

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS**

In the Matter of )  
 )  
 VECO CORPORATION )  
 ) OAH No. 09-0680-TAX  
 Tax Year Ending March 2007 )

**DECISION UPON RECONSIDERATION**

**I. Introduction**

VECO Corporation appealed the Department of Revenue’s assessment of a 25 percent penalty for late payment of taxes for the period ending March 2007. The appeal asserted that VECO had reasonable cause for the late payment because of the chaos and financial distress surrounding a corruption investigation involving senior management of the company, which resulted in third-party actions being taken that made it impossible to pay all obligations. Third-party actions included withdrawal of audited financial statements and the resulting cancellation of a line of credit important to the financial operations.

The department’s tax division did not agree that VECO had shown reasonable cause for the delayed payment. In particular, the division questioned whether VECO’s argument meets the test to show reasonable cause when VECO did not set aside funds through the year to pay taxes, but rather relied on the line of credit. None of the thorny issues raised by this difference about reasonable cause for delay, however, need be addressed. Even if circumstances in VECO’s crisis were to show reasonable cause, the cause would have persisted only as long as the inability to pay persisted.<sup>1</sup>

In this case, an inability to pay would not have persisted past the September 7, 2007 sale to CH2M Hill.<sup>2</sup> Measuring from September 7, VECO accrued a penalty of 25 percent for the four 30-day periods and one fraction of a fifth. The penalty is capped at 25 percent. There is no basis to abate a penalty assessed for late payment accruing after the disability ceases. The department’s assessment of a 25 percent penalty, therefore, is affirmed. This decision need not and will not reach the numerous reasonable cause issues.<sup>3</sup>

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<sup>1</sup> *Glass, Sash and Door Supply, Inc.*, OAH No. 11-0478 TAX (Office of Administrative Hearings 2012), at 8.  
<sup>2</sup> In an unopposed motion for reconsideration, the parties agreed that when the line of credit was unfrozen is not determinable from this record and not material to this decision. Accordingly, no findings are made on that issue.  
<sup>3</sup> To analyze the many issues involved in the reasonable cause question would be tantamount to giving an advisory opinion on a fact scenario that is unlikely to occur in future cases.

## II. Facts

In May, 2007, VECO began experiencing a financial crisis prompted by allegations of political corruption against senior management, followed by criminal charges being filed and a guilty plea by a key officer. Four months later, on September 7, 2007, CH2M Hill acquired 100 percent of the VECO Corporation stock. The sale was part of VECO's strategy to deal with the crisis. VECO's corporate income taxes came due during the crisis. The payment was late.

For the tax period ending March 2007, VECO's corporate income tax payment was due to the state on June 15, 2007.<sup>4</sup> The payment was not made until January 15, 2008,<sup>5</sup> about seven months after the due date. The department assessed VECO a penalty in the amount of \$554,377 (25 percent of the tax) for failure to timely pay and a separate penalty of \$131,490 for underpayment of estimated tax.<sup>6</sup> VECO challenged the assessments, requesting an informal conference.

At informal conference, the department reduced the penalty assessment for underpayment of estimated tax to \$27,080 but sustained the failure-to-timely-pay penalty assessment of \$554,377.<sup>7</sup> The department concluded that VECO did not have reasonable cause for the payment delay because the company failed to exercise ordinary business care and prudence by relying on a line of credit instead of setting aside sufficient funds to pay the tax as earnings came in, and did not show that timely payment of the tax would have caused VECO substantial financial loss.<sup>8</sup> The department's informal conference decision did not address when, relative to the January 15, 2008 payment, VECO's alleged inability to pay or undue hardship ceased. Instead, it upheld assessment of the maximum 25 percent penalty due to the passage of time (nearly seven months) between the due date and the payment date.

VECO appealed the department's final decision on the failure-to-timely-pay penalty.<sup>9</sup> VECO's appeal asserts that reasonable cause exists for abatement of the penalty on both inability to pay and undue hardship grounds.<sup>10</sup> The parties agreed to an evidentiary hearing, which was preceded by a period of discovery that included obtaining VECO-related financial records from

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<sup>4</sup> November 24, 2009 Informal Conference Decision at 2.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.* at 7 & 8.

<sup>8</sup> *Id.* at 5-7.

<sup>9</sup> VECO elected not to appeal the determination on the underpayment penalty, accepting the downward adjustment from \$131,490 to \$27,080. December 21, 2009 Notice of Appeal at 1.

<sup>10</sup> *Id.* at 2.

third parties. Prehearing briefs were filed by both parties. The parties prepared a joint set of exhibits numbered 1-56; all 56 exhibits were admitted into evidence.<sup>11</sup>

A two-day hearing was held, during which evidence concerning VECO's financial crisis and steps the company took to deal with it was gathered. The record was held open for post-hearing briefs. It was at this end stage in the hearing process that the parties' arguments raised the question of whether the reasonable cause inquiry is essentially moot because of the length of time VECO delayed making the payment after the company's crisis ceased.<sup>12</sup>

The tax payment was due June 15, 2007. When the tax year ended, VECO still held a twenty million dollar line of credit from Wells Fargo. That changed in May when criminal charges were filed against a senior manager and in rapid succession KPGM withdrew some audited financial statements, and Wells Fargo froze the line of credit. VECO did not pay its taxes until they were seven months past due, on January 15, 2008.

