

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

In the Matter of the Petition     )     D E T E R M I N A T I O N  
For Refund of                     )  
                                   )             No. 89-1  
                                   )  
                                   )     Registration No.     . . . .  
                                   )     . . . /Audit No.     . . . .  
                                   )     Warrant No.     . . . .  
                                   )

**RULE 217, RULE 228:** WARRANT PENALTY -- WARRANT ISSUED BUT NOT FILED. The warrant penalty imposed by RCW 82.32.090 is effective upon the issuance of a warrant. The fact that a warrant is not filed in superior court does not void the penalty. Issuance and filing are separate acts under RCW 82.32.210. F.I.D.

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: September 7, 1988

NATURE OF ACTION:

The taxpayer petitioned for a refund of a ten percent assessment delinquency penalty and a five percent warrant penalty paid in connection with an assessment issued after an audit of the taxpayer's business activities.

FACTS AND ISSUES:

Potegal, A.L.J. -- The taxpayer was audited for the period from January 1, 1980 through December 31, 1983. The process of conducting and completing the audit took an unusually long time for a variety of reasons. The Department of Revenue accepted some of the responsibility for this and, for a portion of the period between the end of the audit period and the due date of the assessment, waived interest on the amount assessed. Ultimately, an assessment was issued to the taxpayer on December 1, 1987. The

face of the assessment stated that it was due for payment by December 31, 1987 and that a penalty of ten percent of the tax due would be assessed if payment was not received by December 31, 1987.

The taxpayer received the assessment when it was issued. A check in the amount of the assessment was prepared prior to delinquency but was not sent to the Department. The taxpayer has explained that this was because the taxpayer's business was shut down at the end of December, the taxpayer was gone for most of December, and the bookkeeper wasn't sure when to mail the check.

On January 27, 1988, the Department mailed the taxpayer a letter stating that payment of the assessment had not been received. The letter asked for payment by February 8, 1988. It advised that delinquency beyond that date would lead to the issuance of a warrant for unpaid taxes and that a tax warrant increases penalties.

On March 1, 1988, the Department, having no response, mailed another letter, by certified mail with return receipt, to the taxpayer. The letter asked for payment of the unpaid balance of the assessment including delinquent penalty and interest. It asked for payment by March 7, 1988. It again advised that delinquency beyond that date would lead to the issuance of a warrant and that a warrant increases penalties.

On March 14, 1988, the Department, still having no response, issued a tax warrant, mailed a copy of the warrant to the taxpayer, and mailed a cover letter with the warrant. The letter stated that the Department could immediately begin collection proceedings by filing the warrant in Superior Court to be entered as a judgment. The letter further advised the taxpayer that the warrant would be filed unless the total amount of the warrant, plus interest accrued since the issuance of the warrant, was paid within ten days. The amount stated on the warrant included the original amount of the assessment, interest, the ten percent delinquent assessment penalty, and a five percent warrant penalty.

On March 16, 1988, the taxpayer finally responded by paying the original amount of the assessment. On March 18, 1988, the Department responded to the payment by asking for the unpaid balance which represented penalties and interest. The taxpayer was advised that the warrant would be filed as scheduled unless the outstanding amount was paid. On March 25, 1988, the Department received payment of the balance.

The taxpayer objects to both the assessment penalty and the warrant penalty. The taxpayer believes that the penalties are not proper in view of the fact that the audit process went on for a long time and eventually resulted in substantial reductions from the amount originally assessed and the waiving of interest. With respect to

the warrant penalty the taxpayer also believes that it is inapplicable because the warrant was not filed.

DISCUSSION:

The ten percent assessment penalty is authorized by RCW 82.32.050. That statute provides in part:

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 . . . . 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 ours.)

By use of the word "shall" the legislature has mandated a ten percent penalty when assessments are not paid by the due date.

The only authority the Department has for waiving penalties is RCW 82.32.105 which states in pertinent part:

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.

The rules prescribed by the Department in accordance with this law are contained in WAC 458-20-228, . . . . None of the circumstances described in that rule are present in this case. Situation 4 in the rule permits the cancellation of penalties if the delinquency was caused by unavoidable absence of the taxpayer prior to the filing date. This situation is not applicable here because: the taxpayer has not demonstrated that his absence was unavoidable; the taxpayer has not demonstrated that his absence caused the delinquency; and it appears that the delinquency occurred because either the bookkeeper failed to act or the taxpayer did not realize the implications of the assessment. The last-mentioned explanation is supported by the fact that the taxpayer failed to respond to the Department's follow-up letters.

The warrant penalty is authorized by RCW 82.32.090 which provides in part:

If a warrant be issued by the department of revenue for the collection of taxes, increases, and penalties, there *shall* be added thereto a penalty of five percent of the amount of the tax, but not less than five dollars.

(Emphasis ours.)

Again, the use of the word "shall" makes mandatory the imposition of the penalty. The penalty is imposed upon the issuance, not the filing, of the warrant. Issuance and filing are two distinct acts under RCW 82.32.210, the statute providing for warrants. The fact that a warrant has not been filed does not negate the fact that it has been issued.

The law does not permit the cancellation or waiver of either penalty protested by the taxpayer under the facts of this case.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 5th day of January 1989.