

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	<u>D E T E R M I N A T I O N</u>
For Cancellation of Notice of)	
Balance Due of)	No. 88-267
)	
. . .)	Registration No. . . .
)	
)	

[1] **RULE 228:** RCW 82.32.045 -- RCW 82.32.090 --PENALTY -- TAX RETURN -- LATE. Taxpayers reporting on a monthly basis must file tax returns within 25 days after the close of the month. A 5% penalty is imposed if the return is filed within the next 30 days.

[2] **RULE 228:** RCW 82.32.105 -- PENALTY -- WAIVER. A penalty may be waived due to circumstances beyond the control of the taxpayer. Rule 228 sets forth the only circumstances justifying waiver. The penalty may be waived for a first-time delinquent filer.

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:

The taxpayer requests a cancellation of a Notice of Balance Due which imposed a five percent penalty for late filing of a Combined Excise Tax Return.

FACTS AND ISSUES:

Mastrodonato, A.L.J. -- On January 15, 1988, the Department of Revenue issued a Notice of Balance Due against the taxpayer. The Notice assessed a five percent (5%) late filing penalty. The taxpayer has appealed that penalty and this Determination responds to the appeal.

In a letter to the Department dated March 7, 1988, the taxpayer succinctly stated the facts of this case and its arguments in support of its petition to cancel the penalty, as follows:

On September 30, 1987, we received a computer-generated letter dated September 23, 1987, informing us that we would be required to file our combined excise tax return on a monthly basis. On October 30, 1987, we wrote to the Department of Revenue requesting that we remain on a quarterly reporting frequency (. . .). This request was made on the basis of the additional staff that would be required to allow for reporting monthly.

While waiting for a reply from the Department of Revenue, we worked toward fulfilling the first reporting date for the October 1987 reporting period of November 25, 1987. We were able to file the report with payment on November 30, 1987, only five days after the due date. Meanwhile, we had not received a response to our request to remain on a quarterly reporting frequency.

It wasn't until December 10, 1987, that we received an answer to our request. Since that time, we have been prompt in our filings and payments.

On January 19, 1988, we received a Notice of Balance Due for a late filing penalty. On January 21, 1988, we wrote the Department of Revenue asking that the penalty be withdrawn On February 16, 1988, we received a response from . . . denying a waiver of the penalty. I called Mr. . . . that day and he stated that any further appeals would need to be sent to the Interpretation and Appeals Division.

I am requesting that the penalty be withdrawn. [The taxpayer] acted in a reasonable and responsible manner in requesting to remain on a quarterly reporting frequency, informing the Department of Revenue of the need for additional staff to meet a monthly schedule, and making every effort possible to file by the first monthly date, even though we had not received a response [to] our request from the Department of Revenue.

The issue for our consideration is whether the Department can waive or cancel the five percent late payment penalty as a result of the taxpayer's late payment of tax liability for the first month following a change in the taxpayer's reporting frequency from quarterly to monthly.

DISCUSSION:

[1] Before we decide the issue presented, a recitation of the pertinent statutes and rules is in order. First, RCW 82.32.045 prescribes the reporting periods for all taxpayers:

(1) Except as otherwise provided in this chapter, payments of the taxes imposed under chapters 82.04, 82.08, 82.12, 82.14, and 82.16 RCW, along with reports and returns on forms prescribed by the department, are due monthly within twenty-five days after the end of the month in which the taxable activities occur.

(2) The department of revenue may relieve any taxpayer or class of taxpayers from the obligation of remitting monthly and may require the return to cover other longer reporting periods, but in no event may returns be filed for a period greater than one year. For these taxpayers, tax payments are due on or before the last day of the month next succeeding the end of the period covered by the return.

(3) The department of revenue may also require verified annual returns from any taxpayer, setting forth such additional information as it may deem necessary to correctly determine tax liability. (Emphasis supplied.)

Thus, with respect to monthly taxpayers, tax reports or returns are due within 25 days after the end of the month in which the taxable business occurs or results.

Next, RCW 82.32.090 sets forth the late payment penalties. This statute provides in pertinent part as follows:

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. No penalty so added shall be less than two dollars. (Emphasis supplied.)

RCW 82.32.090 makes it clear that if payment of the tax payable on the return or report is not received by the due date (i.e., within 25 days after the end of the month in which the taxable activities occurred), a penalty of five percent of the amount of the tax "shall be assessed" (emphasis added).

