

Cite as Det. No. 98-109, 18 WTD 124 (1999)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment/Refund of)	
)	No. 98-109
)	
...)	Registration No. . . .
)	Tax Warrant No. . . .
)	
)	

- [1] RULE 228 AND RCW 82.32.105: PENALTIES -- CIRCUMSTANCES BEYOND THE CONTROL OF THE TAXPAYER -- ASSETS FROM MARITAL DISSOLUTION -- RESTRAINING ORDERS. It is not a circumstance beyond the control of a taxpayer, such as would require the waiver or cancellation of penalties, where the taxpayer failed to pay a tax assessment when it was due because the taxpayer had insufficient funds to pay the assessment, and the taxpayer's owner later arranged for payment of the assessment from personal assets under the jurisdiction of a superior court in the owner's marriage dissolution action.

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:

A corporation seeks waiver of a delinquency penalty and a tax warrant penalty, alleging circumstances beyond its control.¹

FACTS:

Gray, A.L.J. -- The Department of Revenue (Department) audited the taxpayer for the period January 1, 1993 through December 31, 1996. The Department issued Tax Assessment No. . . . on May 2, 1997 and Tax Warrant No. . . . on December 11, 1997. The taxpayer paid \$. . . against the tax assessment on or about June 5, 1997 (of which \$. . . was credited to interest) and \$. . . on or about July 9, 1997 (of which \$. . . was credited to interest). The taxpayer paid most of the remaining balance on or about December 11, 1997, when he paid \$. . . (of which \$. . . was

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410
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credited to interest). The taxpayer agrees that the tax is owed. The taxpayer appeals only the delinquency penalty and the tax warrant penalty.

The taxpayer's owner's wife initiated a marriage dissolution action in 1996. The dissolution action proceeded in 1997, during which time the Department issued the tax assessment and the tax warrant.

In a letter to the Department dated December 22, 1997, taxpayer's lawyer (in the dissolution action) referred to the existence of the dissolution action and that "any sort of extraordinary transactions were subject to mutual restraining orders," and so had to convince [the taxpayer's owner's wife] counsel of the appropriateness of any large payments. The taxpayer did not have money to pay the tax assessment when due, so [the taxpayer's owner] had to arrange for the sale of personal assets, all of which were outside of the corporation and were community property. The taxpayer provided a copy of a temporary order, entered in his dissolution action in December 1996, that contains the following language that is pertinent to the operation of the taxpayer:

The [x] petitioner [x] respondent is restrained from transferring, removing, encumbering, concealing or in any way disposing of any property except in the usual course of business or for the necessities of life and requiring each party to notify the other of any extraordinary expenditures made after the order is issued.

...

The parties shall account to each other on a monthly basis for the business activities of the community which they are managing -- . . . The parties shall immediately make available to counsel for each other those tax returns, financial records, and other data reasonably necessary to evaluate the assets of the marital community, including their rental properties, . . ., and . . .

Neither party shall undertake any extraordinary transactions of any kind without first notifying the other party through his/her counsel and obtaining agreement.

In . . . letter, he wrote that they had:

all hoped, at least mid-year, that perhaps the amount of the assessment could be recalculated after a thorough evaluation of [the taxpayer's] books was completed. This, of course, took some time and the coordination with [the taxpayer's owner], the bookkeeper, and [the taxpayer's] accountant. As I understand it, the Department's assessment was indeed accurate.

There is no indication that any efforts were made to pay the tax assessment after it was issued on May 2, 1997. Instead, efforts were directed toward an internal examination of its books and records by the corporate owner, bookkeeper, and accountant. As late as October 1997, the corporate owner was still hoping to produce proof to his estranged wife's counsel that the corporation had no assets with which to pay the tax assessment. It was not until early December

that the corporate owner's lawyer (in the dissolution action) was provided with the taxpayer's balance sheet and statement of operations and remitted those documents to opposing counsel on December 11, 1997. On December 22, 1997, the corporate owner's lawyer wrote to the Department, including a check for payment of most of the tax assessment and the request to waive the delinquent penalty and the warrant penalty. He said:

I hope you can appreciate that everyone has made a good faith effort to address this significant issue. Unfortunately, when you involve divorcing marital partners, two attorneys, a bookkeeper, and a CPA, it takes time to acquire and disseminate information and reach consensus.

ISSUE:

The issue is whether the taxpayer has shown the existence of "circumstances beyond its control" preventing timely payment of the tax assessment, such that the Department must waive or cancel the delinquent penalty and the tax warrant penalty.

