

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition For Refund of	)	<u>D E T E R M I N A T I O N</u>
	)	
	)	No. 98-200
	)	
...	)	Registration No. . . .
	)	Balance Due No. . . .
	)	
	)	

[1] RULE 228: RCW 82.32.105(2) -- PENALTY -- WAIVER OF -- 24 MONTH RULE -- ONE-TIME RULE. The one-time penalty waiver provision of Rule 228 and the 24-month waiver provision of RCW 82.32.105(2) may be applied coextensively.

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:

Taxpayer seeks waiver of late-payment penalty.<sup>1</sup>

FACTS:

Dressel, A.L.J. -- . . . (taxpayer) files its state excise taxes on a monthly basis. Its October 1997 return was due with payment on November 25, 1997. The day before Thanksgiving Day 1997, the taxpayer mailed the subject tax return to the Department of Revenue (Department), but, inadvertently, forgot to include with it a check for the tax due. A few days later the taxpayer discovered its error. It immediately phoned the Department to advise it of the situation and mailed a check to the Kirkland office of the Department. The taxpayer's representative reports that he was assured over the telephone that the late-payment penalty had been waived. He followed up his telephonic request for waiver with one in writing. It was denied, however, in a Department letter of January 26, 1998. On March 23, 1998 the taxpayer, simultaneously, paid the \$. . . penalty and petitioned for refund of same. Again, the taxpayer asks for a penalty waiver.

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

## ISSUE:

May a late-payment penalty be waived because a taxpayer forgot to enclose a check with its tax return?

## DISCUSSION:

Authority for the waiver of late-payment penalties is found at RCW 82.32.105 which, in turn, is implemented by WAC 458-20-228 (Rule 228). The rule reads, in part:

(6) **Waiver or cancellation of penalties.** The department will waive or cancel the penalties imposed under RCW 82.32.090 and interest imposed under RCW 82.32.050 upon finding that the failure of a taxpayer to pay any tax by the due date was due to circumstances beyond the control of the taxpayer. The department has no authority to cancel penalties or interest for any other reason. Penalties will not be cancelled merely because of ignorance or a lack of knowledge by the taxpayer of the tax liability.

...

(b) The following situations will be the only circumstances under which a cancellation of penalties will be considered by the department:

(i) The return was filed on time but inadvertently mailed to another agency.

(ii) The delinquency was due to erroneous written information given the taxpayer by a department officer or employee. A penalty generally will not be waived when it is claimed that erroneous oral information was given by a department employee. The reason for not canceling the penalty in cases of oral information is because of the uncertainty of the facts presented, the instructions or information imparted by the department employee, or that the taxpayer fully understood the information received. Reliance by the taxpayer on incorrect advice received from the taxpayer's legal or accounting representative is not a basis for cancellation of the penalty.

(iii) The delinquency was caused by death or serious illness of the taxpayer or his immediate family, or illness or death of his accountant or in the accountant's immediate family, prior to the filing date.

(iv) The delinquency was caused by unavoidable absence of the taxpayer, prior to the filing date.

(v) The delinquency was caused by the destruction by fire or other casualty of the taxpayer's place of business or business records.

(vi) The taxpayer, prior to the time for filing the return, made timely application to the Olympia or district office, in writing, for proper forms and these were not furnished in sufficient time to permit the completed return to be paid before its delinquent date.

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

(Italics ours.) Of the listed circumstances, the only one with possible application to the taxpayer's situation is § vii. Inadvertent failure to enclose a check in an envelope with a tax return qualifies as "an unforeseen and unintentional circumstance not immediately known to the taxpayer". We have no reason to believe that such failure here was anything but inadvertent. Additionally, Department records reflect the check, which the taxpayer eventually sent in as payment on his October 1997 return, was received December 3, 1997. The due date for that return was November 25, 1997. Thus, payment was made within 30 days of the due date. Further, a check of Department records reveals that the taxpayer has not previously been granted a penalty waiver.

The Taxpayer Account Administration Division of the Department (TAA) denied the taxpayer's request for waiver on the basis of Rule 228 and the "24 month penalty waiver provision". Under the latter a waiver may be granted if a taxpayer has timely made all of its tax payments in the previous 24 month period. RCW 82.32.105(2). This is a new opportunity. The cited statute was amended effective January 1, 1997 to add the referenced waiver provision. TAA has taken the position that this provision replaces the one-time waiver provision of Rule 228, § 6(b)(vii), *supra*. In other words it believes that, effective January 1, 1997, the Department may not apply § 6(b)(vii), that it may only consider RCW 82.32.105(2). If one applies the latter authority, the taxpayer is not eligible for a penalty waiver, because it has filed several tax returns late within the 24 month period preceding November 25, 1997, the due date of the subject return.

[1] We disagree with the construction of TAA. Rule 228 and its § 6(b)(vii) is still on the books, as of the date of this Determination. Moreover, it does not conflict with the referenced addition to RCW 82.32.105. Subsection 6(b)(vii) of Rule 228 has not been amended nor has any other legally binding authority been promulgated that would substitute the 24 month provision for the "one-time" provision. Until that happens, penalty waivers will be considered under *both* provisions. Because the taxpayer has met all the requirements of Rule 228, § 6(b)(vii), the penalty is waived.

#### DECISION AND DISPOSITION:

The taxpayer's petition is granted.

Dated this 30<sup>th</sup> day of November, 1998.