

Cited as 1 WTD 29 (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 Correction of Assessment of)	
)	No. 86-218
)	
)	
. . .)	Registration No. . . .
)	Notice of Balance Due
)	

RULE 228 - RCW 82.32.090 - RCW 82.32.105 - PENALTIES - LATE
PAYMENT - WAIVER -LOST RETURN/PAYMENT IN MAIL - SITUATION NO. 7.
TP requested waiver of late payment penalty alleging that its tax
return and check had been lost in the mail. Waiver denied because
situation No. 7 of Rule 228 requires no prior delinquent payments
and full payment of the tax owed within 30 days of the due date.
The fact that taxpayer wasn't made aware of the non-receipt by the
Department until more than 30 days after the due date is
irrelevant.

TAXPAYER REPRESENTED BY: . . .

NATURE OF ACTION:

Petition for waiver of a late payment penalty.

FACTS AND ISSUES:

David L. Dressel, Administrative Law Judge-- . . . (taxpayer) is a
forwarder of freight. During the period in question it was
assigned an annual frequency vis a vis the filing of its state
excise tax returns. The return for 1984 was due on January 31,
1985. It was not received by the Department of Revenue, however,
until approximately July 17, 1985. As a result the Department
assessed a penalty for late payment which penalty amounted to
\$1,678.04 or 20 percent of the tax amount owed.

The events leading up to the penalty assessment go something like
this. According to the taxpayer its 1984 tax return along with its
check no. 21268 for \$8,390.19 was mailed to the Department on
January 31, 1985. . . . was not aware that anything was the matter

until May 23, 1985 on which date it received a notice from the Department indicating that its 1985 tax return had not yet been received. Upon examination of its checking account, the taxpayer discovered that the aforementioned check had not been cashed. At that point taxpayer stopped payment on the original check and issued a new one. The new check along with a photocopy of the original tax return was mailed to the Department. The taxpayer's letter of transmittal is dated July 8, 1985 although the date stamp on the copied return is July 17, 1985.

On August 7, 1985 the Department issued a Notice of Balance Due for the penalty amount. On August 23, 1985 the taxpayer responded with a letter explaining that the original tax return and payment had apparently been lost in the mail and requesting waiver of the penalty for that reason. The Department answered with a note asking for copies of the taxpayer's check register and stop payment order. Taxpayer complied but that turned out to be an idle gesture as the Department then decided that those items were not sufficient to grant penalty relief because "situation no. 7" in WAC 458-20-228 (Rule 228) requires that the delinquent amount be paid within 30 days of the due date.

TAXPAYER'S EXCEPTIONS:

On October 23, 1985 the taxpayer submitted its petition for correction re-stating its request for penalty waiver based on the failure of the mail system and the taxpayer's reasonably prompt payment after it was first notified of the non-receipt of the original return.

DISCUSSION:

Penalties for late payment are mandatory according to RCW 82.32.090 which reads:

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.)

Under RCW 82.32.105 only where there are "circumstances beyond the control of the taxpayer" may penalties be cancelled. Those circumstances are narrowly defined in Rule 228 as follows:

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.)

Of the seven situations listed, the only one with conceivable applicability to the instant case is number seven. The conjunctive language therein indicates all four requirements must be satisfied.

The first requirement is that the tax return with full payment must be received no later than 30 days after the due date. Here full payment was not received until approximately July 17, 1985 which is some 165 days after the due date of January 31, 1985. While we recognize that the taxpayer was not even aware until well after 30 days had elapsed from the due date that the Department had not received its return/payment, such lack of awareness is not determinative in that the rule makes no reference to whether or not a taxpayer knows its return is delinquent. Rule 228 plainly states that in order to obtain one-time penalty relief based on situation number seven, the tax owed must be paid within 30 days of the due date. That wasn't done in this instance, so the penalty must stand. As stated in the first quoted paragraph of Rule 228, "The department has no authority to cancel penalties or interest for any other reason" than the seven situations listed in the rule.

Not only does the taxpayer fall short on the first requirement, but also it fails to satisfy the second, or paragraph (b) of situation number seven in Rule 228. That portion of the rule requires that a taxpayer not have had a previous delinquency. This taxpayer was found delinquent by virtue of a 1982 audit which revealed that the taxpayer was not registered at the time but should have been as it was conducting business within the state. Subsequently, penalties were levied for unpaid taxes in Tax Assessment No. . . . dated January 25, 1983. Thus, for the additional reason of prior delinquent taxes, penalty relief under situation number seven is not available to this taxpayer.

DECISION AND DISPOSITION:

The taxpayer's petition for correction is hereby denied. Notice of Balance Due in the amount of \$. . . . is due for payment by August 7, 1986.

DATED this 18th day of July 1986.