

Cite as Det. No. 99-008, 18 WTD 241 (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 of)	
)	No. 99-008
)	
...)	Registration No. . . .
)	FY . . . /Audit No. . . .
)	

RULE 228; RCW 82.32.090, RCW 82.32.105: PENALTIES -- LATE PAYMENT -- WAIVER -- UNAVOIDABLE ABSENCE -- WEATHER-RELATED. When the late payment of a tax assessment is caused by the only bookkeeper's inability to get to work due to unexpectedly severe weather, the Department may waive the late payment penalty under WAC 458-20-228(6)(b)(iv), which authorizes waiver for delinquency "caused by unavoidable absence of the taxpayer."

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 petitions for waiver of late-payment (of assessment) penalty.¹

FACTS:

Prusia, A.L.J. -- The taxpayer is an Oregon corporation registered and doing business in Washington as a specialty painting contractor.

The Department of Revenue (Department) audited the taxpayer for the period January 1, 1993 through March 31, 1997. On December 10, 1997, the Department issued the above-referenced tax assessment, with a stated payment due date of January 9, 1998. The Department did not receive the payment by the due date, and on January 10, 1998, assessed a late-payment penalty of \$. . . . The taxpayer does not contest the original assessment and paid the amount stated in the

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410

original assessment, \$. . . , on January 20, 1998. The taxpayer does contest the late-payment penalty, and that amount remains unpaid.

The taxpayer explained that the following circumstances combined to cause the late payment. First, the taxpayer did not receive the assessment until December 18, 1997, a week after its mailing date. Second, the assessment arrived during the holiday season, when the office was essentially shut down because of pre-planned vacations. The taxpayer is a small business, and only the president and the bookkeeper staff it. The bookkeeper keeps track of bills, but only the president can approve payment. The president was visiting his family in California between December 20, 1997, and January 4, 1998. The bookkeeper was on vacation leave most of the last week of December, which caused a backlog of bills that the bookkeeper would have to deal with at the first of the year. Third, there was inclement weather in the Portland area during early January 1998, which caused the bookkeeper, who lives about 50 miles away, to miss several days, delaying the taxpayer's normal bill-paying cycle. The bookkeeper was briefly overwhelmed with routine as well as end-of-the year chores. Had it not been for this unusual combination of circumstances, the assessment would have been timely paid in the normal routine.

The taxpayer also argues that a ten percent penalty for being one week late is excessive and punitive.

The taxpayer asks the Department to take into consideration the fact that it has been paying excise taxes to Washington since 1990, and has never been late in filing or paying.

ISSUE:

Must the Department cancel the late-payment-of-assessment penalty because of circumstances beyond the control of the taxpayer?

DISCUSSION:

RCW 82.32.090(2) requires the Department to assess a ten percent late-payment penalty if a taxpayer does not pay a tax assessment on or before the due date. The section states:

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 use of the word "shall" in legislation generally means that an act is mandatory and without discretion. See, State v. Q.D., 102 Wn.2d 19, 685 P.2d 557 (1984). Thus, when it did not receive the payment by the due date, the Department had no choice but to add the penalty, in the amount of ten percent.

Although the late-payment penalty was properly imposed, RCW 82.32.105 allows the Department to waive or cancel penalties under specified circumstances. The Department has no waiver authority beyond that granted by the statute; it is given no discretionary authority to waive or cancel penalties. Det. No. 88-220, 6 WTD 27 (1988).

RCW 82.32.105 provides as follows, in relevant part:

(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 Taxpayer, the department of revenue shall waive or cancel any penalties imposed under this chapter with respect to such tax.

...

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

There are additional waiver provisions that relate only to “delinquency” penalties assessed under subsection (1) of RCW 82.32.090. A delinquency penalty is one assessed when payment of the tax due on a return is not received by the due date. Those additional provisions do not apply to late-payment-of-assessment penalties such as the penalty in this case.

WAC 458-20-228 (Rule 228) is the Department’s rule that implements RCW 82.32.105. Rule 228(6) provides for the waiver or cancellation of penalties 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. Penalties will not be cancelled merely because of ignorance or a lack of knowledge by the taxpayer of the tax liability.

Rule 228 applies to all penalties imposed under RCW 82.32.090. Thus, it applies to the ten percent penalty for the late-payment of an assessment provided in RCW 82.32.090(2), except to the extent any portion of the rule is clearly limited to other penalties. Rule 228(6)(b) lists the “only circumstances” under which the Department will consider cancellation of penalties. It states:

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. . . .

(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.

Subsection vii is the provision of Rule 228(6)(b) that describes the circumstance most like the taxpayer's. Unfortunately for the taxpayer, that provision clearly relates only to late tax returns. Thus, it is not applicable to the ten percent late-payment penalty imposed by RCW 82.32.090(2). See Det. No. 94-229, 15 WTD 73 (1995). The only other circumstance in Rule 228(6)(b) that might apply to the taxpayer's situation is number iv – a late payment “caused by unavoidable absence of the taxpayer, prior to the filing date.”

We believe the taxpayer's circumstance falls within the Rule 228(6)(b)(iv) situation. The absences of the president and the bookkeeper, combined with the other circumstances (late receipt, the holiday season, the end-of-the year crunch) clearly upset the normal routine of the office and delayed the taxpayer's ability to address its affairs in a timely manner. The bookkeeper's weather-related absence was unexpected and clearly beyond the taxpayer's control. The fact that the taxpayer had timely filed and paid its taxes during many years prior to this delinquency, and remitted payment on this assessment only a few days late, lends credence to its statements. We find that the taxpayer's failure to pay the assessment by the due date was due to circumstances beyond its control.

Accordingly, we must grant the taxpayer's petition to cancel the late-payment penalty imposed under RCW 82.32.090(2).

DECISION AND DISPOSITION:

We grant the taxpayer's petition.

Dated this 25th day of January 1999.