

Cite as 3 WTD 191 (1987)

BEFORE THE INTERPRETATION AND APPEALS SECTION  
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> <u>N</u>
for Correction of Assessment of)	
)	No. 87-182
)	
. . . )	Registration No. . . .
)	Notice of Balance Due
)	

[1] **RULE 228, RCW 82.32.080, RCW 82.32.090 AND RCW 82.32.105:** RETURN -- LATE PAYMENT -- PENALTY -- POSTMARK -- POSTAL DELAY. Where envelope containing return is postmarked by due date but delivered after the due date as a result of postal delay, filing is timely and no penalty is due. If envelope is deposited in the mail by the due date but postmarked after the due date as a result of postal delay, then the return is delinquent and penalties are due, unless the requirements of circumstance #7 of Rule 228 are otherwise met.

[2] **RULE 228, RCW 82.32.080, RCW 82.32.090 AND RCW 82.32.105:** RETURN -- LATE PAYMENT -- POSTMARK -- POSTAL DELAY. Where taxpayer asserts that envelope containing return was deposited in the mail ten days prior to due date and envelope is discarded upon receipt so that postmark is not available for examination, it will be presumed that the envelope was postmarked by the due date and that the return was therefore timely filed. Accord: 1 WDT 251 (1986).

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: . . .

NATURE OF ACTION

The taxpayer petitions for waiver or cancellation of late payment penalty alleging that its tax return was placed in the mail ten days prior to the due date.

#### FACTS

Rosenbloom, A.L.J. -- The taxpayer's Combined Excise Tax Return for September 1986 was signed by Ms. . . . and dated October 15, 1986. She stated in a telephone conversation with the undersigned that it was placed in the mail the same day. The return, however, bears a "Lock Box" date stamp indicating receipt by the Department on November 4, 1986. The envelope that contained the return is not available. It was apparently discarded upon receipt.

On January 23, 1987, the Department issued a Notice of Balance Due assessing a five percent penalty for late filing of the September 1986 return. The taxpayer's initial request for waiver of the penalty was denied by the Department's Taxpayer Accounts Administration Unit. This appeal followed.

#### TAXPAYER'S EXCEPTIONS

The taxpayer asserts that the penalty is not due because its tax return was deposited in the mail ten days prior to the due date and was therefore filed in a timely manner.

#### DISCUSSION

If the tax is paid by the due date, then no penalty is properly due. If the tax is paid after the due date, then a penalty is due. RCW 82.32.090. WAC 458-20-228 provides for waiver or cancellation of late payment penalties in certain limited situations, including the following:

7. 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 taxpayer has never been delinquent filing a tax return prior to this occurrence, unless the penalty was excused

under one of the preceding six circumstances, and

c. 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, and delays or losses related to the postal service.

d. The delinquency will be waived under this circumstance on a one-time basis only.

The Taxpayer Account Administration Unit based its denial of the taxpayer's request on the fact that the taxpayer has filed a delinquent tax return on one prior occasion. However, the issue as we see it is not whether a delinquency should be excused, but whether a delinquency in fact occurred. Rule 228 is inapplicable if the tax was paid by the due date. Before proceeding to Rule 228, the Department must find that the tax was paid after the due date. We are unable to make such a finding in this case.

RCW 82.32.080 provides in part:

A return or remittance which is transmitted to the department by the United States mail shall be deemed filed or received on the date shown by the post office cancellation mark stamped upon the envelope containing it.

[1] The taxpayer's statement is that the tax return was deposited in the mail well in advance of the due date. There is no evidence to the contrary. Nevertheless, the return was not received by the Department until after the due date. Two circumstances could account for this:

(1) The envelope may have been postmarked by the due date but delivered after the due date as a result of postal delay, in which case the return would be timely, RCW 82.32.080; or

(2) the envelope may have been deposited in the mail by the due date but postmarked after the due

date as a result of postal delay, in which case the return would be delinquent.

Under the first circumstance, no penalty would be due. Under the second circumstance, the penalty would be due and could not be waived under Rule 228 because the taxpayer has filed a delinquent return on one prior occasion.

[2] It is impossible to determine which of these circumstances occurred because the envelope that contained the return is not available for examination. The envelope was apparently discarded by the Department upon receipt. Examination of the cancellation mark on the envelope is the only reliable means by which we could have determined whether the penalty is due. Since the Department failed to retain this necessary piece of evidence, we must resolve any doubts in favor of the taxpayer. Since the taxpayer deposited the return in the mail ten days prior to the due date, we shall presume that the envelope was postmarked by the due date and that the return was therefore timely filed.

#### DECISION AND DISPOSITION

The taxpayer's petition for correction of Notice of Balance Due is granted.

DATED this 29th day of May 1987.