The use of the word "shall" is significant. It means that the Department has no discretion in the matter. Thus, the assessment of penalties is mandatory under RCW 82.32.090.

Nevertheless, the law does contain a provision allowing for a waiver or cancellation of penalties. RCW 82.32.105 states as follows:

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.)

[2] Thus, if a taxpayer can show that the reason for the failure to timely pay the tax liability was due to circumstances beyond its control, the penalties can be cancelled or waived. The Department has prescribed rules for the waiver or cancellation of penalties. The regulation in question is WAC 458-20-228 (Rule 228). It provides, in pertinent part, as follows:

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.

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

1. The return was filed on time but inadvertently mailed to another agency.
2. The delinquency was due to erroneous information given the taxpayer by a department officer or employee.
3. 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.
4. The delinquency was caused by unavoidable absence of the taxpayer, prior to the filing date.
5. The delinquency was caused by the destruction by fire or other casualty of the taxpayer's place of business or business records.
6. 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.

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.

. . .

A request for a waiver or cancellation of penalties must be in letter form and should contain all pertinent facts and be accompanied by such proof as may be available. Petition for cancellation of penalties must be made within the period for filing under RCW 82.32.160 (within 20 days after the issuance of the original notice of the amount thereof or within the period covered by any extension of the due date thereof granted by the department). In all such cases the burden of proving the facts is upon the taxpayer. (Emphasis supplied.)

Thus, the above situations are the only circumstances under which the Department will consider a waiver or cancellation of penalties for failure to pay a tax by the due date. It is clear that the taxpayer does not qualify under any of the first six situations.

Circumstance number 7 was added to the rule in 1985. It creates a special, one-time exemption from the mandatory penalty provision if, and only if, all four of the requirements (i.e., a, b, c, and d) are satisfied. The four requirements are: (a) that the return and full payment are received by the Department within the five percent penalty period (i.e., within 30 days); (b) that the taxpayer has never been previously delinquent in filing a tax return; (c) that the delinquency was caused by unforeseen and

unintentional circumstances, such as confusion caused by communications with the Department; and (d) that this is a one-time waiver.

It is clear that the important considerations are (a), (b), and (c). The taxpayer satisfies (a). The tax return in question, the October 1987 return, was due for payment on November 25, 1987. The taxpayer filed the return and paid the full amount of tax due on November 30, 1987, or within the five percent penalty period.

The taxpayer also satisfied requirement (b). This requires that the taxpayer has never been delinquent filing a tax return prior to the occurrence in question. Our review of the taxpayer's file revealed that, although it has received Notices of Balances Due in the past, there were for underpayment or incorrect payment of tax liability. To the best of our knowledge, the taxpayer has never been delinquent in filing tax returns in the past.

The taxpayer also appears to satisfy requirement (c). Although it is not entirely clear in regards to what the rule intends by including "confusion caused by communications with the department" as an example of an "unforeseen and unintentional circumstance," it is clear that the taxpayer was in communication with the Department during the period in question.

The taxpayer received a notice on September 30, 1987, informing the taxpayer that it would be required to file all future excise tax returns on a monthly, rather than a quarterly, basis, beginning with the month of October 1987. The taxpayer subsequently wrote to the Department on October 30, 1987, requesting that it remain on a quarterly reporting frequency. The Department did not respond until December 10, 1987, when it sent a letter denying the taxpayer's request. The Notice of Balance Due assessing the late payment penalty on the October 1987 return was not received by the taxpayer until January 19, 1988. The taxpayer timely appealed that denial on January 21, 1988.

In any event, it is clear that there was communications between the taxpayer and the Department, and we are satisfied that those communications caused confusion, such that an unforeseen or unintentional circumstance resulted. We are also impressed with the fact that, upon notification of the change in reporting frequency, the taxpayer acted in a reasonable and responsible manner in writing to the Department, and further making every effort to file that first monthly return by the due date, even though the taxpayer had not received a response from the Department to remain on a quarterly reporting frequency.

Therefore, the taxpayer qualifies for waiver of the late filing penalty, on a one-time basis only, under Rule 228, subsection 7.

DECISION AND DISPOSITION:

The taxpayer's petition is granted. The Notice of Balance Due, imposing a five percent penalty for late filing and payment of the taxpayer's October 1987 tax return, is hereby waived and cancelled.

DATED this 15th day of July 1988.