Cite as 2 WTD 261 (1986)

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. 87-51
. . .	Registration No. . . .
	Tax Assessments No. . . .
	Tax Warrant No. . . .

[1] **RCW 82.32.050:** EVASION PENALTY -- INTENT TO EVADE TAX -- VOLUNTARY REGISTRATION. To sustain the fifty percent evasion penalty, there must be a finding that the taxpayer intended to evade the tax due. The out-of-state taxpayer voluntarily registered with the Department when it became aware of its tax responsibilities. The taxpayer previously gave truthful information indicating it was subject to tax consequences because of its business activities in Washington. Because there was an absence of design, resolve and determination on the part of the taxpayer to evade the tax due, the assessed evasion penalty is rescinded.

[2] **RULE 228, RCW 82.32.050, RCW 82.32.090:** DELINQUENCY PENALTY -- WARRANT PENALTY -- LATE PAYMENT OF ASSESSMENT -- NONRECEIPT OF MAILED TAX ASSESSMENT -- MAIL ROOM PROBLEM -- CIRCUMSTANCES BEYOND CONTROL OF TAXPAYER. To waive or cancel delinquent or warrant penalties arising from late payment or nonpayment of tax assessments, there must be a finding that the delinquency was caused by circumstances beyond the control of the taxpayer. Mail disappearing or not reaching the proper party in the taxpayer's organization are not circumstances beyond the control of the taxpayer.

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: June 12, 1986

NATURE OF ACTION:

Petition for refund of a tax evasion penalty, penalty for late payment of assessment, and warrant penalty.

FACTS AND ISSUES:

Krebs, A.L.J.--. . . (taxpayer), based in California, is a major construction company which does approximately $20,000,000 of gross business each year. The taxpayer does approximately 600 construction jobs a year, mostly in California. In recent years, the taxpayer has sought to expand its presence in Washington. The taxpayer had a vice-president relocated to Washington at the end of 1981 who maintains an office to manage Washington jobs.

On August 29, 1983 the Department of Revenue first contacted the taxpayer with a letter requesting that a Business Activities Statement be completed and returned. The taxpayer was not registered with the Department at that time.

On September 30, 1983 the taxpayer responded with a completed Business Activities Statement reporting that it contracts "to construct or build structures in Washington" but was "not active at this time."

On June 15, 1984 the taxpayer filed an Application for Certificate of Registration. Prior to becoming registered with the Department, the taxpayer had collected sales tax on two different jobs in Washington. Based on information that the taxpayer had employees in Washington as far back as 1978, the Department commenced an audit of the taxpayer's records on August 7, 1984.

As a result of this audit, the Department issued Tax Assessment No. . . . on December 6, 1984 for the period from January 1, 1978 through December 31, 1979 asserting excise tax

liability in the amount of $2,810 and interest due in the amount of $1,499 for a total sum of $4,309. The Department issued Tax Assessment No. . . . also on December 6, 1984 for the period from Januaryá1,á1980 through June 30, 1984 asserting excise tax liability in the amount of $67,993, interest due in the amount of $1,314 and penalties due in the amount of $46,601 for a total sum of $115,908.

Because the two assessments were not paid by the due date of January 6, 1985, a penalty of ten percent was applied to the taxes owed. On May 16, 1985 the Department issued Tax Warrant No. . . . , to enforce payment of the tax assessments. The tax warrant assessed additional amounts for warrant penalty, additional interest and estimated tax liability for the period of Julyá1, 1984 through March 31, 1985 (Q3/84, Q4/84 and Q1/85). On May 29,á1985, the Department received payment of $16,561.18 from retainage by . . . County. On July 2, 1985, the Department received payment of $147,359.30 from . . . Construction Co. (. . .) which withheld that amount from monies due the taxpayer. The Department, after making adjustments relevant to the estimated tax liability portions of the tax warrant, issued a refund of $29,528 to the taxpayer and a credit of $4,316.55 against tax liability for the Q2/85 period.

