

Cite as 3 WTD 345 (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 Correction of Assessment of)	
)	No. 87-227
)	
. . .)	Registration No. . . .
)	Notices of Balance Due,
)	. . .

[1] **RULE 228 AND RCW 82.32.105:** PENALTIES -- LATE PAYMENT -- WAIVER OR CANCELLATION -- REPORTING FREQUENCY. Late payment penalty waived under Situation 6 where: (1) Taxpayer filed a new Application for Certificate of Registration upon incorporating its existing business, (2) the Department, without prior notice, changed the taxpayer's reporting frequency from quarterly to monthly; and (3) the first monthly return was received by the taxpayer only 5 days prior to its due date.

[2] **RULE 228 AND RCW 82.32.105:** PENALTIES -- LATE PAYMENT -- WAIVER OR CANCELLATION -- REPORTING FREQUENCY -- SITUATION 7. Late payment penalty waived under Situation 7 where: (1) Return was received within 30 days of due date, (2) taxpayer's only prior delinquency was waived under Situation 6, and (3) delinquency resulted from taxpayer's failure to realize that the Department, without prior notice, had changed the taxpayer's frequency from quarterly to monthly.

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:

Taxpayer requests waiver or cancellation of late payment penalties asserted on two returns filed after their due date on ground that the delinquency occurred because the Department, without prior notice, changed the taxpayer's reporting frequency from quarterly to monthly.

FACTS:

Rosenbloom, A.L.J. -- In November of 1986, the taxpayer filed an Application for Certificate of Registration because it had incorporated its existing business. The business was previously operated as a partnership and had been assigned a quarterly reporting frequency. The Records Section got the taxpayer "on line" as a corporation on November 10, 1986, and assigned a monthly reporting frequency. The taxpayer received no notice of this change other than the mailing of the returns themselves. An employee of the Records Section estimates the October 1986 return would not have been received by the taxpayer until November 20, 1986, only five days before the due date. The November 1986 return would have been mailed out well in advance of the due date.

The taxpayer completed and filed both returns on January 16, 1987. The Department issued Notices of Balance Due asserting a ten percent penalty on the October 1986 return and a five percent penalty on the November 1986 return. This appeal followed.

TAXPAYER'S EXCEPTIONS:

The taxpayer asserts that the late filings were unintentional, resulting from confusion and lack of communication. The taxpayer had funds available for payment of the tax, but failed to realize that the Department, without prior notice, had changed its reporting frequency from quarterly to monthly. Accordingly, the late payment penalties should be waived or cancelled.

DISCUSSION:

RCW 82.32.090 provides in part:

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 only authority under which penalties may be waived or cancelled is found at RCW 82.32.105, which provides in part:

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.

Pursuant to the directive contained in RCW 82.32.105, the Department has adopted WAC 458-20-228 (Rule 228), which provides in part:

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.

[1] The penalty upon the October 1986 return may be waived or cancelled under the authority of Situation 6. The taxpayer's business, when operated as a partnership had been assigned a quarterly reporting frequency. The taxpayer was entitled to presume that this would not change merely as a result of its incorporation. Assuming no change in reporting frequency, the

taxpayer's next return would have not been due until after the first of the year. Thus, its November 1986 filing of a new Application for Certificate of Registration may be construed as a timely written application. The October 1986 return, however, was received by the taxpayer only five days prior to its due date. The fact that the taxpayer had not previously filed monthly returns coupled with the fact that the taxpayer had received no prior notice of the change from quarterly to monthly reporting leads us to conclude that five days were not sufficient time to permit the completed return to be paid before its delinquent date.

[2] The penalty upon the November 1986 return may be waived or cancelled under the authority of Situation 7. First, the return was received within thirty days of the due date. Second, the taxpayer's only prior delinquency has been excused under Situation 6. Finally, the delinquency was the result of an unforeseen and unintentional circumstance, not immediately known to the taxpayer. Namely, the taxpayer failed to realize that the Department, without prior notice, had changed the taxpayer's reporting frequency from quarterly to monthly.

DECISION AND DISPOSITION:

The taxpayer's petition for correction is granted. The above-referenced Notices of Balance Due are cancelled.

DATED this 8th day of July 1987.