

BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of)
Western Queen Fisheries, LLC,)
)
Appellant.) OAH No. 05-0775-TAX
_____)

DECISION & ORDER

I. Introduction

Western Queen Fisheries, LLC ("Western Queen") appealed from an informal conference decision by the Department of Revenue, Tax Division, assessing interest and penalties totaling \$3,003.79 for underestimating and late payment of its Fishery Resource Landing Tax for 2003. Because the record does not establish that Western Queen had reasonable cause for its failure to comply with the payment requirements or that the interest-based penalty for underestimating payments is subject to abatement, Western Queen has failed to show that the penalties should be abated. Interest on the late-paid tax cannot be abated. Accordingly, the Tax Division's assessment of \$451.39 in interest, \$411 for the Estimated Tax Penalty, and \$2,141.40 for the Failure-to-Pay Penalty is affirmed.

II. Facts

Western Queen Fisheries, LLC, purchased the F/V (fishing vessel) *Western Queen* in December 2002.¹ The vessel first fished for the company in 2003.² During that year, Western Queen made four equal estimated tax payments of \$10,000 each, with the last of these being made at the end of December.³ It did not make another payment for 2003 until after March 31, 2004. Specifically, Western Queen waited until the end of June to pay the \$14,276 balance of its landing tax liability for 2003.⁴

¹ Letter from Western Queen (Willoughby) to Tax Division (August 17, 2005), attached as Department's Exhibit C.

² *Id.*

³ See 2003 Alaska Fishery Resource Landing Tax Return form for Taxpayer Western Queen Fisheries, LLC, signed by Willoughby and dated June 28, 2004, at unnumbered p. 2 (form page 12), attached as Department's Exhibit A to the Department's Opposition Brief (listing payments of \$10,000 each on 3/27/03, 6/23/03, 11/6/03 and 12/29/03); also Tax Adjustment Report (August 11, 2005), attached as unnumbered p. 2 of the Department's Exhibit B & as Western Queen's Exhibit 2 (showing receipt of four \$10,000 payments from Western Queen on 4/1/03, 6/27/03, 11/10/03 and 1/2/04).

⁴ Western Queen apparently sent its final payment with the tax return dated June 28, 2004, but it was not received by the Department of Revenue until July 2, 2004. See Tax Adjustment Report (August 11, 2005), attached as unnumbered p. 2 of the Department's Exhibit B & Western Queen's Exhibits 2 & 6 (showing receipt of \$14,276 from Western Queen on 7/2/04).

Western Queen received the Statewide Average Price Report in May 2004.⁵ The transmittal for the report extended the deadline for filing the 2003 landing tax return to June 30, 2004.⁶ The instructions for landing tax returns explained the following concerning the extension of the filing deadline:

If the Department does not provide statewide average values for fishery resources before the March 31 due date the taxpayer will be given an Automatic Extension. The automatic extension extends the return due date for the fisheries Resource Landing Tax Return until **the last day of the month following the month in which the department publishes the statewide average price information**. An extension of time to file is not an extension of time to pay tax. Estimated tax must be paid in quarterly installments. Final payment is due by March 31 of every tax year.⁷

At the end of June, Western Queen filed its 2003 landing tax return.⁸ The schedules submitted with the return show twenty total landings for four established species occurring in seven months of 2003 and twelve total landings for five developing species in six months of 2003.⁹ The schedules show both the processed and unprocessed weights for the several species landed during the year. Nothing in the record indicates what, if anything, Western Queen did with the landing data in the period leading up to March 31, 2004, to determine whether it needed to pay additional tax by the deadline or whether the \$40,000 in estimated payments it had already made likely would cover its tax liability.

⁵ Letter from Western Queen (Willoughby) to Tax Division (August 17, 2005), submitted as Department's Exhibit C.

⁶ See Letter from Tax Division (May 28, 2004) (invoking the automatic extension of time to file return provided in 15 AAC 77.015 and stating that "the filing due date of the 2003 landing tax return is June 30, 2004"), submitted as Western Queen's Exhibit 4.

⁷ 2003 Fishery Resource Landing Tax Return INSTRUCTION FORM 04-680 at p. 1, submitted as Western Queen's Exhibit 11 (emphasis original). Though organized and worded somewhat differently, the instructions for 2002 were similar on the point about when the tax must be paid. See State of Alaska Fishery Resource Landing Tax Instructions located at page 4 of the 2002 return packet, submitted as Department's Exhibit G (cautioning taxpayers as follows: "An extension of time to file is not an extension of time to pay tax. You must remit full tax payment by the March 31 due date."). *Id.*

⁸ See 2003 Alaska Fishery Resource Landing Tax Return form for Taxpayer Western Queen Fisheries, LLC, signed by Willoughby and dated June 28, 2004, at unnumbered p. 1 (form page 11), submitted as Department's Exhibit A.

