

Cite as Det. No. 97-070R, 18 WTD 6 (1999)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition For Correction of	)	<u>F I N A L</u>
Assessment and Refund of	)	<u>D E T E R M I N A T I O N</u>
	)	
	)	No. 97- 070R
	)	
...	)	Registration No. ...
	)	Notices of Balances Due
	)	..., ..., ...

RULE 228; RCW 82.32.105: LATE PAYMENT PENTALTY – EMPLOYEE MISCONDUCT.  
Failure of a taxpayer to monitor mail from the Department of Revenue was not a circumstance beyond the taxpayer’s control.

NATURE OF ACTION:

A professional service corporation requests a late-payment penalty waiver.<sup>1</sup>

FACTS:

M. Pree, A.L.J. -- [The Taxpayer], is a professional corporation made up of physicians. During 1995, none of its tax returns were filed timely. The Taxpayer Account Administration (TAA) of the Department of Revenue (Department) assessed late-payment penalties. In 1995, the taxpayer's accountant requested, and the Department granted, a one-time waiver of the penalty for the February 1995 taxes. For the other periods from January 1995 through September 1995, the taxpayer paid penalties in the amount of \$ . . . , for which a refund is now sought. During the reporting periods of October, November, and December 1995, the Department assessed additional penalties in the amount of \$ . . . , which have not been paid. The taxpayer requests we cancel those penalties as well. We considered the taxpayer’s requests in Det. No. 97-070, and denied them. The taxpayer requested reconsideration.

The taxpayer contends that it failed to pay its 1995 taxes by the due dates due to circumstances beyond its control. The taxpayer contends that under RCW 82.32.105, the Department must

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

waive any penalties due to circumstances beyond its control. The Department may not limit those circumstances by its own rulings.

The facts in the original determination are not in dispute. In early February 1995, the taxpayer hired an accountant to keep its books. Specifically, her duties included:

1. Calculating various taxes and withholdings;
2. Entering the liabilities in the taxpayer's accounting records;
3. Preparing completed tax returns for review by the taxpayer's administrator; and
4. Preparing checks for payment of the tax obligations to be signed by the administrator and one corporate officer.

The accountant also prepared monthly financial statements and budgets. She was responsible for establishing and maintaining financial controls and reconciling the taxpayer's bank statements. She also assisted with personnel management. The taxpayer alleges that the accountant:

1. Held tax returns or federal tax deposits so that they were not mailed timely;
2. Hid unmailed tax returns and checks after they were signed by a corporate officer or the taxpayer's administrator, yet the accountant recorded the liabilities in the general ledger as if timely paid;
3. Diverted all late notices and penalties to prevent any other member of the taxpayer's administrative staff or organization from discovering the problem;
4. Used the taxpayer's facsimile signature stamp without authorization to "sign" checks (including payments to the Department of Revenue) in response to late notices and penalties; and
5. Reconciled the bank statements in a manner to conceal the checks she signed.

This continued throughout 1995 and in early 1996. On April 29, 1996, when it became apparent that the taxpayer would discover the problem, the accountant resigned without giving the taxpayer advance notice.

The taxpayer states that the accountant prepared the returns prior to the due date, but did not mail them in. The taxpayer cannot explain the accountant's motive. Funds were available to pay the taxes. To the taxpayer's knowledge, the accountant did not take any money or otherwise convert the funds for her personal use.

The taxpayer states that the following controls were in place while the accountant was on the job:

1. Only the administrator and 11 physicians were authorized to sign checks. The accountant did not have check signing authority. Signature stamps were not approved, nor were they on the bank's signature cards;
2. Checks over \$500 required two signatures;
3. Separation of purchasing (office and medical supplies) from check preparation;

4. Daily deposit prepared by the business office supervisor and taken to the bank. All receipts for medical services were handled by business office personnel separate from the accountant;
5. Monthly financial statements prepared by administrator, and reviewed by the physician owners, and an outside CPA; and
6. Annual tax returns prepared by an outside CPA. Periodic review by the outside CPA.

The taxpayer provided correspondence with the IRS to demonstrate similar problems with its federal taxes. The IRS waived federal penalties imposed upon the taxpayer for this period. The taxpayer also provided a copy of the accountant's resume to demonstrate that on paper she was qualified to perform the duties for which she was hired. In addition, the taxpayer provided affidavits from its administrator and CPA to corroborate the facts as outlined above.

Other than the amount of late payment penalties assessed, TAA did not dispute the facts as presented by the taxpayer in its petition. The Department's records indicate in 1995 the Department sent several notices of balance due to the taxpayer for the delinquent returns.

#### ISSUE:

Does an accountant's intentional failure to send prepared tax returns and payment to the Department, and concealment of the misconduct through forgery and falsification of records, constitute a circumstance beyond the taxpayer's control entitling the taxpayer to waiver of late-payment penalties for multiple periods?

#### DISCUSSION:

If payment of tax is not received by the due date of a return, a penalty is assessed. RCW 82.32.090. Until January 1, 1997, RCW 82.32.105 provided in part:

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 of revenue shall prescribe rules for the waiver or cancellation of interest or penalties imposed by this chapter.

