

Cite as 2 WTD 339 (1987)

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

In the Matter of the Petition)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u>
<u>N</u>	
For Correction of Notice of Use)	
Tax Due of)	No. 87-68
)	
. . .)	Unregistered
)	Tax Warrant No. . . .
)	

- [1] **RCW 82.32.050:** EVASION PENALTY. Evasion penalty due where a taxpayer intentionally acted to avoid this state's sales and/or use tax.
- [2] **RULE 177 and RCW 82.08.0264:** RETAIL SALES TAX -- EXEMPTION -- NONRESIDENT. Washington residents may not purchase vehicles in this state without paying retail sales tax because they intend to reside in another state; such an intent does not make one a "nonresident" for purposes of RCW 82.08.0264.
- [3] COLLATERAL ESTOPPEL -- ELEMENTS. The doctrine of collateral estoppel cannot be applied to bar the relitigation of a particular issue adjudicated in a prior action where the issues are not identical, the prior action did not result in final judgment on the merits, and the party against whom the plea is asserted was not a party in the prior action. (Lucas v. Velikanje, 2 Wn. App. 888 cited.)
- [4] **RULE 178 and RCW 82.12.020:** USE TAX -- MOTOR VEHICLE. Use tax due on value of vehicle when it is first used in this state.

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.

NATURE OF ACTION:

The taxpayer protests the assessment of a 50 percent evasion penalty added to a Delinquent Notice of Use Tax.

FACTS AND ISSUES:

Frankel, A.L.J.-- . . . (hereinafter referred to as the taxpayer) purchased a 1986 Toyota truck on October 22, 1985 from a Washington dealer for \$11,355. He gave an Oklahoma address as his address when he purchased the vehicle. He had a contract for a job in Oklahoma and intended to go there to work. He did not pay sales tax. He signed a nonresident affidavit stating the vehicle was purchased for use outside the state and that it would be driven from the dealer's premises under the authority of a trip permit. A copy of the purchase order, affidavit, and trip permit are in the file.

The taxpayer financed the purchase of the vehicle at a Washington credit union. The date of the loan was October 24, 1985. On the credit union agreement, the taxpayer gave his home address in . . . , Washington.

The taxpayer drove the vehicle to Oklahoma. The Oklahoma job did not work out, however, and he went to Oregon to look for work. He licensed the car in Oregon in December of 1985 and gave an Oregon address.

In January of 1986, the Department received a report from the Washington State Patrol regarding a citation that had been issued to the taxpayer for driving the vehicle in Washington with Oregon plates. Included with the report were teletypes showing the Oregon registration of the vehicle and the taxpayer's Washington driver's license. Upon further investigation, the Department found the taxpayer had a home in . . . , Washington. He was sent a Delinquent Notice of Use Tax based on a Kelly Blue Book value for the vehicle of \$14,378. A fifty percent evasion penalty was added based on the information indicating the taxpayer was a Washington resident.

In February of 1986, the taxpayer called the Department and protested the tax. He explained that he had driven the truck to Oklahoma where he had planned to work. He stated the firm did not fulfill its obligation, though, so he went to Oregon to look for work. He stated he was not a Washington resident and had used the vehicle for at least 90 days as a nonresident before bringing it to Washington. The Department told him to send proof of his 90-day out-of-state use of the vehicle as a resident of the other states.

The taxpayer did not send any information verifying his 90-day out-of-state use of the vehicle as a resident of another state; thus, neither the assessment or the evasion penalty was cancelled. The use tax notice was subsequently reduced two times, however. First, after the taxpayer informed the Department that he only paid \$11,355 for the vehicle, and a second time when the Department was informed that the taxpayer had received a \$250 rebate on the truck from the dealer. The final use tax notice showed a value of \$11,105 and tax and fifty percent penalty due in the amount of \$1,249.30.

The taxpayer again called the Department protesting the tax and the assertion that he was a Washington resident. The Department sent the taxpayer copies of the documents it had indicating he was a Washington resident.

Upon further investigation, the Department discovered the following additional information supporting its position that the taxpayer was a Washington resident:

1. The taxpayer's wife and children lived in . . . , Washington. His children attended school there and his wife taught school.
2. The taxpayer had registered to vote in Washington in 1977 and last voted on March 12, 1985.
3. The taxpayer had been a member of the city council where he lived in Washington from December 1983 to December 1985. Copies of council minutes showed he was present at the meetings in October, November, and December of 1985, except for the Octoberá28 meeting where he was "absent without cause."
4. On the taxpayer's Public Disclosure form submitted in September 1983, he stated he was purchasing his family home in . . . , Washington.