⁹ See *id.* at unnumbered pp. 4-5 (detailing landings of established species Pacific Cod, Greenland Turbot, Pollock and Sablefish in the months of January, February, March, July, September, November and December 2003 and of developing species Arrowtooth Flounder, Thornyhead, Rougheye, Shortraker and Skates in January, March, July, September, November and December 2003).

Western Queen's total tax liability for 2003 was calculated at \$54,276, of which the landing tax component was \$49,182.¹⁰ The \$40,000 total estimated tax payments made by Western Queen during 2003 equaled 81 percent of the company's landing tax liability for that year. By March 31, 2004, Western Queen had paid just that 81 percent of its liability, but it rectified the underpayment situation on July 2, 2004, when its payment of \$14,276 was received by the department.

On August 11, 2004, the department issued a demand for payment of \$3,003.79 consisting of \$2,141.40 in a "Failure-to-Pay Penalty," \$411 in an "Estimated Tax Penalty" and \$451.39 in interest.¹¹ The Failure-to-Pay Penalty was computed as fifteen percent of the \$14,276 that Western Queen had paid after the March 31, 2004 deadline.¹² The Estimated Tax Penalty was computed by applying eleven percent to the underpayment on a quarter-by-quarter basis but splitting the third quarter into two parts to reflect the fact that Western Queen's third quarter payment of \$10,000 was not made until about 40 days into the quarter.¹³

On August 19, 2005, Western Queen filed a request for informal conference. Western Queen made three arguments against assessment of the penalties and interest: (1) without the Statewide Average Price Report, it could not have deposited estimated tax payments totaling at least 90 percent of its tax liability by the March 2004 deadline; (2) it deposited the lesser of 90 percent of its 2003 liability or 100 percent of its prior year's tax liability because it had zero tax liability the prior year; and (3) characterizing the payment due March 31st as "final" when the exact tax liability is not known with certainty until the Statewide Average Price Report comes out creates confusion.¹⁴

The department upheld its assessment of the penalties and interest, reasoning that the difficulty of estimating tax payments without the Statewide Average Price Report "does not

¹⁰ 2003 Alaska Fishery Resource Landing Tax Return form for Taxpayer Western Queen Fisheries, LLC, signed by Willoughby and dated June 28, 2004, at unnumbered p. 1 (form page 11), submitted as Department's Exhibit A (setting total liability of \$54,276 based on Net Landing Tax of \$49,183 and Seafood Marking Assessment of \$5,094).

¹¹ Letter Notice from Tax Division to Western Queen and attachments thereto (August 11, 2005), submitted as Department's Exhibit B.

¹² *Id.* at p. 2.

¹³ *Id.* at p. 3. The computation shows third-quarter calculations through 11/10/03 and from that date until receipt of the next payment on 1/2/04. Western Queen's appeal does not challenge this computation or take exception to the documentary evidence indicating that the department did not receive the third estimated payment until November 10, 2003. Thus, notwithstanding the company's assertions in the briefing to the effect that all four quarterly payments were made on time, it appears more likely than not that the third one was late.

¹⁴ Letter from Western Queen (Willoughby) to Tax Division at p. 1 (August 17, 2005), submitted as Department's Exhibit C.

constitute reasonable cause sufficient to abate the failure to pay penalty.”¹⁵ As to the Estimated Tax Penalty, the informal conference decision implies that because “[t]he penalty is computed at the rate prescribed for interest ...” the penalty should not be abated, but it does not clearly indicate whether the department’s reasoning also depended on the conclusion that difficulty in predicting statewide average prices does not constitute reasonable cause for abatement.¹⁶ Indeed, the informal conference decision does not clearly indicate whether the department considered (or could have considered) abating the Estimated Tax Penalty. As to the interest, the department explained that it accrues automatically and cannot be waived or abated when the tax payment is late and the amount of the tax is undisputed.¹⁷

Western Queen timely appealed the department’s decision, incorporating the arguments from its informal conference request and asking that the administrative law judge “consider whether or not the requirement to deposit 90% of the tax liability BEFORE the fish prices come out is reasonable.”¹⁸ The parties agreed that Western Queen’s appeal could be heard on the written record and briefing.¹⁹

III. Discussion

Western Queen gave notice of its intent to appeal the assessment of the interest and both penalties.²⁰ Western Queen, therefore, bears the burden of establishing that the department erred in assessing interest and penalties against it.²¹ Western Queen must show by a preponderance of the evidence that questions of fact should be resolved in its favor.²² The independent judgment standard applies to questions of law in this appeal.²³ Deference is accorded to the department’s informal conference decision only “as to a matter for which discretion is legally vested in the Department of Revenue.”²⁴

Western Queen’s briefing focused on penalties, and particularly on the seeming unfairness of a first-time taxpayer having to predict its probable tax liability accurately enough,

¹⁵ Letter from Bassett of the Tax Division to Western Queen at p. 1 (September 30, 2005), submitted as Department’s Exhibit D.

