

Cite as Det. No. 06-0267, 26 WTD 159 (2007)

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>
Assessment of )	
)	No. 06-0267
)	
... )	Registration No. . . .
)	Doc. Nos. . . .
)	Docket No. . . .

[1] RULE 228; RCW 82.32.090; ETA 419: PENALTIES – IMPOSITION – MANDATORY – ORAL ADVICE – APPLICATION OF PAYMENTS. The legislature, through its use of the word “shall” in RCW 82.32.090 has made the assessment of penalties mandatory. Where a taxpayer argues it incurred penalties due to false information it received from the Department, the taxpayer must provide something in writing from the Department to substantiate that the Department provided misleading information.

[2] RULE 228; RCW 82.32.105: PENALTIES – WAIVER – CIRCUMSTANCES BEYOND THE CONTROL OF THE TAXAPYER – FIRE -- REASONABLE TIME. While the consequences of a casualty or other circumstance beyond the taxpayer’s control may continue for a period beyond the casualty itself, penalty waiver is available only for the period in which the taxpayer does not have a reasonable time or opportunity to obtain an extension or to timely file and pay. While a fire in an adjoining property that damages the taxpayer’s property is a circumstance beyond the taxpayer’s control, where the fire occurred over six months prior to the due date of the first late return at issue, the fire was not sufficiently proximate to the late returns to justify penalty waiver.

C. Pree, A.L.J – . . . business, which experienced a fire in July 2004 and resumed business in December 2004 seeks penalty waiver for its January through August 2005 returns. We deny the petition.<sup>1</sup>

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

## ISSUE:

Where a taxpayer experienced a fire in July 2004 and resumed business in December 2004, does the fire and its consequences qualify as a circumstance beyond the taxpayer's control, which would justify penalty waiver for the taxpayer's late payment of its January through August 2005 returns?

## FINDINGS OF FACT:

The taxpayer is a . . . business that has operated in Washington since . . . . On July . . . , 2004, a building adjoining the taxpayer's place of business caught on fire. The fire did not destroy the taxpayer's records, but it damaged a . . . wall, as well as the taxpayer's inventory and equipment. As a result, the taxpayer's business was closed from August through mid-December 2004.

Based on the taxpayer's inspection of the damages, it anticipated that it would be able to reopen in a short time. Accordingly, to avoid the need to rehire employees, it initially continued to pay its employees during the closure. However, the taxpayer's reopening was delayed due to controversies regarding which insurance company was liable for the damages and which insurance company was responsible for making the building suitable for inspection by the City of . . . . Specifically, the City, which was to assess the damage to the property, could not (or would not) determine the structural status of the property until after the insurance companies determined which would be responsible for making the property suitable for inspection. This took three months. Once the taxpayer understood the magnitude of the delay, it terminated its employees, as well as its bookkeeper.

The taxpayer resumed business in December 2004, but filed its December 2004 through August 2005 excise tax returns late. The taxpayer explained it filed its returns late, in part, because its "insurance company delayed payouts during construction, so cash reserves were depleted hindering the cash flows of the recovery period Dec. 04 – now." To keep the business operating, the taxpayer used all current receipts (including collected retail sales tax) to pay operating expenses. The taxpayer further explained, "[A]ll new employees had to be hired, trained and support operations had to be rebuilt. This was a monumental task, and bookkeeping was the last to be restored." Although the taxpayer hired a bookkeeping service "early and timely along with the new employees," the taxpayer explained "the bookkeeper did not understand the scope of work and was not able to adjust during the chaos of the rebuilding."

The taxpayer paid its December 2004 return in April 2005. The Taxpayer Accounts Administration Division (TAA) waived late payment penalties for the December 2004 return under the "twenty-four month" provision,<sup>2</sup> and this return is not at issue.

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<sup>2</sup> See RCW 83.32.105(2).

On May 6, 2005, the Compliance Division issued an assessment for January through March 2005 because the taxpayer had not yet filed and paid returns for those months. The assessment included delinquent penalties, as well as an assessment penalty and interest.