The sale to CH2M Hill took place on September 7. Measuring 30 day periods from the September 7 sale date to the January 15 payment date yields a total of four full 30-day periods and one ten-day fraction of a fifth.<sup>13</sup> From mid-August the total would be fully five 30-day periods.

### **III. Discussion**

#### *A. Standards of Review and Burden of Proof*

The standards for decision set out in AS 43.05.435 apply to this appeal.<sup>14</sup> Under those standards, the administrative law judge exercises independent judgment to resolve questions of law and affords deference to the department's determination only "as to a matter for which

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<sup>11</sup> Objection to admission of Exhibit 48, the report of Dr. Ramish Rao, was withdrawn after Dr. Rao's testimony was admitted. The department's motion to preclude testimony by Dr. Rao and admission of his report had been denied in a pre-hearing status conference, without prejudice to the ability to make specific objections. December 1, 2010 Recording of Status Conference.

<sup>12</sup> *E.g.* January 12, 2011 Department of Revenue's [Written] Closing Argument at 12-15 (arguing that the disability to pay ceased on September 7, 2007, and that testimony from a company official—Dan Armel—indicated the taxes were supposed to be paid shortly after that date.

<sup>13</sup> The periods are as follows:

September 7, 2007 to October 7, 2007 = 30 days;  
October 7, 2007 to November 6, 2007 = 30 days;  
November 6, 2007 to December 6, 2007 = 30 days;  
December 6, 2007 to January 5, 2008 = 30 days;

January 5, 2008 to January 15, 2008 = 10 day fraction of 30 day period.

<sup>14</sup> This appeal is within the original jurisdiction of the Office of Administrative Hearings under AS 43.05.405.

discretion is legally vested in the Department of Revenue[.]”<sup>15</sup> No deference is due to the department’s determination that reasonable cause for a delayed payment does not exist.<sup>16</sup>

VECO bears the burden of establishing that the department erred in assessing the penalty.<sup>17</sup> It must show by a preponderance of the evidence that any questions of fact should be resolved in its favor.<sup>18</sup>

*B. Failure-to-Timely-Pay Penalty*

The civil penalty provision of AS 43.05.220 imposes an escalating percentage-of-tax penalty on failure to pay a tax on time. Specifically, “[f]ive percent shall be added to a tax for each 30-day period or fraction of the period during which the taxpayer fails to . . . pay the full amount of the tax[.]”<sup>19</sup> The penalty amount is capped at 25 percent.<sup>20</sup> The penalties imposed can be abated “if the taxpayer shows reasonable cause for delay in . . . paying the tax.”<sup>21</sup>

Under the department’s regulations, many different circumstances might constitute “reasonable cause” for a late payment.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup>

VECO’s “reasonable cause” argument is that it could not make the payment on time largely because the accounting firm’s withdrawal of the audited financial statements led to Wells Fargo freezing the line of credit on which VECO had been relying to pay the tax. To decide whether VECO had “reasonable cause” to delay payment during any part of the seven months after the due date until VECO made the payment would require analysis of a number of questions, including whether the accounting firm and bank were third parties beyond VECO’s

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<sup>15</sup> AS 43.05.435 (1)-(3).

<sup>16</sup> *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).

<sup>17</sup> AS 43.05.455(c).

<sup>18</sup> AS 43.05.435(1); AS 43.05.455(c).

<sup>19</sup> AS 43.05.220(a).

<sup>20</sup> *Id.*

<sup>21</sup> 15 AAC 05.200(a).

<sup>22</sup> 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).

<sup>23</sup> 15 AAC 05.200(c)(3).

<sup>24</sup> 15 AAC 05.200(c)(2).

control and a whole host of other questions. Because VECO delayed so long after the sale was perfected, however, it is not necessary to reach those questions.

C. *VECO's post-sale delay accrued a 25 percent penalty for which abatement is not available.*

Even when a taxpayer has “reasonable cause” for delaying payment of taxes, the taxpayer does not have leave to delay payment past the point at which the disabling conditions cease. The cause persists only as long as the inability to pay persists.<sup>25</sup> Assuming, without deciding, that VECO might have shown reasonable cause not to pay the tax on June 15, 2007, by the September sale date at the latest, the inability to pay no longer persisted.

The company had access to a line of credit again and the sale to CH2M Hill was complete. With the disability removed, the failure-to-timely-pay penalty clock started running no later than September 7, 2007. VECO waited to pay the tax until January 15, 2008—four 30-day periods and a fraction of a fifth. Assessment of five 5 percent penalties was in order for the post-September 7 period, without regard to whether VECO had reasonable cause for the delay of the prior few months. Abatement of a penalty assessed due to delayed tax payment is not justified when any reasonable cause established is for a different period.

#### **IV. Conclusion**

VECO waited too long after its financial crisis ceased to pay the tax due for the period ending March 2007. During the delay between the sale to CH2M Hill and VECO's January 15, 2008 tax payment, a 25 percent penalty accrued.

The tax division's assessment of a 25 percent failure-to-timely- pay penalty is **AFFIRMED**. There is no need to reach the “reasonable cause” arguments.

DATED this 30<sup>th</sup> day of April, 2014.

By: Signed \_\_\_\_\_  
Stephen C. Slotnick  
Administrative Law Judge

#### **NOTICE**

This is the final decision of the Administrative Law Judge under AS 43.05.465(f)(2).

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.

[This document has been modified to conform to the technical standards for publication.]

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<sup>25</sup> *Glass, Sash and Door Supply, Inc., supra*, at 8.