

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

In the Matter of the Petition) D E T E R M I N A T I O N
For Refund of)
) No. 89-85
)
)
 . . .) Registration No. . . .
) Tax Assessment No. . . .
) Warrant No. . . .

[1] RCW 82.32.050: EVASION PENALTY. To sustain a fifty percent evasion penalty, the Department must find that the taxpayer intended to avoid paying the tax. Intent may be inferred from the taxpayer's conduct and all the facts and circumstances of the case. Where a taxpayer continued to report no taxable business activity for a four year period although it received a warning that an evasion penalty would be imposed because it had similarly reported no taxable business activity in a prior three year period, evasion penalty is sustained. Continued failure to comply with the tax laws of this state is evidence of intent to evade the taxes properly due.

These 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: . . .

NATURE OF ACTION:

Petition for cancellation of the fifty percent evasion penalty assessed because of nonreporting of taxable business activities during a four year period which followed a three year period of similar nonreporting.

FACTS AND ISSUES:

Krebs, A.L.J. -- . . . (taxpayer) is engaged in speculative building, real estate development and sales, general contracting and operation of apartment/motel complexes.

The Department of Revenue (Department) examined the taxpayer's business records for the period from April 1, 1981 through December 31, 1984. As a result of this audit, the Department issued Tax Assessment No. . . . on January 30, 1986 asserting excise tax liability in the amount of \$. . . , interest due in the amount of \$. . . and imposing a fifty percent evasion penalty on the tax due in the amount of \$. . . for a total sum of \$ The tax assessment was paid in full pursuant to a partial payment plan entered into after the Department had issued Tax Warrant No. . . . on July 16, 1986. Accordingly, the taxpayer's petition protesting the tax evasion penalty is being deemed as a petition for refund of the evasion penalty.

The background for the imposition of the evasion penalty is the following. In the prior audit period of January 1, 1978 through March 31, 1981, the taxpayer reported "no business" on its tax returns filed annually although there were significant taxable business activities. For that prior audit period, the Department issued Tax Assessment No. . . . on March 30, 1982 asserting excise tax liability in the amount of \$ In connection with this prior tax assessment, the auditor issued on March 4, 1982 to the taxpayer "Supplemental Instructions for Future Reporting" which in pertinent part stated:

In referring to deficiencies found through examining returns, RCW 82.32.050 states "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."

...

You are instructed to report income received under the applicable classifications as assessed in this audit until such time as there is a change in the law or rules. Failure to do so could cause the aforementioned penalties to be enforced. (Emphasis supplied.)

The auditor assessed the evasion penalty because the taxpayer disregarded the instructions for the subject audit period and again reported no taxable business activities although the

audit disclosed that there were significant taxable business activities which included the collection of retail sales tax not remitted to the Department.

In protesting the assessment of the evasion penalty, the taxpayer asserts that it did not intend to evade taxation and points out that the evasion penalty statute speaks of "intent to evade the tax." The taxpayer explains that at the time of the prior audit it retained outside accountants because it realized that it needed experienced people to oversee the records and file tax returns. From that point on, the taxpayer relied on the outside accountants who came to its premises and regularly removed records without notifying the taxpayer. The taxpayer asserts that they even removed the "Supplemental Instructions" without the taxpayer seeing it or having knowledge of it.

The taxpayer emphasizes that if it had any intent to evade taxes it would not have hired outside accountants, or it would have filed fraudulent tax returns rather than no tax returns at all. The fact that no tax returns were filed strongly indicates to the taxpayer that its accountants forgot to "calendar" preparation of tax returns. The taxpayer asserts that its accountants are not apt to admit their error in not filing tax returns because of malpractice liability consequences.

The issue is whether the imposition of the fifty percent evasion penalty is proper under the above-described circumstances.

DISCUSSION:

The pertinent statutes are summarized below.

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

Taxpayers are to collect sales tax from their customers on taxable sales and remit the tax to the Department. RCW 82.08.050.

Where the Department finds that all or any part of taxes due but not paid resulted from an intent to evade the tax payable, a penalty of fifty percent of the additional tax found to be due shall be added. RCW 82.32.050.

[1] A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result. It is not necessary to establish intent by direct or positive evidence. Intent may be established in the same way as any other fact by taking into consideration the acts of the parties and all the facts and circumstances of the case. State v. Berman, 50 Wn.App. 125 (1987).

In this case, the taxpayer violated RCW 82.32.045 by not reporting any income or paying any taxes during almost a four year period of time although it had income which incurred a tax liability of \$ Furthermore, for the annual reporting period of 1983 (and contrary to the taxpayer's assertion that no returns had been filed), the taxpayer filed a false report of "no sales" and no taxable income when its tax liability for that year was \$. . . which included retail sales tax collected or which should have been collected in the amount of \$ Thus, the taxpayer violated RCW 82.32.050.

Not to be ignored is the fact that the taxpayer received a warning that the evasion penalty would be imposed, and this occurred after the taxpayer had similarly committed the same violations in a prior three year period. Under such circumstances, we do not believe that the taxpayer's mere retention of outside accountants to file its tax returns, which they did not do, suffices to absolve the taxpayer from responsibility to do something more such as taking a personal interest in complying with the statutes and the auditor's instructions.

We do not give much weight to the taxpayer's assertion that it did not personally receive the auditor's written instructions because the accountants had removed it from the taxpayer's premises. The fact that the taxpayer hired outside accountants shows that it was aware that it had to correct its tax reporting procedures. If the present case involved a first time violation, the taxpayer might receive the benefit of the doubt as was extended to it in the prior audit. However, continued failure to comply with the tax laws of this state is evidence of the taxpayer's intention to evade the taxes properly due. 5 WTD 93 (1988), Det. 88-40.

For the reasons stated and the applicable law, the fifty percent evasion penalty was proper and cannot be canceled.

DECISION AND DISPOSITION:

DETERMINATION (Cont)
No. 89-85

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Registration No. . . .

The taxpayer's petition is denied.

DATED this 17th day of February 1989.