

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 Correction of Notice of)
Balance Due of) No. 89-58
)
) Unregistered
) Notice of Use Tax and
) Evasion Penalty

- [1] **RULE 170 AND RCW 82.04.190:** RETAIL SALES TAX -- USE TAX -- BUILDING -- CONSTRUCTION OF -- BY OWNER. An owner of real property on which a building is constructed is a consumer and is required to pay retail sales tax to the building contractor.
- [2] **RULE 228:** RCW 82.32.090 -- LATE-PAYMENT PENALTY -- BUILDING -- CONSTRUCTION OF -- LIABILITY OF OWNER FOR. Where a property owner fails to pay retail sales tax to a contractor for the construction of a home on the former's property, a late-payment penalty may not be assessed against the owner unless the Department has first specified a tax due date to the owner.
- [3] **RULE 102:** EVASION PENALTY -- RESALE CERTIFICATE -- MISUSE OF. A husband and wife gave a resale certificate in the name of their corporate business to a contractor in connection with the construction of their personal residence. The certificate was found to be presented under false and knowingly misleading circumstances. Evasion penalty affirmed.

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: September 4, 1986

NATURE OF ACTION:

Appeal of use tax, late-payment penalty, and evasion penalty on construction of dwelling.

FACTS AND ISSUES:

Dressel, A.L.J. -- . . . (taxpayers) are a marital community not registered with the Department of Revenue (Department) as a business entity. On March 4, 1986 the Department sent them a Notice of Use Tax Due for the construction of a residential dwelling at the above-captioned address. In the notice the taxpayers were asked to pay \$. . . in use tax or deferred sales tax for the construction of the home, a 20% late-payment penalty of \$. . . , and a 50% evasion penalty of \$. . . for a total of \$ In this action the taxpayers are appealing the notice in its entirety.

In April of 1982 the taxpayers entered into an agreement with . . . Construction under which . . . would build a custom home on property owned by the [taxpayers]. At about that same time the taxpayers gave the builder a resale certificate which read as follows:

FIRM NAME [QRS] Corporation
EFFECTIVE DATE EXPIRATION DATE

I HEREBY CERTIFY that all the tangible personal property which I will purchase from
. . . Construction For. [Colin]'s
will be purchased for resale in the regular course of business without intervening use by me, or for the purpose of consuming the property purchased in producing for sale a new article of tangible personal property of which the property purchased will be an ingredient, or a chemical used in processing the same. This certificate shall be considered a part of each order which I may hereafter give to you, unless otherwise specified, and shall be valid until revoked by me in writing.

Registration No. . . . Type of Business
Firm as Registered
Address
Authorized Signature s/[Orest Kindrachuck] Date 3-10-82
Title General Manager

All blanket resale certificates must be renewed at intervals not to exceed four years.

[QRS] Corp. is a corporation owned by the taxpayers. This business sells and repairs transmissions. Both taxpayers are officers and directors of the corporation. The registration number on the resale certificate is that of the corporation. The certificate was signed by [Orest Kindrachuck], who at the time was vice president of the corporation. Based on the resale certificate, the builder did not charge the taxpayers retail sales tax on his \$203,735 fee for construction of the home.

The taxpayers claim that the reason they used the resale certificate was that they intended from the beginning to resell the home after it was finished. According to them, because of market conditions and other circumstances, they were unable to sell the house. Shortly after construction was completed in June of 1982, they moved into the home and, as of the hearing date in this matter, had occupied it continuously except for an unspecified one and one half year period.

The Department assessed use tax because of the taxpayers' failure to pay sales tax at the time of construction. The late-payment penalty was added because sales tax wasn't paid when the building contractor's fee was paid. That payment occurred shortly after construction was completed in 1982. The evasion penalty was added as well because of the taxpayers' use of the resale certificate, allegedly to avoid payment of sales tax on construction of the house.

Some additional points are worth reciting. During some unknown period, the taxpayers state, they had the home listed for sale with a realtor. They built the house, they say, solely for the purpose of selling it so that they could realize a profit. The taxpayers had never done that previously with any other house. As of the hearing date, they also had not attempted it again since the incident at issue. The house was built according to the specifications of the taxpayers. The taxpayers claim that they were told they would not have to pay sales or use tax until they resold the home.

The issues are: 1) Is sales or use tax due on the construction of the taxpayers' home? 2) If so, are the taxpayers liable for the late-payment penalty? 3) Was the taxpayers' use of the resale certificate improper such that the evasion penalty should be imposed?

DISCUSSION:

A prime contractor is defined at WAC 458-20-170 (Rule 170), section (1)(a) as:

(a) The term "prime contractor" means a person engaged in the business of performing for consumers, the constructing, repairing, decorating or improving of new or existing buildings or other structures under, upon or above real property, either for the entire work or for a specific portion thereof.

[1] This administrative regulation describes the activity of the builder in this case. We conclude that the builder is a prime contractor. Rule 170 goes on to state at section (4)(a): "Prime contractors are required to collect from consumers the retail sales tax measured by the full contract price". The term "consumer" is defined at RCW 82.04.190 which says in part:

"Consumer" means the following:

...

(4) Any person who is an owner, lessee or has the right of possession to or an easement in real property which is being constructed, repaired, decorated, improved, or otherwise altered by a person engaged in business...

