Cite as 2 WTD 463 (1987)

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

In the Matter of the Petition For Refund of	)	D E T E R M I N A T I O N
	)	No. 87-109
. . .	)	Use Tax Notices
	)	. . .
	)	. . .

[1] **RULE 178, RCW 82.12.0251:** USE TAX EXEMPTION -- MOTOR VEHICLE. The specific requirements of that part of RCW 82.12.0251 relating to motor vehicles prevail over the general requirements of the statute relating to tangible personal property.

[2] **RULE 178, RCW 82.12.0251:** USE TAX EXEMPTION -- NON-RESIDENT. For excise tax purposes, a person may be a resident of more than one state.

[3] **RCW 82.32.050:** EVASION PENALTY. When a taxpayer is faced with a known tax obligation, commits an affirmative act such as signing a false statement, and the affirmative act was motivated by an intent to avoid the tax, an evasion penalty will be 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: February 20, 1987

NATURE OF ACTION:

The taxpayer seeks a refund of use taxes paid on the purchase and use in Washington State of a car and accessories. The taxpayer also petitions for a refund of a 50 percent tax evasion penalty.

FACTS:

Normoyle, A.L.J.--The salient facts are these, for the most part in chronological order:

1. Up to August, 1985: It is undisputed that the taxpayer's residence and domicile, at least up to that time, was in Washington State. From June, 1983, until late July or early August, 1985, he lived with a girlfriend in a Seattle apartment rented by her. Thereafter, he occasionally stayed at her apartment. The dispute, in part, is over his status after August of 1985.

2. July 30, 1985: The taxpayer renewed his Washington driver's license.

3. Late July or early August, 1985: The taxpayer moved to Florida where he signed four separate one-year contracts to play a professional sport.

4. September 15, 1985: The taxpayer leased a Florida apartment. The initial lease ran until March 15, 1986. However, the taxpayer has remained on a month-to-month tenancy since then, although he has not stayed in Florida all of the time. This continuing tenancy has been verified by a letter from his landlord.

5. December, 1985: The taxpayer's employment obligations for 1985 ceased.

6. From December 1985 to early February 1986: He primarily stayed in Portland, Oregon at a friend's house (the friend also being his stock broker). In fact, all or nearly all of January was spent there. He did spend some time in December and February in Washington State. The Portland friend has stated in writing that the taxpayer resided in Portland during the month of January, 1986.

7. January 31, 1986: The car was purchased in Bellevue. At that time, as mentioned above, he was living in Portland, had a leased apartment in Florida, and had a girlfriend in Seattle. The Washington State retail sales tax was not paid, although a check was held by the dealer to cover the tax pending licensing outside of Washington. This fact has been verified by a letter from the dealer. The circumstances surrounding the purchase will be detailed later.

8. Early February 1986 to July 1986: During this period, he stayed in Portland, Seattle (at his girlfriend's apartment), California, at a relative's house in Arizona, and in Florida (parts of March and May). The car was driven in all of these states during this period, except Florida. During this time period and during January of 1986, he received his mail in Portland.

9. February 4, 1986: He received an Oregon identification card with the Portland address. He did not obtain an Oregon driver's license.

10. February 5, 1986: The car was licensed in Oregon. On the Application for Registration form, he gave the Portland address. The car had been driven to Oregon under the authority of a trip permit issued by the Washington dealer.

11. March 7, 1986: The car was driven back to Washington. Accessories were ordered in Seattle, including a mobile phone. The accessories were installed in early March and in August, after he had left for Florida. The latter installation was done while the car had been left with his girlfriend. The Washington retail sales tax was not charged on the purchase or installation of these accessories.

12. February 12, 20; April 11, 30; May 8; June 2; August 8, 1986: The car was at the Washington dealer's shop for maintenance and to be "climatized" for use in Florida. His girlfriend took the car in on the last three dates.