¹⁶ See *id.* at p. 1 (discussing the Estimated Tax Penalty in the same paragraph as the Failure-to-Pay Penalty but without explicitly linking the former to the lack of reasonable cause for abatement reasoning).

¹⁷ *Id.* at pp. 1-2.

¹⁸ Notice of Appeal Letter at pp. 1-2 (October 5, 2005) and attached copy of informal conference request.

¹⁹ Recording of Prehearing Conference (October 26, 2005).

²⁰ See Notice of Appeal letter (October 5, 2005).

²¹ AS 43.05.455(c).

²² AS 43.05.435(1); AS 43.05.455(c).

²³ AS 43.05.435(2).

²⁴ AS 43.05.435(3).

without knowing the statewide average prices, to make estimated tax payments equaling at least 90 percent of the actual liability.²⁵ In addition, Western Queen's briefing argued essentially that interest should not be assessed against it because use of the word "final" coupled with a "poorly written and confusing" form led it to believe it could pay its tax liability in excess of the four quarterly payments when it filed the landing tax return in June 2004.²⁶ This discussion first addresses the assessment of interest and then the assessment of the two penalties.

A. WESTERN QUEEN MUST PAY INTEREST ON THE LATE-PAID TAX.

Under AS 43.05.225, a tax delinquency bears interest. Western Queen's landing taxes for 2003 were due no later than March 31, 2004.²⁷ "A grant of an extension of time for filing [the tax return] does not extend the time for payment of the tax."²⁸ In short, the law required Western Queen, like any other taxpayer, to pay interest on any landing tax remaining unpaid on and after April 1, 2004, until such time as the tax was paid, even if an extension of time to file the related tax return has been granted.

Western Queen does not dispute that it paid \$14,276 of its 2003 landing tax liability after March 31, 2004. It questions whether the "final" payment can actually be made by March 31st when the statewide average price data needed to compute the exact tax liability is not available until after that date. It argues that the "Department of Revenue should not call the March 31st payment 'final' unless it truly is the last payment."²⁹ That argument, however, misses the point that the last payment the taxpayer makes before April 1st is, in fact, the "final" (i.e. last) payment that can be made before a delinquency occurs.

The law requires that a taxpayer pay all of the landing tax that is due for one year no later than March 31st of the next year to avoid a tax delinquency.³⁰ Using the word "final" to describe this last possible payment that can be made to avoid a delinquency is not as confusing as Western Queen suggests. Taken in context with the law and the filing instructions, "final

²⁵ See Western Queen's First Opening Brief (second letter dated October 30, 2005, which addresses Western Queen's "Issue #1") at pp. 1-2. The first October 30, 2005 letter provides an overview of and transmittal for the two additional October 30, 2005 letters, each of which purports to address an "issue" and which collectively constitute Western Queen's opening brief.

²⁶ See Western Queen's Second Opening Brief (third letter dated October 30, 2005, which addresses Western Queen's "Issue #2") at pp. 1-2.

²⁷ See AS 43.77.020(b) (providing that "any unpaid tax shall be paid with the return" which "is due before April 1...").

²⁸ AS 43.77.020(c); accord 15 AAC 05.210(d) (stating that "[a]n approved extension to file is not an extension to pay").

²⁹ Western Queen's Second Opening Brief at p. 1.

³⁰ See AS 43.77.020(b).

payment” cannot be read to mean the payment a taxpayer makes to cure a delinquency—e.g., a payment made after the March 31st deadline. To read the term that way would be to change the AS 43.05.225 requirement that delinquencies bear interest—something that neither this office nor the Department of Revenue has the authority to do.

If the law were not so clear that extending the tax return due date does not extend the time for payment of taxes, Western Queen’s position might be well taken. Read in isolation, the last clause of AS 43.77.020(b) arguably creates the impression that the tax payment is supposed to accompany the tax return. That clause cannot be read in isolation. It must be read in context with the rest of the provisions, including the “due before April 1” provision in the same subsection and the subsection (c) provision stating that “[a] grant of an extension of time for filing does not extend the time for payment of the tax.” The instructions for filing a landing tax return reinforce the point that the tax is due by March 31st even if the return deadline is extended.³¹

Western Queen’s 2003 landing taxes were due no later than March 31, 2004. A delinquency arose when Western Queen failed to pay \$14,276 of its tax liability by that date. Interest accrued on that delinquency by operation of law, under AS 43.05.225, until Western Queen paid the \$14,276. The department received the payment on July 2, 2004. Western Queen has not challenged the department’s computation of \$451.39 as the amount of accrued interest for the delinquency period. Western Queen, therefore, must pay the assessed interest.

