

Cite as 5 WTD 237 (1988)

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

In the Matter of the Petition )	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u>
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For Refund of )	
)	No. 88-164
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. . . )	Registration No. . . .
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[1] **RULE 228 AND RCW 82.32.090:** PENALTY -- LATE PAYMENT OF TAX DUE -- CIRCUMSTANCES BEYOND CONTROL OF TAXPAYER -- CONFUSION IN COMMUNICATIONS WITH THE DEPARTMENT -- ADDITIONAL PENALTY. Where taxpayer's remittance of tax was delayed beyond the 5 percent penalty period as a result of confusion in communications with the Department resulting in further delay and additional penalty, Department's mishandling of the situation excuses additional penalty as a circumstance beyond the control of the taxpayer.

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.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: December 12, 1986

NATURE OF ACTION:

Petition protesting late payment penalty assessed on a delinquent tax return.

FACTS AND ISSUES:

Krebs, A.L.J. -- . . . (taxpayer) is engaged in business as a sales representative. The taxpayer files tax returns on a quarterly basis.

The taxpayer's quarterly return for the period of April through June 1986 (Q2-86) was due by July 31, 1986. The Department of Revenue did not receive the Q2-86 return with payment. On August 20, 1986, the Department sent a Delinquent Notice to the taxpayer that the Q2-86 tax return had not been received and that payment could still be made with 5% penalty if the taxpayer acted immediately.

The taxpayer responded to the August 20, 1986 Delinquent Notice with a written message dated August 25, 1986 stating:

Attached is copy of Return sent to your office on 7-29-86. This morning our bank had not yet cleared check # . . . in the amount of \$ . . . . Would you again please check your records and let me know your findings.

The written message has the Department's notation: "Not posted 10/27/86," indicating that as of October 27, 1986 the Department had not received check payment.

By letter dated October 29, 1986, the Department informed the taxpayer that the tax return and payment had not been received and penalties applied.

On November 4, 1986, the taxpayer paid the tax for the Q2-86 period in the amount of \$ . . . with check # . . . , and paid a 20% penalty in the amount of \$ . . . with check # . . . .

The taxpayer protests the 20% late penalty because after its August 25, 1986 written message to the Department it was not notified until October 29, 1986 that its Q2-86 tax payment had not been received by the Department.

The issue is whether the 20% late penalty applies in the above described situation.

#### DISCUSSION:

WAC 458-20-228 (Rule 228), . . . , is the administrative regulation dealing with penalties. Rule 228 in pertinent part provides:

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.

The following situations will constitute the only circumstances under which a cancellation of penalties will be considered by the department.

. . .

2. The delinquency was due to erroneous information given the taxpayer by a department officer or employee. (Emphasis supplied.)

In this case, there is no known proximate cause for the Department's nonreceipt of the Q2-86 tax return with payment by the due date of July 31, 1986. The taxpayer's copy of the tax return was dated July 29, 1986. The taxpayer's check # . . . which never cleared its bank is still missing and its whereabouts are unknown. We can only speculate that the remittance went astray in the postal system because the taxpayer reported that it mailed it on July 29, 1986.

RCW 82.32.090, in pertinent part, provides

If payment of any tax due 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 within thirty days after 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 within sixty days after the due date, there shall be assessed a total penalty of twenty percent of the amount of the tax.

The tax was due by July 31, 1986. The Department sent its Delinquent Notice on August 20, 1986. The taxpayer responded on August 25, 1986 requesting the Department to check its records and advise of its findings. The Department did not respond to the taxpayer until October 29, 1986 advising that payment had not been received and that a 20% late penalty applied. If the Department had timely responded to the taxpayer's written message of August 25, 1986 by telephone or

mail with a simple instruction to the taxpayer to stop payment on the missing check # . . . and send a new check, the taxpayer could have easily sent in a new check before August 31 and avoided the additional penalty. The taxpayer would have been penalized at 5 percent in the amount of \$ . . . instead of at 20 percent in the amount of \$ . . . .

While this sequence of events does not fit within Rule 228's number 2 situation, that is, "the delinquency was due to erroneous information given the taxpayer by a department officer or employee," because actually no information was given, still we see it as a situation where the Department caused the penalty to increase by not handling the situation in a better manner. In effect, the additional penalty "was due to circumstances beyond the control of the taxpayer." Rule 228.

Furthermore, Rule 228's situation 7, while not applicable in this case because full payment of the tax due was not actually received within 30 days after the due date, speaks of a delinquency (excusable) resulting from an "unforeseen and unintentional circumstance, not immediately known to the taxpayer" including confusion caused by communications with the department . . . and . . . losses related to the postal service."

For the reasons stated and the applicable law, we conclude that the penalty assessed be limited to five percent (\$ . . . ) and that \$ . . . , the "additional penalty," plus applicable interest be refunded or credited to the taxpayer's account.

#### DECISION AND DISPOSITION:

The taxpayer's petition is substantially sustained. This matter is referred to the Department's Taxpayer Accounts Audit Section to authorize issuance of a refund or credit in the amount of \$ . . . plus applicable statutory interest.

DATED this 23rd day of March 1988.