

Cite as Det. No. 99-318, 19 WTD 603 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Refund of)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 99-318
)	
...)	Registration No. . . .
)	FY. . . /Audit No. . . .

- [1] RULE 100: SMALL CLAIMS PROCEDURE – CONVERSION TO REGULAR PROCEDURE. A tax appeal, initially accepted as a small claims case, may be converted to regular status where the issue presented is not a simple one.
- [2] RULE 228: TAX PAYMENT – TAX RETURN – SENT BY MAIL – FILING DATE. A tax payment or tax return sent to the Department by mail is deemed filed the day of the postmark on the envelope.
- [3] RULE 228: LATE-PAYMENT PENALTY – TAX ASSESSMENT – WAIVER OF – “ONE-TIME” PROVISION. The one-time penalty waiver provision of §§ 6(b)(vii) of Rule 228 may be applied to tax returns but not to tax assessments.
- [4] RULE 228: LATE-PAYMENT PENALTY – TAX ASSESSMENT – WAIVER OF – “24 MONTH” PROVISION. The “24 month” penalty waiver provision of RCW 82.32.105(2) may be applied to tax returns but not to tax assessments.

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:

Protest of penalty assessed for the late payment of a tax assessment.¹

FACTS:

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

Dressel, A.L.J. -- . . . (taxpayer) is an automobile dealer. Its books and records were examined by the Department of Revenue (Department) for the period January 1, 1992 through March 31, 1996. As a result a tax assessment, identified by the above-captioned numbers, was issued. Two post assessment adjustments reduced the tax bill to \$... and set a payment due date of May 24, 1999. Its records show the assessed amount was received by the Department June 1, 1999. The taxpayer's check no. 4605 is dated May 22, 1999, and the envelope in which it was sent bears the date May 26, 1999. On June 29, 1999 the Department issued a letter, demanding \$. . . in penalty and interest. That figure was comprised of a 10 percent late-payment penalty on the \$. . . of actual tax assessed in the referenced assessment, or \$. . ., plus interest.² The taxpayer paid the \$. . . amount specified in the demand letter but now petitions that it be refunded.

In requesting the refund, the taxpayer explains that it wanted to ask some questions of the Department before it sent in its payment. Shortly before the tax assessment due date of May 24, the taxpayer telephoned an employee of the Department to get its questions answered. That employee, apparently, was out of the office at the time so was not able to respond to the taxpayer's telephone message immediately. Realizing the due date was fast approaching, the taxpayer, according to its undated letter received July 13, 1999, mailed its tax payment on May 23, 1999.

In requesting that the subject penalty and interest be waived, the taxpayer, in effect, blames the post office for the fact that the payment envelope was not postmarked May 24 or earlier. The taxpayer does not know what the post office did with its letter and feels it is not fair that the taxpayer be penalized for the post office's error. The taxpayer further states that its tax payment record, over the years, has been excellent. In addition the taxpayer says that it was under the impression that the Department has a "grace" period to allow for the variable delivery patterns of the post office.

ISSUE:

May a penalty and interest, charged for the late payment of a tax assessment, be waived because the taxpayer states it mailed its payment one day prior to the due date?

DISCUSSION:

[1] First of all, pursuant to WAC 458-20-100(7)(b), we are converting this appeal, initially accepted under the "small claims" procedure, to a "regular" appeal. The reason for this is that the issue raised by the taxpayer requires a more complex analysis than first thought. A result of this conversion is that the taxpayer has a right to seek reconsideration of this decision, something that cannot be done with a small claims decision. WAC 458-20-100(7)(e).

[2] Where a taxpayer chooses to make his/her payment by mail, the postmark date on the envelope is important. In this regard RCW 82.32.080 reads, in part: "A return or remittance

²The \$. . . assessment consisted of \$. . . in tax and \$. . . in interest.

which is transmitted to the department by United States mail shall be deemed filed or received on the date shown by the post office cancellation mark stamped upon the envelope containing it, except as otherwise provided in this chapter.” The statute is clear. The envelope, in the instant case, was postmarked two days after the due date.³ The payment, therefore, was late. The penalty applies. RCW 82.32.090(2).

Having determined that the penalty was lawfully imposed, we next address the question whether it can be waived. WAC 458-20-228 (Rule 228) reads, in part:

(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.

...

(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.

³ A taxpayer who waits until the last minute to mail a tax return or payment does so at his or her own peril. Such a taxpayer should take into consideration the possibility that his/her envelope may not be handled efficiently by the post office. The earlier the envelope is placed in the mail, obviously, the more likely it is that it will be adorned with an early, or timely, postmark.

(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.

(Italics ours.) None of the above-listed seven circumstances fit this taxpayer's case. Subsection vii nearly does, but it applies to tax *returns*, as opposed to tax *assessments*. See Rule 228, *supra*. See also Det. No. 87-367, 4 WTD 359 (1987).⁴

The only other possibility for waiver is found at RCW 82.32.105(2), which reads:

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.

(Italics ours.) The authority for a penalty on a delinquent tax *assessment*, however, is RCW 82.32.090(2), not RCW 82.32.090(1). For that reason, the RCW 82.32.105(2) "24 month" waiver is not available to this taxpayer.

While we recognize and commend the taxpayer for its, otherwise, good record in timely paying its taxes, we do not have the authority to waive the late-payment penalty in this instance.

As to the small amount of interest appealed, RCW 82.32.105 reads, in part:

(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 Since Det. No. 87-367 was written, RCW 82.32.050 and RCW 82.32.090 have been amended such that the authority for a late-payment penalty on a tax assessment is now found in the latter statute. The effect of this is that the waiver provisions of Rule 228, generally speaking, do apply to tax assessments as well as to tax returns. The wording of §§ vii, however, clearly limits its application to tax returns.

The taxpayer's failure to timely pay the tax was not due to either of these circumstances, so the interest assessed may not be waived, either.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 30th day of November, 1999.