

Cite as 3 WTD 63 (1987)

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

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| In the Matter of the Petition) | <u>D E T E R M I N A T I O</u> |
| <u>N</u> | |
| For Refund of) | |
|) | No. 87-135 |
|) | |
| . . .) | Registration No. . . . |
|) | |
|) | |

[1] RULE 228 AND RCW 82.32.090: PENALTIES -- LATE PAYMENT OF TAXES DUE -- EMPLOYEE'S FAILURE TO PERFORM DUTIES -- INADEQUATE COMPUTER SYSTEM -- NOT IMMEDIATELY KNOWN. Where taxpayer was not immediately aware of its employees not performing duties to file timely tax returns and its computer system had to be reprogrammed, the circumstances were not beyond the control of the taxpayer which permits waiver of late payment penalties. Rule 228's situation number 7 is not applicable to excuse penalty in this case because it applies only to late tax returns where payment is made within 30 days after the due date. Penalties sustained.

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: . . .

DATE OF HEARING: August 19, 1986

NATURE OF ACTION:

Petition for refund of penalties assessed on late payment of taxes.

FACTS AND ISSUES:

Krebs, A.L.J.-- . . . (taxpayer), headquartered in Oregon, is engaged in the business of leasing tangible personal property including, but not limited to, office furniture and equipment. It commenced taxable business activity in Washington on April 24, 1984. The taxpayer registered with the Department of Revenue on January 4, 1985.

On October 23, 1985, the taxpayer filed past due quarterly tax returns for the four quarterly periods of 1984 and the first two quarterly periods of 1985 and paid the taxes due. Because of the late payment of the taxes due, penalties at the rate of 20 percent of the taxes due were assessed on November 15, 1985. The total amount of the penalties assessed was \$. . . which has been paid in full. The taxpayer was billed for \$. . . because of adjustments (credits) caused by minor overpayments (totaling \$. . .) of taxes due.

In protesting the assessment of penalties, the taxpayer asserts that the late payment of taxes was due to circumstances beyond its control. In support of its assertion, the taxpayer submits the following information and explanation. The taxpayer employed an in-house accountant to set up its bookkeeping system and to file all required reports. His performance was found to be inadequate. In July 1985, a competent C.P.A. was retained. The taxpayer requests that the unintentional delinquency of late payment of taxes be waived on a one-time basis and gives its assurance that it will be in compliance with timely reporting.

The taxpayer further explains that it experienced unexpected fast growth of its business operation, that its computer system had to be reprogrammed, that adequate personnel were not in place, and that these conditions resulted in inadequate records to file accurate and complete tax returns on a timely basis. Furthermore, the taxpayer asserts that personnel in charge covered up the situation and have been replaced.

The taxpayer seeks abatement of the penalties based on situation number 7 of WAC 458-20-228 (Rule 228).

DISCUSSION:

RCW 82.32.290 provides in pertinent part:

(1)(a) It shall be unlawful:

(i) For any person to engage in business without having obtained a certificate of registration as provided in this chapter;

. . .

(b) Any person violating any of the provisions of this subsection (1) shall be guilty of a gross misdemeanor in accordance with chapter 9A.20 RCW.

It is each individual's responsibility to be aware of any tax implications resulting from activities conducted within this state. Department of Revenue personnel are available to answer any inquiries pertaining to such matters and information is readily available. The taxes imposed by the Revenue Act are of a self-assessing nature and the burden is placed upon a business to correctly inform itself of its obligations under the Act.

Thus, the taxpayer should have filed the Application for Certificate of Registration in April 1984 and filed regular excise tax returns thereafter. Had this happened, the taxpayer would have avoided being delinquent and the resultant build-up of past due taxes and consequential penalties.

The statute as recited below makes mandatory the assessment of penalties upon delinquent payment of taxes.

RCW 82.32.090 provides in pertinent 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 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 specified 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 228, . . . , states the seven situations under which a cancellation of penalties will be considered by the Department. Situation number 7, upon which the taxpayer relies as pertinent to its situation, states in full:

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.)

Situation number 7 applies only to penalties assessed where the tax return with payment was filed within 30 days after the due date. But in this case, the tax returns which incurred the penalties were all filed very much beyond the 30-day period and ranged from one and a half years to three months beyond the due date.

It is unfortunate that the taxpayer's in-house accountant's performance was inadequate, that its computer system had to be reprogrammed, and that the inadequacies were not immediately known to the taxpayer. However, the Department has always considered these matters to be circumstances entirely within the control of the taxpayer.

Note that Rule 228's situation number 7 does allow a one-time waiver of the penalty where the tax return was received within 30 days after the due date and the delinquency was the result of unforeseen and unintentional circumstances including the error or misconduct of the taxpayer's employee or accountant. Situation number 7 was added to Rule 228 on December 21, 1984 to allow 30 days for the taxpayer to become aware of the circumstances--further expression of the principle that neglect of duties by an employee or other unforeseen and unintentional circumstances for more than 30 days do not constitute a circumstance beyond the control of the taxpayer. Accordingly, we find that the delinquent payments of taxes did not result from circumstances "beyond the control of the taxpayer."

The Department recognizes that some businesses do not register because of a misunderstanding or inadvertence. Where a misrepresentation, fraud or intent to evade taxes is found, an additional 50 percent evasion penalty is assessed under the provisions of RCW 82.32.050. In this case, there was no finding to warrant imposition of the evasion penalty.

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

DECISION AND DISPOSITION:

The taxpayer's petition for refund is denied.

DATED this 29th day of April 1987.