This statutory definition describes the taxpayers in this case. Accordingly, we conclude that they are consumers. Recalling our quotation of Rule 170 section (4)(a), we observe that the builder should have collected sales tax from the taxpayers on the construction of the home. He did not do so.

RCW 82.08.050 reads in part:

Where a buyer has failed to pay to the seller the tax imposed by this chapter and the seller has not paid the amount of the tax to the department, the department may, in its discretion, proceed directly against the buyer for collection of the tax...

The taxpayers are the buyer in this case. Clearly, the Department is acting in conformity with the statutes and rules in pursuing the taxpayers for the retail sales tax at issue.¹

On the first issue, sales or use tax on construction of the house, the taxpayers' petition is denied.

Next, we will address the penalties levied in this case. RCW 82.32.090 provides:

Late payment -- Penalties. If payment of any tax due is not received by the department of revenue by the due date, there shall be assessed a penalty of five percent of the amount of the tax; and if the tax is not received within thirty days after the due date, there shall be assessed a total penalty of ten percent of the amount of the tax; and if the tax is not received within sixty days after the due date, there shall be assessed a total penalty of twenty percent of the amount of the tax. No penalty so added shall be less than two dollars.

[2] This statute speaks in terms of due dates and taxes payable to the Department. The retail sales tax in this case was payable by the taxpayers as buyer to the construction contractor as seller. RCW 82.08.050. The seller was, in turn, obligated to remit the tax to the Department with a state excise tax return which is due for payment by a certain date. WAC 458-20-228 (Rule 228). Thus, it is the seller whose taxes are payable to the Department and the seller who missed the due date(s) here. The taxpayers did not have a specific due date on which they were to pay the tax to the Department. Also in their individual capacities, the taxpayers were not registered and had no obligation to file state tax returns on a certain date. That being the case, it is not appropriate that the late-payment penalty be assessed

¹ The auditor's characterization of the tax as "use tax" is understandable in that under WAC 458-20-178 (Rule 178) "use tax applies upon the use of any tangible personal property, the sale or acquisition of which has not been subjected to the Washington retail sales tax". In this fashion the use tax complements the sales tax. Here, however, in that the construction of the house was subject to sales tax in the first instance, and that construction involved more than just tangible personal property, the better label for the tax due is "sales" or, at least, "deferred sales" tax.

against them for missing a due date(s). The first notice of a due date they received from the Department was the Notice of Use Tax Due which is at issue in this case. It specified a date certain for payment, but the taxpayers have effectively put that date in abeyance by filing a timely petition for correction. It is, therefore, our judgment that the 20% late-payment penalty was improperly applied.

The taxpayers' petition is granted as to the late-payment penalty which will be deleted.

With respect to the evasion penalty of 50%, WAC 458-20-102 (Rule 102) is pertinent. It reads in part:

Any purchaser who fraudulently signs a resale certificate with intent to avoid payment of tax is guilty of a gross misdemeanor. When any resale certificate is found to have been fraudulently tendered to any seller or given under false or knowingly misleading circumstances, any retail sales tax which should have been paid but for the tendering of the certificate, which is assessed against the buyer, will automatically incur an evasion penalty of fifty percent of the tax found to be due.

[3] It is our finding that the resale certificate in this case was given under "false or knowingly misleading circumstances". First of all, there is no evidence whatsoever, other than the statement of the taxpayers' representative at the telephone conference in this matter, that the taxpayers either intended to resell or made efforts to resell, the house. That representative, incidentally, at the conference indicated that he would advise if, when, and with whom the house was listed for sale. No further word was heard, however.

Secondly, the taxpayers themselves moved into the house shortly after it was completed which action is, at least, somewhat inconsistent with an intent to resell. In addition, the house was custom-designed by the taxpayers. We think it unlikely that they would have expended that effort unless they intended the house for themselves or had a pre-arranged buyer whose preferences they parroted in their design process. There, obviously, was not such a buyer because the house was not sold. Also, the taxpayers had never previously built a house for the purpose of resale nor had they done so in the time after the subject house was finished until the date of

the conference. Evidence of other house-resale transactions would lend credibility to the taxpayers claim that they intended to resell this one.

But the most damning evidence of all is the resale certificate itself. Even though it was the [taxpayers] personally who owned the property and contracted with the builder for the house, the resale certificate they gave the builder bore the name of a corporation. Not only that, but also it was not signed by either of the taxpayers. It had been signed by another officer of the taxpayers' business. The Department of Revenue registration number of the corporation was listed on the certificate. Next to the builder's name is the handwritten notation, "For. [Colin's]". Thus, the resale certificate on its face reflects that it is being submitted for the corporate president's ([Colin Copperfield]) personal project. That fact shows that the certificate was not mistakenly given to the builder and, indeed, the taxpayer has not suggested that the wrong certificate was presented.

In summary, the circumstances under which the resale certificate was given were clearly "false" in that an intent to resell has not been established and the purchaser of the construction services was incorrectly identified on the certificate. For the same reasons, plus the additional ones that the taxpayers were experienced business people and the certificate was signed by someone other than the taxpayers, we judge the circumstances were "knowingly misleading" as well. The evasion penalty is affirmed.

On the third issue, the evasion penalty, the taxpayers' petition is denied.

DECISION AND DISPOSITION:

The taxpayers' petition is granted in small part and denied in large part.

DATED this 30th day of January 1989.