On February 7, 1986, after the taxpayer had been cited in Washington, he registered to vote in Oregon and obtained an Oregon driver's license. On Juneá27, he registered the vehicle in Washington. At that time he removed his wife's name from the vehicle registration. He paid excise tax and license fees, but no use tax. The application shows the exemption box checked which stated "private automobile was purchased and used by me in another state for a minimum of 90 days while I was a bonafide resident thereof and before I

entered Washington." He stated the date he first entered Washington was June 27, 1986.

Because the taxpayer had not provided evidence showing he had purchased and used the vehicle in another state for a minimum of 90 days while a bonafide resident thereof, and because the Department's evidence indicated the use tax and evasion penalty were properly assessed, the Department sent a demand letter for payment of the use tax and penalty. No response was received, and the Department issued a tax warrant on July 7 against the taxpayer and the marital community composed of himself and his wife. It was mailed to the taxpayer at his [Washington] address on July 16. The warrant states a use tax liability of \$832.87 plus a delinquent penalty, warrant penalty and 50 percent evasion penalty for a total due of \$1,457.49.

On July 25, 1986, the taxpayer went to the . . . licensing office. According to the Department of Licensing employee, the taxpayer stated he wanted a dual license on the vehicle and wanted to pay the use tax. He also stated he lived in Oregon and wanted to use his parents' address in . . . for computation of the use tax. He paid \$803 in use tax. That amount was based on a taxable value of \$11,000 and a tax rate of seven percent. The taxpayer appealed the assessment of the evasion penalty, claiming the Department's evidence does not support a finding that either he or his wife willfully intended to deceive the state. His petition stated that they have not intended to be a resident of or retain residency in Washington since October 15, 1985.

As support for his position, he stated the citation issued against him for not registering his vehicle in Washington was dismissed by the court. He stated the court found he was not a Washington resident when he purchased the vehicle because he had a signed contract for employment in Oklahoma dated October 15, 1986 and he intended to go to Oklahoma to live. Also, he stated he commuted from Oregon to attend the city council meetings in . . . in November and December of 1985. He stated he was not aware that he had to resign because he was no longer a city resident, and that he has offered to return the money received from the city during this period.

In addition, the taxpayer alleged the revenue officers had not furnished him with a written basis for the determination he was a Washington resident or the rules and regulations and legal basis for the assessment. He also alleged he had

requested, but was not given, a meeting with the revenue officer's supervisor.

The taxpayer called the Department on September 25, 1986 and a telephone conference was set for January 7, 1987. He stated he would contact the office on or before that date to inform us of the telephone number where he could be reached for the hearing. He also stated he would send a tape explaining his position. He did not send any further information or contact the Department. We find there is sufficient evidence in the file, however, to allow us to make a determination in this case.

DISCUSSION:

[1] RCW 82.32.050 states that:

If the Department finds that all or part of the deficiency resulted from an intent to evade the tax payable hereunder, a further penalty of 50 percent of the additional tax found to be due shall be added.

We find the taxpayer's actions clearly indicate an attempt to avoid the Washington sales and/or use tax and licensing requirements.

[2] First, we do not find that the taxpayer was a "nonresident" when he purchased the vehicle; therefore, he was not entitled to the nonresident exemption provided by RCW 82.08.0264 and should have paid Washington sales tax at the time of purchase. He had a home in Othello, Washington where his wife taught school, his children attended school, and where he was on the city council. RCW 35.18.150 states "that [o]nly a qualified elector of the city or town may be a member of the council and upon ceasing to be such, . . . he shall immediately forfeit his office."

For purposes of vehicle license registration, a resident includes a person who

1. resides in this state for a period in excess of six months in any one continuous twelve-month period; or
2. becomes a registered voter in this state; or

3. places children in a public school without paying nonresident tuition fees. RCW 46.16.028(b)(c) and WAC 308-99-020.

As the taxpayer met the definition of a resident for purposes of vehicle license registration, he was required to register and license the vehicle in Washington and was not entitled to the exemption for nonresidents provided by RCW 82.08.0264.

When a dealer sells a motor vehicle to one who alleges the sale is exempt of the retail sales tax as a sale to a nonresident, the dealer is to examine two or more documents which show the purchaser's out-of-state residency. See WAC 458-20-177 (Rule 177). Rule 177 lists examples of such documents as a driver's license, voter's registration, fishing or hunting license, or income tax returns.