B. WESTERN QUEEN HAS NOT MET ITS BURDEN OF SHOWING THAT THE PENALTIES SHOULD BE ABATED.

The department assessed two separate penalties against Western Queen: (1) a Failure-to-Pay Penalty and (2) an Estimated Tax Penalty. The Failure-to-Pay Penalty arises from the obligation in AS 43.77.020(b) to pay the landing tax in full before April 1, coupled with the civil penalty provision of AS 43.05.220, which imposes an escalating percentage-of-tax penalty on failure to pay a tax on time. The Estimated Tax Penalty arises under AS 43.77.020(d), which obliges taxpayers to make quarterly payments of estimated landing taxes and imposes an interest-rate-based penalty if the taxpayer’s estimated payments do not total 90 percent of the current tax liability or 100 percent of the prior year’s tax liability. Western Queen’s briefing argues that both penalties should be abated for essentially the same reason: that it could not

determine what 90 percent of its 2003 landing tax liability would be without the statewide average price data and thus had to “guess” what the quarterly payments should be and had to delay paying the remaining balance beyond the March 31, 2004 deadline until that data was published.

Western Queen briefed the penalty issues as if both penalties are subject to the same standard for abatement. The department’s informal conference decision discusses them in the same paragraph and does not make clear whether its rationale for refusing to abate the Failure-to-Pay Penalty bears upon imposition of the Estimated Tax Penalty. The department’s brief did not do much to clarify the department’s position on whether both penalties are subject to abatement. The parties’ briefing, therefore, poses a threshold question: is there a legal basis for Western Queen’s apparent position that the Estimated Tax Penalty can be abated?

1. The Estimated Tax Penalty is not subject to abatement.

Prior to the 2002 tax year, taxpayers were not required to make quarterly estimated payments for landing taxes, unless they elected to do so under a regulation adopted in 1994 that provided for estimated tax payments in lieu of posting a bond.³² If they elected to make such payments, but did not succeed in depositing at least 90 percent of their tax liability through the quarterly payments, the regulation imposed an interest-rate-based penalty on the underpayment.³³

In 2001, the legislature amended AS 43.77.020 to require quarterly estimated landing tax payments and create an underpayment penalty scheme similar to that in the regulation.³⁴ The amendment added subsection (d) to AS 43.77.020. That subsection prescribes the method for calculating the Estimated Tax Penalty. Both the penalty requirement and the calculation method are independent of the civil penalty provisions of AS 43.05.220. The legislature did not provide for abatement of this interest-based Estimated Tax Penalty.

Western Queen has not presented any argument to support its apparent position that this penalty can be abated. The statutory language is not ambiguous. Though it does not use an explicit mandatory (“shall” or “must” pay) formulation, the law unequivocally provides that the taxpayer who does not make the required estimated payments “will be subject to an estimated tax

³¹ See 2003 Fishery Resource Landing Tax Return INSTRUCTION FORM 04-680 at p. 1, submitted as Western Queen’s Exhibit 11.

³² See 15 AAC 77.025 (April 2006 pamphlet). The bond requirement was repealed in 1997, but the regulation remains in place, though the department gave notice of intent to amend it in January 2006.

³³ *Id.*

³⁴ The statutory amendment adding subsection (d) took effect September 25, 2001. See 2001 Session Laws of Alaska, chapter 42, § 3.

penalty”³⁵ The statute does not provide for abatement of this interest-based penalty. The legislature did not amend the civil penalty provisions of AS 43.05.220 to encompass this Estimated Tax Penalty and thus did not extend the “reasonable cause” standard for abatement to this particular penalty. In sum, there is no legal basis to conclude that the Estimated Tax Penalty can be abated.

In its briefing, Western Queen also argues that the penalty should be removed because it satisfied AS 43.77.020(d)(2) by making estimated payments totaling more than zero dollars. Western Queen argues that as a new taxpayer with no landing tax liability for the prior year, it had the option to pay 2003 quarterly payments totaling 100 percent of nothing. This argument mistakenly assumes that AS 43.77.020 can be construed as relieving first-time taxpayers from the obligation to make quarterly estimated payments. It cannot.

The obligation in the first sentence of AS 43.77.020(d) is absolute: the taxpayer “shall make quarterly payments of the tax estimated to be due for the year” Nothing in that language suggests that a first-time taxpayer can pass on making quarterly payments, or can make quarterly payments totaling zero dollars when a good faith estimate of the tax to be due for the year yields an amount in excess of zero. The second sentence of AS 43.77.020(d) does not change this obligation. It imposes an interest-based penalty for underpayment of the estimated tax and allows the taxpayer an opportunity to avoid the penalty if the taxpayer can, and in fact does, take advantage of the opportunity.