The taxpayer's appeal involves the assessment of the 50 percent evasion penalty, the penalty for late payment of assessments, and the warrant penalty.

[1] Tax Evasion Penalty. The taxpayer protests the imposition of the evasion penalty on the basis that it never had any intent to evade payment of taxes.

[2] Delinquency Penalty and Warrant Penalty. The taxpayer protests the imposition of these other penalties on the basis that it was waiting for the bill (assessment) which, to its knowledge, never arrived.

DISCUSSION:

[1] Tax Evasion Penalty. RCW 82.32.050, in pertinent part, provides:

> . . . 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.

The Department assessed the tax evasion penalty in this case for the following reasons: (1) The taxpayer had knowledge or should have known it had tax liability. (2) The taxpayer was aware that Washington had registration numbers because of information which it received from contracts entered into with prime contractors. (3) The taxpayer collected sales tax prior to registering with the Department. (4) The taxpayer commenced taxable construction activities in Washington as early as 1978 and made no attempt to register or determine liability. (5) During the period that the taxpayer was unregistered (from 1978 to June 1984), it used the registration number of its prime contractor to avoid payment of sales tax to material suppliers.

Relevant to the tax evasion penalty, the taxpayer furnished the following information and explanation. In California, the taxpayer performed as a prime contractor and does not bill for sales taxes. There, it paid sales taxes on its purchases and there is no resale certificate given to a supplier. It believed that the same procedure was to be followed in Washington. When it began operations in 1978 in Washington and bought material in Washington, it believed it could use the registration number of its prime contractor, . . . , as obtained from the contracts with . . . , in completing a resale certificate to buy material exempt from sales tax. Initially, all of the jobs performed in Washington were as a subcontractor to . . . . The jobs involved performance of work for a prime contractor and any collection of Washington's sales and use tax was done by the prime contractor. In 1983 and 1984, the taxpayer took on two jobs as a prime contractor in Washington. The taxpayer's vice-president, relocated to Washington in 1981, was notified by one customer, . . . , to send the bill. [The customer] told him to add sales tax and gave the rate of tax. [The customer] mailed the payment to the vice-president who forwarded it to the taxpayer's California headquarters. Shortly thereafter, the vice-president attended a meeting of Associated General Contractors in Seattle where he first learned about charging sales tax which he did with reference to the second job (. . .). Again, the vice-president forwarded the payment to the taxpayer's California headquarters. When the taxpayer's bookkeeping department received the payments and the two bills showing sales tax had been charged, they paid no attention to it because on California jobs there is no sales tax. They merely looked at the bottom line, which they were used to doing, and ignored the fact that sales tax had been collected.

The taxpayer asserts that when it became aware of its tax responsibilities it voluntarily registered. The taxpayer further asserts that while it may have been naive and sloppy in meeting its tax responsibilities to Washington, there was no intent to evade payment of taxes to Washington. The taxpayer stresses that it makes no sense for it as a major company developing a permanent presence in Washington to intentionally evade taxes.

In order to sustain the evasion penalty, there must be a finding that the taxpayer intended to evade the tax due. While there is abundant evidence that the taxpayer failed to meet its tax responsibilities to Washington, there is equally abundant evidence that when the taxpayer became aware and knowledgeable of its proper tax responsibilities it carried them out. In any event, mere failing to meet tax obligations is not the same as intention to evade the tax due.

When the taxpayer furnished a completed Business Activities Statement on September 30, 1983 to the Department at the Department's request, it furnished answers relevant to which the Department in its request letter of Augustá29,á1983 stated the following:

> After the answers have been reviewed you will be given a written opinion concerning the taxable status of business conducted here.

