

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 Correction of Tax Warrant of)	
)	No. 87-343
)	
. . .)	Registration No. . . .
)	Tax Warrant No. . . .
)	

[1] **RULE 228 AND RCW 82.32.090:** PENALTIES -- LATE PAYMENT OF TAXES DUE -- EMPLOYEE'S FAILURE TO PERFORM DUTIES. Where taxpayer's employees erroneously performed their duties by not budgeting for payment of taxes, the circumstance was not beyond the control of the taxpayer. Penalties sustained.

[2] **RCW 82.32.090:** TAX WARRANT -- PENALTY -- WAIVER OF PENALTY. Where taxpayer was delinquent in payment of taxes and penalties due for an extended period of time resulting in issuance of a tax warrant to enforce collection, the five percent warrant penalty is sustained.

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

Petition seeking cancellation of penalties imposed on delinquent filing of tax returns and cancellation of a tax warrant penalty.

FACTS AND ISSUES

Krebs, A.L.J. -- . . . (taxpayer) is engaged in general contracting and construction.

The taxpayer filed the Combined Quarterly Excise Tax Return for the tax period January 1, 1986 through March 31, 1986 (Q1-86) on May 27, 1986 without payment of the tax. The return and payment were due April 30, 1986. The Department assessed a 20 percent delinquent penalty in the amount of \$ X .

The taxpayer filed the monthly tax return for April 1986 on June 25, 1986 without payment of the tax. The return and payment were due May 25, 1986. The Department assessed a 10 percent delinquent penalty in the amount of \$ X .

The taxpayer filed the monthly tax return for May 1986 on June 25, 1986 without payment of the tax. The return and payment were due June 25, 1986. The Department assessed a five percent delinquent penalty in the amount of \$ X .

On July 10, 1986, the Department issued Tax Warrant No. . . . asserting liability as follows:

\$ X	taxes owed
X	delinquent penalties
<u>X</u>	warrant penalty (5% on taxes owed)
\$ X	total due

The taxpayer then entered into a partial payment plan with the Department for payment of amounts due.

The taxpayer protests imposition of the delinquent penalties and warrant penalty which total \$ X on the basis that it fell behind in its tax payments because its "employees responsible for making the tax payments were not versed in the deposit requirements and did not budget for the payment of sales taxes."

The issue is whether, under the above described circumstances, the delinquent penalties and warrant penalty can be abated.

DISCUSSION

[1] RCW 82.32.090, in pertinent part, provides:

If payment of any tax due 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. (Emphasis supplied.)

In this case, payment of the tax due on April 30, 1986, on May 25, 1986 and on June 25, 1986 were not received by the due dates. Accordingly, the penalty provisions of RCW 82.32.090 applied.

The legislature, though its use of the word "shall" in RCW 82.32.090, has made the assessment of the penalty mandatory. The mere fact of nonpayment within a specific period of payment requires the penalty provisions of RCW 82.32.090 to be applied.

As an administrative agency, the Department of Revenue is given no discretionary authority to waive or cancel penalties. The only authority to waive or cancel penalties 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.)

Administrative Rule WAC 458-20-228 (Rule 228), . . . , states the only seven situations under which a cancellation of penalties will be considered by the Department. None of the seven situations apply to the taxpayer except possibly situation seven which states:

7. 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 taxpayer has never been delinquent filing a tax return prior to this occurrence, unless the penalty was excused under one of the preceding six circumstances, and

c. 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, and delays or losses related to the postal service.

d. The delinquency will be waived under this circumstance on a one-time basis only. (Emphasis supplied.)

All conditions, 7a through 7c, must be fulfilled to satisfy situation 7 for cancellation of the penalty. The three conditions, 7a through 7c, are connected by the word "and." The effect of that is that the requirements posed in each of those three conditions must be satisfied to create a "circumstance beyond the control of the taxpayer" which will justify a cancellation of the penalty.

Condition 7a has not been met because "full payment of the tax due" was not received within 30 days after the due date.

Condition 7b has not been met. Our examination of the taxpayer's file discloses that the taxpayer has previously been delinquent in filing tax returns. Specifically, the taxpayer's Q4-85 return was due January 31, 1986 but was received on March 21, 1986 and incurred a ten percent penalty. Also, the taxpayer's Q3-85 return was due October 31, 1986 but was received on February 11, 1986 and incurred a twenty percent penalty.

Thus, while condition 7c may have been met because the taxpayer's employees were delinquent in erroneously performing their duties by not budgeting for payment of taxes, nevertheless all three conditions, 7a through 7c, must be fulfilled to satisfy situation 7 for cancellation of the penalties. Furthermore, the Department has always considered inadequate performance, standing alone, by a taxpayer's employee to be a circumstance entirely within the control of the taxpayer. RCW 82.32.105, Rule 228.

We conclude that, because conditions 7a and 7b were not met, there was no "circumstance beyond the control of the taxpayer" justifying an abatement of the penalties.

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

RCW 82.32.090 further provides in pertinent part:

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 . . . (Emphasis supplied.)

Again, the use of the word "shall" has made the assessment of the warrant penalty mandatory. In this case, the taxpayer was delinquent in payment of the taxes due for an extended period of time from April 30, 1986 through June 25, 1986, the due dates, and into July 1986. The tax warrant was issued on July 10, 1986 to enforce collection of past due taxes and penalties which had accrued to a substantial amount of \$ X . None of Rule 228's seven situations for waiver or cancellation of penalties apply to the taxpayer with respect to the warrant penalty.

For the reasons stated and the applicable law, the delinquent penalties and warrant penalty assessed were proper and cannot be abated.

It may assuage the taxpayer to recognize that it has not been charged interest upon monies due the state earlier which by reason of nonpayment have been at the use and disposal of the taxpayer.

DECISION AND DISPOSITION

The taxpayer's petition is denied. The file is being referred to the Department's Compliance Section relevant to enforcement of the tax warrant.

DATED this 18th day of November 1987.