Any taxpayer—first time or long term—who makes quarterly payments totaling at least 90 percent of the tax liability does not have to pay the penalty on the up-to-ten-percent shortfall.³⁶ In addition, a taxpayer who had a tax liability in the prior year can avoid the penalty by paying 100 percent of that amount for the current year as quarterly payments.³⁷ Though this penalty-avoidance option is of no help to a first-time taxpayer, in the second and subsequent years, that taxpayer can avoid the penalty completely by using the 100-percent-of-prior-year option, or it can pay less than 100 percent and risk incurring a penalty if the payments do not equal at least 90 percent of the current year’s liability. Thus, the repeat taxpayer has two options while the first-time taxpayer has only one. The so-called “penalty,” however, is interest on money owed to the state and past due. As such, the assessment is not punitive in nature.

³⁵ AS 43.77.020(d).

³⁶ AS 43.77.020(d)(1).

³⁷ AS 43.77.020(d)(2).

Western Queen has not shown that a law designed to give taxpayers a second penalty-avoidance option in the second and subsequent tax years, but only one such option in the first year, is legally flawed. Western Queen also has not shown that AS 43.77.020(d) should be construed as relieving first-time taxpayers from the obligation to pay quarterly taxes, or protect them against assessment of a non-punitive, interest-based penalty for underpayment of those taxes if they pay more than zero but less than 90 percent of the liability due. Western Queen correctly deduced that it had to make four equal “quarterly payments of the tax estimated to be due for” 2003.³⁸ In fact, it made four payment of \$10,000 each. Those payments fell short of the 90 percent required to avoid the penalty. The penalty-avoidance option of paying 100 percent of 2002 liability was not available to Western Queen because it was not a taxpayer that year.

In sum, Western Queen has not shown that the penalty-avoidance provisions of under AS 43.77.020(d) apply to it under these circumstances or that the Estimated Tax Penalty can be abated in any event. Even if this penalty were subject to abatement, Western Queen would have to show “reasonable cause” for its failure to make quarterly estimated tax payment totaling at least 90 percent of its 2003 tax liability. As discussed below, Western Queen has not made such a showing and thus must pay the \$411 Estimated Tax Penalty.

2. *Western Queen has not shown “reasonable cause” justifying abatement.*

The civil penalties imposed under AS 43.05.220 can be abated “if the taxpayer shows reasonable cause for delay in ... paying the tax.”³⁹ Under the department’s regulations, many different circumstances might constitute “reasonable cause” for a late payment.⁴⁰ If the taxpayer “took in good faith all steps and precautions reasonably necessary to ensure the timeliness of the ... payment” but the payment was still late, reasonable cause may be found for the delay.⁴¹ If “acts or omissions by a third party which were beyond the control of the [taxpayer] made delay unavoidable” reasonable cause may be found for the late payment. Once the facts concerning the delayed payment are established, whether they add up to “reasonable cause” requires application

³⁸ See AS 43.77.020(d).

³⁹ 15 AAC 05.200(a).

⁴⁰ See 15 AAC 05.200(c) (identifying three groups of circumstances that may constitute reasonable cause and making clear that the groups are not all inclusive).

⁴¹ 15 AAC 05.200(c)(3).

of law to the facts and does not implicate agency expertise.⁴² No deference is given to the department's decision.⁴³ The independent judgment standard applies.⁴⁴

The charge to exercise independent judgment, however, does not allow the administrative law judge to find "reasonable cause" based on personal judgment or opinion about whether imposition of a penalty seems unfair under the circumstances. Rather, the administrative law judge exercises independent judgment about what the law means and, in so doing, considers applicable case precedents.⁴⁵

On the question of what constitutes "reasonable cause," a large body of case precedents is available. Some Alaska-specific precedents exist in the decisions of the predecessor to the Office of Administrative Hearings.⁴⁶ Under the department's regulations, the body of available precedents also includes administrative and judicial interpretations of the analogous federal "reasonable cause" exception to imposition of penalties.⁴⁷ The department has committed to apply federal interpretations when it determines whether "reasonable cause" as used in AS 43.05.220 exists.⁴⁸ Thus, when considering an appeal to determine whether, in light of facts established at the informal conference level, the department erred in refusing to abate a penalty, the administrative law judge must consider relevant federal "reasonable cause" interpretations. When considering whether a penalty should be abated based on new evidence, the federal "reasonable cause" interpretations apply as well.⁴⁹

⁴² *Department of Revenue v. Dyncorp*, 14 P.3d 981, 984-985 (Alaska 2000) (explaining that no special deference was owed to the department's decision at the administrative appeal stage because the reasonable cause determination rested on the application of established law to undisputed facts).

⁴³ *See id.*; also AS 43.05.435(3).

⁴⁴ AS 43.05.435(2).

⁴⁵ The law encourages promotion of "consistency among legal determinations" in tax appeals such as this. AS 43.05.475(b).

⁴⁶ The Office of Administrative Hearings succeeded the Office of Tax Appeal effective July 1, 2005. Prior to that date, the Office of Tax Appeals had original jurisdiction to hear tax appeals such as *Western Queen's*. The decisions of the Office of Tax Appeals and the Office of Administrative Hearings on questions of law in tax appeals such as this have "the force of legal precedent" unless reversed or overruled. AS 43.05.475(a).

