

Cite as 5 WTD 77 (1988)

BEFORE THE INTERPRETATION AND APPEALS DIVISION
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. 88-32
)	
)	Registration No. . . .
. . .)	Tax Assessment No. . . .
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- [1] **RULE 102:** RCW 82.04.050 -- RETAIL SALES TAX -- RESALE -- REGULAR COURSE OF BUSINESS. Assessment of retail sales tax on vehicles upheld where taxpayer was unable to provide evidence that the purchasers paid use tax when the vehicles were licensed. A seller who fails to collect the retail sales tax is personally liable to the state for the amount of the tax. Purchase of a boat allegedly for resale by a business registered as an auto wholesale business was subject to retail sales tax, as it was not a purchase in the regular course of business.
- [2] **RCW 82.32.050:** EVASION PENALTY -- INTENT TO EVADE. Evasion penalty cancelled where evidence did not clearly establish a taxpayer's intent to evade payment of taxes owing on the items at issue.

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 11, 1987

NATURE OF ACTION:

The taxpayer protests the assessment of retailing and retail sales tax and an evasion penalty.

FACTS AND ISSUES:

Frankel, A.L.J. -- This appeal concerns assessments against three businesses owned and operated by Mr. . . . (hereinafter referred to as the taxpayer):

1) . . . Wholesale -- This business registered in 1980 as an auto wholesale partnership. [Business A]'s records were examined for the period January 1, 1982 through December 31, 1985. The audit disclosed retailing and retail sales taxes and interest owing in the amount of \$ The tax was assessed on the value of twelve vehicles and vessel purchases made by the taxpayer. The taxpayer's records contained no evidence that retail sales tax or use tax was paid on the items.

A fifty percent evasion penalty was added to the assessment. The Department found [Business A] had no real business purpose other than allowing the taxpayer to purchase items without paying sales tax.

The taxpayer subsequently provided evidence that use tax had been paid when two of the vehicles were licensed. The tax, interest, and penalties were deleted on the amounts paid for those vehicles, resulting in an adjusted assessment of \$ (. . .).

Because it was not clear from the taxpayer's records [which of the three] owned the vehicles, the same tax was assessed against each business. The audit report indicates that the non-owning affiliates will receive a credit once the ownership of the property is established. The auditor found that the vehicles and boat were not maintained in business inventory.

Deposits were made to the [Business A] account from an unidentified source within a few days of the purchase. The auditor believed that some of the items were purchased by [Business B] or [Business C] and some were withdrawn from inventory for use by the taxpayer.

2 & 3) [Business B], and [Business C]. These companies do major road construction work for larger contractors and haul logs. During the audit period, they also sold gravel, topsoil and bark, rented heavy equipment with an operator, and did excavating and landscaping. Although separate companies, the auditor found that the taxpayer viewed the three businesses as one. The invoices are printed with the names of both [Business B] and [Business C] on them and purchases were made from the checking account that had funds in it at the time.

Both [Business B] and [Business C]'s records were examined for the period January 1, 1982 through June 30, 1986. As noted above, the auditor included the assessment of the retail sales tax on the vehicles and vessels purchased by [Business A] and the evasion penalty in both assessments. Also included in the assessments is tax on the estimated value of a 1985 Cadillac purchased by the trucking businesses. The assessment against [Business B] (No. . . .) was for a total of \$ A post-audit adjustment reduced the assessment to \$ The assessment against [Business C], (No. . . .) was for a total of \$ A post-audit adjustment reduced the amount to \$ The taxpayer protests the assessment of retailing and retail sales tax on the vehicles and vessels, and the imposition of the evasion penalty.

DISCUSSION:

[1] At issue is the assessment of retailing and retail sales tax on thirteen items. (. . .) The taxpayer agrees with the assessment of tax on the motorcycle trailer (. . .) and presented no arguments to dispute the assessment of tax on the first three payments listed for 1983 (. . .) or the 1985 payment for the Chevy pick-up for \$4,200. The tax on these items, therefore, is upheld.

The taxpayer protests the assessment of tax on the 1985 Cadillac. The auditor assessed the tax on the estimated value of the vehicle because he observed the car at the business and it was displaying dealer plates. Nothing in the taxpayer's records at that time indicated retail sales tax was paid when the vehicle was acquired. The taxpayer subsequently produced a copy of the invoice showing the used vehicle had been

purchased from a Cadillac dealer and retail sales tax was collected at the time of the sale. A phone call to the dealer confirmed that the sales tax had been collected and remitted. We will agree to delete the tax assessed on the 1985 Cadillac.

The taxpayer contends the remaining items were purchased for re-sale or for an employee or relative who paid the use tax at the time of licensing the vehicle. The taxpayer contends none of the vehicles were subjected to intervening use. Purchases for resale in the regular course of business without intervening use are not deemed to be "retail sales." RCW 82.04.050.

Specifically, the taxpayer objects to tax on the following items:

1) [Mr. H] -- . . . -- The taxpayer stated he purchased the car for [Mr. H], his employee, who reimbursed him for the purchase price. The taxpayer said he and [Mr. H] went to the bank together to arrange financing and [Mr. H] made the payments to the bank for the total purchase price. [Mr. H] licensed the car and the taxpayer stated that he would have paid use tax at that time. Because [Mr. H] is deceased, the taxpayer has been unable to get evidence showing the use tax was paid when the vehicle was licensed.

