

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</u>
	<u>A T I O N</u>	
For Refund of)	
)	No. 88-
337)	
)	
No. . . .)	Registration
)	
)	

[1] **RULE 228, RCW 82.32.090 AND RCW 82.32.105:** PENALTY -- LATE PAYMENT OF TAX DUE -- UNREGISTERED TAXPAYER -- MISTAKEN ASSUMPTION -- CIRCUMSTANCE BEYOND CONTROL OF TAXPAYER. Where taxpayer failed to register in a timely manner and mistakenly assumed after registering that it would be reporting on a quarterly basis which caused late filing of monthly tax returns, the circumstances were not beyond control of the taxpayer. Accordingly, late payment penalties 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: . . .

NATURE OF ACTION:

Petition for waiver of penalties assessed because of late filings of monthly tax returns, and deemed a petition for refund of penalties paid.

FACTS AND ISSUES:

Krebs, A.L.J. -- [The taxpayer] processes, distributes and sells beverages, foods and related products.

The taxpayer incorporated on December 22, 1986 in Washington, purchased a business on January 1, 1987 and commenced business activities on that date in Washington.

The taxpayer filed its Master Business Application with the Department of Revenue office in Vancouver on March 5, 1987. The taxpayer received its Master License Number on April 14, 1987 and then filed its tax returns for the months of January and February, 1987 on April 24, 1987.

The January 1987 tax return was due by February 25, 1987. The taxpayer filed the return on April 24, 1987 with payment of \$ X for taxes. The Department's excise tax examiner found a 4 cents error in arithmetic and added that to the 10% late payment penalty in the amount of \$ X causing a Notice of Balance Due to be issued on July 24, 1987 in the amount of \$ X which has been paid.

The February 1987 tax return was due by March 25, 1987. The taxpayer filed the return on April 24, 1987 with payment of \$ X for taxes. The Department's excise tax examiner adjusted the tax due to \$ X because of arithmetic errors and assessed a 5% late payment penalty in the amount of \$ X. The resulting balance due of \$ X has been paid.

The taxpayer's petition for waiver of the penalties is being considered as a petition for refund of the penalties paid.

The taxpayer asserts that after filing its Master Business Application it waited for "adequate reporting documentation, assuming [its] first filing would be for the first quarter 1987 and due on April 30, 1987." The taxpayer telephoned the Department's Seattle office on April 24, 1987 and was informed that it had to file separate returns for January, February and March immediately. The taxpayer further asserts that its delay in filing January and February returns was not an intentional avoidance to pay the tax due but a misunderstanding of reporting procedures.

The issue is whether the late payment penalties can be waived under the above described circumstances.

DISCUSSION:

WAC 458-20-101 (Rule 101) in pertinent part provides:

(18) Penalties for noncompliance. The law provides that it shall be unlawful for any person to engage in any business without having obtained a certificate of registration. To do so constitutes a gross misdemeanor.

Thus, the taxpayer should have filed the Master Business Application in January 1987 when it commenced business activities. Instead, it filed on March 5, 1987. Accordingly, the January 1987 tax return due February 25, 1987 was already delinquent, and the February 1987 [tax return] due March 25, 1987 was destined to be delinquent unless the taxpayer made a timely inquiry concerning it.

It is noted that the taxpayer did not make inquiry until April 24, 1987 at which time the taxpayer was able to file the past due January and February tax returns. At the same time of April 24, 1987, the taxpayer was able to file the March 1987 tax return due April 25, 1987 in a timely manner.

[1] 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 taxes due on February 25 and March 25, 1987 were not received by the Department of Revenue by the due dates. Accordingly, the penalty provisions 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. The taxpayer does not meet the conditions set forth in the seven situations. The taxpayer, per situation 6, did not make timely application in writing for proper forms. The monthly tax return for February 1987, per situation 7, while filed within the five percent penalty period, was filed at a

time when the taxpayer was already delinquent on a prior return.
Rule 228, situation 7b.

All conditions, 7a through 7c, must be fulfilled to satisfy situation 7 for cancellation of the penalty. The three conditions, 7a through 7c, are connected by the word "and." The effect of that is that the requirements posed in each of those three conditions must be satisfied to create a "circumstance beyond the control of the taxpayer" which will justify a cancellation of the penalty.

We are sympathetic to the taxpayer's taking for granted or assuming that its first filing would be for the first quarter of 1987 and due on April 30, 1987. This mistaken belief or assumption is a circumstance entirely within the control of the taxpayer. Accordingly, such circumstance cannot be a basis for waiver of penalties. RCW 82.32.105.

For the reasons stated and the applicable law, we conclude that the assessed late payment penalties were proper and cannot be waived.

DECISION AND DISPOSITION:

The taxpayer's petition for refund is denied.

DATED this 25th day of August 1988.