Cite as Det. No. 99-279, 20 WTD 149 (2001)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 99-279
. . .	)	Registration No. . . .
	)	Notice of Balance Due No. . . .D

[1] RULE 22802; RCW 82.32.085: ELECTRONIC FUNDS TRANSFER (EFT) — DUE DATES. An electronic funds transfer (EFT), when the taxpayer uses the automated clearing house (ACH) credit method, is to be completed by the taxpayer so that the state receives collectible funds on or before the next banking day following the tax return due date. Generally, tax return due dates for monthly filers are the 25th of every month. If the 25th falls on a Saturday, Sunday or holiday, the tax return due date is the next banking day. On such occassions, the EFT payment due date is on or before the banking day following the tax return due date.

[2] RULE 22802; RCW 82.32.085: ELECTRONIC FUNDS TRANSFER (EFT) – DUE DATE—PENALTY. In order to avoid late payment penalties, a return must be received by the Department on or before the due date, or with a postmark on or before the due date, and the EFT payment must be completed, in its entirety, by the next banking day after the return's due date. If both events occur, there is timely filing and payment and no penalties apply.

[3] RULE 22802, RULE 228; RCW 82.32.080, RCW 82.32.090: ELECTRONIC FUNDS TRANSFER (EFT) – LATE PAYMENT PENALTY. There are no special provisions for penalties when payment is made by EFT. The general provisions for all taxpayers apply. Penalties may be waived only when the circumstances causing delinquency are 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.

NATURE OF ACTION:

The taxpayer protests the delinquency penalties imposed on the late electronic funds transfer (EFT) of taxes due.[1]

FACTS:

S. Thomas, A.L.J. -- The taxpayer is required to file its Washington State combined excise tax returns monthly and to remit the taxes due on those returns by EFT. The taxpayer makes its payments using the Automated Clearing House (ACH) credit system which requires that the taxpayer initiate its electronic transfers no later than 3:00 p.m. on the return's due date in order to be timely. [See WAC 458-20-22802 (Rule 22802).]

The taxpayer's September 1998 excise tax return was due on October 27, 1998. [See RCW 82.32.045; Rule 22802.] The taxpayer initiated partial payment of $. . . on October 26, 1998; the taxpayer's total tax liability was $. . . . The Department of Revenue (Department) received the partial payment October 28, 1998. The Department assessed a five-percent late penalty of $. . . on the taxpayer's total tax liability and a ten-percent short payment penalty of $. . . [2] on the remaining amount due. On December 10, 1998, the Department issued a balance due notice (. . .) for $. . . .

The taxpayer contends it initiated the transmission on time and any error in the transmission belongs to the bank. To support this contention, the taxpayer submitted a copy of the initiation report. The initiation report showed the taxpayer logged onto the system on October 26, 1998 at 1:28:56 p.m., and assigned transaction number 625136 to the transmission. A report received from the third party bank who processes the EFT payments for the taxpayer's bank shows the transmission was initiated on October 26, 1998. The report further reveals the taxpayer entered a settlement date of October 28, 1998. The settlement date is entered by the taxpayer as the date it wishes the funds transfer to be complete. The taxpayer contends that the EFT was timely initiated, and therefore, the Department should waive the delinquent penalties assessed when it did not receive payment by the tax payment due date of October 27, 1998.

ISSUES:

1. Whether the taxpayer, who is using the ACH credit system, has demonstrated any basis for a delinquency penalty waiver.
2. Whether the taxpayer has demonstrated any basis for waiver of the short payment penalty.

DISCUSSION:

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[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.
[2] Apparently, a mathematical mistake was made in calculating the short penalty. The proper amount should have been about $. . . .

The taxpayer began paying its monthly excise taxes by EFT in December 1997. The Washington legislature mandates that businesses reporting taxes due in a calendar year of $240,000 or more must make the payment by EFT. RCW 82.32.080. An EFT is:

> . . . any transfer of funds, other than a transaction originated by check, drafts, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account.

RCW 82.32.085. An EFT is "to be completed so that the state receives collectible funds on or before the next banking day following the due date." Id.

Rule 22802 is the Department's rule implementing RCW 82.32.080 and RCW 82.32.085. Rule 22802(2) provides the following definitions:

> "ACH"or "automated clearing house" means a central distribution and settlement system for the electronic clearing of debits and credits between financial institutions . . . .
>
> "ACH credit" means the electronic transfer of funds cleared through the ACH system that is generated by the taxpayer instructing the taxpayer's bank to charge the taxpayer's account and deposit the funds to the department's account . . . .
>
> "Collectible funds" actually means collected funds that have completed the electronic funds transfer process and are available for immediate use by the state.

For monthly filers, tax returns are due "within twenty-five days after the end of the month in which the taxable activities occur." RCW 82.32.045.

