

Cite as 1 WTD 71 (1986)

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

In the Matter of the Petition)	<u>D E T E R M I N A T I O N</u>
For Refund of)	
)	No. 86-228
. . .)	
)	Registration No. . . .
)	

[1] RULE 228 - PENALTIES - LATE FILING - WAIVER - TURNOVER OF TAXPAYER PERSONNEL - PREGNANCY LEAVE. State tax returns were filed late because office manager went on pregnancy leave, her replacement quit, and the second replacement was unfamiliar with tax-reporting requirements. Held: no penalty waiver based on either an illness or unavoidable absence theory.

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:

Claim for refund of late-payment penalties.

FACTS AND ISSUES:

David L. Dressel, Administrative Law Judge -- . . . (taxpayer) is a wholesaler of steel pipe and other steel products. On October 4, 1985 the Department of Revenue penalized the taxpayer for late payment of its May, June, and July, 1985 state excise taxes. The penalties assessed totaled \$. . . In its October 24, 1985 petition for refund of the referenced penalties, the taxpayer writes:

Please find attached the check for May, June and July, penalties. However, we feel there were

mitigating circumstances that we would like you to take into consideration.

Our office manager, . . . went on pregnancy leave on 4/30/85. We felt her assistant, . . . could handle the office in her absence. Unfortunately, . . . quit on 6/18/85 and left us somewhat stranded. We turned the office over to . . ., our inventory control clerk, along with some temporary help. . . did a reasonable job, but was not familiar with taxes and filed away your tax forms as he received them. . . . now has the tax situation under control and we foresee no more problems.

We feel that this situation falls under your penalty exemptions of unexpected illness and/or unexpected absence of owner, officer or person responsible for filing taxes (pregnancy leave, followed by unexpected loss of key personnel).

We hope you will understand our circumstances and refund our penalties.

The sole issue to be decided herein is whether a waiver of penalties may be granted under these circumstances.

DISCUSSION:

The controlling statute is RCW 82.32.090 which reads in part:

Late payment----Penalties. 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. No penalty so added shall be less than two dollars. . . .
(Emphasis ours.)

Although the legislature's use of the word "shall" indicates the mandatory nature of the penalties, it has also provided for waiver of same in RCW 82.32.105 as follows:

Waiver or cancellation of interest or penalties. 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. Notwithstanding the foregoing the amount of any interest which has been waived, canceled or refunded prior to May 1, 1965 shall not be reassessed according to the provisions of this chapter.
(Emphasis ours.)

As required by that statute, the Department has promulgated an administrative rule WAC 458-20-228 (Rule 228), in which the circumstances justifying waiver are listed. The rule states in part:

The department will waive or cancel the penalties imposed under RCW 82.32.090 and interest imposed under RCW 82.32.050 upon finding that the failure of a taxpayer to pay any tax by the due date was due to circumstances beyond the control of the taxpayer. The department has no authority to cancel penalties or interest for any other reason.

The following situations will constitute the only circumstances under which a cancellation of penalties will be considered by the department:

1. The return was filed on time but inadvertently mailed to another agency.
2. The delinquency was due to erroneous information given the taxpayer by a department officer or employee.
3. The delinquency was caused by death or serious illness of the taxpayer or his immediate family, or illness or death of his accountant or in the accountant's immediate family, prior to the filing date.
4. The delinquency was caused by unavoidable absence of the taxpayer, prior to the filing date.

5. The delinquency was caused by the destruction by fire or other casualty of the taxpayer's place of business or business records.

6. The taxpayer, prior to the time for filing the return, made timely application to the Olympia or district office, in writing, for proper forms and these were not furnished in sufficient time to permit the completed return to be paid before its delinquent date.

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 ours.)

In its petition the taxpayer apparently argues that situations No. 3 and/or No. 4 fit its circumstances and justify waiver of the penalties. We respectfully disagree. As to No. 3, pregnancy, in our opinion, falls short of being classified as "death or serious illness." Of course with complications it can result in either, but here we have no indications of either, and we will not presume any in the absence of additional evidence. As to No. 4, the Department has consistently held and we so hold today that the turnover of employees including those responsible for compiling state tax returns is not "the unavoidable absence of the taxpayer" nor

is such turnover otherwise deemed a "circumstance beyond the taxpayer's control." The prudent practice of many businesses, large and small, is to have at least two different employees trained to prepare and file the state tax return. The taxpayer is charged by law with the responsibility of anticipating contingencies such as the retirement, resignation, or pregnancy leave of a key employee.

Situation No. 7, at first glance, might appear to be a basis for relief, but it is not well founded, because there is the requirement that the tax in question be paid no later than 30 days after the due date. Here taxes for the months of May, June and July were all paid October 4 which is more than 30 days after even the July due date.¹

Inasmuch as the Department has no authority to cancel penalties for any reason other than those listed in Rule 228, supra, the penalties assessed in the instant case must stand. The circumstances described by the taxpayer are not deemed as "beyond the taxpayer's control." Only those named in the rule qualify for that designation.

DECISION AND DISPOSITION:

For the reasons stated above, the taxpayer's petition is hereby denied.

DATED this 15th day of August, 1986.

¹ Monthly reporting taxpayers must file their returns no later than the 25th day of the following month per Rule 228.