At the time he purchased the car, the taxpayer had a Washington driver's license and was registered to vote in Washington. The taxpayer had no such evidence showing he was a resident of another state. Instead, he had a contract which he said showed he intended to reside in another state. Washington residents may not purchase vehicles in this state without paying retail sales tax because they intend to leave this state. As discussed above, for purposes of vehicle registration, such an intent does not make one a nonresident.

[3] The taxpayer argues, however, that the court determined he was a nonresident when it dismissed the traffic citation and that the Department should be bound by this decision. The doctrine of collateral estoppel precludes relitigation of the same issues by the same parties in a subsequent action based on a different cause of action. In Lucas v. Velikanje, 2 Wn.App. 888 (1970), the court stated affirmative answers must be given to the following questions before the doctrine of collateral estoppel can be applied:

- (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question?
- (2) Was there a final judgment on the merits?
- (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
- (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

2 Wn.App. at 894.

In this case, the issue of whether the taxpayer was a Washington resident was not litigated and was not decided by a final judgment on the merits. We do not find the doctrine applicable in this case. Furthermore, the taxpayer has not shown that the prosecutor or the court was aware that the taxpayer's wife lived and worked in Washington, his children attended school in Washington, and that he had a Washington driver's license and was registered to vote in Washington.

[4] Even if we were to find that the taxpayer considered himself a nonresident when he purchased the vehicle and did not intend to evade the Washington sales tax by having the vehicle licensed in Oregon, we believe his subsequent actions clearly showed an intent to evade the use tax.

The statute imposing the use tax is RCW 82.12.020. It provides in part:

There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail . . .

The tax shall be levied and collected 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 under RCW 82.08.020, as now or hereafter amended.

The "value of the article used" is defined in RCW 82.12.010(1) as:

(T)he consideration, whether money, credit, rights or other property, expressed in terms of money, paid or given or contracted to be paid or given by the purchaser to the seller for the article of tangible personal property, the use of which is taxable under this chapter.

The administrative rule implementing the above provisions is WAC 458-20-178 (Rule 178). The rule also states that the tax is levied on an amount equal to the value of the article used and defines value the same as in RCW 82.12.010(1) quoted above. Rule 178 clearly provides that the tax liability imposed under use tax arises at the time the property is first put to use in this state, which includes any act by which the

taxpayer "takes or assumes dominion or control over the article."

Clearly under both RCW 82.12.010(20) and Rule 178, use tax was due on the truck when the taxpayer "used" the truck in Washington. The taxpayer has provided no evidence that he used the vehicle as a nonresident of this state for 90 days prior to bringing it to Washington. He apparently used the truck to attend the city council meetings in Washington in November and December of 1985. This was less than 30 days after the vehicle had been purchased in Washington. The use tax was due at that time and he was not entitled to the nonresident exemption provided by RCW 82.12.0251.

The taxpayer's intent may be inferred from his conduct. See, United States v. Esser, 520 F.2d 213 (7th Cir. 1975). In this case, the taxpayer did not obtain an Oregon driver's license or register to vote in Oregon until he was cited in Washington. Furthermore, after he was cited he registered the vehicle in Washington, but alleged no use tax was due by checking the exemption box which stated he had used the vehicle in another state for a minimum of 90 days while a bona fide resident thereof and before he had entered Washington. He stated the date he first entered Washington was June 27, 1986--a statement that the facts indicate was not so. These facts clearly indicate the taxpayer acted to evade payment of the use tax. Accordingly, the taxpayer's petition is denied.

We find no grounds to cancel the evasion penalty because of the taxpayer's allegations that the Department did not furnish him with a written basis for the determination he was a Washington resident, or the rules and regulations and legal basis for the assessment when first requested. As discussed above, under Washington law the assessment of use tax was proper and the taxpayer is presumed to know the law. Furthermore, the taxpayer's file indicates he was provided copies of the applicable use tax statutory provisions, Rule 178 and Rule 100. He was also told the compliance supervisor would be available to meet with him on June 23rd in the . . . office. The taxpayer, however, did not appear on that date.

DECISION AND DISPOSITION:

The taxpayer's petition is denied. The amount remaining unpaid under Warrant No. . . . , plus additional interest as provided by RCW 82.32.210 (one percent of the amount of the warrant for each 30-day period or portion thereof after the date of such warrant) is due by March 26, 1987. Absent

payment of the amount due by that date or a timely appeal of this Determination, the Department will proceed to collect the amount due as provided by chapter 82.32 RCW.

DATED this 6th day of March 1987.