

Cite as 5 WTD 229 (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 of)	
)	No. 88-161
)	
)	Registration No. . . .
. . .)	Notice of Balance Due
)	
)	

[1] **RULE 228, RCW 82.32.090 AND RCW 82.32.105:** PENALTY -- LATE PAYMENT OF TAX DUE -- UNREGISTERED TAXPAYER -- TELEPHONE REQUESTS FOR TAX RETURN FORMS -- MISTAKEN BELIEF. Where taxpayer failed to register in a timely manner and requested tax returns by telephone, the late payment of taxes due cannot be excused per Rule 228's situation 6. Nor does Rule 228's situation 7 apply where prior returns have been delinquent and not excused. Taxpayer's mistaken belief that it will be on a quarterly or annual reporting basis does not excuse penalty when taxpayer is placed on a monthly basis at time it registers.

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 1, 1987

NATURE OF ACTION:

Petition for cancellation of penalties assessed because of late filings of monthly tax returns.

FACTS AND ISSUES:

Krebs, A.L.J. (successor to Rosenbloom, A.L.J.) -- . . . (taxpayer) is engaged in business as a broker-dealer of securities. The taxpayer commenced business activities in Washington on October 6, 1986. The taxpayer registered with the Department of Revenue (Department) on December 22, 1986.

The taxpayer filed its monthly tax return for October 1986, due November 25, 1986, on February 4, 1987. The Department assessed on April 3, 1987 a 20 percent late penalty in the amount of \$. . . which remains unpaid.

The taxpayer filed its monthly tax return for November 1986, due December 25, 1986, on February 4, 1987. The Department assessed on April 3, 1987 a 10 percent late penalty in the amount of \$. . . which remains unpaid.

The taxpayer filed its monthly tax return for December 1986, due January 25, 1987, on February 4, 1987. The Department assessed on April 3, 1987 a 5 percent penalty in the amount of \$

In requesting waiver of the penalties assessed, the taxpayer states that the late filings were caused by the following circumstances. Unintentionally, the taxpayer registered late due to "hectic working conditions" and a mistaken belief that all companies filed on a quarterly or annual basis. The taxpayer's three related subsidiary companies file tax returns on a quarterly or annual reporting basis. They all file in a timely manner. In late December 1986 and in January 1987, the taxpayer phoned 3 or 4 times and requested blank tax returns. On one of these calls, the taxpayer was surprised to learn that it had been assigned a monthly basis to file tax returns.

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

DISCUSSION:

WAC 458-20-101 (Rule 101) in pertinent part provides:

(18) Penalties for noncompliance. The law provides that it shall be unlawful for any person to engage in any business without having obtained a certificate of registration. To do so constitutes a gross misdemeanor.

Thus, the taxpayer should have filed the Application for Certificate of Registration in October 1986 when it commenced business activities. Instead, it registered on December 22, 1986. Accordingly, the October 1986 tax return due November 25, 1986 was already delinquent, and the November 1986 tax return due December 25, 1986 was destined to be delinquent unless the taxpayer appeared personally to obtain and complete the tax return by December 25th.

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

In the case, payment of the taxes due on November 25, 1986, December 25, 1986 and January 25, 1987 were not received by the Department by the due dates. 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. The taxpayer does not meet the conditions set forth in the seven situations. The taxpayer, per situation 6, did not make timely application in writing for proper forms. The monthly tax return for December 1986, per situation 7, while filed within the five percent penalty period, was filed at a time when the taxpayer was already delinquent on prior returns. Rule 228, situation 7b.

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.

It is noted that the taxpayer, having registered on December 22, 1986, received the January 1987 tax return in a timely manner. This tends to show that if the taxpayer had timely registered before October 6, 1986 when it commenced business it would have received the tax returns for October through December 1986 in the same timely manner.

We are sympathetic to the taxpayer's taking for granted that all taxpayer's file tax returns on a quarterly or annual basis. This mistaken belief is a circumstance entirely within the control of the taxpayer. Accordingly, such circumstance cannot be a basis for cancellation of penalties. RCW 82.32.105.

For the reasons stated and the applicable law, we conclude that the assessed late payment penalties were proper and cannot be waived.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 23rd day of March 1988.