

Cite as Det. No. 99-062, 19 WTD 60 (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>
Notice of Balance Dues of:)	
)	No. 99-062
)	
...)	
)	Registration No. . . .
)	Balance Due Nos. . . .;
)	. . . ; . . . ; . . .
)	

[1] RCW 82.32.090; RCW 82.32.105; RULE 228: LATE PAYMENT PENALTIES WAIVER OR CANCELLATION OF PENALTIES. Late payment penalties will be waived or cancelled when the taxpayer's late filing and paying of monthly excise tax returns were due to the effects of a recent injury of his own and the recent death of his mother. Late returns due more remotely from these events will not have the late-payment penalties waived.

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:

Restaurateur and chef, whose injury and subsequent care of his mother, a resident of France, interfered with his income, requests the waiver of late payment penalties.¹

FACTS:

Munger, A.L.J. -- In early April 1997, taxpayer, a restaurateur and chef, suffered a back injury, which left him physically incapacitated. The resulting injury required several weeks of chiropractic care and physical therapy. Taxpayer was unable to work, and hired a replacement chef in order to keep the restaurant operating. Taxpayer closed his restaurant for approximately three weeks in the summer of 1997 to visit his gravely ill mother in France. He left June 24, 1997 and returned July 9, 1997.² Taxpayer states the injury and continued pain, coupled with his

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

² A Bulletin de Deces (Death Certificate), issued in Monereau, France, confirms the death of taxpayer's mother on October 13, 1997.

mother's death, interfered with his normal income stream to the extent that he was unable to pay his taxes in a timely manner.

The state tax returns for June, July, August, and September 1997 were filed and paid late. Delinquent penalties assessed ranged from five to twenty percent. All periods are now paid in full, including the respective penalties.

Taxpayer's notice of appeal states the delinquencies were the result of circumstances beyond his control. On that basis taxpayer requests a waiver and refund of the late payment penalties assessed with respect to his excise tax returns due for the months of June, July, August, and September of 1997.³

ISSUE:

Are taxpayer's injury and the death of a family member sufficient grounds for waiver of late payment penalties?

DISCUSSION:

The law states "if payment of any tax due on a return to be filed by a taxpayer is not received by the Department by the due date there shall be assessed [penalties]" for the late payment of taxes. RCW 82.32.090. (Underlining added.) The use of the word "shall" indicates the legislature's intent was to make the assessment of the penalty mandatory. See Det. No. 87-300, 4 WTD 101 (1987); Det. No. 86-238, 1 WTD 125 (1986).

The Department of Revenue (Department) is an administrative agency and has no discretionary authority to waive or cancel penalties. See Det. No. 87-300, supra; Det. No. 86-238, supra. The statutory authority for waiver or cancellation of penalties is RCW 82.32.105, which provides in part:

If the department of revenue finds that. . . 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 interest or penalties imposed under this chapter with respect to such tax.

The administrative rule that implements the above law is WAC 458-20-228 (Rule 228). Rule 228 states that the Department will waive or cancel the penalties imposed under RCW 82.32.090 only upon the finding that the failure of the taxpayer to pay any tax by the due date was due to "circumstances beyond the control" of the taxpayer. Rule 228 lists the seven situations under which a cancellation of penalties and/or interest will be considered by the Department. Taxpayer contends that the penalty should be canceled under the authority of Rule 228(6)(b)(iii):

³ All the monthly periods at issue were due on the 25th of the following month. See WAC 458-20-228(3).

(6) **Waiver or cancellation of penalties.** The department will waive or cancel the penalties imposed under RCW 82.32.090 . . . 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 for any other reason. . . .

. . .

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

. . .

(iii) The delinquency was caused by death of serious illness of the taxpayer or his immediate family

Taxpayer contends that his injury prevented him from resuming his duties as a chef, which necessitated hiring, at extra expense, a replacement chef, resulting in a financial hardship. However, neither the statute nor Rule 228 enumerates financial hardship as a basis for waiving delinquent penalties. We have held "financial hardship is not a basis for forgiving a taxpayer's tax liability, penalties, or interest." See Det. No.94-16, 14 WTD 184 (1994).

Therefore, we will consider whether, under the circumstances, taxpayer's injury and mother's death justify a waiver of the penalties under Rule 228(6)(b)(iii). In order to grant relief we must find the injury and death occurred in reasonable proximity, time-wise, to the due dates of the respective returns. See Det. No.88-288, 6 WTD 231 (1988). Taxpayer stated that the four late payments were due to his prolonged injury. While a serious illness of the taxpayer can be the basis for cancellation of a penalty under Rule 228, the rule does not provide an ongoing and indefinite basis for cancellations. Taxpayer's injury occurred prior to April 5, 1997. The first delinquent period, June 1997, was due July 25, 1997. The total between the two dates is 110 days. We have held:

A large interval of time between the tragic event and the tax due date makes it impossible to waive the penalty. The cited provision of Rule 228 is not intended to have indefinite application. It is meant to give relief in emergency situations where death or serious illness has occurred at a point much nearer to the due date.

Det. No. 88-288, supra. We find the taxpayer's injury does not fall within any of the circumstances that justify waiver of the penalties. The intervening time between the injury and first date of delinquency exceeded three months. In the interim, taxpayer filed April and May 1997 tax returns, continued to operate the business, and traveled to France. The injury, in order to satisfy the requirements of Rule 228's penalty waiver, must be proximately close in time to the due dates of the late payments.

However, situation (iii) provides for waivers of penalties if the serious illness or death of an immediate family member prior to the filing date caused the delinquency. We have noted that "...the [parent's] illness was apparently sudden and not capable of anticipation by the taxpayer. . ." which caused the taxpayer to miss the payment deadline. See Det. No. 87-306, 4 WTD 131, 132 (1987).

Taxpayer's mother was seriously ill late in June. Taxpayer visited her from June 24 through July 9, 1997. June taxes were due July 25, less than two weeks after he returned from Europe. With respect to September's return due on October 25, taxpayer's mother passed away on October 13, again two weeks prior to the due date. While normally we would consider this sufficient time to pay the taxes due, the cumulative effect of his mother's illness and death and his own injury make it understandable that the taxes for June and September 1997 would be paid late. We therefore find the illness and subsequent passing of taxpayer's mother, combined with the ongoing effects of his own injury, justify relief under Rule 228.

Accordingly, we find that taxpayer's situation for the tax periods June and September fall within the circumstances that justify waiver of penalties. We find the injury sustained by taxpayer in April 1997 not to be closely proximate in time to the due dates of July and August 1997, and therefore not a circumstance beyond his control.

DECISION AND DISPOSITION:

Taxpayer's petition for refund of penalties paid is granted in part and denied in part. That portion of the petition seeking a refund of penalties paid for the tax periods June and September 1997 is granted. That portion of the petition seeking refund of penalties paid for the tax periods July and August 1997 is denied.

Dated this 19th day of March, 1999.