

Cite as 4 WTD 261 (1987)

BEFORE THE INTERPRETATION 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 Refund of)	
)	No. 87-344
)	
)	Registration No. . . .
. . .)	Tax Assessment No. . . .
)	Tax Warrant No. . . .

- [1] **RCW 82.32.050:** TAX ASSESSMENT -- DELINQUENCY PENALTY -- INTEREST.

Where a tax assessment is not paid by the due date, there is imposed a ten percent delinquency penalty on the tax due and interest accrues until date of payment.

- [2] **RULE 228, RCW 82.32.130:** TAX ASSESSMENT -- DELINQUENCY PENALTY -- NONRECEIPT OF NOTICE. A taxpayer is precluded from denying liability for a delinquency penalty on a tax assessment based on a bare assertion of nonreceipt of the tax assessment notice by mail. The Department is authorized by statute, RCW 82.32.050, to mail tax assessment notices.

- [3] **RCW 82.32.210, RCW 82.32.090:** TAX WARRANT -- ISSUANCE -- FIVE PERCENT WARRANT PENALTY -- WAIVER OF PENALTY. If a tax or penalty has not been paid within 15 days after it becomes due, the Department may issue a tax warrant to which is added a penalty of five percent of the tax due. Where taxpayer has paid substantially all of the tax assessment before issuance of the warrant and the taxpayer's file reveals no compelling reason for issuance of the warrant, the warrant penalty may be waived.

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.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: October 15, 1987

NATURE OF ACTION:

Petition for refund of penalty imposed on late payment of a tax assessment, refund of additional interest found due, and refund of tax warrant penalty on the basis of nonreceipt of tax assessment.

FACTS AND ISSUES:

Krebs, A.L.J. -- . . . (taxpayer) is engaged in business as a masonry contractor.

The Department of Revenue examined the taxpayer's business records for the period from January 1, 1983 through June 30, 1986. As a result of this audit, the Department issued Tax Assessment No. . . . on February 24, 1987 asserting excise tax liability in the amount of \$ X and interest due in the amount of \$ X for a total sum of \$ X. The Tax Assessment had the following printed notations:

This is your tax assessment. Payment due March 21, 1987.
Important: A penalty of 10% of the tax due and additional interest at 9% per annum from issue date will be assessed if payment not received by March 21, 1987.

Because payment of the tax assessment was not received, the Department on April 23, 1987 sent a letter to the taxpayer which in pertinent part stated:

Tax Assessment No. . . .

The above tax assessment with explanation was previously mailed to you. Full payment was due March 21, 1987 and has not been received.

The unpaid balance including delinquent penalty [\$ X] and interest is \$ X. This amount must be received . . . no later than May 5, 1987. Delinquency beyond this date will cause the issuance of a warrant for your unpaid taxes. A tax warrant increases penalties and authorizes the Department of Revenue to enforce collection. (Bracketed number supplied.)

On June 5, 1987, the Department issued Tax Warrant No. . . . asserting liability as follows:

\$ X	Tax
X	Audit interest
X	Delinquent penalty (10% of tax)
X	Additional interest
X	Warrant penalty
<u>X</u>	
\$ X	Total due

The taxpayer has made payment in full of the \$ X plus \$ X additional interest.

The taxpayer seeks refund of the delinquent penalty of \$ X , the additional interest of \$ X and the warrant penalty of \$ X .

The taxpayer protests the delinquent penalty on the basis of nonreceipt of the tax assessment. The taxpayer asserts it received a phone call from the Department that payment had not been received. The taxpayer informed the Department that the tax assessment was never received. The taxpayer went to the Department's . . . office, received a copy of the tax assessment, and requested an extension of time for payment because it needed extra time to forward the copies of the audit report to two general contractors for reimbursement of sales taxes which they were obligated to make per subcontracts. The taxpayer was being held liable for the sales taxes per tax assessment. The taxpayer's request for extension of time was not granted by the Department.

The taxpayer protests the additional interest (\$ X) and warrant penalty (\$ X) because it was unreasonable since the taxes and interest per assessment had been paid.

The issue is whether, under the above described circumstances, the delinquent penalty, additional interest and warrant penalty can be canceled.

DISCUSSION:

[1] RCW 82.32.050, in mandatory terms, provides for a delinquent penalty of ten percent of the amount of tax found due by tax assessment when the tax assessment is not timely paid and for additional interest until date of payment. The statute in pertinent part states:

If upon examination of any returns or from other information obtained by the department it appears that a tax or penalty has been paid less than that properly due, the department shall assess against the taxpayer such additional amount found to be due and . . . shall add thereto interest at the rate of nine percent per annum . . . until date of payment. The department shall notify the taxpayer by mail of the additional amount and the same shall become due and shall be paid within ten days from the date of the notice, or within such further time as the department may provide. If payment 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. (Emphasis supplied.)

In this case, payment of the tax assessment, issued February 24, 1987, was due by March 21, 1987. Payment was not made by that date

causing the ten percent penalty (\$ X) and additional interest (\$ X) to date of payment to apply.

