

Cite as Det. No. 99-302, 19 WTD 497 (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>
Balance Due Notices of)	
)	No. 99-302
...)	
)	Reg. No. ...
)	Balance Due Nos.: ...;...;...;...;...;
)	...
)	

- [1] RCW 82.32.160: PETITION FOR CORRECTION OF NOTICE OF BALANCE DUE – TIMELY. Petitions filed more than thirty days after the issuance of the balance due notices are not timely. The Department cannot consider the issues raised in untimely petitions, and the petitions must be denied.
- [2] RULE 228; RCW 82.32.090; RCW 82.32.105: PENALTIES – WAIVER – CIRCUMSTANCES BEYOND CONTROL – EMPLOYEE TURNOVER – FLOODING – FAILURE OF DEPARTMENT TO PROVIDE ASSISTANCE -- CAUSE OF LATE FILING. Where the taxpayer argued that its area had been flooded several times in recent years, but failed to show that the flooding caused it to file its return late, the late payment penalty can not be waived. Where the taxpayer argued that it did not receive requested help regarding filing its returns by EFT, but failed to prove that this failure caused it to file its return late, the late payment penalty can not be waived. Employee turnover is not considered a circumstance beyond the control of the taxpayer; therefore, it is not grounds for waiver of the late payment penalty.

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 assessment of late payment penalties.¹

FACTS:

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

C. Pree, A.L.J. – On December 29, 1998, the taxpayer filed a petition requesting waiver of late payment penalties for December 1997 through August 1998.² Balance due notices for the late payment penalties were issued on the following dates for the following tax periods in the following amounts:

<u>Issue Date</u>	<u>Tax Period</u>	<u>Amount</u>
March 25, 1998	December 1997	\$. .
March 25, 1998	January 1998	\$. .
August 27, 1998	April 1998	\$. .
August 27, 1998	May 1998	\$. .
October 13, 1998	June 1998	\$. .
December 7, 1998	July 1998	\$. .

The taxpayer paid its taxes late during other months in 1997 and in prior years.

In its petition, the taxpayer explained that during the period at issue it “experienced a series of turnovers in our Accounting Department with our Accountants, which resulted in misinformation concerning our tax liabilities owing to the State and our ability to file our returns to the State electronically or on time.” Further, the taxpayer argued that it “repeatedly made phone requests to the Revenue Department asking for training on filing our taxes electronically and have not received help enabling us to file our tax returns electronically.”³ Finally, the taxpayer argued that its “cash flow and revenues have . . . suffered in the fourth quarter of 1998 due to diminished working days and weather constraints.”⁴

During the telephone conference, the taxpayer argued that the area in which it conducts business had been flooded three to four times during the last six years. Although the taxpayer was given additional time after the hearing to present additional documents or arguments to support its entitlement to a waiver of the penalties, the taxpayer did not do so.

ISSUES:

1. Whether the taxpayer’s petition for waiver of penalties was timely.
2. To the extent the taxpayer’s petition was timely, whether the taxpayer has set forth sufficient grounds for waiver of the penalties.

² Balance due notices were not issued for February 1998 and August 1998. Further, the balance due notice for March 1998 was canceled due to a death in the taxpayer’s accountant’s family.

³ Certain taxpayers are required to pay their taxes by electronic funds transfer (“EFT”). See RCW 82.32.080, .085. The penalty provisions discussed below apply to these taxpayers. See WAC 458-20-22802.

⁴ Because any penalties assessed for the fourth quarter of 1998 are not at issue in this determination, we will not address this argument.

DISCUSSION:

[1] As a preliminary matter, we must address the issue of whether the taxpayer's petition for correction of the balance due notices was timely. RCW 82.32.160 addresses the requirement that a timely petition be filed with the Department before the Department can consider granting the taxpayer the relief requested in the petition. The statute provides in pertinent part as follows:

Any person having been issued a notice of . . . penalties assessed by the department, may **within thirty days after the issuance of the original notice** of the amount thereof or within the period covered by any extension of the due date thereof granted by the department petition the department in writing for a correction of the amount of the assessment, and a conference for examination and review of the assessment. The petition shall set forth the reasons why the correction should be granted and the amount of . . . penalties, which the petitioner believes to be due. The department shall promptly consider the petition and may grant or deny it. . . . **If no such petition is filed within the thirty-day period the assessment covered by the notice shall become final.**

(Emphasis added.) As noted above, the taxpayer filed its petition for correction of the balance due notices on December 29, 1998. Thus, the taxpayer's petition was timely only for the July 1998 balance due notice, which was issued on December 7, 1998. The taxpayer's petition for the remaining periods was filed more than thirty days after the issuance of the balance due notices. As such, the taxpayer's petition for the remaining periods is denied.

[2] Thus, the remaining issue is whether the taxpayer presented sufficient grounds for waiver of the penalty for the July 1998 tax period.

RCW 82.32.090 requires the Department to impose penalties for the late payment of taxes. That statute provides in pertinent part as follows:

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; and if the tax is not received on or before the last day of the month following 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 on or before the last day of the second month following the due date, there **shall** be assessed a total penalty of twenty percent of the amount of the tax

(Emphasis added.) The legislature, through its use of the word "shall" in RCW 82.32.090, has made the assessment of the penalty mandatory. See Det. No. 87-300, 4 WTD 101 (1987); Det. No. 86-238, 1 WTD 125 (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 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, 82.23B.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.

Section two of the above statute is not applicable because the taxpayer did not timely file all tax returns for the twenty-four month period preceding the July 1998 return.

The taxpayer argues that it experienced a series of turnovers in its Accounting Department, which “resulted in misinformation concerning our tax liabilities owing to the State and our ability to file our returns to the State electronically or on time.” Further, the taxpayer argues that it “repeatedly made phone requests to the Revenue Department asking for training on filing our taxes electronically,” but it did not receive the requested help. Finally, the taxpayer argues that the area in which it conducts business had been flooded three to four times during the last six years. Essentially, the taxpayer is arguing that its late payment is excused under paragraph (1) of the statute, i.e., the late payment was the result of circumstances beyond the control of the taxpayer. WAC 458-20-228 (Rule 228) is the Department’s rule that implements RCW 82.32.105 and sets forth the circumstances that are deemed to be beyond the taxpayer’s control. Subsection (6)(b) of Rule 228 provides as follows:

(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.

Although the taxpayer noted that its area had been flooded several times in recent years, the taxpayer failed to show that the flooding caused it to file its July 1998 return late. Further, although the taxpayer argued that it did not receive requested help regarding filing its returns by EFT, the taxpayer did not prove that this failure caused it to file its July 1998 return late. Finally, employee turnover is not considered a circumstance beyond the control of the taxpayer. See, e.g., Det. No. 86-28, 1 WTD 71 (1986) (“[T]he turnover of employees including those responsible for compiling state tax returns is not . . . deemed a ‘circumstance beyond the taxpayer's control.’”) In short, the taxpayer has failed to substantiate its entitlement to a penalty waiver due to circumstances beyond its control. As such, the taxpayer’s petition is denied

DECISION AND DISPOSITION:

The taxpayer’s petition is denied.

Dated this 17th day of November 1999.