⁴⁷ *See* 15 AAC 05.200(b). This section provides, in part, as follows: "In determining whether the delinquency was due to reasonable cause and not to willful neglect, the department will apply the administrative and judicial interpretations of Internal Revenue Code § 6651 and the Treasury Regulation § 301.6651-1(c)." The cited federal tax statute provides for assessment of penalties for late filings and late payments but relieve the taxpayer of liability for such penalties when the taxpayer's tardiness is "due to reasonable cause and not due to willful neglect . . ." 26 U.S.C. § 6651(a)(1)-(3). The cited Treasury Regulation sets out the procedure a federal taxpayer must follow to make the necessary showing of "reasonable cause" to get relief from the penalties. *See* 26 C.F.R. § 301.6651-1(c).

⁴⁸ 15 AAC 05.200(b).

⁴⁹ *See Dyncorp*, 14 P.3d at 984-985 (explaining that "the body of federal law interpreting the Internal Revenue Code's reasonable-cause exception" has been incorporated in the department's regulation and concluding that the outcome of that particular "reasonable cause" case rested on "the application of established federal law to undisputed facts").

In short, whether the “reasonable cause” determination depends on the taxpayer’s good faith steps and precautions, acts or omissions of third parties beyond the taxpayer’s control, or some other circumstances within the broad sweep of 15 AAC 05.200(c)’s non-exclusive list, federal precedents may apply to supplement any existing state precedents, if those federal precedents interpret the Internal Revenue Code’s “reasonable cause” exception. That exception states, in pertinent part, the following:

A failure to pay will be considered to be due to reasonable cause to the extent that the taxpayer has made a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship ... if he paid on the due date.^[50]

Thus, many of the precedents applying the federal “reasonable cause” exception give meaning to the exercise of “ordinary business care and prudence.”

For example, the Alaska Supreme Court decision in *Dyncorp* gives meaning to that phrase insofar as the court found that Dyncorp’s decision to put its inadequate resources toward meeting filing deadlines in states in which it could expect refunds, resulting in late filing in Alaska, was not an exercise of ordinary business care and prudence.⁵¹ The court distinguished the business *advantage* the taxpayer may have gained by doing this from the lack of ordinary business *care and prudence* shown by the taxpayer’s deliberate choice not to comply with a tax deadline.⁵²

The precedents also show that a taxpayer can exercise ordinary business care and prudence by reasonably relying on a third party and be free from penalty assessment when the third party’s act or omission causes the delay in payment. For instance, when a taxpayer sends the return and payment in advance of the deadline but the courier service misdelivers it and cannot rectify the situation before the deadline, reasonable cause may be found.⁵³ Similarly, when other events beyond the taxpayer’s control, such as a fire or government-ordered closure of

⁵⁰ 26 C.F.R. § 301.6651-1(c)(1).

⁵¹ *Dyncorp*, 14 P.3d at 986-989 (reversing the Office of Tax Appeal’s decision that Dyncorp’s business reasons for giving lower priority to filing in states requiring more complex, unitary tax returns constituted reasonable cause).

⁵² *Id.* at p. 989.

⁵³ See *Matter of New West Fisheries, Inc.*, Case No. 5-OTA-97, Decision on Reconsideration at p. 6 (Alaska Office of Tax Appeals 1998) (concluding that “New West exercised ordinary business care in arranging to make timely payment of its 1995 fish taxes but failed to do so [in part] because of ... a UPS delivery error”).

a fishery, contribute to the taxpayer's inability to pay taxes on time, reasonable cause may be found.⁵⁴

The difficulty with Western Queen's appeal of the Failure-to-Pay Penalty (and of the Estimated Tax Penalty insofar as Western Queen seeks abatement and asserts "reasonable cause" for the underpayment) is that the thing beyond the company's control was the timing of the release of the Statewide Average Price Report. The lack of that report, in and of itself, does not prevent a taxpayer from paying its landing tax liability by March 31st or from estimating that liability within the ten percent margin of safety provided by AS 43.77.020(d)(1).

This is not to say that the unavailability of the report can never be a factor in the "reasonable cause" showing a taxpayer makes. To the contrary, it is easy to imagine the unavailability of the report, or of an alternate source of statewide average price data, being one factor among several which, when combined, show that despite the exercise of ordinary business care and prudence, or the taking in good faith all of the steps and precautions needed to pay the tax on time, the taxpayer could not make the payment on time in the amount required. Western Queen has not made such a showing.

