

Cite as Det. No. 94-229, 15 WTD 73 (1995).

BEFORE THE INTERPRETATIONS AND APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition	)	<u>D E T E R M I N A T I O N</u>
for Correction of Assessment of	)	
	)	No. 94-229
	)	
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .
	)	

RULE 24002, RULE 228; RCW 82.61. et seq., RCW 82.32.090, RCW 82.32.105: DEFERRAL CERTIFICATE -- PAYMENT PLAN -- ASSESSMENT -- PENALTY -- WAIVER: Deferral certificate holders who fail to pay a tax assessment by the due date in accordance with a scheduled payment plan are subject to a 10% delinquency penalty and are not eligible for a one-time only waiver.

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.

NATURE OF ACTION:

Taxpayer protests delinquent penalties and interest imposed on the late payment of retail sales and use taxes assessed, and due under a deferral payment plan.

FACTS:

Danyo, A.L.J. -- Taxpayer applied for and was granted a deferral certificate for payment of retail sales and use taxes. As part of the deferral program, the Department of Revenue (Department) determined Taxpayer's retail sales tax and use tax liability, issued five assessments in March 1987, for the taxes due, and provided Taxpayer with a scheduled payment plan for each of the assessments. The payment plan included a payment due on or before December 31, 1993. Taxpayer remitted this payment on or about January 13, 1994.

The Department received the payment on January 18, 1994. The Department's Taxpayer Accounts Administration Division (TAA) notified Taxpayer, by letter dated February 8, 1994, that a 10% penalty plus interest had been imposed on the amount due by December 31, 1993. On February 14, 1994, Taxpayer responded to TAA's notice of balance due by requesting a waiver of the penalties and interest. That request was denied.

Taxpayer petitioned the Interpretation and Appeals Division for a waiver of the penalties and interest on the grounds that the payment was late because of an employee's "unintentional and unforeseen" oversight and error. Further, Taxpayer states that it is entitled to a waiver because Taxpayer had never been late in any of its prior payments under the scheduled payment plan and the Department had received the payment "within thirty (30) days of due date."

#### ISSUE:

May the Department waive a penalty and/or interest imposed on Taxpayer's late payment of a tax assessment where the late payment was caused by an employee's error, the payment was made within 30 days after the original due date, and Taxpayer has not received a prior waiver?

#### DISCUSSION:

Chapter 82.61 RCW governs the terms, conditions, and procedures under which a taxpayer may apply for and be granted a deferral of state and local sales and use taxes due under chapters 82.08, 82.12, and 82.14 RCW. Taxpayer applied for and was issued a deferral certificate. RCW 82.61.050 provides that "the use of the certificate shall be governed by rules established by the department." Accordingly, the Department promulgated WAC 458-20-24002 (Rule 24002).

Audit procedures for determining the certificate holder's deferred sales and use tax liability are discussed in Rule 24002, subsection (26). This subsection requires that the Department "conduct a final audit of the investment project." Rule 24002, subsection (27), states:

Upon completion of the audit the department shall certify the amount of sales and use taxes subject to deferral and the date on which the project was operationally complete. The recipient shall be notified in writing of the total amount of deferred taxes, the date(s) upon which the deferred taxes shall be paid, and any reports required to be submitted in the subsequent years.

The Department's Audit Division conducted a partial audit of Taxpayer's records to determine Taxpayer's use tax and retail sales tax liability in accordance with the requirements set out in Rule 24002(26) and (27). The audit resulted in the issuance of five tax assessments including this one being appealed. The Department deferred Taxpayer's payment of taxes due under this assessment to December 31, 1993. This payment schedule was consistent with the requirements of RCW 82.61.060(1) which explains that "[t]he first payment will be due on December 31st of the third calendar year after such certified date, with subsequent annual payments due on December 31st of the following four years . . . ."

Taxpayer failed to make the scheduled payment on or before the due date provided in the payment plan, i.e., on or before December 31, 1993. As a result, a ten percent (10%) delinquency penalty plus interest was imposed. Rule 24002, subsection (36), provides that:

Interest shall not be charged on any taxes deferred under this program during the period of deferral, although other penalties and interest applicable to delinquent excise taxes may be assessed and imposed for any delinquent payments during the repayment period pursuant to chapter 82.32 RCW.

