

Cite as Det. No. 99-083E, 19 WTD 70 (2000)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition For Correction of	)	<u>E X E C U T I V E   L E V E L</u>
Balance Due of	)	<u>D E T E R M I N A T I O N</u>
	)	
	)	No. 99-083E
	)	
...	)	Registration No. ...
	)	...
	)	

[1] RULE 228; RULE 22802; RCW 82.32.085; RCW 82.32.090: EFT PAYMENT – LATE PAYMENT PENALTY. For taxpayers required to pay their taxes by EFT, a timely filed return and timely payment by EFT are required in order to avoid late payment penalties. An EFT is timely when the state receives collectible funds on or before 3:00 p.m. of the EFT payment due date. Where a taxpayer calls in its EFT payment seven minutes late, the payment is not timely. As an administrative agency, the Department is given no discretionary authority to waive or cancel penalties. The mere fact of nonpayment within a specified period of payment requires the penalty provisions of RCW 82.32.090 to be applied.

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.

NATURE OF ACTION:

Taxpayer protests the assessment of a late payment penalty with respect to an EFT payment that it called in seven minutes late.<sup>1</sup>

FACTS:

C. Pree, A.L.J. -- The taxpayer began paying its monthly excise taxes to the Department by Electronic Funds Transfer ("EFT")<sup>2</sup> in 1996. Specifically, the taxpayer pays its taxes using the ACH debit mechanism.<sup>3</sup>

<sup>1</sup> Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

<sup>2</sup> WAC 458-20-22802(2)(a) (Rule 22802(2)(a)) provides:

"Electric funds transfer" or "EFT" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or

The taxpayer's taxes for the January 1998 reporting period were paid on February 27, 1998, after the EFT due date. A 5% late payment penalty of \$2,916.54 was imposed with respect to this late transfer.

The taxpayer states that its bookkeeper called in the payment at 3:07, February 25, 1998. The taxpayer argues that it is unjust to penalize it for being seven minutes late on the payment. Citing WAC 458-20-228(4)(d)(ii) (Rule 228(4)(d)(ii)), the taxpayer also argues that it "made a good faith effort to comply with specific written instructions" and, as such, should not be liable for the penalty.

#### ISSUE:

Whether the Department may waive the late payment penalty where a taxpayer's EFT payment is seven minute late.

#### DISCUSSION:

The taxpayer's January 1998 return and payment were due February 25, 1998. See RCW 82.32.045. For taxpayers required to pay their taxes by EFT, a timely filed return and timely payment by EFT are required in order to avoid late payment penalties. See WAC 458-20-22802 (Rule 22802). Rule 22802(8) states:

A return shall be considered timely filed only if it is received by the department on or before the due date, or with a postmark on or before the due date. In addition, the payment by EFT must have been completed by the next banking day after the due date. If both events occur, there is timely filing and payment and no penalties apply.

See also RCW 82.32.085 ("The electronic funds transfer is to be completed so that the state receives collectible funds on or before the next banking day following the due date.") <sup>4</sup> Rule 22802(7)(a) further explains:

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computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account.

<sup>3</sup> Rule 22802(2)(b) and (c) explain:

(b) "ACH" or "automated clearing house" means a central distribution and settlement system for the electronic clearing of debits and credits between financial institutions.

(c) "ACH debit" means the electronic transfer of funds cleared through the ACH system that is generated by the taxpayer instructing the department's bank to charge the taxpayer's account and deposit the funds to the department's account.

<sup>4</sup> Rule 22802(2)(f) explains that collectible funds are those "that have completed the electronic funds transfer process and are available for immediate use by the state."

An EFT is timely when the state receives collectible U.S. funds on or before 3:00 p.m., Pacific time, of the EFT payment due date. The ACH system . . . requires that the necessary information be in the originating bank's possession on the banking day preceding the date for completion. Each bank generally has its own transaction deadlines and it is the responsibility of the taxpayer to insure timely payment.

Rule 22802(7) contains the following example with respect to ACH debit users, such as the taxpayer:

The tax return due date is December 25th, a legal and banking holiday, which, for the example, falls on a Friday. The next business day would be Monday, December 28th, and this is the new tax return due date. EFT must be completed by 3:00 p.m., Pacific time, Tuesday, December 29th, which is the next banking day after the new due date. For an ACH debit user, the department's bank must have the appropriate information by 3:00 p.m., Pacific time, on Monday, December 28th.

RCW 82.32.090 addresses penalties.<sup>5</sup> It provides in pertinent part:

(1) If payment of any tax due on a return to be filed by a taxpayer 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;

. . .

