

Cite as 11 WTD 215 (1991).

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 A T I O N</u>
For Correction of Assessment)	
of)	No. 91-173
)	
. . .)	Registration No. . . .
)	. . ./Audit No. . . .
)	. . ./Audit No. . . .
)	

[1] RCW 82.32.050 and RCW 82.08.050: EVASION PENALTY -- SALES TAX -- FAILURE TO REMIT. An unregistered taxpayer who collects sales tax and uses it to pay his own bills because of inadequate cash flow shall receive the evasion penalty notwithstanding his claims that he intended to remit the tax to the Department or that he thought fuel taxes he overpaid would partially offset his sales tax liability.

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:

Appeal of tax evasion penalty.

FACTS AND ISSUES:

Dressel, A.L.J. -- . . . (taxpayer) conducts a business which is adequately described by his dba. His books and records were examined by the Department of Revenue (Department) for the period January 1, 1981 through December 31, 1990. As a result tax assessments, identified by the above-captioned numbers, were issued in the total amount of \$ The taxpayer herein appeals a portion of the assessments, the penalty for tax evasion.

The taxpayer started his business in 1979. He conducted it continuously to the beginning of 1991 without registering or paying state excise taxes to the Department of Revenue. In that period he did charge retail sales tax to his customers. Prior to 1979 the taxpayer had been in a business partnership which was registered with the Department. Regarding his present business, the taxpayer stated that he knew he should have been registered and that he knew he should have been transmitting the sales tax he collected to the Department. He had cash flow problems, however, so used some of the tax he collected to take care of those. He intended to register with the Department and to repay the sales tax he collected to the Department but just never got around to it. His accountant also states that the taxpayer paid state and federal highway fuel taxes on fuel that was used for off road purposes. The taxpayer thought "to a large part" that the excess fuel taxes that he paid would offset the sales tax he collected but did not remit to the Department. Further, the taxpayer's accountant says, in part:

[Taxpayer] was not aware that the fuel tax refund provision was through the Department of Licensing and that there was a 13 month statute of limitations. He also did not understand that there are no offset provisions between excess taxes paid to one State of Washington Department and shortages and taxes due another department.

The issue is whether a taxpayer who collects sales tax from customers without paying it to the Department is subject to the tax evasion penalty.

DISCUSSION:

[1] The statutory authority for the tax evasion penalty is RCW 82.32.050 which reads, in part: "If the department finds that all or any part of the (tax) deficiency resulted from an intent to evade the tax payable hereunder, a further penalty of fifty percent of the additional tax found to be due shall be added". (Parenthetical inclusion ours.)

A statutory duty is also imposed on sellers of tangible personal property and retail services to collect from buyers and remit to the state retail sales tax. RCW 82.08.050. Further, the statute states, in part:

The tax required by this chapter, to be collected by the seller, shall be deemed to be held in trust by

the seller until paid to the department, and any seller who appropriates or converts the tax collected to his own use or to any use other than the payment of the tax to the extent that the money required to be collected is not available for payment on the due date as prescribed in this chapter shall be guilty of a gross misdemeanor.

A gross misdemeanor is a criminal penalty. However, collecting sales tax without paying it to the state is also an incriminating practice in a civil case in which tax evasion is alleged. The taxpayer here has admitted that he used the sales tax he collected for his own purposes. In addition, he admits he knew it was wrong. Thus, he had the "intent to evade" state of mind required in RCW 82.32.050 for the civil penalty of tax evasion. Such admission also constitutes clear, cogent, and convincing evidence of this intent to evade.

We are not persuaded by his statements that he intended to repay the tax or that the deficiency was partially offset by excess fuel taxes paid. That is akin to saying he only intended to evade temporarily. RCW 82.32.050, however, does not differentiate between an intent to temporarily evade and an intent to permanently evade. It just says "intent to evade", period. Clearly, the taxpayer had an intent to evade, even if it was only temporary and even if he only intended to evade a portion of the tax owed, i.e. that which the fuel taxes did not offset. More is not required. Finally, the taxpayer is not eligible for waiver of the penalty under RCW 82.32.105 in that the circumstances of his tax deficiency, inadequate cash flow or financial hardship, are deemed to be entirely within his control. Determination 87-300, 4 WTD 101 (1987).

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 27th day of June 1991.