

Cite as 4 WTD 359 (1987)

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

|                                 |   |
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| 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 Refund of )                 |   |
| )                               | No. 87-367  |
| )                               |   |
| . . . )                         | Registration No. . . .  |
| )                               | Tax Assessment No. . . .  |
| .                               |   |
| )                               |   |

[1] **RULE 228, RCW 82.32.050, RCW 82.32.090 AND RCW 82.32.105:** PENALTY -- LATE PAYMENT -- ASSESSMENT -- F.I.D. Rule 228 applies to the late payment/filing of a tax return, not to the late payment of a tax assessment. The criterion for waiver of penalty in the latter situation is simply the statutorily-stated "circumstances beyond the taxpayer's control." Oversight by a taxpayer employee does not satisfy that criterion.

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 penalty imposed for the late payment of a tax assessment.

FACTS AND ISSUES:

Dressel, A.L.J. -- . . . (taxpayer) is engaged in a business which is adequately described in its name. Its books and records were examined by the Department of Revenue (Department) for the period January 1, 1983 through March 31, 1987. As a result, the above-referenced tax assessment in the amount of \$ . . . was issued July 28, 1987. The computer-

generated notice of said assessment stated plainly that payment was due August 27, 1987.

Payment, however, was not received by August 27, 1987. The taxpayer employee responsible for taxes had never before experienced an audit and was unfamiliar with the Department's procedure for billing tax deficiencies determined as the result of an audit. When she received the notice of assessment, she did not think it was a "bill." She thought it was a computer print-out recap of the audit results and that she would receive a separate billing statement to which she intended to promptly respond. The next "statement" she got apparently was a phone call from the Department on October 7, 1987 during which she was advised of the tax delinquency and of the fact that a late payment penalty had been added to increase the past-due total to \$ . . . . A check in that amount arrived at the Department's Kelso office the following day.

By this petition the taxpayer is asking for a waiver of the aforementioned penalty. The taxpayer employee stresses that the late payment was simply an oversight. It resulted at least in part from the relationship the taxpayer had with a local CPA firm. Typically, that firm computed the taxpayer's monthly state tax obligation and sent the taxpayer a memo directing it to pay a certain amount by a certain date. The taxpayer employee apparently thought that the assessment amount had been added by the CPA firm to the tax return filed for a previous month. The taxpayer has never been tardy with a previous tax payment and takes pride in paying its debts in a timely fashion.

Whether waiver of penalty can be granted under these circumstances is the sole issue in this case.

#### DISCUSSION:

RCW 82.32.050 reads:

**Deficient and delinquent payments--Penalties and interest--Limitations.** 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 as to assessments made on and after May 1, 1965, including assessments for additional tax or penalties due prior to that date

shall add thereto interest at the rate of nine percent per annum from the last day of the year in which the deficiency is incurred 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 added.)

[1] Use of the word "shall" in the statute is indicative of the legislature's intent that the penalty be mandatory. There is, however, another statute which authorizes the waiver of penalties where late payment is due to circumstances beyond a taxpayer's control. RCW 82.32.105. The same statute authorizes the Department to prescribe Rules for such waiver. The Department has done that in WAC 458-20-228 (Rule 228) for penalties imposed under RCW 82.32.090 and interest imposed under RCW 82.32.050. The rule reads in part:

The department will waive or cancel the penalties imposed under RCW 82.32.090 and interest imposed under RCW 82.32.050 upon finding that the failure of a taxpayer to pay any tax by the due date was due to circumstances beyond the control of the taxpayer.

Here, however, where the issue is a tax assessment as opposed to a regular tax return, the authority for the 10% late payment penalty is RCW 82.32.050. The seven circumstances of Rule 228 do not apply to this kind of penalty. The rule applies to interest charged under RCW 82.32.050 but not to penalties imposed under the same statute. The only penalties to which Rule 228 applies are those imposed for the late filing/payment of a tax return which penalties are authorized under RCW 82.32.090.

Having determined that the administrative Rule is not controlling, we revert to the statutory authority for waiver of penalties which is RCW 82.32.105. It states in part:

**Waiver or cancellation of interest or penalties.** 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.

. . .

Because the Rule does not tell us exactly what "circumstances beyond the control of the taxpayer" are where a tax assessment is at issue, we are left to figure it out ourselves on a case by case basis. In the one presently before us, the taxpayer's employee either overlooked the deadline on the notice of assessment or did not take it seriously because she thought either she would get another billing or the firm's CPAs had already included the assessment in a previous payment made by the taxpayer. While we understand the mix-up and how it could have occurred, we do not think it rises to the level of a "circumstance beyond the control of the taxpayer."

We confirmed the taxpayer's statement that it has not previously been tardy with a state excise tax payment. Its record in that regard is exemplary. On the other hand, the notice of assessment that the taxpayer thought was not a bill plainly and prominently states that it is, that a penalty would be imposed if it was not paid by August 27, and that a copy of the notice should accompany the payment. The name and telephone number of a Department employee is even listed for the taxpayer to call in the event of questions. Surely all of that information is a least enough to alert the taxpayer that either an inquiry to its accountant or the Department was advisable. Still, we regret that the above-referenced authority does not furnish us with the latitude to provide the relief requested, in light of the taxpayer's excellent record and immediate response to the Department's telephonic notice of delinquency.

#### DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 18th day of December 1987.