

Cite as Det. No. 98-047, 17 WTD 186 (1998)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition For Correction of	)	<u>D E T E R M I N A T I O N</u>
Notice of Balance Due of:	)	
	)	No. 98-047
	)	
...	)	Registration No. . . .
	)	Balance Due No. . . .
	)	
	)	

RULE 228; RCW 82.32.105: PENALTY -- WAIVER -- CIRCUMSTANCES BEYOND CONTROL -- INJURY --FINANCIAL HARDSHIP. A taxpayer's injury, which occurred two months prior to the due date of the return, is not a circumstance beyond the control of the taxpayer that is sufficiently proximate in time to the due date of the return to justify waiver of the penalty. Financial hardship is not grounds for waiver of a penalty.

NATURE OF ACTION:

Sole practitioner attorney, whose injury and subsequent surgery interfered with his income, requests waiver of the late payment penalty.<sup>1</sup>

FACTS:

C. Pree, A.L.J. (successor to Krebs, A.L.J.) -- In early November 1994, the taxpayer, a sole practitioner attorney, suffered an injury, which caused him to miss a substantial amount of work. The injury later required surgery, which occurred in March 1995. The taxpayer missed a substantial amount of work after the surgery, as well, due to post-surgical rehabilitation. The taxpayer argues that the injury and surgery interfered with his normal income stream to the extent that he was unable to pay his taxes in a timely manner.

The taxpayer requests a waiver of the late payment penalty that was assessed with respect to his excise tax return due for the fourth quarter of 1994.<sup>2</sup>

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<sup>1</sup> Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

<sup>2</sup> In March 1995, the taxpayer received a "one-time waiver" of the late payment penalty with respect to his return for the second quarter of 1994. See WAC 458-20-228(6)(b)(vii).

## ISSUE:

Whether the taxpayer's injury and subsequent surgery, which resulted in reduced income, are sufficient grounds for waiver of the late payment penalty where the injury occurred over two months prior to the due date of the return and the surgery occurred over a month after the due date of the return.<sup>3</sup>

## DISCUSSION:

RCW 82.32.090 requires the Department to impose penalties for the late payment of taxes. That statute provides in pertinent part as follows:

If payment of any tax due on a return to be filed by a taxpayer is not received by the department of revenue by the due date, there shall be assessed a penalty of five percent of the amount of the tax; and if the tax is not received on or before the last day of the month following the due date, there shall be assessed a total penalty of ten percent of the amount of the tax; and if the tax is not received on or before the last day of the second month following the due date, there shall be assessed a total penalty of twenty percent of the amount of the tax . . . (Emphasis supplied.)

The legislature, through its use of the word "shall" in RCW 82.32.090, has made the assessment of the penalty mandatory. See Det. No. 87-300, 4 WTD 101 (1987); Det. No. 86-238, 1 WTD 125 (1986).

As an administrative agency, the Department is given no discretionary authority to waive or cancel penalties. See Det. No. 87-300, supra; Det. No. 86-238, supra. The Department's only authority to waive or cancel penalties is set forth in RCW 82.32.105. That statute provides in pertinent part as follows:

If the department of revenue finds that the payment by a taxpayer of a tax less than that properly due or 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.

WAC 458-20-228 (Rule 228) is the administrative rule implementing the statute. Rule 228 lists the only circumstances in which the Department will consider canceling penalties:

(6) **Waiver or cancellation of penalties.** The department will waive or cancel the penalties imposed under RCW 82.32.090 . . . upon finding that the failure of a taxpayer to

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<sup>3</sup> The fourth quarter return was due by January 25, 1995. See RCW 82.32.045; WAC 458-20-228(3).

pay any tax by the due date was due to circumstances beyond the control of the taxpayer. The department has no authority to cancel penalties or interest for any other reason. . . .

. . .

(b) The following situations will be the only circumstances under which a cancellation of penalties will be considered by the department:

(i) The return was filed on time but inadvertently mailed to another agency.

(ii) The delinquency was due to erroneous written information given the taxpayer by a department officer or employee. . . .

(iii) The delinquency was caused by death or serious illness of the taxpayer or his immediate family, or illness or death of his accountant or in the accountant's immediate family, prior to the filing date.

(iv) The delinquency was caused by unavoidable absence of the taxpayer, prior to the filing date.

(v) The delinquency was caused by the destruction by fire or other casualty of the taxpayer's place of business or business records.

(vi) The taxpayer, prior to the time for filing the return, made timely application to the Olympia or district office, in writing, for proper forms and these were not furnished in sufficient time to permit the completed return to be paid before its delinquent date.

(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.

The taxpayer essentially argues that his injury and subsequent surgery interfered with his normal income stream, and, therefore, timely payment of his taxes would have caused financial hardship. Neither the statute nor the rule permits financial hardship to be the basis for waiving late payment penalties. See also, Det. No. 94-16, 14 WTD 184 (1994) ("Financial hardship is not a basis for forgiving a taxpayer's tax liability, penalties and/or interest imposed thereon."); Det. No. 87-300, supra, ("The legislature . . . has not chosen good faith or financial hardship as a basis under the law for relief from the penalty.").

Further, while situation (iii) in Rule 228 does provide for waiver of penalties if the delinquency was caused by serious illness of the taxpayer prior to the filing date, such an illness (or injury) must be closely proximate in time to the due date of the return. For example, in Det. No. 87-300, supra, we did not waive the penalty where the mother of the taxpayer's accountant was seriously ill, but the

taxpayer did not file its returns until six weeks after the accountant returned to work. Similarly, in Det. No. 86-238, supra, the extended illness of a taxpayer's employee resulted in the taxpayer's failure to file tax returns for a five month period. The taxpayer was unaware of the employee's illness and the unfiled tax returns. We did not waive the penalty. We reasoned:

It is unfortunate that the medical problems of the Sales Tax Clerk and her inability to carry out her job responsibilities did not come to the attention of her supervisors until it was too late. It is noted that her neglect of duties occurred over an extended period of time from June through August 1985.

In another determination, Det. No. 88-288, 6 WTD 231 (1988)(copy enclosed), we denied relief from a late-payment penalty where a two and one-half month period elapsed between a serious injury to the taxpayer's accountant's brother and the date of the late-filed tax return. The determination reasoned:

Had the injury to the accountant's brother occurred in reasonable proximity, time-wise, to the due date of the subject tax return, we could consider waiver under numbered paragraph three as cited above. Here, however, there was more than a two and one half month gap between the brother's injury and the due date of the tax return. The injury took place August 8; the tax return was due October 31. This was a total of 84 days. While we are very sympathetic with the accountant's situation, we think such a large interval of time between the tragic event and the tax due date makes it impossible to waive the penalty. The cited provision of Rule 228 is not intended to have indefinite application. It is meant to give relief in emergency situations where death or serious illness has occurred at a point much nearer to the due date than is the case here. How near is a question that may vary according to the situation presented. Two and one-half months, however, is an interval which exceeded the emergency nature intended by the rule.

Thus, based on the above authorities, we find that the taxpayer's situation does not fall within any of the circumstances that justify waiver of penalties. Although the above-cited determinations involved injury or illness sustained by persons other than the taxpayer himself, the analysis applied in those cases controls here. Specifically, for an injury or illness to satisfy the requirements for waiver of the late-payment penalty, the injury or illness must be closely proximate in time to the due date of the missed payment.

#### DECISION AND DISPOSITION:

The taxpayer's petition is denied.

Dated this 31 day of March, 1998.