

Cite as 5 WTD 383 (1988)

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

In the Matter of the Petition )  
For Correction of Assessment of)

D E T E R M I N A T I O N

No. 88-204

Registration No. . . .

Notice of Balance Due

. . .

[1] **RULE 228 AND RCW 82.32.080:** PENALTIES -- TIMELINESS --  
MAILED PAYMENTS -- POSTMARK. Payment deemed timely where  
substantial evidence presented that payment was mailed on  
due date and where Department discarded postmarked  
envelope. Accord: Determination No. 86-257, 1 WTD 195  
(1986).

[2] **RULE 228 AND RCW 82.32.090:** PENALTIES -- TAX RETURN --  
PARTIAL PAYMENT. Where a taxpayer sends only a portion  
of the tax due with its tax return, the late-payment  
penalty is to be applied only against the deficiency.

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: June 10, 1987

NATURE OF ACTION:

Petition for partial waiver of late payment penalty based on the  
contention that a portion of the tax was paid prior to the due  
date.

FACTS AND ISSUES:

Dressel, A.L.J. -- . . . (taxpayers) own and operate an ice cream  
parlor and restaurant known as . . . . They have been assigned by  
the Department of Revenue (Department) a monthly reporting period  
for the filing of their state excise tax returns. With their  
return for August, 1986 they included only a partial payment of the

tax owed. Subsequently, the Department mailed them a notice of balance due for the unpaid amount. In addition the Department added a 5% late-payment penalty calculated on the total tax originally due for August, 1986. The taxpayers contend that the tax return with partial payment was timely filed and that, therefore, the 5% late-payment penalty should have been applied only to the unpaid portion of their August tax liability.

It is claimed by the taxpayers that the subject tax return was mailed on September 25, 1986, the due date. They were aware that the payment included was deficient by \$ . . . but had no choice but to send a "short" payment as their accounts receivable for that month were slow to be received. The tax return with partial payment was mailed on September 25, 1986 at the same post office annex and at the same hour as has been done for five years.

The issues are two: (1) whether the return was filed on time; and, if so, (2) whether the penalty should have been applied to the total tax due for the month.

#### DISCUSSION:

[1] A return or remittance which is transmitted to the Department by United States mail shall be deemed filed or received on the date shown by the post office cancellation mark stamped upon the envelope containing it. RCW 82.32.080. For monthly reporting taxpayers, tax returns are due on the 25th day of the month following the month for which the return is filed. WAC 458-20-228 (Rule 228).

In this case, the taxpayers claim they put the return in the mail on September 25. If the return was postmarked that date, the filing would be timely. Unfortunately, that can never be established because it is the Department's policy to discard upon receipt envelopes bearing excise tax returns. There are several factors, however, that tend to corroborate the taxpayer's story. First of all, under the taxpayer's signature on the return is written the date of September 23, 1986. Secondly, there is a handwritten notation on the tax return, apparently written by a Department employee, which reads in part "9-29-86 short pay." That would seem to indicate that somebody from the Department "processed" the return on that date. If the return was mailed on September 25, 1986 which fell on a Thursday, it is quite likely that the following Monday, September 29, would be the first working day on which the Department could process the tax form. Finally, an examination of other monthly returns filed by the taxpayers indicates that many were sent on the actual due date but none resulted in late-payment penalties by the Department.

Taking these factors into consideration, including the fact that the Department has, as a matter of routine, thrown away the

probative evidence of the post-marked envelope, we find that the taxpayers' August, 1986 tax return was timely filed.<sup>1</sup>

[2] Having determined that the return was timely, we next examine whether the 5% late-payment penalty should have been imposed against the total tax due for the month or against only the unpaid portion. The statutory authority for late-payment penalties is RCW 82.32.090 which states, "If payment of any tax due is not received by the Department of Revenue by the due date, there shall be assessed penalty of five percent of the amount of the tax . . . ." We think that the reasonable construction of that statute as applied to the instant situation is that a portion of the tax due was received by the due date so that portion, therefore, is not subject to a penalty. In addition, although neither RCW 82.32 or Rule 228 specifically discuss how a partial payment made on a tax return is to be treated, it is not logical or practical to submit such a partial payment to the same penalty that would be imposed if the taxpayer were to make no payment at all. Partial payments are better than no payments, and it makes no sense for the Department to discourage the former which is, in effect, what they would be doing if they were to impose the late-payment penalty on the total tax due for the month. We, therefore, rule that such penalty may only be applied against the deficient portion of the periodic tax payment. The language of RCW 82.32.090 is, thus, interpreted to mean, " . . . there shall be assessed a penalty of five percent of the amount of the tax . . . ." *which is unpaid.* (Italics ours.)

#### DECISION AND DISPOSITION:

The taxpayer's petition is granted. A credit will be issued in the amount of the error.

DATED this 29th day of April 1988.

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<sup>1</sup> For a discussion of the evidentiary effect of the Department's policy of discarding envelopes, please see 1 WTD 195 (1986).