

Cite as 1 WTD 191 (1986)

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

In the Matter of Petition)	<u>D E T E R M I N A T I O N</u>
for Correction of Assessment of)	
)	No. 86-256
)	
. . .)) Registration No. . . .
)	
)	

RULE 228: PENALTIES -- LATE PAYMENT -- WAIVER OR CANCELLATION -- TAX RETURN NOT RECEIVED BY TAXPAYER. The claim that a tax return was not received by a taxpayer did not justify the cancellation or waiver of a late payment penalty. The taxpayer did not make a timely request for a replacement return. Assuming that the return was not received, relief could not be granted because the taxpayer had prior unexcused penalties.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: May 28, 1986

NATURE OF ACTION

The taxpayer petitions for a correction of a notice of balance due. The balance due represents a late payment penalty.

FACTS AND ISSUES

Gregory I. Potegal, Administrative Law Judge -- The taxpayer was issued a notice of balance due in the amount of \$498.73 for the November 1985 tax reporting period. The \$498.73 represented a five percent late payment penalty. The tax return and tax payment for November 1985 was filed on December 31, 1985 which was after the due date of December 25, 1985.

According to the taxpayer the taxes were paid late because the November 1985 tax return form was never received by it. The taxpayer's secretary has a tickler file which would have insured the payment of the tax if the return had been sent to the taxpayer. It was only because the return was not received that the tax was not paid on time. As soon as the taxpayer discovered that the tax had not been paid, it filed a return with payment.

DISCUSSION

RCW 82.32.090 provides in part:

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.)

If a payment is received late the law demands that a penalty be assessed. Under certain circumstances, however, the penalty may be waived or cancelled. The authority for this is RCW 82.32.105 which states in 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 circumstance 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 rule adopted by the Department covering the waiver or cancellation of penalties is WAC 458-20-228. As it applies to the taxpayer's appeal it states:

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:

. . . .

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.

None of the quoted situations fit the taxpayer's circumstances. Under paragraph 6 the taxpayer failed to make timely application for proper forms. Under paragraph 7, even assuming that the return was never received by the taxpayer, relief can not be granted because the taxpayer has two prior unexcused delinquencies -- July 1983 and September 1983.

The Department has no authority to waive or cancel penalties other than for the reasons stated above. We must therefore deny the taxpayer's petition.

During the hearing the taxpayer's representative mentioned that he felt he drew attention to the delinquency by sending a cover letter along with the late return. All late returns result in the assessment of penalties. The cover letter was not the cause of the assessment. We appreciate the taxpayer's honesty and cooperation and the effort taken to write the cover letter. If the situation had been one of those which authorize the cancellation of penalties, the letter would have cleared up the matter very quickly to both the taxpayer's and Department's benefit. Unfortunately, that was not the case.

DECISION AND DISPOSITION

The taxpayer's petition is denied. The late payment penalty of \$498.73 is due for payment by October 7, 1986.

DATED this 17th day of September 1986.