The taxpayer contends that we need read no further than this statute. According to the taxpayer, its accountant committed theft and forgery, which could not be foreseen, causing the delinquencies. The taxpayer contends the Department cannot take away the essence of the statute by rule or other interpretations. If we need to further interpret the statute, the taxpayer states the amended language in RCW 82.32.105 is instructive. Effective January 1, 1997, the statute provides:

**RCW 82.32.105 Waiver or cancellation of penalties or interest--Rules.** (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.

(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.

The taxpayer notes that subsection (2) provides for waiver in circumstances, which do not qualify as circumstances beyond the control of the taxpayer. Those circumstances are similar to subsection (6)(b)(vii) of the Department's Rule 228 (WAC 458-20-228):

(vii) The delinquency penalty will be waived or canceled 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.

The taxpayer reasons that since the current statute recognizes circumstances similar to those in subsection (6)(b)(vii) may not be beyond the control of the taxpayer, the Department could not limit the application of the waiver to the circumstances specified in Rule 228.

The taxpayer contends that its situation was similar to the circumstances in Det. No. 86-277, 1 WTD 283 (1986), in which we stated:

In this case, the bookkeeper embezzled funds from the taxpayer. In perpetration of the crime, the bookkeeper made false entries in the taxpayer's computer system so that sales taxes collected were not remitted to the Department. These false entries helped the bookkeeper to conceal the theft of money which the taxpayer would not be able to discover. The machinations of the bookkeeper resulted in tax deficiencies unknown to the taxpayer. Indeed, the Department's auditor did not discover the deficiencies during the first audit. We must conclude that the circumstances involved (concealed and deceptive criminal conduct) were beyond the control of the taxpayer. Accordingly, the assessment of audit interest is canceled.

We do not agree that these circumstances were beyond the taxpayer's control. First, the facts of this case are different from those in Det. No. 86-277.<sup>2</sup> That determination granted a waiver of interest for a single delinquency. In our case the taxpayer requests a waiver of penalties for numerous periods. Further, the Department granted a waiver of penalties for one period, February 1995.

In Det. No. 88-13, 5 WTD 5 (1988), issued after Det. No. 86-277 and written by the same author, we denied a petition regarding the waiver of penalties. Det. No. 88-13 involved employee misconduct over several periods.

In our case, the Department sent the taxpayer numerous notices of the delinquencies, which apparently were only seen by the accountant. Certainly, the Department attempted to notify the taxpayer of a problem. Had anyone, beside the accountant, reviewed the taxpayer's mail, the problem could have been identified and rectified. Given that the Department sent notices to the taxpayer, the taxpayer should have discovered the employee's misconduct. Having adequate procedures for detecting employee misconduct and reviewing mail are circumstances within the taxpayer's control. Subsection (6)(b)(vii) of Rule 228 recognizes this. As we explained in Det. No. 97-070:

Should a taxpayer fail to pay the tax on time once due to employee misconduct or other unforeseen circumstances, the penalty may be waived. However, one-time waiver anticipates that taxpayers adjust their behavior to prevent future occurrences. The other circumstances listed in subsections (6)(b)(i - vi) of Rule 228 are not limited to a single occurrence, because it is recognized that those circumstances have little to do with taxpayer behavior, and taxpayers cannot reasonably expect to prevent future occurrences in those circumstances by changing personnel or systems. In those unforeseen

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<sup>2</sup> We explained in the initial determination:

The taxpayer points out that like the bookkeeper in Det. No. 86-277, the accountant engaged in "concealed and deceptive criminal conduct." Further the taxpayer states that it is irrelevant that no "loss or detriment" to the taxpayer directly benefited the accountant. However, we note that the interest at issue in that determination involved a single assessment. In the situation before us, the taxpayer is requesting cancellation of penalties for numerous periods.

circumstances, taxpayers would not be expected to change behavior following a single late payment occurrence. Employee misconduct is a behavior that should be corrected.

Arguably, in this case the taxpayer did not have notice that it failed to pay the taxes on time. However, it was within control of the taxpayer to have procedures to know this. Therefore, the failure to pay the other 1995 taxes on time was not a circumstance beyond the control of the taxpayer. Under these circumstances, we cannot cancel the penalty more than the one-time that it has already been waived.

We also note that Det. No. 86-277 involved a waiver of interest, while we are considering a penalty waiver. Subsection (7) of Rule 228 lists two circumstances for waiver of interest contrasted with seven situations for penalty waivers in subsection (6). Subsection (7) does not state the two situations are the *only* circumstances under which interest will be waived. Subsection (6) limits waiver of penalties *only* to the circumstances listed. We have on numerous occasions recognized that Rule 228 limits *penalty* waivers to the listed circumstances. In numerous determinations, we have stated that the seven situations listed in the Rule are the only circumstances for waiver that the Department will consider. See Det. No. 86-239, 1 WTD 129 (1986); Det. No. 87-214, 3 WTD 281 (1987); Det. No. 87-73, 2 WTD 375 (1987); and Det. No. 86-228, 1 WTD 71 (1986).

As explained in Det. No. 97-070, the circumstances regarding the employee's misconduct were within the taxpayer's control. After reviewing the arguments in the taxpayer's petition for reconsideration, we conclude the Department may not waive the taxpayer's penalties.

#### DECISION AND DISPOSITION:

The taxpayer's petition for reconsideration is denied.

Dated this 20th day of May, 1998.