(4) If the department finds that all or any part of a deficiency resulted from the disregard of specific written instructions as to reporting or tax liabilities, the department shall add a penalty of ten percent of the amount of the additional tax found due because of the failure to follow the instructions. . . . The department shall not assess the penalty under this section upon any taxpayer who has made a good faith effort to comply with the specific written instructions provided by the department to that taxpayer

The legislature, through its use of the word "shall" in RCW 82.32.090, has made the assessment of the late payment penalty mandatory. See Det. No. 98-047, 17 WTD 186 (1998); Det. No. 88-168, 5 WTD 253 (1988); Det. No. 87-300, 4 WTD 101 (1987); Det. No. 86-238, 1 WTD 125

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<sup>5</sup> Rule 22802(13) provides:

There are no special provisions for penalties when payment is made by EFT. The general provisions for all taxpayers apply. To avoid the imposition of penalties, it is necessary for both the filing of the tax return and the payment to be timely. Penalties may be waived only when the circumstances causing delinquency are beyond the control of the taxpayer.

(1986). As an administrative agency, the Department is given no discretionary authority to waive or cancel penalties. See Det. No. 87-300, supra; Det. No. 86-238, supra. The mere fact of nonpayment within a specified period of payment requires the penalty provisions of RCW 82.32.090 to be applied. Det. No. 88-188.

The Department's only authority to waive or cancel penalties is set forth in RCW 82.32.105. That statute provides in pertinent part as follows:

(1) 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 penalties imposed under this chapter with respect to such tax.

(2) The department shall waive or cancel the penalty imposed under RCW 82.32.090(1) when the circumstances under which the delinquency occurred do not qualify for waiver or cancellation under subsection (1) of this section if:

(a) The taxpayer requests the waiver for a tax return required to be filed under RCW 82.32.045, 82.14B.061, 82.23B.020, 82.27.060, 82.29A.050, or 84.33.086; and

(b) The taxpayer has timely filed and remitted payment on all tax returns due for that tax program for a period of twenty-four months immediately preceding the period covered by the return for which the waiver is being requested.

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(4) The department of revenue shall adopt rules for the waiver or cancellation of penalties and interest imposed by this chapter.

Our records reflect that the taxpayer has had untimely returns in the 24-month period prior to the return at issue. As such, the only provision under which its late payment penalty could qualify for waiver is if the circumstances causing the late payment were beyond its control.<sup>6</sup>

Rule 228(6) addresses the waiver of penalties.

**(6) Waiver or cancellation of penalties.** 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. Penalties will not be cancelled merely because of ignorance or a lack of knowledge by the taxpayer of the tax liability.

<sup>6</sup> We note the taxpayer argued in its petition that it "made a good faith effort to comply with specific written instructions." However, this penalty waiver provision applies only to the penalty for failure to follow specific written instructions. Because the late payment penalty, not the penalty for failure to follow specific written instructions, is at issue in this case, this reason for waiver is inapplicable. See Rule 228 (4)(d).

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(b) The following situations will be the only circumstances under which a cancellation of penalties will be considered by the department:

(i) The return was filed on time but inadvertently mailed to another agency.

(ii) The delinquency was due to erroneous written information given the taxpayer by a department officer or employee. A penalty generally will not be waived when it is claimed that erroneous oral information was given by a department employee. The reason for not cancelling the penalty in cases of oral information is because of the uncertainty of the facts presented, the instructions or information imparted by the department employee, or that the taxpayer fully understood the information received. Reliance by the taxpayer on incorrect advice received from the taxpayer's legal or accounting representative is not a basis for cancellation of the penalty.

(iii) 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.

(iv) The delinquency was caused by unavoidable absence of the taxpayer, prior to the filing date.

(v) The delinquency was caused by the destruction by fire or other casualty of the taxpayer's place of business or business records.

(vi) 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.

(vii) The delinquency penalty will be waived or cancelled on a one time only basis if 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 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, natural disasters such as a flood or earthquake, and delays or losses related to the postal service.

The taxpayer previously received the one-time waiver set forth in paragraph (vii), above, with respect to its May 1996 return.

In Det. No. 94-016, 14 WTD 184 (1995), the taxpayer called in its EFT payments late but within a day of the due date on several occasions due to its confusion as to the date the calls were required to be placed. We determined that we were not permitted to waive the penalties because the payments were late and confusion is not one of the circumstances beyond the taxpayer's control.

The taxpayer argues that its accrual basis accounting requires that it pay the retail sales tax to the Department prior to the time it collects the tax from his customers. The taxpayer argues that this timing difference results in financial hardship. The taxpayer also argues that it made a good faith effort to comply with the payment due dates. Neither the statute nor the rule permits financial hardship or good faith to be the basis for waiving late payment penalties. See also, Det. No. 94-16, 14 WTD 184 (1994) (“Financial hardship is not a basis for forgiving a taxpayer's tax liability, penalties and/or interest imposed thereon.”); Det. No. 87-300, supra, (“The legislature . . . has not chosen good faith or financial hardship as a basis under the law for relief from the penalty.”).

In summary, we have considered all of the circumstances in which the legislature permits us to waive the penalty. The taxpayer's circumstances do not fall within any of the circumstances under which we are allowed to waive the penalty. Accordingly, we must deny the taxpayer's petition.

#### DECISION AND DISPOSITION:

The taxpayer's petition is denied.

Dated this 31<sup>st</sup> day of March 1999.