

Cite as 3 WTD 227 (1987)

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

In the Matter of the Petition)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u> <u>N</u>
For Refund of)	
)	No. 87-190
)	
)	Registration No. . . .
. . .)	Petition for Refund of
Penalty	
)	
)	

[1] **RULE 228 AND RCW 82.32.090: PENALTY -- LATE PAYMENT OF TAX DUE -- NSF DISHONORED CHECK -- RULE 228'S SITUATION NUMBER SEVEN.** Where taxpayer's check payment was not honored by bank because of insufficient funds (NSF check), penalty for late payment applied because it was a circumstance not beyond the control of the taxpayer. Taxpayer was ineligible for relief under Rule 228's situation number seven because of past delinquencies in filing tax returns which incurred unexcused penalties.

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 the Determination.

TAXPAYER REPRESENTED BY: . . .

NATURE OF ACTION:

Petition for refund of penalty imposed on late payment of tax due arising from a dishonored check because of insufficient funds in the checking account.

FACTS AND ISSUES:

Krebs, A.L.J.-- [Taxpayer] was engaged in the practice of medicine in . . . , Washington until the end of December 1986 at which time he moved to . . . , California.

The taxpayer had been filing his tax returns on a quarterly basis. The tax return for the last quarter of 1986 (Q4-86) was due on January 31, 1987. The taxpayer mailed it in on January 27, 1987 with a check in the amount of \$ The check was not honored by the bank because of insufficient funds (NSF). The taxpayer was notified by the Department on or about February 13, 1987 of the NSF check and assessed a five percent penalty in the amount of \$ On March 2, 1987, the taxpayer made payment of \$. . . which included the \$. . . tax liability and \$. . . penalty.

The taxpayer seeks refund of the penalty in the amount of \$. . .; correctly \$ The taxpayer explains that the NSF check occurred because he was in the midst of changing his business address and business accounts including his checking account which was being phased out because of his relocation. The taxpayer further states that during his five years of medical practice there was never an NSF check given to the Department.

The issue is whether the penalty can be waived or cancelled under the foregoing circumstances.

DISCUSSION:

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.)

The tender of a NSF check cannot be deemed payment of the tax due. RCW 82.32.080. In this case, the taxpayer made payment of the tax due after the due date because of the problem caused by the NSF check. Accordingly, the statutory 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. None of the seven situations apply to the taxpayer except possibly situation number seven which states:

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.
(Emphasis supplied.)

All conditions, a. through d., must be fulfilled to satisfy situation number seven. However, our examination of the taxpayer's file discloses that on at least four previous occasions the taxpayer was delinquent in filing a tax return where the penalty was not excused, namely: Q2-1982, 10 percent, penalty; Q4-1982, five percent penalty; Q3-1983, five percent penalty; and Q4-1983, five percent penalty. Accordingly, the taxpayer cannot benefit from situation number seven.

It is unfortunate that the taxpayer's relocation caused the NSF check problem. However, that is a situation which did not result from circumstance beyond the control of the taxpayer. Therefore, we must sustain the penalty.

DECISION AND DISPOSITION:

The taxpayer's petition for refund is denied.

DATED this 5th day of June 1987.