

Cite as 4 WTD 37 (1987)

BEFORE THE INTERPRETATION AND APPEALS SECTION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition )	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u>
<u>N</u>	
For Correction of Assessment of)	
)	No. 87-272
)	
. . . )	Registration No. . . .
)	Tax Assessment No. . .
.	
)	

[1] **RULE 228 AND RCW 82.32.090:** PENALTY -- LATE PAYMENT  
-- UNREGISTERED TAXPAYER -- UNKNOWN TAX LIABILITY.  
Where taxes were assessed against a taxpayer for  
time period when not registered, Rule 228's  
situation 7 is not applicable to excuse penalty. It  
applies only to late tax returns where payment is  
made within 30 days after the due date. Lack of  
knowledge of tax law changes is not a basis for  
abating penalty.

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: . . .

NATURE OF ACTION:

Petition for cancellation of penalty imposed on delinquent  
taxes assessed against an unregistered taxpayer who was not  
aware of tax liability.

FACTS AND ISSUES:

Krebs, A.L.J. -- [The taxpayer] is in the business of  
providing long distance telephone service, that is, "network  
telephone service" as defined in WAC 458-20-245 (Rule 245)

which includes "toll service" which means the charge for services outside the local telephone network.

The taxpayer was incorporated in Oregon on February 10, 1983 and is based in . . . , Oregon. The taxpayer has no facilities in Washington. The taxpayer began actual business activities in March 1983. In September 1985, the Department's auditor first contacted the taxpayer who was not registered. The taxpayer subsequently registered in March 1986.

The Department of Revenue examined the taxpayer's business records for the period from July 1, 1983 through December 31, 1985. As a result of this audit, the Department issued Tax Assessment No. . . . on April 3, 1986 asserting excise tax liability in the amount of \$ . . . , interest due in the amount of \$ . . . and penalty due in the amount of \$ . . . for a total sum of \$ . . . . On April 21, 1986, the taxpayer made payment in the amount of \$ . . . and the balance remains due.

In seeking the abatement of the \$ . . . penalty, the taxpayer has furnished the following information and explanation. The taxpayer has made every good faith attempt to file all reports and returns and to pay all taxes and fees to all Departments and entities in the State of Washington on a timely basis. When the taxpayer first investigated its tax liability to Washington in February 1983, it alleges that it correctly determined that there was no liability at that time. The taxpayer points out that it was not aware nor received any notice from the Department of the change in the tax law that affected it as of July 1983.

The taxpayer believes that situation 7 of WAC 458-20-228 (Rule 228), . . . , applies to excuse the penalty on the basis that the "taxpayer has never been delinquent filing a tax return" and the "the delinquency was the result of an unforeseen and unintentional circumstance, not immediately known to the taxpayer." The taxpayer asserts that it had no idea the law would be changed within four months after it commenced business. Therefore, the taxpayer asserts that the change in law was unforeseen. Being unaware of the tax law change, the taxpayer declares that the delinquency was unintentional.

The issue is whether the penalty should be waived under the above described circumstances.

#### DISCUSSION:

RCW 82.32.290 provides:

It shall be unlawful for any person to engage in business without having obtained a certificate of registration as provided herein;

. . .

Any person violating any of the provisions of this section shall be guilty of a gross misdemeanor.

It is each individual's responsibility to be aware of any tax implications resulting from activities conducted within this state. Department of Revenue personnel are available to answer any inquiries pertaining to such matters and information is readily available. The taxes imposed by the Revenue Act are of a self-assessing nature and the burden is placed upon a business to correctly inform itself of its obligations under the Act.

Thus, the taxpayer should have filed the Application for Certificate of Registration in 1983 and filed regular excise tax returns thereafter. Had this happened, the taxpayer would have avoided being delinquent and the resultant build-up of past due taxes and consequential penalties.

The statute as recited below makes mandatory the assessment of penalties upon delinquent payment of taxes.

RCW 82.32.090 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.)

The legislature, through 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 specified 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.)

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 although the taxpayer contends that it qualifies under situation 7 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.

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.

Situation 7 applies only to penalties assessed because of a late tax return, not a late payment where the taxpayer, as in this case, was not registered and had not filed any tax returns at all. Furthermore, in this case, full payment of taxes due was not made within 30 days after the due date (condition 7a), that is, the due dates during the years of 1983 through 1985.

The Department recognizes that some businesses do not register because of a misunderstanding or inadvertence. Where a misrepresentation, fraud or intent to evade taxes is found, an additional fifty percent evasion penalty is assessed under the provisions of RCW 82.32.050. In this case, there was no finding to warrant imposition of the evasion penalty.

The taxpayer has contended that it did not know that the law affecting its operations and tax liability was changed in July 1983. As noted above, the Department does try to provide information to taxpayers. Business taxes, however, are self-assessing in nature. The ultimate responsibility for properly reporting taxes rests on persons in business. The Department is not required to make sure every business knows its tax liability although it tries to do so by media publicity. It is unfortunate that the taxpayer located in [Oregon], a few miles from Washington's border city of . . . , did not become aware of the tax law change which was widely circulated at the time in 1983 via . . . media of newspapers, radio and television. In any event, the Department did not contribute to the taxpayer's mistake in not registering at that time and in not paying timely the taxes when due.

For the reasons stated and the applicable law, we conclude that the delinquent penalty assessed was proper and cannot be abated.

#### DECISION AND DISPOSITION:

The taxpayer's petition is denied. Because the delay in the issuance of this Determination was solely for the convenience of the Department, extension interest will be waived from

December 5, 1986 through the new due date. The amount remaining owing on Tax Assessment No. . . . of \$ . . . , plus unwaived extension interest in the amount of \$ . . . , for a total of \$ . . . is due for payment by September 18, 1987.

DATED this 19th day of August 1987.