13. Prior to July 29, 1986: The taxpayer returned to Florida. The car was still in Washington, as the maintenance and climatization work was not completed.

14. July 29, 1986: The Washington State Patrol wrote a letter to the taxpayer instructing him to obtain a Washington vehicle license. The State Patrol believed that he was a Washington resident. The taxpayer had already moved back to Florida by that time.

15. July 31, 1986: The girlfriend moved into another apartment in Seattle. Although the telephone service and all utilities were in her name, the landlord had earlier required the taxpayer to co-sign on the lease, due to the high monthly rental. The taxpayer's name appeared with his girlfriend's on the apartment doorbell.

16. August 1986: The girlfriend shipped the car to Florida.

17. September 2, 1986: The State Patrol issued, in absentia, a citation for failure to license the car in Washington. The citation was issued under RCW 46.16.010, .500; and Washington Administrative Code (WAC) 308-99-010-040. That case is still pending.

18. September 9, 1986: The Department of Revenue, by letter sent to the girlfriend's apartment in Seattle, assessed use tax on the car plus a 50ápercent evasion penalty.

19. September 26, 1986: The taxpayer licensed the car in Florida. In addition to the registration fees, use tax of $2,998.12 was paid.

20. December 18, 1986: A second use tax assessment was issued by the Department of Revenue, this one for the accessories. It, too, included a 50ápercent evasion penalty.

21. December 31, 1986: The taxpayer paid the Washington use tax assessments and penalties.

The bottom line is that the taxpayer licensed the car in Oregon and paid that state's small registration fee; licensed the car in Florida, paying a registration fee of approximately $50 and use tax of approximately $3,000; and paid Washington use tax of $4,621 for the car and $318 for the accessories, and paid penalties of $2,469.89. The grand total of taxes and penalties paid is $10,459, plus the Oregon fees. Contrast that with $4,939, which is what the Washington retail sales tax, without penalty, would have been for both the car and accessories.

We now focus on the purchases themselves. When the taxpayer bought the car, he told the dealer that he was a resident of Florida and wanted to license the car there. He also told the dealer that he was, at that time, living in Oregon. He was told by the salesman that the dealer couldn't license the car for him, but that he could avoid Washington retail sales tax by licensing the car in Oregon and then having it licensed in Florida when he returned there that summer (1986). The dealer also required that he leave a check in the amount of the Washington sales tax, which would be returned to him if:

1. He licensed the car in Oregon; and

2. He supplied the dealer with proof of Florida residency.

The dealer has verified in writing that the above facts are correct. Presumably, by requiring a deposit of the sales tax, the dealer felt that he was protecting himself from tax liability.

When he purchased the car, the taxpayer signed an affidavit supplied by the dealer stating that he "is a **bona fide** resident of the state of Florida and that his address is (Florida address given), Tampa, Florida;" and stating that the "vehicle is being purchased for use outside this state and that the same will be driven from the premises of the dealer under the authority of (a)áa trip permit."[1] Nowhere in the affidavit is Oregon mentioned, yet the dealer gave the taxpayer a trip permit authorizing him to drive the car there without Washington license plates.

After licensing the car in Oregon, the taxpayer gave the Washington dealer copies of documents showing that he was employed in Florida. The dealer then returned the check. Again, this information has been verified by the dealer.
As to the accessories, when they were bought in early February, 1986, the taxpayer had Oregon plates on his car, was staying in Portland, and had an Oregon identification card. Either he told the seller or the seller told him that Washington sales tax was not due if the car was not going to be licensed in Washington. In any event, the seller did not charge sales tax.[2]

Not all of the above facts were known to the revenue officer. The letters from the stock broker, landlord, and car dealer were not available when he made the tax and evasion penalty assessments. Also, the revenue officer mistakenly believed that the Oregon identification card was used to purchase the car. It couldn't have been--it wasn't issued until February 4, 1986, five days after the car was purchased. Finally, he placed emphasis on the fact that the
girlfriend's new apartment (leased in July, 1986) had the taxpayer's name on the doorbell, as indicative of Washington residency. This latter fact may be of some consequence in determining whether or not the taxpayer was a resident on or after July 31, 1986, but it has little bearing on whether or

---

[1]We find that both of these statements were true, for reasons discussed later in this Determination.

