

Cite as 1 WTD 255 (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)	
)	No. 86-274
)	
. . .)	Registration No. . . .
)	Tax Assessment No. . . .
)	Notice of Balance Due

RULE 228: PENALTIES -- INTEREST -- WAIVER -- UNREGISTERED TP -- DISAGREEMENT AS TO REGISTRATION REQUIREMENT. Previous disagreement with the state as to whether out-of-state TP was required to register is not a basis under the statute or Rule 228 to abate penalties or interest.

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: . . .

DATE OF HEARING: January 21, 1986

NATURE OF ACTION:

Petition for abatement of penalty and interest charged to previously unregistered taxpayer.

FACTS AND ISSUES:

David L. Dressel, Administrative Law Judge -- . . . (taxpayer) is a wholesaler of men's clothing. Its activities in the state of Washington were partially audited for the period January 1, 1980 through December 31, 1984. As a result Tax Assessment No. . . . was issued for business and occupation tax, penalties, and interest totaling \$7,411. Payment of the tax portion \$5,259, was received December 27, 1985. The balance, which is attributable to penalties and

interest, remains outstanding. Also at issue, but based on a Notice of Balance Due, are late-payment penalties for the first 3 quarters of 1985.

The Department of Revenue first became aware of the taxpayer's presence in this state on January 16, 1980 at which time the Department mailed to the taxpayer a "Business Activities Statement" on which the taxpayer was asked to describe the extent of its operation in Washington state. After numerous delays and the exchange of considerable correspondence, the Department determined that the taxpayer's sales into Washington were taxable based on the nexus provided by the solicitation efforts of the taxpayer's non-resident salespeople. Upon receipt of the taxpayer's sales figures for the audit period, the Department issued the above-referenced tax assessment.

The taxpayer has appealed the penalty and interest portion of the assessment. It has suggested that because of a dispute over the propriety of its registration and its agreement to do so in a spirit of compromise so as not to get both sides involved in costly legal proceedings, abatement of the penalty and interest is appropriate. Whether such relief should be granted is the sole issue presented for our resolution.

DISCUSSION:

Interest and penalties were assessed under the authority of RCWs 82.32.050 and 82.32.090 respectively which read in part:

RCW 82.32.050 Deficient and delinquent payments -- Penalties and interest -- Limitations. If upon examination of any returns or from other information obtained by the department it appears that a tax or penalty has been paid less than that properly due, the department shall assess against the taxpayer such additional amount found to be due and as to assessments made on and after May 1, 1965, including assessments for additional tax or penalties due prior to that date shall add thereto interest at the rate of nine percent per annum from the last day of the year in which the deficiency is incurred until date of payment. The department shall notify the taxpayer by mail of the additional amount and the same shall become due and shall be paid within ten days from the date of the notice, or within such further time as the department may provide. If payment is not received by the department by the due

date specified in the notice, or any extension thereof, the department shall add a penalty of ten percent of the amount of the additional tax found due. If the department finds that all or any part of the deficiency resulted from an intent to evade the tax payable hereunder, a further penalty of fifty percent of the additional tax found to due shall be added.

No assessment or correction of an assessment for additional taxes due may be made by the department more than four years after the close of the tax year, except (1) against a taxpayer who has not registered as required by this chapter, (2) upon a showing of fraud or of misrepresentation of a material fact by the taxpayer, or (3) where a taxpayer has executed a written waiver of such limitation.

RCW 82.32.090 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 mine.)

The persistent use of the word "shall" in these statutes is indicative of the intent of the legislature that the interest and penalties be mandatory.

Waiver of interest and penalties is possible, but only under certain prescribed circumstances which are listed in WAC 458-20-228 (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.

. . .

The following situations will constitute circumstances under which a waiver or cancellation of interest upon assessments pursuant to RCW 82.32.050 will be considered by the department:

1. The failure to pay the tax prior to issuance of the assessment was the direct result of written instructions given the taxpayer by the department.

2. Extension of the due date for payment of an assessment was not at the request of the taxpayer and was for the sole convenience of the department. (Emphasis mine.)

First, as to penalties none of the circumstances recognized as beyond the taxpayer's control are present in the instant case. Per Rule 228 tax returns and payments are due monthly, quarterly, or annually from those who are doing business in this state. This taxpayer has been making sales here since at least January 1, 1980, the beginning of the audit period. It should have been registered, filing tax returns, and making tax payments since the time it commenced doing business here. Because it was not complying with any of those requirements, the penalties and interest assessed are appropriate and waiver of same is inappropriate based on the authority previously cited.

Secondly, with respect to interest in particular the taxpayer also does not qualify for waiver under Rule 228. The failure to pay tax was not the result of written instructions by the Department and no due dates were extended.

It may be as the taxpayer has stated that it chose to register and pay the tax owed because it felt it would be less

expensive to do so than to hire a lawyer to fight the tax. Such a circumstance can have no bearing, however, on whether or not penalty and interest is due. There is no evidence that an agreement was made between the taxpayer and the Department such that penalties and interest would not be asserted if the taxpayer would voluntarily register and pay its back taxes. Indeed, the Department does not have the authority to enter into such a compromise.

Waiver of penalties and interest is strictly controlled by Rule 228 and the statute it implements, RCW 82.32.105. The Department would be in violation of the statutory law and its own administrative rules if it granted a waiver in these circumstances.

DECISION AND DISPOSITION:

The taxpayer's petition is denied. The balance of Tax Assessment No. . . . in the amount of \$2,152 plus extension interest of \$69 for a total of \$2,221 is due for payment by November 23, 1986. Because this due date has been extended for the sole convenience of the Department, however, interest will be waived for the period from April 21, 1986 through the new due date. Penalties of \$238.45 for the first 3 quarters of 1985 based on a Notice of Balance Due are also due for payment by November 23, 1986.

DATED this 24th day of October, 1986.