

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 Assessment)	
)	No. 87-47
)	
)	Registration No. . . .
)	
. . .)	
)	
)	

[1] **RULE 100:** APPEALS -- CONFERENCES -- FAILURE TO APPEAR.

A taxpayer who fails to appear for a scheduled conference and who fails to communicate a reason for his failure to appear will have his appeal decided on the basis of the written record.

[2] **RULE 102 AND RCW 82.04.470:** SALES -- WHOLESALE OR RETAIL -- BURDEN OF PROOF.

The burden of proving that a sale was not a retail sale is on the seller.

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 petitioned for a correction of an assessment of excise taxes. The assessment resulted from a routine audit of the taxpayer's records.

FACTS AND ISSUES

Potegal, A.L.J. -- During the period covered by the audit (January 1, 1981 through June 30, 1985) the taxpayer sold new and used cars and was also in the motor transportation business. The only records which the taxpayer could provide for examination were federal income tax returns. Large

differences were found between gross amounts reported to the Department of Revenue and gross amounts reported to the federal government.

The auditor allowed the taxpayer two months to produce documents to prove that the unreported amounts represented wholesale sales rather than retail sales. The taxpayer was unable to come up with any proof within that time frame. Consequently, Tax Assessment No. . . . in the amount of \$. . . was issued on November 26, 1985. After that assessment was issued, the taxpayer did provide evidence that some sales were wholesale rather than retail. This resulted in a reduction of the amount owed. Amended Tax Assessment No. . . . in the amount of \$. . . was issued on July 22, 1986.

On August 6, 1986 the taxpayer filed a petition for a correction of that assessment. He stated that he was in the process of procuring documents which he did not have at the time of the audit. He asked for the opportunity to present the documents at a hearing.

In response, the Department sent him a letter dated September 24, 1986 explaining the appeal process and another letter dated September 26, 1986. The September 26th letter informed the taxpayer that he had been granted a telephone conference and that an administrative law judge would telephone him at 10:30 a.m. on Friday, November 21, 1986 to conduct the conference.

At the appointed time and date this administrative law judge called the taxpayer. I was informed that he was out of town. I left a message for him to call me on Monday, November 24th. He did not call back and has not called back to date.

DISCUSSION

[1] In view of the taxpayer's nonavailability for the scheduled telephone conference and his lack of communication since then, this appeal will be decided on the basis of the written record as it currently exists.

The record reflects that the taxpayer has no apparent objection to the legal theory used by the auditor in arriving at the assessment. His objection is purely on factual grounds. He claimed to have been in the process of obtaining evidence, presumably to prove that at least some of the sales taxed as retail were in fact wholesale or otherwise not

subject to sales tax. The taxpayer has failed to provide any such evidence.

The law which is pertinent to this appeal is RCW 82.04.470. That statute provides that:

Unless a seller has taken from the purchaser a resale certificate signed by, and bearing the name and address and registration number of the purchaser to the effect that the property was purchased for resale, or unless the nature of the transaction is clearly shown as a sale at wholesale by the books and records of the taxpayer in such other manner as the department of revenue shall by regulation provided, the burden of proving that a sale of tangible personal property was not a sale at retail shall be upon the person who made it.

[2] The law places the burden of proof on the seller to establish that a sale was not a sale at retail. The taxpayer here has not met that burden of proof. Accordingly, the taxpayer's petition must be denied.

If the taxpayer does obtain proof that some of these sales were not subject to sales tax, he may, after paying the assessment, petition for refund. He must do this within the statutory period allowed for refunds no later than four calendar years after the end of the year in which the tax was paid. RCW 82.32.060.

DECISION AND DISPOSITION

The taxpayer's petition is denied. Tax Assessment No. . . . in the amount of \$. . . , plus additional interest of \$. . . , for a total of \$. . . is due for payment by March 2, 1987.

DATED this 10th day of February 1987.