On June 15, 2005, the taxpayer paid an amount that corresponded to the payment due on its January return and penalty. Because January was included in the outstanding assessment, the payment was applied to the assessment (first to penalties and interest, then to tax). On July 26, 2005, the Department issued a warrant for the period of January 2005 through March 2005 and May 2005, because the assessment remained unpaid after its due date, and the May return had not been paid.

On August 8, 2005, the taxpayer paid an amount that corresponded to the tax due on its February and March returns. This amount was applied to the warrant.

On September 9, 2005, the taxpayer paid \$10,000, which was also applied to the warrant balance. On September 28, the taxpayer paid the warrant in full, as well as its August 2005 return (plus a 5% delinquent penalty). The taxpayer subsequently timely filed and paid its returns, and the Department applied the payments to the returns with which they were sent. However, because the April, June, and July returns remained outstanding, the Department issued a warrant for these periods (plus interest and penalties) on January 9, 2006. The taxpayer and the Compliance Division entered into a partial payment agreement in January 2006 with respect to this warrant, and the taxpayer made payments pursuant to this agreement.

The taxpayer requested penalty waivers for its January through August 2005 returns. TAA did not waive the penalties for these returns based on its reasoning that financial hardship is not considered a circumstance beyond the control of the taxpayer. The taxpayer appealed.

#### ANALYSIS:

There is no issue here as to whether the taxpayer had delinquent returns. During the period at issue, RCW 82.32.045 required that monthly returns be filed within twenty days after the end of the month in which the taxable activity occurs. The taxpayer filed its January through August 2005 returns past their due dates. However, the taxpayer argues that penalties were either inappropriately applied or should be waived. Accordingly, we will address the statutes and rules applicable to the imposition and waiver of penalties.

[1] RCW 82.32.090 is the statute that governs the imposition of penalties. It provides, in pertinent part, as follows:

(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 on or before the last day of the month following the due date, there shall be assessed a total penalty of fifteen percent of the amount of the tax under this subsection; 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-five percent of the amount of the tax under this subsection . . . .

(2) If the department of revenue determines that any tax is due, there shall be assessed a penalty of five percent of the amount of the tax determined by the department to be due and if payment of any tax determined by the department to be due is not received by the department by the due date specified in the notice, or any extension thereof, there shall be assessed a total penalty of fifteen percent of the amount of the tax under this subsection; and if the tax is not received on or before the thirtieth day following the due date specified in the notice of tax due, or any extension thereof, there shall be assessed a total penalty of twenty-five percent of the amount of the tax under this subsection.. . .

(3) If a warrant be issued by the department of revenue for the collection of taxes, increases, and penalties, there shall be added thereto a penalty of ten percent of the amount of the tax . . . .

The legislature, through its use of the word “shall” in RCW 82.32.090 has made the assessment of penalties mandatory. *See, e.g.*, Det. No. 03-0152, 22 WTD 278 (2003); Det. No. 99-042, 19 WTD 784 (2000).

In support of its argument that the Department inappropriately applied penalties, the taxpayer argues that the Department misled it regarding payment of its taxes, which resulted in more penalties than should be due. Specifically, the taxpayer states:

The Department of Revenue compounded the penalties needlessly. They directed the taxpayer to pay past liabilities instead of current liabilities, thus recrcating [sic] multiple penalties when only one penalty properly should have been assessed. They gave false information for which the taxpayer in good faith relied on incurring more penalties. The taxpayer appealed and was again given false information to jeopardize their appeal rights.

However, our review of the taxpayer’s payment history reflects that the payments were properly applied to the various returns, assessment, and warrants at issue. The taxpayer failed to timely pay its January through August 2005 returns. Accordingly, the late payment or delinquent penalty set forth in RCW 82.32.090(1) was properly imposed. Further, the Department determined that tax was due and issued an assessment in May 2005; accordingly, the assessment penalty set forth in RCW 82.32.090(2) was properly imposed. Finally, the Department issued warrants in July 2005 and January 2006 and properly imposed the warrant penalty set forth in RCW 82.32.090(3).

