where Taxpayer's customer receives the benefit of Taxpayer's services.

Taxpayer's service is performing genealogical research for its customers. Those customers are individuals who are seeking to obtain information about their ancestry and family history. Taxpayer asserts that each customer receives the benefit of Taxpayer's services at the location of the items or ancestors that Taxpayer researches for the customer. Taxpayer contends that its research services relate to "specific, known location(s)" under Rule 19402(303)(d)(ii) because its research services are focused on specific locations and because Taxpayer tracks those locations throughout the completion of each research project.

Audit concluded that Taxpayer's customer receives the benefit of its research services at the customer's residence. Audit contends that the underlying purpose behind apportioning income is to attribute it to where the customer actually receives the benefit. Audit disagrees that Taxpayer's research services relate to specific, known locations as contemplated by Rule 19402(303)(d)(ii). Audit maintains, rather, that Taxpayer's customer receives the benefit of Taxpayer's research services where the customer resides under Rule 19402(303)(d)(iii).

The "benefit of the taxpayer's service" is not defined in statute. Rule 19402(303), however, defines that term in a variety of ways, depending on the factual circumstances. Relevant here, it reads:

> (d) If the taxpayer's service does not relate to real or tangible personal property, is either provided to a customer not engaged in business or unrelated to the customer's business activities; and:
>
> (i) The service requires the customer to be physically present, then the benefit is received where the customer is located when the service is performed. The following is a nonexclusive list of services that require the customer to be physically present:

(A) Medical examinations;

(B) Hospital stays;

(C) Haircuts; and

(D) Massage services.

(ii) The taxpayer's service relates to a specific, known location(s), then the benefit is received at those location(s). The following is a nonexclusive list of services related to specific, known location(s):

(A) Wedding planning;

(B) Receptions;

(C) Party planning;

(D) Travel agent and tour operator services; and

(E) Preparing and/or filing state and local tax returns.

(iii) If (d)(i) and (ii) of this subsection do not apply, the benefit of the service is received where the customer resides. The following is a nonexclusive list of services whose benefit is received at the customer's residence:

(A) Drafting a will;

(B) Preparing and/or filing federal tax returns;

(C) Selling investments; and

(D) Blood tests (not blood drawing).

Rule 19402(303).

Here, Taxpayer's research services do not relate to real or tangible personal property and are provided to individual customers that are not engaged in business. It is undisputed that Rule 19402(303)(d) applies to define where Taxpayer's customer receives the benefit of its services. The crux of the disagreement between Taxpayer and Audit is which subpart of Rule 19402(303)(d) applies. Taxpayer and Audit agree that the genealogical research does not require customers to be physically present and Rule 19402(303)(d)(i) does not apply. However, Taxpayer contends that Rule 19402(303)(d)(ii) applies and that its customer receives the benefit of its services at the specific, known locations which are the subject of such services. Audit maintains that Rule 19402(303)(d)(ii) does not apply, Rule 19402(303)(d)(iii) does apply, and the customer receives the benefit of Taxpayer's services where the customer resides.

Here, we find that, because neither Rule 19402(303)(d)(i) nor Rule 19402(303)(d)(ii) of this subsection apply, Taxpayer's customer receives the benefit of its research services at the customer's residence according to Rule 19402(303)(d)(iii).

Rule 19402(303)(d)(ii) only applies when a taxpayer's services relate to specific, known locations. When that is the case, the taxpayer's customer receives the benefit of its services at those specific, known locations. Rule 19402(303)(d)(ii) does not define "relate to," but does set out a non-exhaustive list of examples of services that relate to specific, known locations as contemplated in the rule: "wedding planning; receptions; party planning; travel agent and tour operator services; and preparing and/or filing state and local tax returns." Rule 19402(303)(d)(ii). The commonality in each of these examples, is that there is a discernable benefit that the customer receives at the specific location to which the service relates.

In planning a wedding, holding a reception, or planning a party, the customer receives the benefit of enjoying such an event in a specific location. . . . The customer's enjoyment of the event is related to that specific, known location because that is where the event occurs. Travel agent and tour operator services are similar. Such services relate to the specific locations of the planned travel destinations or where the tours occur, because that is where the customer actually enjoys the travel or tour. . . . The customer receives the benefit at the location of the event, travel, or tour, because a person must go to that specific location to enjoy the event, travel, or tour. The service is the planning performed by the taxpayer, but the benefit is the enjoyment of the event, travel, or tour, that is yielded from the planning services. Enjoyment of the event, travel, or tour is a discernable benefit that the customer receives in the location to which the planning services relate.

Considering the preparation or filing of state and local tax returns, the customer receives the benefit of meeting the customer's obligation to file its taxes in a specific jurisdiction. A person does not prepare and file a state or local tax return unless that person has an obligation to file a return in that state or location. . . . Thus, the tax obligation . . . relates to that specific . . . jurisdiction. When a taxpayer prepares or files a tax on behalf of a customer, the service is the preparation or filing, but the benefit to the customer is the satisfaction of the customer's obligation to file the prepared return. Because state or local tax obligations are specific to a particular state or local jurisdiction, the customer received the satisfaction of its tax obligation in that location. . . .

Here, Taxpayer's research services are different from the examples in Rule 19402(303)(d)(ii) [and Example 27 in Rule 19402(304)(d)] because Taxpayer's customer does not receive a discernable benefit in the locations at which Taxpayer's research is directed. Taxpayer's research projects it performs for each customer commence with the creation of a research plan. The goal of each research plan is to discover information about the customer's ancestry to allow the customer to better understand its family history.

