

Cite as Det. No. 00-041, 19 WTD 960 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
)	No. 00-041
)	
...)	Registration No. ...
)	Notices of Balance Due
)	...

RULE 228; RCW 82.32.105: CANCELLATION OF LATE PAYMENT PENALTY –DELINQUENT TAX RETURNS - CIRCUMSTANCES BEYOND TAXPAYER’S CONTROL – PRECEEDING 24 MONTHS. Circumstances were not beyond a taxpayer’s control in causing the filing of two delinquent annual excise tax returns when a personal injury to the taxpayer occurred 26 months and 38 months, respectively, before the due dates of the returns. The taxpayer had reasonable time and opportunity to timely file the returns and pay the tax by the due dates. However, the taxpayer is entitled to cancellation of the first late payment penalty because she had no tax liability when she filed returns for the 24 months immediately preceding the first delinquent return in question.

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:

A taxpayer seeks cancellation of late payment of return penalties.¹

FACTS:

De Luca, A.L.J. – The taxpayer is in the business of providing accounting services for her clients. In November 1994, the taxpayer was involved in a near-fatal automobile collision. Consequently, the taxpayer states she was unable to work during much of 1995 and she filed a petition in Bankruptcy under Chapter 13 in November 1995. She claims she spent much of 1996 rebuilding her business. The taxpayer was delinquent in paying her Washington excise taxes for the years 1996 and 1997. The taxpayer reported and continues to report her excise taxes on an

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

annual basis. Thus, her excise tax return and taxes for 1996 were due January 31, 1997, and her tax return and taxes for 1997 were due January 31, 1998.

The taxpayer filed her 1996 excise tax return without payment in April 1997. The taxpayer reported her income under the service B&O tax classification. In May 1997, the Compliance Division of the Department of Revenue (the Department) issued a warrant for the overdue 1996 excise taxes. The taxpayer protested and the Compliance Division cancelled the warrant and the warrant penalty. The taxpayer paid the service B&O taxes and a 20% late payment of return penalty for 1996 in June 1997. The Department's records show the penalty amounted to \$. . . .

The taxpayer states she and her largest client parted ways in October 1997, which further impacted her business. The taxpayer paid her 1997 excise taxes, along with a 20% late payment penalty, in August 1998. The Department's records show the penalty amounted to \$. . . . At or about that time, the taxpayer discovered she had been improperly reporting her gross income under the service B&O tax classification rather than the applicable selected business services B&O tax classification that was in effect from July 1, 1993 until July 1, 1998. Consequently, additional tax was owed for the years 1996 and 1997 due to the difference in rates between the two B&O tax classifications. The taxpayer has stated she is aware the selected business services B&O tax classification was repealed effective July 1, 1998 and the service B&O tax classification is again applicable to her accounting activities.

Subsequent to the taxpayer's initial petition of December 2, 1998 to the Appeals Division, she tendered amounts on or about March 19, 1999 with her revised petition to pay for the additional B&O taxes due for 1996 and 1997. The Department's electronic records currently show balances due of \$. . . plus extension interest for 1996, and \$. . . plus extension interest for 1997.

TAXPAYER'S EXCEPTIONS:

The taxpayer seeks a waiver or cancellation of the late payment of return penalties for 1996 and 1997. The taxpayer states the reasons for the delinquencies were circumstances beyond her control, such as the automobile accident, and financial hardship.

ISSUE:

Is the taxpayer entitled to waiver or cancellation of the late payment of return penalties for 1996 and 1997?

DISCUSSION:

The statute that governs the waiver or cancellation of penalties and interest is RCW 82.32.105, which provides:

RCW 82.32.105 Waiver or cancellation of penalties or interest--Rules.
(Effective January 1, 1999.) (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.

(3) The department shall waive or cancel interest imposed under this chapter if:

(a) The failure to timely pay the tax was the direct result of written instructions given the taxpayer by the department; or

(b) The extension of a due date for payment of an assessment of deficiency was not at the request of the taxpayer and was for the sole convenience of the department.

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

Thus, penalties can be waived or canceled if the late payments are the results of circumstances beyond the taxpayer's control, or if the taxpayer has been current in her tax obligations during the 24 months preceding the period covered by the return for which the waiver is being requested.

The Department adopted WAC 458-20-228 (Rule 228) in accordance with the statute.² Rule 228(8) provides that the Department will apply taxpayer payments first to interest, next to penalties, and then to the tax, without regard to any direction of the taxpayer. *See also* RCW 82.32.080.

