

Cite as 5 WTD 133 (1988)

BEFORE THE INTERPRETATION AND APPEALS DIVISION  
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)	
)	No. 88-142
)	
. . . )	Registration No. . . .
)	Notice of Balance Due
)	

[1] **RULE 228 AND RCW 82.32.090:** PENALTY -- LATE PAYMENT OF TAX DUE -- CONFUSION CAUSED BY MOVE -- BEYOND CONTROL OF TAXPAYER. It is not beyond the control of the taxpayer when confusion arising out accountant's move to another office caused late payment of the tax due. 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 late payment penalty assessed on the late filing of a monthly tax return.

FACTS AND ISSUES:

Krebs, A.L.J. -- . . . (taxpayer) is engaged in wholesaling and retailing furniture. The taxpayer filed the July 1987 monthly tax return, due August 25, 1987, on August 31, 1987. The tax return was received by the Department on September 1, 1987 with payment of the tax due.

On November 6, 1987, the Department of Revenue issued a Notice of Balance Due assessing a five percent late payment penalty in the amount of \$ . . . because of the late filing of the July 1987 tax return. The penalty has not been paid and remains due.

In requesting waiver of the penalty assessed, the taxpayer states that the late filing was caused by the following circumstances. The taxpayer's accounting department was disrupted due to a relocation of its offices. The controls to assure the timely filing broke down when the tax return and its accompanying work schedules were boxed up for the move of the office. The taxpayer's accountant failed to remind the staff of the filing due date.

The taxpayer believes it should be granted a waiver of the late penalty under situation 7 of WAC 458-20-228 (Rule 228), . . . , for the following reasons:

- a) The return was received by the department with full payment of tax due within thirty days after the due date.
- b) The taxpayer has not been delinquent in filing a tax return prior to this instance except when the penalty was excused under WAC 458-20-228 No. 4 per the department's letter dated February 4, 1986.
- c) The delinquency was the result of an unforeseen and unintentional circumstance.

The issue is whether the late payment penalty can be waived under the above-described circumstance and Rule 228's situation 7.

#### DISCUSSION:

[1] 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 by

assessed a total penalty of twenty percent of the amount of the tax. (Emphasis supplied.)

In this case, payment of the tax due on August 25, 1987 was not received by the due date. Accordingly, the 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 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 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. (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 7b has not been met. Our examination of the taxpayer's file discloses that the taxpayer has previously been delinquent filing a tax return prior to this occurrence where the penalty was not excused. Specifically, the taxpayer's November 1981 tax return was due December 25, 1981 but was filed on January 20, 1982 and incurred a five percent penalty not excused. Additionally, the taxpayer's April 1983 tax return was due May 15, 1983 but was filed on June 3, 1983 and incurred a five percent penalty not excused.

Thus, while condition 7a and 7c may have been met, nevertheless all three conditions, 7a through 7c, must be fulfilled to satisfy situation 7 for cancellation or waiver of the penalty. Furthermore, the Department has always considered inadequate performance, standing alone, by a taxpayer's employee or outside accountant to be a circumstance entirely within the control of the taxpayer. RCW 82.32.105 and Rule 228.

We conclude that, because condition 7b was 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 was proper and cannot be waived.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 29th day of February 1988.