

Cite as Det. No. 99-255, 19 WTD 303 (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. 99-255
	)	
...	)	Registration No. . . .
	)	Warrant No. . . .
	)	

- [1] RULE 228; RCW 82.32.090; RCW 82.32.105: PENALTIES – WAIVER – CIRCUMSTANCES BEYOND CONTROL – SLEEP DEPRIVATION. Sleep deprivation caused by the responsibilities of caring for young children is not a circumstance beyond the taxpayer’s control sufficient to justify penalty waiver. Specifically, where the taxpayer was neither hospitalized nor under a doctor’s care for the sleep deprivation, it does not rise to the level of a “serious illness.”

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 with young children protests assessment of late payment penalties because he suffered from sleep deprivation during the period at issue.<sup>1</sup>

FACTS:

C. Pree, A.L.J. – The taxpayer is a certified public accountant. He filed and paid his third and fourth quarter returns for 1997 late. Delinquent penalties of \$. . . (\$. . . for the third quarter and \$. . . for the fourth quarter), plus a warrant penalty of \$. . . were assessed. The taxpayer paid the assessment and seeks a refund. The taxpayer argues he suffered from sleep deprivation because he was required to care for his children, including twins, during the period at issue. The taxpayer explained:

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

I had to take care of the kids . . . two to three days a week and in the first six to seven months of life the twins (who were born on 6/3/97) would wake up 4 to 5 times a night to be cared for. The constant sleep deprivation wore down my physical and mental stamina. After four months of this I was not able to get the 3<sup>rd</sup> quarter 97 tax return filed on time or the 4<sup>th</sup> quarter.

#### ISSUES:

1. Whether sleep deprivation caused by the responsibility to care for young children is a circumstance beyond the taxpayer's control sufficient to support waiver of the late payment penalty.
2. Whether any other grounds for penalty waiver apply.

#### DISCUSSION:

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 supplied.)

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.

The taxpayer argues his sleep deprivation caused the late payment of his taxes. Essentially, the taxpayer is arguing that his 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) of Rule 228 provides as follows:

(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 . . . .

(a) A request for a waiver or cancellation of penalties must be in letter form and . . . . In all such cases the burden of proving the facts is upon the taxpayer.

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

...  
(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 the accountant's immediate family, prior to the filing date.

...

Thus, the first issue is whether the taxpayer's sleep deprivation was a "serious illness" sufficient to justify waiver under Rule 228, section (b)(iii). We do not find that lack of sleep, under the circumstances present in this case, is sufficiently serious to justify waiver of the penalty. We note that the taxpayer was not hospitalized or otherwise under a doctor's care for his sleep deprivation. Thus, we do not find the taxpayer's failure to timely pay his taxes to be the result of circumstances beyond his control.

Although not argued by the taxpayer, we find that we are able to waive the penalty for the third quarter of 1997 under section (2) of RCW 82.32.090. This section applies when the circumstances that caused a late payment were not beyond the control of the taxpayer. See Det. No. 98-97, 17 WTD 395 (1998). Waiver is required under the twenty-four month provision if the taxpayer timely filed and remitted payment on all excise tax returns due during the twenty-four months immediately preceding the period covered by the third or fourth quarters of 1997. Clearly, the penalties attributable to the fourth quarter cannot be waived because the third quarter return for the same year was also late. However, our records reflect no unexcused late payments for the twenty-four months preceding the third quarter 1997 return. Thus, the taxpayer's petition is granted with respect to the penalties assessed for the third quarter of 1997. However, the taxpayer's petition is denied with respect to the fourth quarter of 1997.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part.

Dated this 18<sup>th</sup> day of August, 1999.