The taxpayer was thereby alerted to possible tax consequences. If the taxpayer intended to evade tax liability, any false or misleading answer would be the way to go. However, the taxpayer gave the following answers to questions:

2. Do you receive income from services performed in Washington? (answer) YES

5. Are sales solicited on your behalf from Washington customers?
(answer) YES

10. Do you contract to construct or build structures in Washington?
(answer) YES

11. Do you deliver goods to Washington customers with your own equipment or equipment under lease by your firm? (answer) YES

> A) Are deliveries made from points out of Washington to points in Washington? (answer) YES
>
> Briefly describe your type of business other than activities noted above as applies to the State of Washington:
>
> (answer) Transportation of drilling equipment for foundation contracts-- . . . No activity at this time.

Clearly, the taxpayer's answers demonstrated that it was subject to tax consequences in Washington. It is also clear that the taxpayer's forthright answers, subjecting it to tax consequences, do not exhibit any intent to evade tax liability. While the last answer above included the statement, "No activity at this time," it meant that at the time the Business Activities Statement was being completed there was no active work in Washington.

The taxpayer's voluntary registration with the Department before the audit began and the submission of the Business Activities Statement showing taxable activities is inconsistent with an intent to evade tax.

"Intent" is defined in Black's Law Dictionary as follows:

> Design, resolve, or determination with which person acts. Witters v. United States, 106 F.2d 837, 840, 70 App.D.C. 316, 125 A.L.R. 1031; being a state of mind, is rarely susceptible of direct proof, but must ordinarily be inferred from the facts. State v. Walker, 109 W.Va. 351, 154 S. E. 866, 867. It presupposes knowledge. Reinhard v. Lawrence Warehouse Co., 41 Cal.App.2d 741, 107 P.2d 501, 504.

In this case, there was an absence of design, resolve and determination on the part of the taxpayer to evade the tax. We conclude that the element of "an intent to evade the tax" is lacking. Accordingly the evasion penalty is rescinded.

[2] Delinquency Penalty and Warrant Penalty. The delinquent payment of a tax assessment gives rise to a mandatory ten percent penalty under the following pertinent provision of RCW 82.32.050:

> If upon examination of any returns or from other information obtained by the department it appears

> that a tax or penalty has been paid less than that properly due, the department shall assess against the taxpayer such additional amount found to be due . . . The department shall notify the taxpayer by mail of the additional amount and the same shall become due and shall be paid within ten days from the date of the notice, or within such further time as the department may provide. If payment is not received by the department by the due date specified in the notice, or any extension thereof, the department shall add a penalty of ten percent of the amount of the additional tax found due. (Emphasis supplied.)

The mandatory warrant penalty is provided for by the following pertinent provision of RCW 82.32.090:

> If a warrant be issued by the department of revenue for the collection of taxes, increases, and penalties, there shall be added thereto a penalty of five percent of the amount of the tax, but not less than five dollars.

The auditor completed his field work on August 8, 1984 and subsequently contacted the taxpayer by telephone numerous times. On November 7, 1984, the auditor completed his audit report. On December 3, 1984, the review of the audit report was completed by the Department. On December 6, 1984, the two subject assessments were mailed to the taxpayer. The assessments had a due date for payment by January 6, 1985. Payment was not received by the Department by the due date. The ten percent delinquency penalty applied per RCW 82.32.050.

On February 19, 1985, the Department sent a letter by certified mail, . . . , to the taxpayer advising that payment had not been received, that the penalty applied and that a new due date of February 28, 1985 was established which if not met by payment would cause issuance of a tax warrant. Again, payment was not received by the Department. On May 16, 1985, the Department issued a tax warrant which was mailed to the taxpayer on May 20, 1985 by certified mail; a signed receipt was received by the Department.

On May 29, 1985, the Department received partial payment ($16,561.18) of the tax assessment from the retainage fund held by . . . County Department of Public Works.

On July 2, 1985, the Department received $147,359.30 from [a prime contracter] pursuant to a Notice and Order to Withhold and Deliver.

