

Cite as 1 WTD 195 (1986)

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

In the Matter of the Petition for)	<u>D E T E R M I N A T I O N</u>
Refund of Penalty of)	
)	No. 86-257
)	
. . .)	Registration No. . . .
)	Late Penalty
)	January 1986 Excise Tax
)	Return

[1] RCW 82.32.105 and Rule 228: PENALTIES -- LATE PAYMENT OF TAX DUE-- SITUATION #7 -- POST OFFICE DELAY -- ABSENCE OF POSTMARKED ENVELOPE. Taxpayer met criteria of Rule 228's situation #7 for cancellation of penalty. Department did not retain postmarked envelope to overcome taxpayer's assertion that tax return was timely mailed. Postal service delay in delivery can be inferred only with situation #7 when so alleged.

These 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 rescission of penalty assessed because of late payment of tax due.

FACTS AND ISSUES:

Abraham J. Krebs, Administrative Law Judge-- . . . (taxpayer) is engaged in the business of retailing and wholesaling flowers and plants.

The January 1986 Combined Monthly Excise Tax Return was due on February 25, 1986. The Department of Revenue received the tax return on March 10, 1986 with payment of the tax due in the

amount of \$1,438.05. A five percent late penalty in the amount of \$71.90 was assessed and has been paid.

The taxpayer asserts that the tax return was mailed on Monday, February 24, 1986 at the mailbox located 40 feet from the entrance to her business. The mailbox has pickup times of 10 a.m. and 5:30 p.m. The bookkeeper remembers mailing it about 11 a.m. because she did it on her way to a dental appointment at 11:15 a.m. The taxpayer is perplexed as to why the Department did not receive it until March 10, 1986.

The taxpayer communicated with the U.S. Postal Service for an explanation, and its reply dated June 20, 1986 with an apology and solicitude for understanding is attached to this Determination.

The taxpayer seeks rescission of the "stiff penalty" on the basis that the tax return was timely mailed and because of its past record of timely filing tax returns and paying taxes.

DISCUSSION:

The only authority to cancel penalties is found in RCW 82.32.105 which allows the Department to waive or cancel penalties if the failure of a taxpayer to pay any tax by the due date was the result of circumstances beyond the control of the taxpayer. That statutory provision also requires the Department to prescribe rules for the waiver or cancellation of penalties.

The administrative rule which implements RCW 82.32.105 is WAC 458-20-228 (Rule 228), copy attached. We find that situation number 7 applies to the taxpayer's situation, and it 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 added.)

In this case, the tax return was received (March 10, 1986) with full payment of tax due within 30 days after the due date (February 25, 1986). The taxpayer has never been delinquent filing a tax return prior to this occurrence. The delinquency was the result of an unforeseen and unintentional circumstance, not immediately known to the taxpayer, which included "delays or losses related to the postal service."

Furthermore, the envelope in which the alleged late tax return was sent is not in the file for us to see firsthand the date of the postmark. We assume the envelope was discarded upon receipt by the Department. In order for the late penalty to stand, the Department should have retained the envelope so that the postmark could be examined. Without the postmarked envelope there is no evidence that the filing is untimely and therefore, we must look favorably upon the taxpayer's assertion that the tax return was timely mailed. A timely postmark would have cast the shortcoming on the operation of the postal system in making a delayed delivery of the tax return--a circumstance certainly beyond the control of the taxpayer.

We feel that the facts in this case demonstrate a diligent effort by the taxpayer to file the tax return in a timely manner. We conclude that Rule 228's situation number 7 is applicable and sufficient other facts are present to hold that the late filing was due to circumstances beyond the control of the taxpayer. Accordingly, the late penalty is cancelled.

DECISION AND DISPOSITION:

The taxpayer's petition is granted. This matter will be referred to the Department's Office Operations Section to authorize issuance of a refund or credit in the amount of \$71.90.

DATED this 24th day of September 1986.