

Cite as 4 WTD 107 (1987)

BEFORE THE INTERPRETATION AND APPEALS SECTION
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 Assessment)	
)	No. 87-302
)	
. . .)	Registration No. . . .
)	Notice of Balance Due
)	

[1] **RULE 228 AND RCW 82.32.090:** PENALTY -- LATE PAYMENT OF TAX DUE -- CONFUSION -- BEYOND CONTROL OF TAXPAYER. It is not beyond control of taxpayer when confusion at its liquidation and closing activities causes a late payment of taxes. Situation 7 of Rule 228 does not apply where taxpayer was previously delinquent and delinquency was not excused under Rule 228's situations 1 through 6.

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 waiver of five percent penalty assessed because of late payment of tax due.

FACTS AND ISSUES:

Krebs, A.L.J. -- [The taxpayer] was engaged in the retailing of groceries. The taxpayer ceased operations on November 15, 1986 and the Department closed the taxpayer's registration effective that date.

The Combined Monthly Excise Tax Return for the period of October 1986 was due by November 25, 1986. The taxpayer completed the tax return on December 4, 1986. The Department received the tax return on December 10, 1986 with payment of tax due in the amount of \$. .

..

On February 20, 1987, the Department issued a Notice of Balance Due which imposed a five percent penalty of \$. . . for late payment and it remains unpaid.

The taxpayer seeks waiver of the five percent penalty on the basis that the delinquent filing was caused by confusion surrounding its closing activities connected with its liquidation and having no assets.

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

DISCUSSION:

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 November 25, 1986 was not received by the Department until December 10, 1986. The tax return was dated December 4, 1986 which already made it past due. Accordingly, the five percent penalty provision of RCW 82.32.090 applied.

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 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.

While condition 7a has been met because the tax return and payment were received by the Department within 30 days after the due date, our examination of the taxpayer's file discloses that the taxpayer has previously been delinquent filing a tax return. Thus, condition 7b has not been met. Specifically, the taxpayer's August 1981 return was due September 30, 1981 but was dated October 20, 1981 and received on October 22, 1981. In that instance, the penalty was excused but not "under one of the preceding six circumstances." The reason given by the taxpayer for the late filing of the August 1981 return was that notification from its accountant that payment was due was lost in the mail. This circumstance is not within any of "six preceding circumstances."

Furthermore, condition 7c has not been met. The confusion surrounding the taxpayer's closing activities connected with its

liquidation, while perhaps an unforeseen and unintentional circumstance, cannot be said to have been not immediately known to the taxpayer. In other words, while the taxpayer cannot foresee or intend confusion at its closing activities, the confusion would be immediately known to the taxpayer.

We conclude that because condition 7b and 7c were not met there was no "circumstance beyond the control of the taxpayer" justifying a waiver of the penalty.

For the reasons stated and the applicable law, the delinquent penalty assessed was proper and cannot be waived.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 11th day of September 1987.