

Cite as 3 WTD 107 (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 Refund of)	
)	No. 87-146
)	
)	Registration No. . . .
. . .)	Tax Warrant No. . . .
)	

[1] **RULE 228 AND RCW 82.32.090:** PENALTY -- LATE PAYMENT OF TAX DUE -- UNREGISTERED TAXPAYER -- RULE 228's SITUATION NUMBER 2. Where unregistered taxpayer has not filed tax returns and after five years of business activity voluntarily registers and pays past due taxes, penalties on late payment of taxes cannot be waived.

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: March 12, 1987

NATURE OF ACTION:

Petition for refund of penalties paid. The penalties were assessed because of late payment of taxes due.

FACTS AND ISSUES:

Krebs, A.L.J. -- . . . (taxpayer) is engaged in the business activity of selling medical equipment as an independent contractor. The taxpayer is and has been so engaged on a commission basis

The taxpayer commenced his business activity on July 1, 1981 but did not register with the Department until April 30, 1986 at which time he filed tax returns for the period from 1981

through March 31, 1986. The taxpayer then began making partial payments periodically for past due taxes. The Department assessed penalties for late payment of taxes. . . .

On July 24, 1986, the Department issued Tax Warrant No. . . . against the taxpayer for past due taxes still unpaid and penalties By August 14, 1986, the taxpayer paid \$. . . against the warrant which included accrued interest. Thus, the taxpayer became current on his liability for amounts owed to the Department.

In protesting the assessment of penalties and seeking a waiver thereof, the taxpayer furnished the following information and explanation. . . . The taxpayer's previous accountant never directed or advised the taxpayer that he owed taxes on his commissions. In 1986, the taxpayer retained a new accountant, . . . , who advised him that he was accountable for B&O taxes. The taxpayer was astounded to learn that he too was supposed to file and pay taxes on the same sales [as the person for whom he sold]. [The new accountant] contacted by telephone the Seattle office of the Department and was told that if the taxpayer initiated his payment of taxes past due and registered voluntarily, then the taxpayer would not be penalized.

The taxpayer asks that the Department take into consideration also that he voluntarily came forward to register, revealed his delinquency, and has paid in full all delinquent taxes.

The issue is whether under the circumstances stated above the Department can waive the penalties assessed.

DISCUSSION:

RCW 82.32.290 provides

It shall be unlawful for any person to engage in business without having obtained a certificate of registration as provided herein;
. . . .

Any person violating any of the provisions of this section shall be guilty of a gross misdemeanor.

It is each individual's responsibility to be aware of any tax implications resulting from activities conducted within this state. Department of Revenue personnel are available to

answer any inquiries pertaining to such matters and information is readily available. The taxes imposed by the Revenue Act are of a self-assessing nature and the burden is placed upon a business to correctly inform itself of its obligations under the Act.

Thus, the taxpayer should have filed the Application for Certificate of Registration in 1981 and filed regular excise tax returns thereafter. Had this happened, the taxpayer would have avoided being delinquent and the resultant build-up of past due taxes and consequential penalties.

The statute as recited below makes mandatory the assessment of penalties upon delinquent payment of taxes.

RCW 82.32.090 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.)

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 specified 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 situation number 2 where erroneous information allegedly was given by a Department employee. The taxpayer asserts that his accountant was informed by a telephone conversation with an employee of the Department that the taxpayer would incur no penalty if the taxpayer registered voluntarily and paid past due taxes. However, the Department cannot give consideration to claimed misinformation resulting from telephone conversations with a Department employee. See ETB 419.32.99, Furthermore, in this case, full payment of taxes was not made within 30 days after the due dates, that is, the due dates during the years of 1981 through 1986. Also, the alleged misinformation did not have anything to do with the delinquency in not filing tax returns on time which resulted in the assessment of penalties.

The fact that the taxpayer's previous accountant never directed or advised the taxpayer to register or pay taxes on commissions earned cannot excuse the taxpayer from the penalties assessed. The selection of an accountant who will properly advise the taxpayer as to his taxation responsibilities is a matter entirely within the control of the taxpayer. Accordingly, the failure of the taxpayer to pay taxes by the due dates did not result from "circumstances beyond the control of the taxpayer." RCW 82.32.105, *supra*.

The Department recognizes that some businesses do not register because of a misunderstanding or inadvertence. Where a misrepresentation, fraud or intent to evade taxes is found, an additional fifty percent evasion penalty is assessed under the provisions of RCW 82.32.050. In this case, there was no finding to warrant imposition of the evasion penalty.

For the reasons stated and the applicable law, we conclude that the delinquent penalty assessed was proper and cannot be waived.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 6th day of May 1987.