Western Queen's showing establishes that the company took the following steps: (1) it tasked Mr. Willoughby, an experienced accountant, with the job of projecting tax liability and making the payments; (2) as such, it used a person who was experienced with Alaska's landing tax regime; (3) it made four quarterly payments of \$10,000 each, totaling 81 percent of the company's 2003 landing tax liability; (4) it chose not to make another payment until after the March 31, 2004 deadline because it could not compute the exact tax liability until it received the Statewide Average Price Report two months later; (5) it paid the balance of its 2003 tax liability about a month after the report was distributed. Western Queen's showing ends there.

Western Queen made no showing at all as to whether (and if so how) it used the landing data for the four established and five developing species the F/V *Western Queen* reported throughout 2003 to figure out if it needed to pay more than \$40,000 in taxes before March 31st. It made no showing about whether it consulted anyone, and relied on that third party's advice,

⁵⁴ See *Matter of Woodbine Alaska Fish Co.*, Case No. 12-OTA-97 at pp. 5-6 (Alaska Office of Tax Appeals 1997) (finding reasonable cause for late payment of taxes because a vessel fire and temporary closure of the Bristol Bay salmon fishery exacerbated the taxpayer's cash flow problems and noting as significant the fact that the taxpayer nonetheless "made a good faith effort to make tax payments as soon as it was able to do so" by making partial payments and eventually paying the balance, "plus a self-assessed penalty ... after income from sales had increased substantially").

about how to comply with the March 31st payment deadline without the report. It made no showing about whether it considered (based on previous years' price data or other factors) that its 2003 tax liability might be greater than \$40,000 such that it would need to pay more by March 31st to avoid the penalty. It made no showing about any particular business considerations that affected its choice not to pay more than \$40,000 by March 31st. In sum, it made no showing that it exercised ordinary business care and prudence in letting the March 31st deadline come and go without making a payment above and beyond the four \$10,000 quarterly estimated payments.

Regarding the quarterly payments, in its briefing, Western Queen's controller, Mr. Willoughby, provided the following explanation of how he decided what amount to pay:

As the person who is responsible for filing the Alaska Landing Tax Report for three other vessels over the last ten years, the decision of how much to deposit was easy. I first looked in the booklet supplied by the Alaska Department of Revenue and found no direction. Using the tax history of our other three vessels over the prior 10 years, I took a wild-ass guess and came up with the number \$40,000. I 'guessed' wrong. I should have guessed \$44,263.^[55]

The briefing does not show that the three other vessels are comparable to the F/V *Western Queen*, had similar landing rates over the ten-year period, fished the same species, garnered similar prices, or otherwise provided points of reference on which a business, exercising ordinary care and prudence, would reasonably rely in projecting its landing tax liability for a newly acquired vessel. The briefing also does not explain why Western Queen made the third quarterly payment late or whether the cause for that late payment had any bearing upon Western Queen's ability to meet the March 31st deadline. Western Queen provided nothing from which a reasonable inference can be drawn that it exercised ordinary business care and prudence in deferring its final payment until after the deadline.

Compared to the precedents described above, Western Queen's appeal is more like *Dyncorp* than the others: no fire, no fishery closure, no courier misdelivery—just a choice to let the final deadline run without complying with the requirement. One difference is that *Dyncorp* did not claim to be confused about the deadline; it admitted making a deliberate choice to put its resources elsewhere and give lower priority to satisfying the Alaska requirement. In contrast, Western Queen made no such admission and instead argues that the "final payment" instructions were confusing. As discussed in subpart A above, however, both the instructions and the law

⁵⁵ Appellant's Reply Brief at p. 1 (December 6, 2005).

quite plainly told taxpayers that the tax had to be paid before April 1st and that an extension of the tax return filing deadline did not extend the tax due date. More likely than not, therefore, Western Queen either misunderstood the law, on its own, without reliance on erroneous instructions or advice from a third party or the department, or made a deliberate choice not to pay additional tax before April 1st. In either event, Western Queen has failed to show by a preponderance of the evidence facts which would support a conclusion that it exercised ordinary business care and prudence or took in good faith all steps and precautions to comply with the tax payment requirement, or was prevented from complying by the acts or omissions of a third party beyond its control. Accordingly, Western Queen has not met its burden of establishing “reasonable cause” for failure to pay the tax on time.

The result might be different if Western Queen had made a showing that it tried to comply with the deadline but, despite taking appropriate steps and precautions in good faith, its efforts were frustrated because the average price data that came out in May 2004 was so different from what Western Queen used in projecting its liability that the company’s pre-April 1 final payment unavoidably fell short. In that kind of scenario, “reasonable cause” for making part of the tax payment after the deadline might be found. When, as here, however, the taxpayer’s shows only that it made a “wild-ass guess” at the estimated tax liability for purposes of sending in the quarterly payments and then let the final payment deadline pass without making any effort to pay the rest of its tax liability, because it mistakenly believed it could wait to do so when it filed the return, the taxpayer has not met its burden of establishing “reasonable cause.”

