

Cite as 5 WTD 171 (1988)

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	<u>D E T E R M I N A T I O N</u>
for Correction of)	
Notices of Balance Due of)	No. 88-135
)	
)	Registration No. . . .
. . .)	Notices of Balance Due dated
)	September 25, 1987

RULE 228: RCW 82.32.090 -- PENALTIES -- LATE PAYMENT -- INADVERTENCE. If a taxpayer fails to pay taxes by the due date, there shall be assessed a penalty, unless the delay was caused by circumstance beyond the taxpayer's control. Nonpayment of taxes pending the outcome of the National Can litigation is not such a circumstance.

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:

The taxpayer protests the assessment of late payment penalties.

FACTS AND ISSUES:

Burroughs, A.L.J.-- The taxpayer at issue was assessed a 5% penalty in two Notices of Balance Due for late payment of its June and July 1987 tax returns. Payment of the tax amount has been received, but the taxpayer has petitioned for waiver of the penalty amounts.

On June 23, 1987, the U.S. Supreme Court in Tyler Pipe Industries, Inc. v. Washington Department of Revenue, 483 U.S. ___, 97 L.Ed.2d 199, 107 S.Ct. 2810 (1987), invalidated the

multiple activities exemption, RCW 82.04.440, and remanded the case to the Washington Supreme Court to decide the issue of remedy. The taxpayer initially withheld payment of its taxes pursuant to its determination that they would not ultimately be due and owing. The tax amounts were ultimately paid in October 1987. The five percent penalty amounts, however, were not paid and are the subject of this appeal.

On January 28, 1988, the Washington Supreme Court issued its opinion in National Can, Docket No. 51910-2 and Tyler Pipe, Docket No. 51110-1. The Court ruled that the U. S. Supreme Court's decision in Tyler Pipe should be applied prospectively only from the date the opinion was issued. Thus, the taxpayer was properly subject to Washington's B&O tax for periods prior to June 23, 1987.

With respect to tax reporting periods after June 23, 1987, taxes were also lawfully due. On August 10, 1987, the Washington legislature enacted laws of 1987, 2nd Ex. Sess., ch. 3. This statute provides for credits to cure the defect in the multiple activities exemption, RCW 82.04.440, identified by the U. S. Supreme Court in Tyler Pipe. As a result of this credit, the taxpayer was also properly subject to Washington's B&O tax for reporting periods after June 23, 1987.

The Department's well-publicized position throughout the above course of events was that all taxes subject to this litigation were to be timely paid, and that refunds would be later issued in the event the Department did not prevail.

The taxpayer requests a waiver of the penalties on its Notices of Balance Due.

DISCUSSION:

Washington's Revenue Act provides that if any tax due is not received by the Department of Revenue by the due date, there shall be assessed a penalty. RCW 82.32.090. A five percent penalty is mandated for returns which are received more than 30 days after the due date. As an administrative agency, the Department does not have discretion to change the law.

The only authority to cancel penalties or interest is found in RCW 82.32.105. That statute allows the Department to waive or cancel interest or penalties if the failure of a taxpayer to pay any tax on the due date was the result of circumstances beyond the control of the taxpayer. The statute also requires

the Department to prescribe rules for the waiver or cancellation of interest and penalties.

The administrative rule which implements the above law is found in WAC 458-20-228 (. . .). Rule 228 lists the situations which are clearly stated as the only circumstances under which a cancellation of penalties and/or interest will be considered by the Department. None of the situations apply in the present case.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 10th day of March 1988.