Taxpayer and its customer create the research plan with consideration for the locations where the customer's ancestors lived, among other factors. Using project management software, Taxpayer tracks the type of research conducted, as well as the particular locations that are the subject of that research. In this way, Taxpayer's research is focused on known locations. However, the focus on such locations is not the ultimate focus of Taxpayer's research, and the focus on researching a particular location to learn about a customer's ancestors can change based on what Taxpayer

discovers through its research about the customer's ancestors. In other words, the research does not relate to a "specific" location under WAC 458-20-19402(303)(d)(ii). Unlike event planning and state and local tax returns, where services are directed at a specific location, Taxpayer's services are directed at uncovering customer's ancestry and the research into a known location only occurs because the location plays a role in such ancestry. The benefit that the customer receives is the information about the customer's ancestry that is yielded by Taxpayer's research. Taxpayer's customer does not experience this benefit of increased knowledge about their family history in the locations that Taxpayer focused its research. Thus, Taxpayer's research services are unlike the examples set out in Rule 19402(303)(d)(ii) because Taxpayer's customer does not receive a discernable benefit in the locations Taxpayer focuses its research. Accordingly, we find that Taxpayer's research services do not relate to specific, known locations within the meaning of Rule 19402(303)(d)(ii).

If Rule 19402(303)(d)(i) and Rule 19402(303)(d)(ii) do not apply, the benefit of the service is received where the customer resides. Rule 19402(303)(d)(iii). Because we find that Rule 19402(303)(d)(i) and Rule 19402(303)(d)(ii) do not apply, we conclude that, under Rule 19402(303)(d)(iii), Taxpayer's customer receives the benefit of Taxpayer's research service where the customer resides. . . .

Accordingly, we determine that Audit correctly concluded that Taxpayer's gross receipts from its research activity are properly apportioned to the location of each customer's residence under RCW 82.04.462(3)(b)(i) and Rule 19402(301)(a)(i). We further find that Taxpayer's income apportioned to Washington during the Audit period . . . establishes substantial nexus with Washington for those years under RCW 82.04.067 and Rule 19401.

Penalty Waiver

The Department has limited authority to waive or cancel penalties. RCW 82.32.105. The Department must waive the unregistered business penalty, substantial underpayment penalty, or delinquent payment penalties, if it finds that the underlying act giving rise to the penalty was the result of "circumstances beyond the control of the taxpayer."[6] RCW 82.32.105(1); WAC 458-20-228 (Rule 228); *see* Det. No. 16-0324, 36 WTD 135 (2017).

Rule 228 is the Department's administrative rule that implements RCW 82.32.105. 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).

[6] In the case of only the delinquent payment penalty, (under RCW 82.32.090(1)), the Department may waive the penalty based on good reporting and payment history, if the taxpayer has timely made all payments for the twenty-four months preceding the period for which the waiver is requested. RCW 82.32.105(2). However, RCW 82.32.105(2) is not applicable here because Taxpayer was unregistered and did not file or pay any taxes during the twenty-four months immediately preceding the Audit Period. WAC 458-20-228 (Rule 228) explains that a Taxpayer may still be eligible for waiver under RCW 82.32.105(2) when it hasn't made timely payments for the preceding twenty-four months only if the taxpayer became registered with the Department prior to engaging in business activities in Washington for a period of less than twenty-four months. Rule 228(9)(b)(i). Here, Taxpayer did not register with the Department prior to engaging in business activities in Washington and is, therefore, not eligible for waiver any of the delinquent payment penalties under RCW 82.32.105(2).

Rule 228(9)(a)(ii) sets out a non-exhaustive list of circumstances that are generally considered to be circumstances beyond the control of a taxpayer for the purpose of waiving taxes. One item on that list explains that circumstances beyond the control of the taxpayer include scenarios where a delinquent payment is caused by erroneous written information given to the taxpayer by a department officer or employee. Rule 228(9)(a)(ii)(B).

Conversely, Rule 228(9)(a)(iii) lists several circumstances that are generally not considered circumstances beyond the control of a taxpayer for the purpose of waiving taxes. Relevant here, a Taxpayer's misunderstanding or lack of knowledge are not circumstances beyond the taxpayer's control. Rule 228(9)(a)(iii)(B); *see also* 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 not only to taxpayers, but to the tax professionals who support them."); Det. No. 18-0052, 37 WTD 108, 110 (2018) (a taxpayer's hired consultant's lack of knowledge that an activity gives rise to tax liability does not constitute a circumstance beyond a taxpayer's control). Further, a taxpayer acting in good faith and without intent to defraud Washington is not a circumstance beyond the control of a taxpayer for the purpose of waiving penalties. Det. No. 15-0151, 35 WTD 182, 190-1 (2016).

Here, Taxpayer requests a waiver of penalties on two bases: (1) that it took a reasonable and good faith tax position by apportioning its gross receipts under Rule 19402(303)(d)(ii); and (2) that it received erroneous written information from a Department officer or employee. However, Taxpayer has not shown that either basis is a circumstance beyond its control here. First, we have previously held that a taxpayer's good faith actions do not constitute a circumstance beyond its control. 35 WTD at 190-1. Second, Taxpayer has not identified the written information it received from a Department officer or employee that it alleges is erroneous. Without knowing the facts surrounding such written information, we cannot find it to have caused Taxpayer to incur the penalties at issue. Therefore, we are not able to conclude that either is a circumstance beyond Taxpayer's control. Because Taxpayer has not shown that circumstances beyond its control caused its failure to register with the Department, its delinquent payment, or substantial underpayment of taxes, we lack the authority to waive the assessed penalties under RCW 82.32.105(1).

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 9th day of March 2021.