When Mr. [H] died, the taxpayer purchased the vehicle from his widow for \$4,000. He stated it did not use the car and re-purchased it as a favor to the widow. The taxpayer did not keep the car and the new owner paid use tax when the car was licensed. Because the taxpayer was able to provide evidence that the use tax was paid when it was licensed, the tax on the sale of the Lincoln by Mrs. [H]¹ was deleted.

Unless the taxpayer is able to produce some evidence showing Mr. [H] paid use tax on the vehicle when it was licensed, though, we must sustain the assessment.² A seller who fails

¹ [Spelling error noted.]

² If the taxpayer knows the vehicle license number or ID number, he could contact the records department, Department of Licensing (206-753-6990) Highways-Licensing Building, PB-01, Olympia, Washington 98504-8001 to determine if use tax was paid when the car was licensed by Mr. [H]. For purposes of this assessment, the Department also will accept a copy of Mr. [H]'s 1983 federal tax return. If the return claims a deduction for retail

to collect the retail sales tax is personally liable to the state for the amount of the tax. RCW 82.08.050. The burden of proof is on the seller to show the tax was collected and remitted or to show that the buyer paid use tax directly to the state.

2) "Eagle" -- . . . -- The taxpayer stated he purchased this car for his sister and that she paid the use tax owing when she licensed the car. As of the date of the hearing, the taxpayer had not provided evidence that the use tax was paid. If the evidence is provided before the new due date of the assessment, the retail sales tax shall be deleted on this transaction.

If not, the taxpayer may present the evidence, if obtained within the four-year period provided by RCW 82.32.060, with a petition for refund.

3) Boat and Accessories -- . . . -- The taxpayer contends the boat and accessories were purchased for re-sale. He stated that at the time they were purchased, he had a buyer, but the sale fell through. The taxpayer stated that he only had the boat in the water twenty minutes to take a picture to use to advertise the boat and that the boat has always been held for re-sale.

RCW 82.04.050 defines retail sales to mean:

every sale of tangible personal property . . . to all persons irrespective of the nature of their business . . . other than a sale to a person who (a) purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person
(Emphasis supplied.)

Whether a particular transaction is in the regular course of business is a question of fact to be determined from all of the surrounding circumstances. In this case, the following facts indicate the boat was not purchased in the regular course of business:

1) The boat and accessories were purchased in 1984 and the taxpayer provided no evidence showing they have been advertised for sale;

sales/use tax paid on the Lincoln, the taxpayer shall receive a credit for the amount paid.

- 2) The taxpayer has purchased no other boats;
- 3) The taxpayer's application for Certificate of Registration describes the nature of the business as auto wholesale; and
- 4) The boat was not maintained in business inventory.

Even if the boat is held for resale, therefore, we find that deferred sales tax was correctly assessed because the boat and accessories were not purchased in the regular course of business. The tax on the boat and accessories is upheld.

[2] Evasion penalty -- In reviewing the taxpayer's records, the auditor concluded [Business A] was not conducting business, but merely functioning as a tool to purchase vehicles and vessels without payment of sales tax. The auditor stated that the taxpayer told him that [Business A] existed to allow him, family members, and affiliated corporations to operate vehicles and vessels on dealer plates to avoid the payment of the retail sales tax. The auditor also found that the taxpayer avoided paying retail sales tax on items purchased for the vehicles by claiming they were for re-sale or for use in interstate commerce. The taxpayer is not licensed as an ICC carrier.

A fifty percent evasion penalty shall be assessed if the Department finds that all or part of a deficiency resulted from an intent to evade payment of the tax owing. RCW 82.32.050. The taxpayer has produced evidence showing that the retail sales or use tax was paid on three of the transactions for which the evasion penalty was assessed. The taxpayer also believes that Mr. [H] paid tax on the Lincoln in 1983 and that his sister paid use tax on the "Eagle." If the taxpayer is correct, we would agree that these purchases were not made to evade payment of tax. No evidence exists showing the taxpayer used the Lincoln or the "Eagle."

The taxpayer also contends that the boat and accessories were purchased for, and have been held for, re-sale. The Department has no evidence that the taxpayer has been using the boat. Although we find this is a close question, we agree to give the taxpayer the benefit of the doubt and cancel the evasion penalty. The taxpayer has had limited business activity since it was registered in 1980, but some of the returns do show retail and/or wholesale business and

occupation and retail sales taxes have been remitted. We do not find the evidence clearly shows that the failure to pay sales or use tax on the items at issue resulted from an intent to evade tax liability.

DECISION AND DISPOSITION:

The evasion penalty in all three assessments at issue is cancelled. The assessments of taxes and interest are upheld, except for the tax assessed on the estimated value of the 1985 Cadillac (. . .). As previously advised, the tax and interest that was assessed in all three audits will be deleted on two of the audits when the actual owner of the item is identified. An amended assessment shall be issued and will be due on the date provided thereon.

DATED this 19th day of February 1988.