

Cite as 1 WTD 129 (1986)

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

In the Matter of the Petition For) D E T E R M I N A T I O
N
Correction of Assessment and/or)
Refund of) No. 86-239
)
. . .) Registration No. . . .
) Tax Warrant No. . . .
)
)
)
and)
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. . .) Registration No. . . .
) Tax Warrant No. . . .
)

[1] **RCW 82.32.090 AND RULE 228:** PENALTIES -- LATE PAYMENTS OF TAXES DUE -- EMPLOYEE'S FAILURE TO PERFORM DUTIES -- EMPLOYER'S LACK OF KNOWLEDGE OF EMPLOYEE'S NEGLIGENCE. Taxpayer's clerk's medical problems caused her not to perform her duty of timely filing tax returns over an extended period of time. Taxpayer was not aware of situation. The failure of an employee to perform her duties is not a circumstance beyond the taxpayer's control. Penalties sustained.

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 waiver of penalty assessed because of late payments of taxes due.

FACTS AND ISSUES:

Abraham J. Krebs, Administrative Law Judge -- . . . (taxpayer no. 1) is the parent corporation of its wholly owned subsidiary corporation, (taxpayer no. 2).

Taxpayer no. 1 failed to file monthly Combined Excise Tax Returns for the months of May, June, September and October 1985, and January and February 1986 causing the Department of Revenue to issue Tax Warrant No. . . . on March 12, 1986 for liability of estimated taxes, delinquency penalties and warrant penalty. The taxpayer's file reveals that the July and August 1985 tax returns were timely filed. On March 19, 1986, the taxpayer filed tax returns for the months of May, June, July (a duplication), August (a duplication), September and October 1985. On March 4, 1986, the taxpayer filed the tax return for the month of January 1986. On March 28, 1986, the taxpayer filed the tax return for the month of February 1986. This state of facts requires the Department's Compliance Section to adjust and reconcile the taxes due based on actual taxes due versus the warrant's estimated taxes due and duplications (July and August 1985) as well as the delinquent penalties and warrant penalty assessed.

Taxpayer no. 2 failed to file monthly Combined Excise Tax Returns for the months of September and October 1985, and January and February 1986 causing the Department of Revenue to issue Tax Warrant No. . . . on March 12, 1986 for liability of estimated taxes, delinquency penalties and warrant penalty. The taxpayer's file reveals that the July and August 1985 tax returns were timely filed. On March 19, 1986, the taxpayer filed tax returns for the months of July (a duplication), August (a duplication), September and October 1985. On March 4, 1986, the taxpayer filed the tax return for the month of January 1986. On March 28, 1986, the taxpayer filed the tax return for the month of February 1986. This state of facts requires the Department's Compliance Section to adjust and reconcile the taxes due based on actual taxes due versus the tax warrant's estimated taxes due and duplications (July and August 1985) as well as the delinquent penalties and warrant penalty assessed.

Taxpayer no. 1 and 2 (collectively "taxpayers") seek waiver of the delinquent penalties based upon the same alleged facts and reasons as follows:

1. The late filings occurred primarily because of the medical problems of their Sales Tax Clerk who at first was hired temporarily and then replaced the former clerk who resigned. Before resigning, this clerk instructed the new Sales Tax Clerk in the established filing procedures. She also received instructions from supervisory personnel.
2. The new Sales Tax Clerk appeared to be doing a fine job until she resigned for medical reasons in December 1985.
3. The taxpayers then discovered that she had not filed many of their sales and use tax returns which they are required to file in virtually all states, had not filed the May, June, September and October 1985 Washington Combined Tax Returns on behalf of taxpayer no. 1, and the September and October 1985 Returns on behalf of taxpayer no. 2.
4. The Sales Tax Clerk, unbeknownst to the taxpayers, had been under a doctor's care for some time and had been experiencing severe pains and related emotional trauma.
5. The taxpayers also learned that the illness had affected her ability to carry out her job responsibilities which resulted in lapses of her work.
6. Because of her unwarranted fears of losing her job, she never informed supervision or gave any indications that she was unable to file all the required returns.
7. The taxpayers cite RCW 82.32.105 and believe that the above described circumstances are sufficient to grant a waiver of the penalties.

DISCUSSION:

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 this case, the taxpayers have filed tax returns with payments on dates subsequent to the due dates. Accordingly, the statutory 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 specified 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), copy attached, states the seven situations under which a cancellation of penalties will be considered by the Department. None of the seven situations apply to the taxpayers. Essentially, the failure of a taxpayer to pay any tax by the due date must be the result of circumstances beyond the control of the taxpayer to warrant waiver or cancellation of the penalties. RCW 82.32.105. The acts or omissions of an employee are generally within the control of the employer. Negligence by a taxpayer or neglect of duties by an employee, as was the case here, does not and has never been thought to constitute a circumstance beyond the control of the taxpayer.

It is unfortunate that the medical problems of the Sales Tax Clerk and her inability to carry out her job responsibilities did not come to the attention of her supervisors until it was too late. It is noted that her neglect of duties occurred over an extended period of time from May through October 1985. Note that Rule 228's situation number 7 does allow a one-time waiver of the penalty where the tax return was received within 30 days after the due date and the circumstance included the error or misconduct of the taxpayer's employee. Situation

number 7 was added to Rule 228 on December 21, 1984 to allow 30 days for the taxpayer-employer to become aware of the employee's error or misconduct -- further expression of the principle that neglect of duties by an employee for more than 30 days does not constitute a circumstance beyond the control of the taxpayer.

The Department as an administrative agency cannot properly extend relief beyond that authorized by law or by administrative regulation. The situations must be such as to warrant a finding that the failure of a taxpayer to pay any tax due by the due date resulted from circumstances beyond the control of the taxpayer. The circumstances in this case do not fall within any of the enumerated situations in WAC 458-20-228. Accordingly, we find that the delinquent payments of taxes did not result from circumstances "beyond the control of the taxpayer."

DECISION AND DISPOSITION:

The taxpayers' petitions are denied. The taxpayers' files are being referred to the Department's Compliance Section for adjustment and reconciliation of the taxes, delinquent penalties and warrant penalties. If there is a balance due or credit in favor of the taxpayers, they will be notified by the Compliance Section.

DATED this 29th day of August 1986.