

Cite as Det. No. 00-053, 19 WTD 981 (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. 00-053
)	
...)	Registration No. . . .
)	FY. . . /Audit No. . . .
)	FY. . . /Audit No. . . .

[1] RULE 228: LATE PAYMENT PENALTY – WAIVER – LATE PAYMENT OF ASSESSMENT. The WAC 458-20-228(6)(b)(vii) one-time-only penalty waiver, by its very terms, applies only to penalties imposed by RCW 82.32.090(1) on the late filing and payment of regular tax returns, and not to the RCW 82.32.090(2) penalties imposed for the late payment of tax assessments. Accord: Det. No. 86-235, 1 WTD 107 (1986).

[2] RCW 82.32.105(2): LATE PAYMENT PENALTY – WAIVER – 24-MONTH RULE – LATE PAYMENT OF ASSESSMENTS. RCW 82.32.105(2), which grants a waiver to taxpayers having filed no late returns for the previous 24 months is limited only to RCW 82.32.090(1) penalties imposed for the late payment of tax returns and not for the late payment of 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:

Petition for the cancellation of penalties for the late payment of two assessments.¹

FACTS:

Bauer, A.L.J. – Taxpayer filed a petition, dated February 24, 1999, requesting the cancellation of two 10% penalties for the late payment of two December 31, 1998 installments on the above-referenced assessments. The assessments consisted of deferred taxes, based on new construction projects, which had originated several years before. Under this program, Taxpayer is required to

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

make payments every December 31 for approximately five years. No invoices are mailed at the time the installments are due, and Taxpayer overlooked the payments due on December 31, 1998 until contacted by the Department of Revenue's (Department's) Taxpayer Account Administration (TAA) Division. Once contacted, Taxpayer immediately sent the required payments by Federal Express.

Taxpayer has taken steps – setting the payments up in the accounts payable system -- to assure that future installments will not be late. Given the size of the installment, Taxpayer believes the 10% penalty is excessive and punitive, and requests their waiver.

ISSUES:

1. Can a 10% penalty for late payment of an assessment be waived under the one-time-only circumstance set forth in WAC 458-20-228(6)(b)(vii) when payment was received by the Department within 30 days of the due date?
2. Can a 10% penalty for late payment of an assessment be waived under the provisions of RCW 82.32.105(2)?

DISCUSSION:

RCW 82.32.105(1) provides:

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.

[Emphasis added.] WAC 458-20-228(6)(b) (Rule 228) provides examples of situations which would so qualify.

Taxpayer's initial petition explained that, during the preceding year, it had experienced a great deal of management and staff changes. The department manager responsible for finance was re-assigned to an unrelated department. Taxpayer's petition stated that the person responsible for payment of the tax assessments had been out on sick leave to care for her husband, who was dying of cancer and, as a result, there was no one in the accounting group who remained aware of the installment due on December 31, 1998. "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" is a situation under which penalties might be waived under Rule 228 (6)(b)(iii).

Taxpayer's representative later shared in the teleconference, however, that further investigation had revealed that the person in charge of payments was not out of the office in December, but had been on sick leave caring for her husband from April to October.

By later letter dated November 30, 1999, Taxpayer cited WAC 458-20-228(6)(b)(vii) in support of its argument for waiver of the penalty. Under that regulatory provision, Taxpayer argues, a penalty must be waived or cancelled on a one-time basis if the payment of overdue taxes is received by the Department within 30 days of the due date and the delinquency is the result of error of the taxpayer's accountant or employee.

Taxpayer argues the installment payments were in fact received by the Department within 30 days of their due date,² and their delinquency was caused by the error of an "employee or accountant."

WAC 458-20-228(6)(b)(vii) provides:

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.

(Emphasis added.) There are several types of penalties. One is the penalty prescribed by RCW 82.32.090(1),³ which applies to the late filing and payment of periodic excise tax returns.⁴ The penalty here at issue, however, is the 10% penalty on the late payment of a tax assessment prescribed in RCW 82.32.090(2),⁵ which provides:

(2) 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. . . .

² It was due on December 31, 1998, and it was sent by Federal Express on January 21, 1999. The check cleared the bank on January 28, 1999.

³ RCW 82.32.090 provides:

(1) 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. No penalty so added shall be less than five dollars.

⁴ See also WAC 458-20-228(4)(a).

⁵ See also WAC 458-20-228(4)(b).

[1] The WAC 458-20-228(6)(b)(vii) one-time-only penalty waiver, by its very terms,⁶ applies only to penalties imposed by RCW 82.32.090(1) on the late filing and payment of regular tax returns. The WAC 458-20-228(6)(b)(vii) penalty waiver does not apply to the RCW 82.32.090(2) penalty for late payment of tax assessments, and thus cannot be used in Taxpayer's circumstance. See Det. No. 86-235, 1 WTD 107 (1986).

Taxpayer ultimately had control over its own office personnel and procedures, and in insuring that functions continued even in the face of personnel turnover. Absent circumstances such as those listed in Rule 228(6)(b)(i) through (vi), we must find that Taxpayer's failure to timely pay its December 31, 1998 assessments was not a circumstance beyond its control. Thus, the penalties cannot be waived under RCW 82.32.105 or the provisions of Rule 228.

In 1998 the legislature passed a new provision, amending RCW 82.32.105(2), which provides for a waiver of late payment penalties if a taxpayer, when the late payment is made, has had no other instances of late payments within the prior 24-month period.⁷

[2] However, RCW 82.32.105(2), by its own terms, is limited only to RCW 82.32.090(1) penalties imposed for the late payment of tax returns.

Accordingly, because the late payment of Taxpayer's assessments were not attributable to circumstances beyond its control in accordance with the requirements of RCW 82.32.105(1) and Rule 228, and because the RCW 82.32.105(2) 24-month waiver does not apply to RCW 82.32.090(2) penalties for the late payment of assessments, we have no authority under the law to waive Taxpayer's 10% assessment penalties.

DECISION AND DISPOSITION:

⁶ Relying on the "return" and 5% penalty" language.

⁷ (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) RCW 82.32.105(2) provides as follows:

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.

(Emphasis added.)

Taxpayer's petition is denied.

Dated this 29th day of March, 2000.