Rule 22802 explains:

> The EFT payment is due on or before the banking day following the tax return due date. An EFT is timely when the state receives collectible U.S. funds on or before 3:00 p.m., Pacific time, of the EFT payment due date. The ACH system, either ACH debit or ACH credit, requires that the necessary information be in the originating bank's possession on the banking day preceding the date for completion. Each bank generally has its own transaction deadlines and it is the responsibility of the taxpayer to insure timely payment . . . . The tax return due date shall be the next business day after the original due date if the original due date falls on a Saturday, Sunday or legal holiday.

The taxpayer's returns were due on the 25th of the month, except when, as here the 25th fell on a weekend. Rule 22802 (7)(b). October 25, 1998 fell on a Sunday, therefore, the tax return was due on Monday, October 26, 1998. To be timely, the Department had to receive payment by

3:00 p.m., October 27, 1998. Rule 22802(2)(f), (7); See also Det. No. 94-016, 14 WTD 184 (1994). The Department received payment on October 28, 1998, one day past the due date prescribed by statute and rule. The Department must have timely received both the tax return and payment for a taxpayer to avoid late-payment penalties. Rule 22802(8).

Filing by "EFT merely changes the method of payment and no other tax return procedures or requirements are changed." Rule 22802(1). There are no special penalty provisions for EFT payments. RCW 82.32.080, Rule 22802(13). A taxpayer filing by EFT is subject to the procedures and penalty provisions found in RCW 82.32.090. RCW 82.32.080. The Department may waive penalties only when the circumstances causing delinquency are beyond the control of the taxpayer as provided in WAC 458-20-228 (Rule 228). Rule 22802(13). When a taxpayer pays using the ACH credit method,

> the taxpayer's bank is the originating bank and the taxpayer is primarily responsible for its accuracy. The taxpayer must have timely initiated the transaction, provided the correct information for the ACH CCD + record, and shown that there were sufficient funds in the account, in order to prove timely compliance. If the taxpayer can make this showing then no penalties shall apply as to those funds authorized if the transaction is not completed.

Rule 22802(13).

The initiation report and the processing bank's report show the transaction was complete on October 26, 1998. Upon further investigation, however, we discovered the taxpayer erred when it initiated the EFT. The report from the third party processing bank revealed the taxpayer erroneously entered October 28, 1998 as the settlement date. Thus, although the taxpayer initiated the payment transfer transaction on time, it erred when it entered the settlement date. The entry of the settlement date is totally within the control of the taxpayer and the bank can only complete the transfer as instructed. The Department received the payment on October 28, 1998, the date the taxpayer instructed its bank to transfer the monies.

The Department issued . . . on December 10, 1998. [The balance due notice] imposed a five-percent penalty on the total tax due. It also imposed a ten-percent penalty on the difference between the taxpayer's tax liability and the payment the Department received. The ten-percent penalty was imposed because 30 days past the due date, the Department had not received full payment of taxes due. RCW 82.32.090 states:

> [i]f 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 within thirty days after the due date, there shall be assessed a total penalty of ten percent of the amount of the tax.

When the legislature used the word "shall" in RCW 82.32.090, it rendered the delinquent penalties imposed mandatory penalties. Det. No. 98-109, 18 WTD 124 (1999); Det. No. 87-235, 3 WTD 363 (1987). Therefore, the Department properly assessed a five-percent penalty on the taxpayer's

total tax liability. The Department properly assessed a ten-percent penalty on the balance that remained due after the Department received the short payment on October 28, 1998.

The late payment penalties can be waived only if the delinquent payment was due to circumstances beyond the taxpayer's control. RCW 82.32.105:

> 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 interest or penalties imposed under this chapter with respect to such tax.

The Department's only authority to waive penalties is found in RCW 82.32.105 and Rule 228, the administrative rule implementing RCW 82.32.105. Rule 228 states in its introduction: "[t]axpayers have a responsibility to become informed about applicable tax laws and to correctly and timely report their tax liability." See also Chapter 82.32A RCW, "Taxpayer Rights and Responsibilities."

Rule 228(6)(b) lists the only circumstances under which the Department will waive penalties. Sections (i) through (vi) of Rule 228(6)(b) do not apply to this taxpayer. Section (vii) authorizes the Department to grant a one-time penalty waiver under certain situations. The Department granted this one time waiver to this taxpayer when it filed its November 1995 return late. Therefore, the Department may not consider a second "one-time" waiver.

When a taxpayer does not meet the criteria set forth in RCW 82.32.105(1), the Department will waive penalties imposed under RCW 82.32.090(1) if that taxpayer has filed all returns on time for the twenty-four month period preceding the period under protest. RCW 82.32.105(2). Review of the taxpayer's account revealed the taxpayer also filed its August 1998 return late. Therefore, the taxpayer does not meet the statutory requirements enabling the Department to grant a penalty waiver under this provision.

In summary, the taxpayer paid its September 1998 taxes late. It erred when it entered the wrong settlement date in its communications with the bank. It also erred when it failed to remit payment for its total tax liability for September 1998. Examination of the taxpayer's records reveals it does not meet the criteria authorizing the Department to waive either penalty.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

Dated this 30th day of September 1999.