[2]The taxpayer did not have a tax exempt permit as provided for in RCW 82.08.0273.

not he was a resident on January 31, 1986, when he bought the car.

ISSUES:

1. Was the use tax properly assessed on the use of the car?

2. Was the use tax properly assessed on the use of the accessories?

3. Was the taxpayer, for Department of Revenue purposes, a Washington resident, a Florida resident, or both, when he bought the car and accessories?
4. Did the taxpayer intentionally evade payment of Washington retail sales tax?

DISCUSSION:

I. PURCHASE OF THE CAR

The retail sales tax applies to sales of tangible personal property. RCW 82.08.020. An exemption is contained in RCW 82.08.0264 for purchases of motor vehicles by nonresidents for use outside of this state if the motor vehicle will be taken directly out of state under the authority of a trip permit. See also, WAC 458-20-177. Assuming, arguendo, that the taxpayer was, on Januaryá31, 1986, a nonresident of Washington; that he met the other technical requirements of this statute; and was exempt from retail sales tax, we next have to determine if he is subject to use tax for any use of the car in Washington from February until, at least, July, 1986.

The use tax complements the sales tax by imposing a tax equal to the sales tax on an item of tangible personal property used in this state in cases where the retail sales tax was not paid. WAC 458-20-178.

RCW 82.12.020 imposes a tax "for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail." The statute further provides that the tax rate shall be "in an amount equal to the value of the article used by the taxpayer multiplied by the rate in effect for the retail sales tax."

RCW 82.12.010 defines "value of the article used" as meaning the consideration (here, money) paid by the purchaser to the seller. That statute also supplies the definition for the

word "using." It means "the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer). . . ."

Because of the above two statutes, this taxpayer is liable for use tax based on the cost of the car, unless specifically exempted by another statute. RCW 82.12.0251 contains a use tax exemption. The statute, like many legislative enactments, consists of one long sentence broken up with a series of commas and semicolons. For ease of analysis, we will break the statute down into three parts. The first part reads as follows:

> The provisions of this chapter shall not apply in respect to the use of any article of tangible personal property brought into the state by a nonresident thereof for his use or enjoyment while temporarily within the state unless such property is used in conducting a nontransitory business activity within the state; . . .

The second part reads as follows:

> . . . [the provisions of this chapter shall not apply] in respect to the use by a nonresident of this state of a motor vehicle or trailer which is registered or licensed under the laws of the state of his residence, and which is not required to be registered or licensed under the laws of this state, including motor vehicles or trailers exempt pursuant to a declaration issued by the Department of Licensing under RCW 46.85.060; . . .

The third part reads as follows:

> . . . [the provisions of this chapter shall not apply] in respect to the use of household goods, personal effects, and private automobiles by a bona fide resident of this state or nonresident members of the armed forces who are stationed in this state pursuant to military orders, if such articles were acquired and used by such persons in another state while a bona fide resident thereof and such acquisition and use occurred more than ninety days prior to the time he entered the state.

The initial reading of the first part would lead one to assume that it would apply to this taxpayer if he were a nonresident, as it refers to "any article of tangible personal property" brought into this state for temporary use. He did bring the car into Washington, from Oregon. However, the second part is specifically related to motor vehicles. It is a well-established rule of law that a more specific provision of a statute prevails over a general provision (such as is in the first part of the statute). See State v. San Juan County, 102 Wn.2d 311 (1984), and In Re North River Logging Co, 15 Wn.2d 204 (1942). Under the second part, the exemption does not apply because, even if he were a nonresident, the car was not registered under the laws of his claimed state of residency (Florida) when he first brought it into this state in February.