The legislature, through its use of the word "shall" in RCW 82.32.050, has made the assessment of the penalty and additional interest mandatory. The mere fact of nonpayment within a specified period of payment requires the penalty and interest provisions of RCW 82.32.050 to be applied.

As an administrative agency, the Department of Revenue is given no discretionary authority to waive or cancel penalties or interest. The only authority to waive or cancel penalties or interest is found in RCW 82.32.105 which in pertinent part provides:

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. The department of revenue shall prescribe rules for the waiver or cancellation of interest or penalties imposed by this chapter. (Emphasis supplied.)

[2] WAC 458-20-228 (Rule 228), . . . , states the only seven situations under which a cancellation of penalties and the two situations under which a cancellation of interest will be considered by the Department. None of the situations apply to the circumstances in this case.

The taxpayer's situation is that it allegedly never received the tax assessment by mail. After a phone call from the Department that payment had not been received, the taxpayer went to the Department's . . . office and received a copy of the tax assessment. The taxpayer asserts that if it had by mail received the assessment, it would have been timely paid.

RCW 82.32.130 in pertinent part provides:

Notwithstanding any other law, any notice or order required by this title to be mailed to any taxpayer . . . shall be addressed to the address of the taxpayer as shown by the records of the department of revenue, . . . Failure of the taxpayer to receive such notice or order whether served or mailed shall not release the taxpayer from any tax or any increases or penalties thereon. (Emphasis supplied.)

The Department mailed the notice of assessment to the taxpayer at its address of record. The failure of the taxpayer to receive it does not by itself release the taxpayer from the delinquency

penalty. The Department never received the mail back as undeliverable. We can only assume that the assessment reached its destination as mailed. The Department is authorized by statute, RCW 82.32.050, supra, to mail tax assessments. The underscored portion of RCW 82.32.130, quoted above, makes it clear that the taxpayer is precluded from denying liability for the delinquent penalty or additional interest based on a claim that a tax assessment notice was not received by mail. Accordingly, we must sustain the delinquent penalty and additional interest.

Relevant to the taxpayer's request for an extension of time to make payment, which request was denied by the Department, Rule 228, . . . , in pertinent part provides:

The department will grant a stay of collection only when it is satisfied and determines that it is in the best interests of the state to do so. Factors which it will consider in making this determination include: The existence of 1. a constitutional issue to be litigated by the taxpayer the resolution of which is uncertain; 2. a matter of first impression for which the department has little precedent in administrative practice; and 3. an issue affecting other similarly situated taxpayers for whom the department would be willing to stay collection of the tax.

Claims of financial hardship or threat of litigation are not grounds which would justify the granting of a stay of collection.

The taxpayer's request for an extension of time so that it could be reimbursed by two general contractors do not meet the criteria set forth in Rule 228.

We now turn our attention to the matter of the warrant penalty.

[3] RCW 82.32.210 in pertinent part provides:

If any tax, increase, or penalty or any portion thereof is not paid within fifteen days after it becomes due, the department of revenue may issue a warrant under its official seal in the amount of such unpaid sums, together with interest thereon at the rate of one percent of the amount of such warrant for each thirty days or portion thereof after the date of such warrant. If, however, the department of revenue believes that a taxpayer is about to cease business, leave the state, or remove or dissipate the assets out of which taxes or penalties might be satisfied and that any tax or penalty will not be paid when due, it may declare the tax or penalty to be immediately due and payable and may issue a warrant immediately. (Emphasis supplied.)

RCW 82.32.090 in pertinent part provides:

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 five percent of the amount of the tax . . .

In this case, the Department issued the tax warrant on June 5, 1987 asserting liability in the amount of \$ X which included the five percent warrant penalty of \$ X on unpaid taxes of \$ X . The taxpayer, prior to the warrant issuance date of June 5, 1987, had made payments on the following dates in the following amounts:

May 4, 1987	\$ X				
May 14, 1987	X				
May 22, 1987	<u>X</u>				
	\$ X	Total	(same	amount	as tax

assessment)

Thus, prior to the issuance of the warrant, the taxpayer had already paid the amount of the tax assessment, although under RCW 82.32.080 the Department is required to "apply the payment of the taxpayer first against penalties and interest, and then upon the tax, without regard to any direction of the taxpayer."

The statutory language in RCW 82.32.210, *supra*, that the Department "may issue a tax warrant" indicates that issuance is discretionary. The taxpayer's file discloses no compelling reason for issuance of the tax warrant. Furthermore, we take administrative notice that the Department has waived the warrant penalty where a taxpayer has made payment of the tax assessment even after the issuance of the tax warrant. In this case, the taxpayer has paid before the issuance of the tax warrant. Accordingly, we conclude that the taxpayer is entitled to a refund of the warrant penalty.

DECISION AND DISPOSITION:

The taxpayer's appeal is denied in part and sustained in part as indicated in this Determination.

The taxpayer's appeal with respect to the issue of delinquent penalty and additional interest is denied. The taxpayer's appeal with respect to refund of the warrant penalty is sustained. The file will be referred to the appropriate section of the Department for refund of the warrant penalty in the amount of \$ X plus statutory interest.

DATED this 18th day of November 1987.