

Cite as 5 WTD 5 (1988)

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. 88-13
)	
. . .)	Registration No. . . .
)	Notices of Balance Due

[1] **RULE 228 AND RCW 82.32.090:** PENALTIES -- LATE PAYMENT OF TAXES DUE -- EMPLOYEE'S MISCONDUCT -- CIRCUMSTANCE BEYOND CONTROL OF TAXPAYER. Where taxpayer's employee neglected duty to file tax returns and engaged in other misconduct, the circumstances were not beyond the control of the taxpayer. Late payment penalties sustained. Where Department in error assessed a late payment penalty on a tax return which was timely filed, the penalty is rescinded.

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: December 18, 1987

NATURE OF ACTION:

Petition for waiver of penalties assessed on late payment of taxes due.

FACTS AND ISSUES:

Krebs, A.L.J. -- . . . (taxpayer) is engaged in the business of rendering interior design services. The taxpayer was incorporated and commenced business activities on July 2, 1985. The taxpayer registered with the Department of Revenue in July 1985 and was assigned a quarterly basis for filing tax returns. The taxpayer filed past due quarterly tax returns with payment of taxes on July 31, 1986 for the quarterly periods against which the Department assessed late payment penalties and issued Notices of Balance Due tabulated below:

<u>Tax</u> <u>Return</u>	<u>Due</u>	<u>Filed and</u> <u>Tax Paid</u>	<u>Penalty</u> <u>Applied</u>	<u>Amount of</u> <u>Penalty</u>	<u>Notice</u> <u>Issued</u>
Q3-85	10-31-85	7-31-86	20%	[X]	10-10-86
Q4-85	1-31-86	7-31-86	20%	[X]	10-10-86
Q1-86	4-30-86	7-31-86	20%	[X]	10-10-86
Q2-86	7-31-86	7-31-86	20%	[X]	10-10-86
				\$ [X]	

On March 12, 1987, the taxpayer paid the total amount (\$ [X]) of the penalties assessed with a cashier's check in the amount of \$ [X] which included \$ [X] in taxes owing on the Q3-85 return. It is noted that the Q2-86 tax return was due on July 31, 1986 and it was timely filed with payment on July 31, 1986. The Department has acknowledged that the penalty of \$[X] was improperly assessed.

In requesting waiver of the penalties assessed, the taxpayer states that the late filings of the tax returns were caused by the following circumstances. The taxpayer hired an individual, . . . , in July 1985 as exclusive sales agent. He was given also the responsibility to file tax returns and update records. He did not perform these duties properly. The taxpayer believes he discarded late notices from the Department. In December 1985, the taxpayer discovered that [he] was engaged in embezzlement of its funds and other improper activities. The taxpayer then terminated his employment and retained an attorney to seek legal redress. The attorney secured a confession of judgment in February 1986 from [him] in the amount of \$[X] "for monies improperly diverted." The taxpayer then had its records updated by the accounting office of an affiliated company which took considerable time to accomplish.

The taxpayer asserts that it made a good faith and honest effort to rectify the late filing situation caused by the misconduct of an employee.

The issue is whether the late payment penalties can be waived under the above-described circumstances.

DISCUSSION:

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

RCW 82.32.090 provides in pertinent part:

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, the taxpayer filed the Q3-85, Q4-85 and Q1-86 excise tax returns after the due dates. Accordingly, the statutory penalty provisions 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 for 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 the tax returns and payments were not received "within 30 days after the due date." Thus while condition 7c has been met because of the "misconduct of the taxpayer's employee," nonetheless that is not sufficient to entirely satisfy situation 7.

We are sympathetic to the taxpayer's problem that the tax payment delinquency, in spite of its good faith and honest effort, was basically caused by the misconduct of its employee. However, the conduct of and performance by an employee is a circumstance strictly within the control of the taxpayer-employer and has been uniformly so held by the Department of Revenue.

We conclude that there was no "circumstance beyond the control of the taxpayer" justifying a waiver of the penalties with respect to the late filing of the returns for Q3-85, Q4-85 and Q1-86.

With respect to the Q2-86 tax return which was timely filed, the assessment of a delinquent penalty in the amount of \$ [X] was improper and is hereby rescinded.

DECISION AND DISPOSITION:

The taxpayer's petition is sustained in part and denied in part.

DATED this 22nd day of January 1988.