Finally, the third part is an exemption for Washington residents. That section also does not apply, even if we conclude that the taxpayer was a Washington resident, because the car was not acquired in another state.

Because none of the exemptions in RCW 82.12.0251 apply to the use of the car, whether the taxpayer was a resident of Washington or not, the use tax was properly assessed. The use tax was due when the car was first "used" in Washington in February. The fact that the car, according to the taxpayer, was not used very much here from February to July or that it was repeatedly in and out of the shop does not prevent imposition of the use tax. Unless the exemptions in the above statute apply to the taxpayer, the first use in the state is sufficient to impose the use tax.

II. PURCHASE OF ACCESSORIES

The analysis concerning taxation of the accessories is less complicated. Regardless of his residency, retail sales tax was due at the time of purchase. The exemption under RCW 82.08.0264 does not apply, as it is limited to sales of motor vehicles, trailers and campers. There is an exemption under RCW 82.08.0273 for tangible personal property purchased in Washington by nonresidents, for use outside of this state, but only if the purchaser has a nonresident tax exemption permit issued by the Department of Revenue. Here, even if the taxpayer were a nonresident, the exemption is not available to him because he did not have such a permit. We therefore conclude that retail sales tax was due on the purchase of the accessories under the retail sales tax statutes, without regard to liability under the use tax statutes. RCW 82.08.050

provides that when a purchaser has failed to pay the retail sales tax, the Department may proceed directly against him for the collection of the tax. Because the retail sales tax was due, in the same amount as that assessed as use tax, we need not engage in an analysis of liability under the use tax statute.

III. RESIDENCY

We have concluded that the use tax was due on the car purchase and that the retail sales tax was due on the accessories purchase and installation, regardless of the taxpayer's residency. We now turn to a discussion of residency, however, because an analysis of his residency is important in determining whether or not the 50ápercent evasion penalty should be upheld. The taxpayer claims that, at the time of purchase of the car and accessories, he was a Florida, not Washington, resident. The revenue officer concluded just the opposite. We find that they are both right and both wrong, as this is a case of dual residency. Although there are no Washington court cases directly on point, it is the Department of Revenue's position that, in the context of the excise tax statutes, a person may have more than one residence, even though he may only have one domicile.[3]

In this case, the facts support a conclusion that the taxpayer was a resident of Washington, on the dates of purchase. He had taken his high school and college education here, he returned here for at least part of December, 1985, after his employment obligation for that year ceased. He stayed in Washington, at his girlfriend's house, both before and after the car purchase on Januaryá31, 1986. Finally, and most importantly, he had a Washington driver's license but not a Florida one. The license was renewed just before he left for Florida the first time, in July of 1985. This is a clear indication that he intended to return to Washington State after the first season was over. RCW 46.16.028(e), while not controlling in an excise tax case, is helpful. That statute lists the obtaining of a Washington driver's license as being an indicia of Washington residency.

The facts tend to show that he was also a Florida resident. He had signed four separate one-year contracts of employment

---

[3] See Black's Law Dictionary, Fourth Ed., p. 1473, under the word "residence," for a short but excellent discussion of the meaning of residence and domicile.

in Florida. He spent part of March and May, 1986, there. He lived there full-time from late July, 1985, to December, 1985, and for the same period of time in 1986. Finally, he has continued as a month-to-month tenant of an apartment in Florida from the lease expiration in March of 1986, through the present time. These facts lead us to conclude that he was, and is now, a Florida resident.

IV. PENALTY

The Department assessed the 50 percent penalty under authority of RCW 82.32.050, which reads as follows, in pertinent part:

> If the department finds that all or any part of the 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.