Although the taxpayer argues it incurred these penalties due to false information it received from the Department, the taxpayer has provided nothing in writing to substantiate that the Department provided misleading information. WAC 458-20-228(9)(a)(ii)(B) (Rule 228)(9)(a)(ii)(B)<sup>3</sup>

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<sup>3</sup> During the hearing in this matter, the Administrative Law Judge referred to Rule 228 in the context of “circumstances beyond the control of the taxpayer.” The taxpayer’s representative requested that the ALJ’s

explains penalties will be waived where the taxpayer received erroneous written information from the Department, and that information caused the delinquency. Rule 228 explains the reason for requiring that the information be in writing, as follows:

A penalty generally will not be waived when it is claimed that erroneous oral information was given by a department employee. The reason for not cancelling the penalty in cases of oral information is because of the uncertainty of the facts presented, the uncertainty of the instructions or information imparted by the department employee, and the uncertainty that the taxpayer fully understood the information given. . . .

*See also* ETA 419.32.99 (which addresses the question of whether oral instructions or interpretations by employees of the Department are binding upon the Department.) Although the reasoning in Rule 228 applies to penalty waiver, rather than the imposition of penalties, these reasons apply in the taxpayer's case. We simply do not have a record of what the taxpayer presented to the Department employee or what the employee told the taxpayer regarding payment of its taxes. *See* Det. No. 03-0165, 24 WTD 330 (2005). Thus, we conclude that the penalties were properly applied.

[2] The next issue is whether the taxpayer qualifies for waiver of the penalties. The Department is an administrative agency, and its authority to waive or cancel penalties is restricted to the authority granted by the Legislature. The Legislature has granted the Department limited authority to waive or cancel penalties, set out in RCW 82.32.105 and RCW 82.32A.020.<sup>4</sup> Thus, contrary to the taxpayer's argument that the Department "has the right and duty to waive [penalties] when collection of tax is assured and enforced collection of penalties is contrary to equitable good judgment," the Department has no discretionary authority to waive or cancel penalties. *See, e.g.*, Det. No. 98-85, 17 WTD 417 (1998); Det. No. 99-285, 19 WTD 492 (2000). Det. No. 03-0152, 22 WTD 278 (2003); Det. No. 99-042, 19 WTD 784 (2000).

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determination reflect the fact that he objects to her introduction of this "new information" into the case. In partial response to the representative's objection, the ALJ allowed the representative additional time after the hearing to draft a response regarding Rule 228. In the taxpayer's supplemental response regarding Rule 228, the taxpayer asked the Appeals Division to explain what section of Rule 228 was relevant to the appeal. As set forth in this determination, Rule 228(9) explains circumstances beyond the control of the taxpayer, which is the only basis on which the Department may consider waiving penalties in this case.

<sup>4</sup>RCW 82.32A.020(2) gives taxpayers the right to have penalties waived where they have detrimentally relied on specific, official written advice from the Department to them. However, as explained above, this provision does not afford a basis for relief in this case because the taxpayer has provided no evidence that it received written advice from the Department.

RCW 82.32.105, provides, in pertinent part:<sup>5</sup>

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 penalties imposed under this chapter with respect to such tax.

RCW 82.32.105 does not define the term “circumstances beyond the control of the taxpayer,” but the Department has explained and given examples of the term in Rule 228(9)(a)(ii), which states, in pertinent part:

The circumstances beyond the control of the taxpayer must actually cause the late payment. Circumstances 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 further explains:

Circumstances beyond the control of the taxpayer include, but are not necessarily limited to, the following: . . . The delinquency was caused by the destruction by fire or other casualty of the taxpayer's place of business or business records.

The taxpayer bears the burden of establishing that the circumstances were beyond its control and directly caused the late payment. Rule 228.