DISCUSSION:

The various types of tax penalties applicable to Washington excise taxes are found in RCW 82.32.090. The delinquency penalty assessed in Tax Warrant No. . . . was imposed pursuant to RCW 82.32.090(2):

If payment of any tax assessed by the department of revenue is not received by the department by the due date specified in the notice, or any extension thereof, the department shall add a penalty of ten percent of the amount of the additional tax found due. No penalty so added shall be less than five dollars.

The tax warrant penalty was imposed pursuant to RCW 82.32.090(3):

If a warrant be issued by the department of revenue for the collection of taxes, increases, and penalties, there shall be added thereto a penalty of five percent of the amount of the tax, but not less than ten dollars.

The legislature used the word "shall" in directing the Department to impose these penalties. By using the word 'shall,' [the statute] imposes a mandatory duty." Washington State Coalition for the Homeless, 133 Wn.2d 894, 907-08, ___ P.2d ___ (1997). The Department has no choice but to assess penalties if the statutory conditions for those penalties exist.

The only authority for waiving or canceling penalties or interest is found in RCW 82.32.105. That statute says:

(1) 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 penalties imposed under this chapter with respect to such tax.

(2) The department shall waive or cancel the penalty imposed under RCW 82.32.090(1) when the circumstances under which the delinquency occurred do not qualify for waiver or cancellation under subsection (1) of this section if:

(a) The taxpayer requests the waiver for a tax return required to be filed under RCW 82.32.045, 82.23B.020, 82.27.060, 82.29A.050, or 84.33.086; and

(b) The taxpayer has timely filed and remitted payment on all tax returns due for that tax program for a period of twenty-four months immediately preceding the period covered by the return for which the waiver is being requested.

(3) The department shall waive or cancel interest imposed under this chapter if:

(a) The failure to timely pay the tax was the direct result of written instructions given the taxpayer by the department; or

(b) The extension of a due date for payment of an assessment of deficiency was not at the request of the taxpayer and was for the sole convenience of the department.

(4) The department of revenue shall adopt rules for the waiver or cancellation of penalties and interest imposed by this chapter.

The rules that are required by RCW 82.32.105(4) are contained in WAC 458-20-228 ("Rule 228"). Rule 228(6) is the section of the rule that addresses the waiver or cancellation of penalties. It provides²:

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 canceled merely because of ignorance or a lack of knowledge by the taxpayer of the tax liability.

(a) 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 thirty days after the issuance of the original notice of the amount owed or within the period covered by any extension of the due date granted by the department). In all such cases the burden of proving the facts is upon the taxpayer.

(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

² This rule does not reflect the amendments to RCW 82.32.105 that took effect on January 1, 1997.

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 canceled 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.

This law determines whether the delinquency penalty and the tax warrant penalty must be waived. It is obvious that the first six circumstances did not exist here. The seventh circumstance also does not apply, despite its reference to a "delinquency penalty." RCW 82.32.090(1) and (2) both create delinquency penalties, but each is imposed under different circumstances. The kind of delinquency penalty that was imposed in this case was authorized under RCW 82.32.090(2), when the taxpayer did not pay the tax assessed by the Department (in this case, the tax assessment issued by the Department on May 2, 1997). From the language that appears in Rule 228(6)(vii), it is plain that the subsection refers to the kind of delinquency penalty that is authorized under RCW 82.32.090(1). The latter kind of delinquency penalty is imposed for the late filing or payment of excise tax returns. The reason why there are no "circumstances beyond the control of the taxpayer" is that the dissolution and the language in the restraining order did not prevent the taxpayer from paying the tax assessment when it was due. The taxpayer did not have the money to pay the assessment. The taxpayer would have paid the tax assessment late in any event. The marriage dissolution and the restraining order only contributed to the late payment. If the taxpayer had shown that the money was available to pay the tax assessment when it was due, but that the only reason it was not timely paid was due to a court order prohibiting the disbursement of the corporate funds, that situation would be different and would qualify as a "circumstance beyond the control of the taxpayer." That is not the case here, however.

The tax warrant penalty was imposed by the act of issuing the tax warrant. The taxpayer has not stated any facts that would support waiver of cancellation of the tax warrant penalty. Next, we must similarly conclude that RCW 82.32.105(2) does not authorize waiver or cancellation of penalties in this case because the penalties here were not imposed under RCW 82.32.090(1).

There being no legal authority to waive or cancel the penalties in this case, we must deny the petition.

DECISION AND DISPOSITION:

The petition to waive or cancel the delinquency and warrant penalties is denied.

Dated this 17th day of June, 1998.