Our task, then, is to decide whether the evidence is sufficient to sustain a finding that the taxpayer intended to evade payment of Washington use tax (car) and retail sales tax (accessories). Again, we are not guided by any appellate court decisions on point. There have been, however, many appeals to the Department concerning this issue. By administrative rule (WAC 458-20-100(12)) we are directed to:

> . . . make such determination as may appear to [the Administrative Law Judge] just and lawful and in accordance with the rules, principles and precedents established by the department of revenue .á.á.

Prior Department Determinations establish the following principles in cases involving a claim of tax evasion:

1. The tax evasion statute is not part of the criminal code, therefore, the burden of proof is a preponderance of the evidence. However, the Department's policy is that questions of doubt concerning penalties are resolved in the taxpayer's favor.

2. The purpose of the statute is to allow the Department to exercise its discretion where it has found facts sufficient to penalize a taxpayer for activity which is a gross deviation from the spirit of our tax laws.

3. Merely failing to meet one's tax obligations is not the same as intention to evade the tax.

4. Tax avoidance is legal; tax evasion is not.

5. To sustain a 50 percent penalty assessment, the Department must find that the taxpayer intentionally acted to avoid paying the tax with the knowledge or belief that he or she in fact owed it. Put another way, the word "intent" presupposes knowledge.

6. Intent may be inferred from a taxpayer's conduct; that is, an inference of intent to evade can arise solely from the facts of the case. The taxpayer, once such an inference is established, then shoulders the burden of rebutting that inference.

7. Although not controlling, the Department gives considerable weight to the fact that a taxpayer had been previously warned that a particular activity was taxable, and chose to not heed those warnings.

8. Although not controlling, the penalty is usually assessed where the taxpayer is or should be knowledgeable of tax laws, based on business or tax experience.

9. In an appropriate case, the penalty will not be sustained where the taxpayer relied on the advice of a car dealer that Washington sales tax was not due.

10. Finally, and in summary, when a taxpayer is faced with a known tax obligation, commits an affirmative act such as signing a false statement, and the affirmative act was motivated by an intent to avoid the tax, the penalty will be sustained.

Applying the above guidelines to this case, we conclude that the facts do not support a finding of intentional tax evasion. The taxpayer could reasonably, although incorrectly, have concluded that he was not, at the time of the purchases, a Washington resident. The taxpayer could also have reasonably concluded that the Washington car dealer was correct when he advised the taxpayer that he could legally license the car in Oregon. Obviously, the dealer knew that the taxpayer was claiming to be a Florida resident, yet supplied him with the trip permit to Oregon, and refunded the Washington sales tax upon proof of licensing in Oregon and upon submission of the employment documents which were intended to show Florida residency. Most importantly, the statements in the sworn affidavit which served as the basis for the trip permit were

not false. The statement that he was a "bona fide resident of Florida" was a true statement, at least insofar as Washington tax law is concerned. Likewise, the statement that the "vehicle is being purchased for use outside the state" was true. The car was used outside of Washington for much of the period between February and July, 1986. The fact that the car was used in Washington justifies imposition of the use tax. The fact that retail sales or use tax was not paid does not, by itself, require a penalty assessment. From all available evidence, the taxpayer was not knowledgeable in the intricacies of Washington tax law. Ignorance of the law, while not a defense to a tax assessment, may be a defense to a penalty assessment such as the one at issue, where actual intent to wrongfully evade a tax must be found.

Finally, the accessories present a more difficult case. But, coming on the heels of successfully avoiding Washington sales tax on the car, it was not unreasonable for the taxpayer to assume that he also was not liable for purchases of accessories for the car. For that reason, we do not believe that it is appropriate to assess a penalty on the accessory purchases either.

DECISION AND DISPOSITION:

The taxpayer's petition for a refund of use tax paid on the car and accessories is denied. The petition for a refund of the penalty is granted. The Department will issue a refund in the amount of $2,469.89, plus statutory interest.

The taxpayer, depending on Florida law, may also be entitled to a refund for use tax paid there, but that is a matter between him and the Florida Revenue Department.

DATED this 10th day of April 1987.