The taxpayer, in protesting the penalties, asserts that it did not receive the assessments by mail. It attributes this nonreceipt to mail problems in the building where it was located and which had other tenants. Mail received for tenants in the building, undergoing a transition period at the time by being rented out to new tenants, was stacked in a mail room available to anyone who wandered in. Mail and even equipment disappeared. The taxpayer also did not receive some checks from customers who reported that they mailed the checks.

The taxpayer acknowledges that the Department's certified letters dated February 19, 1985 cautioning that a tax warrant would be issued, and dated Mayá20, 1985 containing the tax warrant were received at its reception desk but asserts that the persons in charge never saw them and the letters were not ever located. The first time that the taxpayer became aware of the situation was when it received a phone call that levies were being made. The taxpayer stresses that if it had received the assessments, it would have paid them.
The taxpayer points to situation number 5 of WAC 458-20-228 (Rule 228) and contends that its nonreceipt of the assessment was a "casualty loss" in that mail disappeared from the mail room.

RCW 82.32.130 in pertinent part provides:

> Notwithstanding any other law, any notice or order required by this title to be mailed to any taxpayer . . . shall be addressed to the address of the taxpayer as shown by the records of the department of revenue, . . . Failure of the taxpayer to receive such notice or order whether served or mailed shall not release the taxpayer from any tax or any increases or penalties thereon. (Emphasis supplied.)

The Department mailed the assessments to the taxpayer at its address of record. The failure of the taxpayer to receive them does not by itself release the taxpayer from the delinquency penalty. The Department never received the mail back as undeliverable. We can only assume that the assessments reached their destination as mailed.

As an administrative body, the Department 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 provides in pertinent part:

> If the department of revenue finds . . . 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 . . . penalties imposed under this chapter with respect to such tax. (Emphasis supplied.)

The foregoing statute, RCW 82.32.105, is implemented by Rule 228, . . . , which states the situations constituting the only circumstances under which a cancellation of penalties will be considered by the Department. None of the seven situations in Rule 228 for cancellation of the penalties apply to the taxpayer, although the taxpayer has likened its situation to situation number 5 which states:

> 5. The delinquency was caused by the destruction by fire or other casualty of the taxpayer's place of business or business records.

In other words, it is the taxpayer's claim that its nonreceipt of the assessment was caused by a mail room problem of mail disappearing because access to the mail room was available to outsiders and was therefore a casualty loss.

Essentially, the failure of a taxpayer to pay an assessment by the due date giving rise to the assessment penalty must be the result of circumstances beyond the control of the taxpayer to warrant cancellation of the penalty. RCWá82.32.105 and Rule 228. Aside from the speculative nature of the taxpayer's claim that some outsider could have removed the letter containing the assessment from the mail room, the manner in which mail is received and handled is strictly a circumstance within the control of the taxpayer. The taxpayer was certainly aware of the mail room problem (other mail was not received) and for its own self-interest had an obligation to rectify the situation. Just as the Department's certified letters dated Februaryá19,á1985 and May 20, 1985 were received at the taxpayer's reception desk but were not processed to the person in charge, the assessment also could have gone astray. Moreover, the underscored portion of RCW 82.32.130, supra, makes it clear that the taxpayer is precluded from denying

liability for a penalty based on a claim that the tax assessment was not received. Accordingly, for the above reasons and as mandated by the applicable statutory law, we must sustain the delinquency and warrant penalties.

DECISION AND DISPOSITION:

The taxpayer's petition for refund is granted in part and denied in part as indicated below.

Tax Evasion Penalty. The taxpayer's petition is granted. The tax evasion penalty is rescinded.

Delinquency Penalty and Warrant Penalty. The taxpayer's petition is denied.

This matter will be referred to the Department's Audit Section for review of the computations relevant to the penalties, adjustment as required by this Determination, and to authorize issuance of a refund or credit with statutorily allowed interest.

DATED this 20th day of February 1987.