

Cite as 4 WTD 41 (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 Assessment of)	No. 87-273
)	
)	
. . .)	Registration No. . . .
)	Tax Assessment No. . . .
.	
)	
)	

[1] **RCW 82.32.050:** EVASION PENALTY. A 50 percent evasion penalty may not be assessed on taxes which had been paid prior to the assessment, nor may it be assessed on a 20 percent late payment penalty, also paid prior to the assessment.

[2] **RCW 82.32.050:** EVASION PENALTY: 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 the tax was in fact owed. 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.

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 23, 1987

NATURE OF ACTION:

Petition for cancellation of a 50 percent evasion penalty.

FACTS:

Normoyle, A.L.J. -- The taxpayer is a building contractor. He obtained a Certificate of Registration from the Department of Revenue in 1979. From 1979 through 1982 he paid Washington excise taxes, on a quarterly basis. He discontinued the business on December 30, 1982, and his account with the Department was closed the next day. He conducted no business in 1983. In 1984, without obtaining a new or reissued Certificate of Registration, he resumed his business. In 1984 and 1985, still unregistered, he performed remodeling and home construction. He did not report or pay excise tax either year. On April 16, 1986, he filed 1984 and 1985 annual returns, reporting gross income of \$71,229 in 1984 and \$18,797 in 1985. He paid the 20 percent late payment penalty for the reported amounts both years. His actual gross income in 1985 was \$154,404, some \$83,000 more than reported.

The taxpayer was audited for the period from January 1, 1982, to December 31, 1985. The audit arose from the taxpayer giving a resale certificate to a sub-contractor in connection with construction of one of the houses. The resale certificate was dated July 5, 1984, and the taxpayer used his old (at that time invalid) registration number. The taxpayer later decided to use this home as his residence.

As a result of the audit, additional tax was found to be due for 1984 and 1985, in the sum of \$. . . A 50 percent evasion penalty was added to this delinquency, and to the reported 1984 and 1985 taxes, and to the 20 percent late payment penalty already paid.

These are the disputed facts:

1. The taxpayer claims that the underreported income was due to accountant error (that accountant has since been replaced).
2. The auditor claims that the taxpayer collected sales tax from a customer for a 1985 remodeling job, yet didn't include the \$83,000 income in his returns, and kept the collected sales tax until the audit.
3. The taxpayer claims that he was building a custom home for a buyer, when he gave the resale certificate. The sale fell through and he completed the house for himself. He argues that the resale certificate was valid when given, under these circumstances.

4. The auditor claims that, even if the above is true, the taxpayer knew that he should have paid use tax, once he decided to complete the home for himself.

5. The taxpayer states that the reason that he didn't file the 1985 return until April 16, 1986, was that he thought he was on an annual reporting basis, and that April 16 coincides with his annual federal tax return.

The reason for filing the 1984 return more than two years late, the taxpayer claims, is that either he forgot or he thought his wife was going to take care of it, in connection with her separate business.

6. The auditor claims that he made a telephone call to the taxpayer in February of 1986, after discovery of the resale certificate. He states that he told the taxpayer at that time that he would be audited. The auditor's assumption is that the taxpayer filed the returns in April of 1986 only because of the telephone call.

ISSUES:¹

1. May a 50 percent evasion penalty be assessed on taxes which were paid prior to an audit assessment?

2. May a 50 percent evasion penalty be assessed on a 20 percent late payment penalty?

3. Under these facts, may a 50 percent evasion penalty be assessed on the additional tax found due as a result of the audit?

DISCUSSION:

The pertinent statutes are summarized below.

All persons engaged in business are required to be registered with the Department of Revenue. RCW 82.32.030.

¹ The taxpayer also argues that the evasion penalty should be waived under Washington Administrative Code 458-20-228, situation 7(c) (the failure to pay taxes was due to circumstances beyond the taxpayer's control, i.e., accountant error). That section of the code is inapplicable to these facts. Situation 7 is in the conjunctive; parts (a) - (c) must all be present. Here, the taxpayer can't meet either (a) or (b).

Taxpayers are to report income and pay taxes monthly or at other intervals as directed by the Department. RCW 82.32.045.

If a taxpayer pays less tax than properly due, the Department is to issue an assessment for the unpaid taxes, and "shall" add interest at 9 percent per annum. "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." RCW 82.32.050. (Emphasis added).

If a taxpayer pays taxes more than sixty days after they are due, the Department "shall" assess a 20 percent late payment penalty. RCW 82.32.090.

ISSUE NOS. 1 AND 2.

The language of the evasion statute, RCW 82.32.050, limits the 50 percent penalty to "additional taxes" found to be due, in cases where there was an intent to evade taxes. The taxes paid in 1986, for the two preceding years, were not "additional taxes" -- they had already been paid prior to the audit. Likewise, the 20 percent late payment penalty was paid before the audit and, further, was not a "tax" anyway, "additional" or otherwise. We thus conclude that the evasion penalty on the paid 1984 and 1985 taxes, and the 20 percent penalty paid in connection with that reported income, cannot be sustained.

ISSUE NO. 3.

The audit assessment, in contrast, was for "additional taxes." The inquiry then is whether or not the taxpayer's failure to report and pay these taxes resulted "from an intent to evade the tax."

We are not guided by any appellate court decisions concerning the evasion penalty. 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

. . .

Prior Department Determinations establish the following principles applicable to this case:

1. The tax evasion statute is not part of the criminal code. Therefore, the burden of proof is a preponderance of the evidence.
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. To sustain a fifty 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.
5. 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.
6. 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.

We conclude that the evidence, even ignoring the disputed facts, warrants imposition of the evasion penalty on the audit assessment.

The taxpayer violated RCW 82.32.030 by engaging in business without a valid Certificate of Registration.

The taxpayer violated RCW 82.32.045 by not reporting all income.

The taxpayer violated RCW 82.04.470 by giving a resale certificate without a valid registration number.

The taxpayer violated RCW 82.08.050 by either not collecting retail sales tax from its customers or by collecting but not remitting the tax.

The taxpayer violated RCW 82.12.020 by not paying use tax on those items purchased from the subcontractor without tax, through use of an invalid resale certificate.

The taxpayer's actions, when taken together, represent a gross deviation from the spirit of our tax laws. They also, in combination, give rise to an inference that the taxpayer intended to evade the tax. He has not rebutted that inference.²

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part. The 50 percent evasion penalty assessed on the \$. . . paid in connection with the 1984 and 1985 annual returns is cancelled. The 50 percent evasion penalty on Tax Assessment No. . . . , in the sum of \$. . . , is sustained. Tax Assessment No. . . . is being referred to the Audit Section for adjustment and will be due on the date indicated thereon.

DATED this 19th day of August 1987.

² We also have given weight to the fact that this taxpayer was no neophyte to Washington's tax laws. He had been registered, in business, filing returns, and paying taxes from at least 1979 through 1982.