In support of its argument that its late payments were due to circumstances beyond its control, the taxpayer argues it had no control over the insurance companies and the City of . . . , which delayed its reopening and caused it to lose income. The taxpayer argues it is the victim of a “catastrophic event” and it “appears unreasonable to penalize the victim of a catastrophic event, even to the point of compromising their ability to survive.” The taxpayer further explains the catastrophic event “hindered the business’ ability to do business for an extended period of time.” The taxpayer explains:

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<sup>5</sup> RCW 82.32.105(2) provides:

The department shall waive or cancel the penalty imposed under RCW 82.32.090(1) when the circumstances under which the delinquency occurred do not qualify for waiver or cancellation under subsection (1) of this section if:

(a) The taxpayer requests the waiver for a tax return required to be filed under RCW 82.32.045 . . . and  
(b) The taxpayer has timely filed and remitted payment on all tax returns due for that tax program for a period of twenty-four months immediately preceding the period covered by the return for which the waiver is being requested.

TAA waived the penalty for the taxpayer’s December 2004 return under this provision. Accordingly, waiver under this provision is not available for the succeeding periods at issue here.

Lack of control relates to the taxpayer, and implies that others are controlling the situation or natural events (sometimes attributed to acts of God) are in control. Accordingly, we state that:

1. The fire was caused by someone other than the taxpayer, beyond their control.
2. It occurred in a building adjacent to the business, not within the control of the taxpayer.
3. The City of . . . refused to allow them access to do anything to remediate the situation, including access to records and filing of returns; which also is outside the taxpayer's control.
4. The insurance company who was to pay for the loss, including business interruption, was itself diverted (sending all available staff) to the Hurricane Katrina disaster. They then would not or could not do what the city demanded of them, and did not provide the taxpayer what they had to have in order to control the outcome of events.
5. All staff were dismissed because of the prior four events, and thus were not immediately available to complete the filing and reporting tasks. People were hired when they did have control. However, accounting is an ongoing process of each day's activity that results in reports as of a certain day in the future. If it is beyond one's control to accomplish the daily reporting, then significant time is required to reconstruct it when and after control is returned.

Thus, the taxpayer argues, although the fire itself may have lasted a short period of time, the consequential effects lingered for months. While we agree that the consequences of a casualty or other circumstance beyond the taxpayer's control may continue for a period beyond the casualty itself, penalty waiver is available only for the period in which the taxpayer does not have a reasonable time or opportunity to obtain an extension or to timely file and pay. Rule 228.

We have applied this concept in a number of published determinations. For example, in Det. No. 88-288, 6 WTD 231 (1988), we denied waiver of a late payment penalty when a two and one-half month period elapsed between a serious injury to an accountant's brother and the date of the late-filed return. The determination stated:

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.

In Det. No. 99-062, 19 WTD 60 (2000), we applied the reasoning in Det. No. 88-288 and denied penalty waiver where the intervening time between the taxpayer's injury and first date of delinquency exceeded three months. We reasoned, "The injury, in order to satisfy the requirements of Rule 228's penalty waiver, must be proximately close in time to the due dates of the late payments." However, we did allow penalty waiver for two subsequent returns. The taxpayer returned from visiting his mother, who had become seriously ill, two weeks prior to the

filing date for one of the returns, and his mother passed away two weeks prior to the due date for the second return. We explained:

While normally we would consider this sufficient time to pay the taxes due, the cumulative effect of his mother's illness and death and his own injury make it understandable that the taxes for June and September 1997 would be paid late. We therefore find the illness and subsequent passing of taxpayer's mother, combined with the ongoing effects of his own injury, justify relief under Rule 228.

In Det. No. 98-054, 18 WTD 23 (1999), we concluded that a major computer failure was an "other casualty" of the taxpayer's business records for purposes of penalty waiver, but the failure was not sufficiently proximate in time to justify the late payment of its October and November returns, which were paid on December 29. The computer failure occurred in mid-October and erased the taxpayer's sales data. We noted that the taxpayer kept its invoices organized by month and was eventually able to reinput the sales data after the drive was replaced. We concluded that the late payment of the November return was not justified because the sales upon which it was based all occurred after the computer's failure in the preceding month. We also concluded that the late payment of the October return was not justified. Although the computer failure occurred in the middle of that month and it was reasonable to assume that there could be delays in having all the October information as quickly available as usual, the October return was not due until over one month later. We concluded, "This was adequate time in which to prepare a return for which the taxpayers did have back up records."

