

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 Correction of Notices of)	
Balance Due of)	No. 88-
330)	
)	
. . .)	Registration No. . . .
)	
)	

RULE 228: PENALTIES -- LATE PAYMENT -- TEN PERCENT PERIOD -- DATE OF FILING RETURN. A taxpayer who hand delivers a tax return to the Department on the date which the return clearly states is the start of the 10% penalty period is liable for the 10% penalty. The instructions on the return are not misleading.

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:

The taxpayer petitioned for correction of notices of balance due for September and December 1987. The taxpayer had paid taxes for those periods late and had added a five percent penalty to each payment. The notices added an additional five percent penalty because the taxes were paid more than thirty days after the due dates.

FACTS AND ISSUES:

Potegal, A.L.J. -- The due date for filing a return and paying taxes for September 1987 was October 25, 1987. This is clearly indicated in three places on the face of the return form which the taxpayer received from the Department and eventually filed. At the bottom of the form, directly next to the signature and date lines, this language appears:

ADD PENALTY IF PAYING
AFTER OCTOBER 25, 1987

5% AFTER OCTOBER 25, 1987
10% AFTER NOVEMBER 24, 1987
20% AFTER DECEMBER 24, 1987

The taxpayer signed, dated and hand delivered the return to the .
. . office of the Department on November 25, 1987.

The facts with respect to the December 1987 are essentially the same except for the dates. This return was due on January 25, 1988. The ten percent penalty period began after February 24, 1988. The return in this case was signed, dated and hand delivered on February 25, 1988.

The taxpayer acknowledges liability for the first five percent but asks for a waiver of the additional five percent penalty. It claims that it understood that returns could be postmarked by the 25th of each month. It also claims that there is a vague description of when taxes are due and overdue.

DISCUSSION:

RCW 82.32.090 states 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. (Underscoring ours.)

By the use of the word "shall", the legislature has made the imposition of a ten percent penalty mandatory in cases where tax is not received by the Department within thirty days after the due date. There is no question that the taxes in question here were not received within thirty days of their due dates. Thus, the law requires the ten percent penalty.

In some instances the law does permit the waiver or cancellation of penalties. RCW 82.32.105 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.

The rule prescribed by the Department for the cancellation of penalties is WAC 458-20-228 (Rule 228). It states 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.

None of these situations apply in this taxpayer's case. Although the taxpayer impliedly argues that situation 2 -- erroneous information given by the Department -- applies, we do not see how that could be under the facts. The information in the returns about due dates is clear. A ten percent penalty applied if payment was made after a certain date. The taxpayer made its payments after that date.

The taxpayer's understanding that returns can be postmarked by the 25th of each month is only true with respect to the original due date for which no penalty applies. The original due date of all monthly returns is the 25th day of the month following the end of the month in which the taxable activities occur. RCW 82.32.045. The law, at RCW 82.32.080, provides that a return or remittance transmitted by U.S. mail is deemed filed or received on the postmarked date.

None of this, however, has anything to do with the circumstances of this case. The taxpayer acknowledges it was delinquent. The issue is whether the five percent or ten percent penalty applies. For both returns in question, the ten percent penalty applied if payment was not received by the 24th, rather than the 25th, as clearly stated on the returns. Finally, neither of the returns was mailed anyway. They were both hand delivered to the Department after the start of the ten percent penalty period.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 23rd day of August 1988.