Western Queen’s desire to appeal is understandable. It may have been misled by the department’s April 2005 informal conference decision in the Zenith Fisheries matter to believe that unavailability of the Statewide Average Price Report before the payment deadline, in and of itself, is cause for penalty abatement.⁵⁶ In that matter, the department did conclude that reasonable cause had existed for late payment due to the unavailability of the Statewide Average Price Report prior to the March 31st final payment deadline.⁵⁷ The department acknowledged in its briefing that it found “reasonable cause” in the Zenith Fisheries matter and one other but then subsequently reconsidered this approach, deciding instead to

abandon the notion of “reasonable cause” *per se* in the Landing Tax situation and to instead require a taxpayer to show that steps and

⁵⁶ See Excerpt from Letter to Zenith Fisheries, LP, from Tax Division (April 5, 2005), submitted as Western Queen’s Exhibit 13.

⁵⁷ *Id.*

precautions reasonably necessary to ensure payment of the correct amount of tax by the due date for payment were undertaken, but were nonetheless unsuccessful, beyond simply relying on the unavailability to [sic] the statewide price information on the due date for payment.^{58]}

The question implicit in Western Queen's reliance on the Zenith Fisheries informal conference decision is whether the department was bound to reach the same conclusion in Western Queen's case.

The simple answer is "no." If the Zenith Fisheries informal conference decision was wrongly decided, the fact that that taxpayer got the benefit of penalty abatement to which it was not entitled does not relieve other taxpayers from making the "reasonable cause" showing necessary for penalty abatement. Alaska's tax laws do not require the department to perpetuate errors from one taxpayer to the next. To the contrary, the informal conference process and the administrative appeal opportunity are designed to allow agencies to correct errors while a disputed case remains with the executive branch, and thereby hopefully obviate the need for parties to resort to the courts to get errors corrected. If Zenith Fisheries made no showing of cause for failure to pay its landing taxes on time other than citing the unavailability of the Statewide Average Price Report and the difficulty that creates in computing the exact tax liability, it failed to meet its burden to demonstrate that "reasonable cause" existed for the same reasons Western Queen has failed to do so. That the department found "reasonable cause" without more of a showing, and thereby erred in abating Zenith Fisheries' penalty, does not change the legal standards that apply to Western Queen's appeal.

In sum, Western Queen has failed to make the showing necessary to justify abatement of the Failure-to-Pay Penalty, not because it invoked the unavailability of the Statewide Average Price Report, but because that alone is not enough to show that the company exercised ordinary business care and prudence in attempting to meet the unequivocal tax payment deadline. The unavailability of the report before the deadline may be a factor in showing "reasonable cause" for delay in making full payment, but that alone does not constitute "reasonable cause" when the taxpayer chooses to allow the final payment deadline to pass and rely solely on "wild-ass guess" based quarterly estimated payments to meet the tax payment obligation. Western Queen, therefore, must pay the \$2,141.40 Failure-to-Pay Penalty.

⁵⁸ Affidavit of David T. LeBlond at ¶¶ 5-7 (November 28, 2005).

IV. Conclusion

The Department of Revenue's assessment of \$3,003.79 in interest and penalties against Western Queen Fisheries, LLC, is affirmed. Interest accrues on late-paid taxes by operation of law. An Estimated Tax Penalty assessed under AS 43.77.020 is not subject to abatement. A showing of "reasonable cause" for purposes of abatement of a Failure-to-Pay Penalty assessed under AS 43.05.220 requires more than showing that the Statewide Average Price Report was unavailable before the tax payment deadline. Accordingly, Western Queen Fisheries, LLC, is hereby ordered to pay the assessment to the State of Alaska, through the Department of Revenue, Tax Division, within ten days after the effective date of this decision.

DATED this 9th day of August, 2006.

By: _____
Terry L. Thurbon
Chief Administrative Law Judge

NOTICE

This is the decision of the Administrative Law Judge under AS 43.05.465(a). Unless reconsideration is ordered, this decision will become the final administrative decision 60 days from the date of service of this decision.⁵⁹

A party may request reconsideration in accordance with AS 43.05.465(b) within 30 days of the date of service of this decision.

When the decision becomes final, the decision and the record in this appeal become public records unless the Administrative Law Judge has issued a protective order requiring that specified parts of the record be kept confidential.⁶⁰ A party may file a motion for a protective order, showing good cause why specific information in the record should remain confidential, within 30 days of the date of service of this decision.⁶¹

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 43.05.480 within 30 days after the date on which this decision becomes final.⁶²

⁵⁹ AS 43.05.465(f)(1).

⁶⁰ AS 43.05.470.

⁶¹ AS 43.05.470(b).

⁶² AS 43.05.465 set out the timelines for the decision becoming final.

Certificate of Service

The undersigned certifies that on August 9, 2006, this order was mailed to the following: James Willoughby for Western Queen Fisheries, LLC; Chris Poag, Assistant Attorney General.

Kim Rechin