

Cite as 1 WTD 89 (1986)

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

In the Matter of the Petition	)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u>
<u>N</u>		
For Correction of Assessment of	)	
Penalty of	)	No. 86-231
	)	
. . .	)	Registration No. . . .
	)	Notices (3) of Balance
Due	)	
	)	

**RCW 82.32.090 AND RULE 228:** PENALTIES -- LATE PAYMENTS OF TAXES DUE -- EMPLOYEE'S FAILURE TO PERFORM DUTIES. Taxpayer's bookkeeper's personal problems caused him not to perform his duty of timely filing tax return. The failure of an employee to perform his 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: . . . , Bookkeeper

NATURE OF ACTION:

Petition for waiver of penalty assessed because of late payment of taxes due.

FACTS AND ISSUES:

Abraham J. Krebs, Administrative Law Judge -- . . . (taxpayer) is engaged in the business of vending machine sales.

The taxpayer registered in January 1984 and the Department of Revenue assigned a monthly frequency to the taxpayer for the filing of its excise tax returns.

The Combined Excise Tax Return for September 1985 was due by October 25, 1985. The taxpayer filed this return on January 17, 1986 with tax payment of \$6,075.05. On March 7, 1986, the Department issued a Notice of Balance Due (copy attached) in the amount of \$1,214.93 which remains due. The Notice shows an assessment of a twenty percent penalty in the amount of \$1,215.00.

The Combined Excise Tax Return for October 1985 was due by November 25, 1985. The taxpayer filed this return on January 21, 1986 with tax payment of \$8,605.90. On March 14, 1986, the Department issued a Notice of Balance Due (copy attached) in the amount of \$860.59 which remains due. The Notice shows an assessment of ten percent penalty in the amount of \$860.59.

The Combined Excise Tax Return for November 1985 was due by December 25, 1985. The taxpayer filed this return on January 24, 1986 with tax payment of \$7,663.78. On March 14, 1986, the Department issued a Notice of Balance Due (copy attached) in the amount of \$387.28 which remains due. The Notice shows an assessment of a five percent penalty in the amount of \$383.38.

The taxpayer's representative, . . . (bookkeeper), by letter dated March 20, 1986, copy attached, requested waiver of the penalties assessed as noted in the above three Notices of Balance Due. The letter states that, because of severe emotional illness for which the bookkeeper was under professional care, he became "extremely despondent as well as negligent in the performance of . . . duties resulting in the late filing of the returns in question."

Based on his illness, the bookkeeper seeks waiver of the penalties assessed against his employer-taxpayer who continued his employment during his "trying times."

#### 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 tax due by October 25, 1985 was paid on January 17, 1986. Accordingly, the twenty percent penalty provision of RCW 82.32.090 applied. The tax due by November 25, 1985 was paid on January 21, 1986. Accordingly, the ten percent penalty provision of the statute applied. The tax due by December 25, 1985 was paid on January 24, 1986. Accordingly, the five percent penalty provision of the statute 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 taxpayer except, possibly, number 3 which states:

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. (Emphasis supplied.)

In my attempt to verify the taxpayer's bookkeeper's alleged "severe emotional illness" for which he was allegedly "under professional care," I had a telephone conversation with the bookkeeper on April 14, 1986 who stated that he would have his professional counselor mail me a letter describing the illness, treatment, seriousness of the illness and how it affected his work. We received no letter from the counselor.

By letter dated May 19, 1986, the bookkeeper gave the following explanation and pertinent information which is summarized as follows:

1. The bookkeeper had not contacted the counselor to send me a letter.
2. The bookkeeper's foster son was admitted to a drug treatment program in August 1985 suffering from both alcoholism and multiple drug addiction where he was in the in-patient program until early September 1985.
3. The foster son was then in the bookkeeper's home from about September 3, 1985 until mid October 1985 and then moved back to his parent's home.
4. The bookkeeper met with the counselor in August 1985 as part of a family therapy program and has not seen the counselor since September 3, 1985.
5. While the foster son was in the bookkeeper's home from about September 3, until mid October 1985, addictive behavior patterns reappeared. The strain upon the bookkeeper and his perceived failure preoccupied him causing him to put off things at work. His nonperformance at work was not recognized by his employer-taxpayer. The bookkeeper felt depressed and turned to drinking.
6. In late December 1985, the bookkeeper quit drinking and took interest in his work. At about this time, the Department's field auditor contacted the taxpayer about the past due tax returns. The bookkeeper then turned his attention to the completion and filing of the past due tax returns.

We are sympathetic to the bookkeeper's problems. However, we note that the foster son (if he could be deemed "immediate family") left the bookkeeper's household in mid October. The earliest delinquent tax was due October 25, 1985. Furthermore, while the bookkeeper was troubled with problems, we do not find that it was an "illness" which prevented his attendance at work. The failure of an employee to perform his duties is a circumstance strictly within the control of the

taxpayer-employer and has been uniformly so held by the Department of Revenue.

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 taxpayer's petition is denied. The Notices of Balance Due in the unpaid total sum of \$2,462.80 are due for payment by September 16, 1986.

DATED this 26th day of August 1986.