We will next review the five circumstances the taxpayer set forth, which it alleges were beyond its control and caused the late payments. The first and second points the taxpayer raised are that the fire was caused by someone other than the taxpayer in a building adjacent to the taxpayer's. While we agree that the fire was beyond the control of the taxpayer, and the building in which it occurred was not under the taxpayer's control, the fire occurred over six months prior to the due date of the first late return at issue. Accordingly, the fire was not sufficiently proximate to the late returns to justify penalty waiver.

The third point the taxpayer raised was that the City refused to allow the taxpayer access to its records. Again, we agree that this was beyond the taxpayer's control, but again, it was not sufficiently proximate to the late returns to justify penalty waiver. The taxpayer was allowed access to its business and records at least two and a half months prior to the due date of the first late return at issue.

The fourth point the taxpayer raised was that the insurance company, which was to pay for the taxpayer's loss, was diverted due to Hurricane Katrina. The taxpayer states the insurance company "then would not or could not do what the city demanded of them, and did not provide the taxpayer what they had to have in order to control the outcome of events." Basically, the taxpayer argues the insurance company did not timely pay the taxpayer's claims and delayed the taxpayer's access to its building. With respect to the access issue, as we explained above, the taxpayer was allowed access to its business at least two and a half months prior to the due date of

the first late return at issue, which is not sufficiently proximate in time to constitute a circumstance beyond the taxpayer's control. With respect to the payment issue, we see no relevant difference between a delay in insurance payments and other payments on which a business depends. Late payments cause financial hardship, and financial hardship is specifically listed in Rule 228 as a circumstance not beyond the taxpayer's control. We have reached this conclusion in a number of published determinations. *See, e.g.*, Det. No. 99-062; Det. No. 94-16, 14 WTD 184 (1994).

In Det. No. 87-189, 3 WTD 223 (1987), we addressed a situation similar to the taxpayer's. In that determination, the taxpayer was in the health care business. It received approximately 40 percent of its income from the state of Washington, and the State's payments to the taxpayer were frequently months delinquent. We concluded that the State's late payment of amounts due to the taxpayer could not justify penalty waiver. We reasoned, "the penalty may not be waived even though the taxpayer has difficulty making the payment because another state agency was late in its payments to the taxpayer." We explained:

It makes no difference that the state is the contracting party with the taxpayer. Our holding would be the same even if the contracting party were a private business. In other words, a person's tax liability is an absolute; it is no defense that other third parties owe the taxpayer money with which the taxes could have more easily been made.

Accordingly, we conclude that the insurance company's late payment of amounts due to the taxpayer does not justify penalty waiver.

The fifth and final point the taxpayer raises is that it was forced to terminate its staff due to the four prior events, which resulted in the taxpayer not having staff available to timely file its returns. The taxpayer explains:

[A]ccounting is an ongoing process of each day's activity that results in reports as of a certain day in the future. If it is beyond one's control to accomplish the daily reporting, then significant time is required to reconstruct it when and after control is returned.

We note that the taxpayer reopened its business two and one-half months prior to the first return at issue being due. Thus, the taxpayer had staff on hand in ample time to prepare the returns. The fact that the taxpayer may have delayed hiring its bookkeeper until later in its rehiring process cannot be considered a circumstance beyond its control. Further, as we explained in Det. No. 98-054, while it is reasonable to assume that there can be delays in having accounting information available after a casualty, a delay of over one month after the casualty is simply too lengthy to be considered to have been caused by a circumstance beyond the taxpayer's control. Accordingly, we conclude that the taxpayer's lack of staff does not justify penalty waiver.

#### CONCLUSIONS OF LAW AND DISPOSITION:

Taxpayer's petition is denied.

Dated this 27th day of October 2006.