(Emphasis added.) Delinquent payment penalties are imposed when a taxpayer fails to pay taxes by a specified due date. RCW 82.32.090 provides:

(1) 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 shall be assessed a penalty of five percent of the amount of the tax; and if the tax is not received within thirty days after the due date, there shall be assessed a total penalty of ten percent of the amount of the tax; and if the tax is not received within sixty days after the due date, there shall be assessed a total penalty of twenty percent of the amount of the tax. No penalty so added shall be less than five dollars.

(2) If payment of any tax assessed by the department of revenue is not received by the department by the due date specified in the notice, or any extension thereof, the department shall add a penalty of ten percent of the amount of the additional tax found due. No penalty so added shall be less than five dollars.

WAC 458-20-228 (Rule 228) is the administrative rule which addresses the Department's authority to impose and/or cancel penalties and interest. Rule 228, subsection (4)(a), explains

the penalties imposed for failure to file the returns by the due dates pursuant to RCW 82.32.090(1). In accordance with RCW 82.32.090(2), Rule 228, subsection (4)(b), explains that:

An additional penalty of ten percent of the tax due will be added to any taxes assessed by the department if payment of the taxes assessed is not received by the department by the due date specified in the notice, or any extension thereof. . . .

RCW 82.32.105 is the Department's statutory authority for waiving penalties and interest. It states:

If the department of revenue finds that the . . . failure of a taxpayer to pay any tax by the due date was the result of circumstances beyond the control of the taxpayer, the department of revenue shall waive or cancel any interest or penalties imposed under this chapter with respect to such tax. The department of revenue shall prescribe rules for the waiver or cancellation of interest or penalties imposed by this chapter.

Rule 228, subsection (6), lists the only circumstances under which the Department will waive a delinquent payment penalty on grounds that "the failure of a taxpayer to pay any tax by the due date was due to circumstances beyond the control of the taxpayer." Taxpayer requests cancellation of the penalty because it believes its circumstance qualifies under Rule 228, subsection (6)(vii), which states:

(vii) The delinquency penalty will be waived or cancelled on a one time only basis if the delinquent tax return was received under the following circumstances:

(A) The return was received by the department with full payment of tax due within 30 days after the due date; i.e., within the five percent penalty period prescribed by RCW 82.32.090, and

(B) The delinquency was the result of an unforeseen and unintentional circumstance, not immediately known to the taxpayer, which circumstances will include the error or misconduct of the taxpayer's employee or accountant, confusion caused by communications with the department, failure to receive return forms timely, natural disasters such as a flood or earthquake, and delays or losses related to the postal service.

Taxpayer requests a one-time only waiver of the penalties imposed pursuant to RCW 82.32.090(2). We cannot grant Taxpayer the relief requested under Rule 228(6)(vii) because this section pertains to returns which are filed late but are received by the

Department, with full payment of the tax due, within 30 days after the due date. This section contemplates only the penalties imposed under RCW 82.32.090(1). Rule 228(6)(vii) does not apply to the ten percent (10%) penalty imposed on late payments of tax assessments. Rule 228(4)(b). See, Det. No. 90-130, 9 WTD 280.7. Thus, deferral certificate holders who fail to pay a tax assessment by the due date in accordance with a scheduled payment plan are subject to a 10% delinquency penalty and are not eligible for a one-time only waiver.

Taxpayer's December 31, 1993, payment under the deferred payment plan was received by the Department after the due date. The only reason the payment was late was because of an employee's error. This circumstance is not one of the six other circumstances discussed in Rule 228(6).

Taxpayer also requested waiver of the interest assessed on the late payment. However, the assessment of interest is mandatory. RCW 82.32.050. Rule 228, subsection (5), provides: "If the assessment is not paid by the original due date, extension interest will be added . . . ." Interest also applies to penalties. Rule 228.

Rule 228, subsection (7), provides the only circumstances under which interest will be waived. They are:

. . . The following situations will constitute circumstances under which a waiver or cancellation of interest upon assessments pursuant to RCW 82.32.050 will be considered by the department:

(a) The failure to pay the tax prior to issuance of the assessment was the direct result of written instructions given the taxpayer by the department.

(b) Extension of the due date for payment of an assessment was not at the request of the taxpayer and was for the sole convenience of the department.

Neither of these circumstances pertain to Taxpayer. Therefore, interest cannot be waived.

#### DECISION AND DISPOSITION:

Taxpayer's petition for waiver of penalties and interest is denied.

DATED this 31st day of October, 1994.