

Cite as Det. No. 99-268, 19 WTD 577 (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)	
)	No. 99-268
)	
...)	Registration No. . . .
)	FY. . . /Audit No. . . .

[1] RULE 228, RCW 82.32.090, RCW 82.32.105: LATE PAYMENT PENALTIES – CIRCUMSTANCES BEYOND THE TAXPAYER’S CONTROL. Late payment penalty will be waived as a circumstance beyond the taxpayer’s control where a taxpayer did not work during part of the year when a tax assessment arrived, the taxpayer did not know when the tax assessment would arrive, and upon the taxpayer’s return, the taxpayer paid the tax assessment within 30 days of his return.

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 sole proprietor seeks a refund of a late payment penalty for failing to pay a tax assessment within the time provided.¹

FACTS:

Gray, A.L.J. – The Department of Revenue (Department) Audit Division audited the taxpayer for the period January 1, 1993 through December 31, 1996, and subsequently issued a tax assessment. The Audit Division issued two post assessment adjustments (PAA). The Department issued the first PAA on April 8, 1998, and it was due on May 8, 1998. The Department issued the second PAA on February 17, 1999, and it was due on March 19, 1999.² The second PAA was Tax Assessment No. . . ., which included retail sales tax in the amount of \$. . . and interest in the amount of \$. . ., for a total tax assessment of \$. . .

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

² What appears to be a slightly longer time in which to pay is due to the fact that February 1999 had only 28 days.

The taxpayer paid \$. . . , plus an additional \$. . . for an estimated annual 1997 excise tax return, on April 6, 1999. Thus, the taxpayer paid the amount of the tax assessment, but paid the amount approximately three weeks after it was due on March 19, 1999. The Revenue Agent's notes from April 13, 1999 say:

TP [taxpayer] sent ck [check] to Oly [Olympia] to pay \$. . . for A/97 [1997 annual excise tax return] and \$. . . for tax assessment. There is a balance on the tax assessment of \$. . . Will send TP notice out today with due date of 4/27/99 for remaining payment.

As a result of the late payment, the Department assessed a late payment penalty in the amount of \$. . . . The taxpayer appealed the late payment penalty.

The taxpayer says the audit lasted longer than it should and that he was prepared to pay earlier. He did not pay the tax assessment on time because he was out of town on vacation. At that time of year, he explained, he doesn't work much. The taxpayer is a sole proprietor.

ISSUE:

Whether the penalty must be waived because the taxpayer paid the tax assessment late due to circumstances beyond his control?

DISCUSSION:

RCW 82.32.090(2) requires the Department to assess late payment penalties:

If payment of any tax assessed by the department of revenue 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. No penalty so added shall be less than five dollars.

The statute specifies that the Department "shall" add the ten percent penalty if those conditions exist. The Washington Supreme Court has construed the word "shall:" "[i]t is well settled that the word 'shall' in a statute is presumptively imperative and operates to create a duty. [citations omitted.] The word 'shall' in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent." The Erection Co. v. Department of Labor & Ind., 121 Wn.2d 513, 518, 852 P. 2d 288 (1993). The Department has no discretion here; it is required to impose the penalty.

The only authority for canceling or waiving a penalty or interest is RCW 82.32.105. RCW 82.32.105(1) and (4) provide:

(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.

...

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

There are additional waiver provisions that relate only to “delinquency” penalties assessed under subsection (1) of RCW 82.32.090. A delinquency penalty is one assessed when payment of the tax due on a tax return is not received by the due date. Those additional provisions do not apply to late payment of tax assessment penalties such as the penalty in this case.

The Department adopted WAC 458-20-228 (Rule 228) which contains its rules for returns, remittances, penalties, extensions, interest, and stays of collection. Rule 228(6) addresses the subject of waiving or canceling penalties. The main paragraph states:

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.

Rule 228 applies to all penalties imposed under RCW 82.32.090. Thus, it applies to the ten percent penalty for the late-payment of an assessment provided in RCW 82.32.090(2), except to the extent any portion of the rule is clearly limited to other penalties. Rule 228(6)(b) lists the “only circumstances” under which the Department will consider cancellation of penalties. It states:

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 canceling 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.

Subsection vii is the provision of Rule 228(6)(b) that describes the circumstance most like the taxpayer's. Unfortunately for the taxpayer, that provision clearly relates only to the late filing of tax returns. Thus, it is not applicable to the ten percent late-payment penalty imposed by RCW 82.32.090(2). See Det. No. 94-229, 15 WTD 73 (1995). The only other circumstance in Rule 228(6)(b) that might apply to the taxpayer's situation is number iv – a late payment “caused by unavoidable absence of the taxpayer, prior to the filing date.”

According to the taxpayer, he generally conducts little or no business during the time of year that the assessment was apparently issued by the Department. He chose to be out-of-town on vacation and any arrangements he made concerning his business did not include responding to the Department's demand for payment of a tax assessment which he did not know would be issued while he was out-of-town. We previously addressed a situation where the Department issued an assessment and the taxpayer failed to timely remit payment of the assessment because the taxpayer's president and bookkeeper were both absent from the place of business when the assessment arrived and payment became due. Considering the facts and circumstances surrounding the late payment, we said in Det. No. 99-008, 18 WTD 241 (1999):

The absences of the president and the bookkeeper, combined with the other circumstances (late receipt, the holiday season, the end-of-the year crunch) clearly upset the normal routine of the office and delayed the taxpayer's ability to address its affairs in a timely manner. The bookkeeper's weather-related absence was unexpected and clearly beyond the taxpayer's control. The fact that the taxpayer had timely filed and paid its taxes during many years prior to this delinquency, and remitted payment on this assessment only a few days late, lends credence to its statements. We find that the taxpayer's failure to pay the assessment by the due date was due to circumstances beyond its control.

Det. No. 98-008, supra. Here, the taxpayer is a sole proprietor and doesn't work much during the winter months. He was away on vacation when the tax assessment arrived. Unlike the monthly, quarterly, or annual excise tax returns, which have due dates known in advance, the

taxpayer did not know when this tax assessment would arrive. We note that the assessment was a second post-assessment adjustment issued almost two years after the original audit was completed. This fact contributes to the circumstance that was beyond the taxpayer's control: that is, the taxpayer could not have anticipated the arrival date of the assessment and thus have made arrangements for its payment during his absence. Upon his return, and just three weeks after the due date, the taxpayer paid the tax assessment. We conclude that like the taxpayer in Det. No. 98-008, supra, the 10% late payment penalty should be cancelled because the late payment was due to circumstances beyond his control.

DECISION AND DISPOSITION:

The taxpayer's petition for correction of assessment is granted.

Dated this 14th day of September 1999.