

Cite as 3 WTD 469 (1987)

APPEALS SECTION

BEFORE THE INTERPRETATION AND

DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)
N
For Correction of Assessment of)

D E T E R M I N A T I O

No. 87-263

. . .

Registration No. . . .

[1] **RULE 228 and RCW 82.32.090:** PENALTY -- LATE PAYMENT
-- LOST MAIL -- SITUATION 7. Where taxpayer alleges
that he timely mailed a remittance and that it
either went lost in the mail or with the Department,
the penalty cannot be waived if taxpayer does not
meet all conditions of Rule 228's situation number
7. The taxpayer had incurred prior unexcused
delinquent penalties which breached situation number
7.

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:

Petition for waiver of 20 percent penalty imposed on late
payment of tax due.

FACTS AND ISSUES:

Krebs, A.L.J. -- . . . (taxpayer) is engaged in the printing
business and related activities.

The taxpayer's monthly tax return for the period of December 1986 was due on January 25, 1987, which fell on a Sunday. The taxpayer reports in its petition that because the due date was on a weekend, he mailed the return on January 26, a Monday, with his check, numbered . . . , in the amount of \$ The Department of Revenue did not receive the tax return nor check payment. In April 1987, the Department contacted the taxpayer by telephone and advised him of the nonreceipt of the tax return and payment. On April 17, 1987, the taxpayer filed a copy of the December 1986 tax return with payment of \$. . . by check number

The Department reviewed the tax return and disallowed certain deductions which raised the tax due to \$. . . , a difference of \$. . . from the reported \$ The Department then imposed a 20 percent penalty of \$. . . on the adjusted tax due of \$ On May 29, 1987, the Department issued a Notice of Balance Due in the amount of \$. . . (\$. . . additional tax and \$. . . penalty) which remains unpaid.

In seeking waiver of the 20 percent penalty for late filing of the tax return, the taxpayer asserts that the tax return was timely mailed but "either the post office misplaced it or it was misplaced within the Department of Revenue." The taxpayer submits documentary evidence as follows:

1. A carbon copy of check number . . . , dated January 26, 1987 in the amount of \$. . . , payable to the Department of Revenue; and carbon copies of checks numbered . . . and . . . respectively dated January 27, 1987 and February 2, 1987 to show that the check in question, numbered . . . , was timely written on January 26, 1987.
2. Bank statement showing check number . . . to have cleared the bank on January 29, 1987, and a bank statement showing check number . . . to have cleared the bank on February 4, 1987.
3. Bank statements for the months of January through the end of April 1987 showing that the check in question, number . . . , did not clear through the bank.

The issue is whether, under the circumstances described above, the penalty for late filing of a tax return can be waived.

DISCUSSION:

The documentary evidence establishes that the taxpayer wrote out check number . . . , payable to the Department of Revenue on January 26, 1987. Beyond that, we can only rely on the taxpayer's word that he mailed the tax return and check the same date. The Department of Revenue neither received the mailed item nor did the taxpayer receive a return of the mailed item. For purposes of further discussion of this situation, we will assume that the taxpayer in fact mailed the item, that it was correctly addressed, had the proper postage, and had the taxpayer's return address.

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. (Emphasis supplied.)

In this case, payment of the tax due on January 25, 1987 was not received by the Department until April 17, 1987, more than sixty days after the due date. Accordingly, the 20 percent penalty provision of RCW 82.32.090 applied.

The legislature, through its use of the word "shall" in RCW 82.32.090, has made the assessment of the penalty mandatory. The mere fact of nonpayment within a specific period of payment requires the penalty provisions of RCW 82.32.090 to be applied.

As an administrative agency, the Department of Revenue is given no discretionary authority to waive or cancel penalties. The only authority to waive or cancel penalties is found in RCW 82.32.105 which in pertinent part provides:

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. (Emphasis supplied.)

Administrative Rule WAC 458-20-228 (Rule 228), . . . , states the only seven situations under which a cancellation of penalties will be considered by the Department. None of the seven situations apply to the taxpayer except possibly situation seven which states:

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. (Emphasis supplied.)

All conditions, 7a through 7c, must be fulfilled to satisfy situation 7 for cancellation of the penalty.

Condition 7a has not been met because the tax return and payment were not received by the Department within 30 days after the due date. The due date was January 25, 1987; the tax return and payment were received on April 17, 1987.

Condition 7b has not been met because the taxpayer has been previously delinquent in filing a tax return where the penalty was not excused. Our examination of the taxpayer's file discloses that the Q3-82 return, due October 31, 1982, was

filed November 23, 1982 and incurred a penalty which was not excused. Additionally, the July 1985 return, due August 25, 1985, was filed September 6, 1985 and incurred a penalty which was not excused.

While condition 7c may have been met in that the delinquency could have been caused by a loss "related to the postal service," (and here we have assumed that the taxpayer correctly addressed the remittance with properly applied postage and that the envelope bore the taxpayer's return address), yet situation 7 requires all conditions, 7a through 7c, to be met in order for cancellation of the penalty to be allowed under Rule 228.

Having failed to meet conditions 7a and 7b, the taxpayer cannot benefit from situation 7. Therefore, we must sustain the penalty.

DECISION AND DISPOSITION:

The taxpayer's petition is denied. The unpaid amount of \$. . . is due for payment by September 7, 1987.

DATED this 7th day of August 1987.