Rule 228(9) addresses the waiver or cancellation of penalties. Rule 229(9)(a) discusses "circumstances beyond the control of the taxpayer" that qualify for the waiver or cancellation of penalties. Rule 228(9)(a) provides in pertinent part:

(ii) The circumstances beyond the control of the taxpayer must actually cause the late payment. Circumstances beyond the control of the taxpayer are generally those which are immediate, unexpected, or in the nature of an emergency. Such circumstances result in the taxpayer not having reasonable time or opportunity to obtain an extension of the due date or otherwise timely file and pay. Circumstances beyond the control of the taxpayer include, but are not necessarily limited to, the following:

...

² We note Rule 228 was revised effective February 24, 2000 and we are relying on the latest revisions.

(C) The delinquency was directly caused by death or serious illness of the taxpayer, or a member of the taxpayer's immediate family. The same circumstances apply to the taxpayer's accountant or other tax preparer, or their immediate family. This situation is not intended to have an indefinite application. A death or illness which denies a taxpayer reasonable time or opportunity to obtain an extension or to otherwise arrange timely filing and payment is a circumstance eligible for penalty waiver. (Underlining ours.)

In light of RCW 82.32.105 and these provisions in Rule 228, we do not find the taxpayer qualifies for waiver or cancellation of the penalties for 1996 and 1997 due to circumstances beyond her control. We do not doubt she was seriously injured in the automobile accident in November 1994. However the annual tax return for 1996 was not due until January 31, 1997 and the annual tax return for 1997 was not due until January 31, 1998. These due dates were 26 months and 38 months, respectively, after the accident. The circumstances surrounding the accident could no longer be deemed "immediate, unexpected, or in the nature of an emergency" by the due dates. Similarly, the accident no longer denied the taxpayer a reasonable time or opportunity to timely file and pay the taxes by the due dates.

The taxpayer gives financial hardship as a second reason for waiver or cancellation of the penalties. However, Rule 228(9)(a) provides:

(iii) The following are examples of circumstances that are generally not considered to be beyond the control of the taxpayer and will not qualify for a waiver or cancellation of penalty:

(A) Financial hardship

Thus, financial hardship does not qualify for a waiver or cancellation of the penalties.

Finally, there remains one more basis to consider whether to waive or cancel the penalties for 1996 and 1997. As quoted above, RCW 82.32.105(2) allows the waiver or cancellation of a penalty if the taxpayer was current in her tax obligations for 24 months immediately preceding the period covered by the disputed return.³ Consistently, Rule 228(b) provides:

Waiver of the late payment of return penalty. The late payment of return . . . may be waived either as a result of circumstances beyond the control of the taxpayer . . . or after a twenty-four month review of the taxpayer's reporting history, as described below.

³ RCW 82.32.105(2) became effective January 1, 1997. This statute is applicable to the present case because the taxpayer's 1996 annual excise tax return was not due until January 31, 1997, which was after the effective date of the legislative act.

(i) If the late payment of return penalty is assessed on a return but is not the result of circumstances beyond the control of the taxpayer, the penalty will still be waived or canceled if the following two circumstances are satisfied:

- (A) The taxpayer requests the penalty waiver for a tax return which was required to be filed under RCW 82.32.045 . . .; and
- (B) The taxpayer has timely filed and paid all tax returns due for that specific tax program for a period of twenty-four months immediately preceding the period covered by the return for which the waiver is being requested. RCW 82.32.105(2).

. . .

(ii) A return will be considered timely for purpose of the waiver if there is no tax liability on it when it is filed. Also, a return will be considered timely if any late payment penalties assessed on it were waived or canceled due to circumstances beyond the control of the taxpayer The number of times penalty has been waived due to circumstances beyond the control of the taxpayer not influence whether the waiver in this subsection will be granted

The Department's records show the taxpayer had no tax liability for the years 1994 and 1995 when she filed her returns. Thus, she was timely in filing her returns for those two years and no late payment penalties were due. Consequently, the twenty-four months immediately preceding 1996 permit the Department to waive or cancel the late payment of return penalty assessed for 1996. However, because the taxpayer was delinquent in filing her excise tax return and paying her taxes for 1996, she does not qualify for a waiver or cancellation of the penalty for 1997 because 1996 was within the preceding twenty-four months of 1997.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part. The late payment of return penalty for 1996 is cancelled.

Dated this 15th of March 2000.