

Cite as Det. No. 00-218, 21 WTD 150 (2002)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 00-218
...)	
)	Registration No. . . .
)	Tax Assessment No. . . .

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:

Petition concerning unpaid retail sales tax on the Washington purchase of a motor home by Washington residents, and the penalties and interest assessed thereon.¹

FACTS:

Bauer, M.M., A.L.J. Prior to the incident at issue, Taxpayers had been contacted by the Department concerning a [three automobiles] which they had registered in Oregon. Taxpayers had given a Portland, Oregon address . . . as their residence to register these vehicles. The address was a business plaza – not a residence. Taxpayers’ names were not in evidence. Taxpayers, when contacted by the Department of Revenue (Department), registered these three vehicles in this state and paid the taxes owing on them. When the motor home purchase later became an issue, the Department’s Compliance Division pointed to this history to conclude that these taxpayers were aware of their obligation to register vehicles in this state and pay the use tax.

The Department . . . obtained a purchase agreement from the [Washington dealership-seller] indicating Taxpayers had not paid retail sales tax when they purchased their motor home in Washington on May 23, 1999. The purchase agreement reflected a purchase price of \$28,000. In support of their nonpayment of retail sales tax at the time of purchase, Taxpayers had supplied the [Washington dealership-seller] with a copy of [Mr. Taxpayer]’s Oregon driver’s license and [Mrs. Taxpayer]’s California driver’s license. Taxpayers’ motor home left the [Washington dealership-seller’s sales] lot under the authority of Washington Trip Permit . . ., which reflected [Mr. Taxpayer]

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

as the driver, and . . . , Portland Oregon . . . as his address. This address was identical to that given on the purchase agreement and was the same address used previously by Taxpayers for the licensing of their [three automobiles] in Oregon. [Mr. Taxpayer] signed the trip permit, and its dates of validity were May 23 through May 28.

On January 10, 2000 Taxpayers registered their motor home in Washington using a bill of sale dated December 28, 1999. This bill of sale was handwritten and reflected a purchase price of “\$4,875.” The bill of sale was not from the [Washington dealership-seller], but appeared to be from a private individual. The signature is unreadable. Based on this bill of sale, Taxpayers paid only \$. . . in use tax on the motor home.

The Compliance Division, after trying unsuccessfully to contact Taxpayers, determined that they had unlawfully avoided paying retail sales tax on their motor home’s purchase at the [Washington dealership-seller], and that they had, further, substantially underpaid the use tax. The Department issued an assessment on July 20, 2000, as follows:

Total Value	\$28,000.00
Retail Sales Tax @ 8.2%	...
Delinquent Penalty 20%	...
Failure to Pay Sales Tax 10%	...
Evasion Penalty 50%	...
Credit for Use Tax Paid	...
Interest	...
Total Remittance	...

In an undated letter to the Revenue Agent in response to the assessment, [Mr. Taxpayer] contended the Department of Licensing (DOL) had “misread” the bill of sale and thus undercharged the use tax. Taxpayers argue they would have paid the full tax due had they known the correct amount. Taxpayers now want to pay use tax pursuant to the “correct” bill of sale – identical to the one submitted to DOL, except that it now reflects a purchase price of \$14,875. [Mr. Taxpayer] also submitted in his correspondence to Compliance that a [motorhome], like the one they purchased, sells in his area “anywhere from 12500 to 19000 depending on its condition,” and that [Taxpayer’s motorhome] was not in good, or even running, condition because it had an electrical fire/problem.

The Department has recovered the copy of the bill of sale Taxpayers submitted to DOL. The bill of sale does in fact state the purchase price to be \$4,875. It is identical to the “correct” bill of sale which Taxpayers now submit to the Department, except that the “1” between the “\$” and the “4” is clearly missing.

Taxpayers paid the full assessment and appealed for a refund under the small claims hearings process. Although the case was initially accepted for small claims treatment, we find the case to be unsuitable for small claims resolution because of the number of issues involved. WAC 458-20-100(7)(b). The case has, therefore, been converted to a mainstream appeal.

ISSUES:

1. Whether \$. . . in deferred sales tax should be refunded to Taxpayers on their . . . motor home (i.e., the amount assessed on its value in excess of Taxpayers' claimed value of \$14,875).
2. Whether the 20% delinquency penalty should be refunded.
3. Whether the 10% "failure to pay sales tax" penalty should be refunded.
4. Whether the 50% evasion penalty should be refunded.
5. Whether the interest paid on the assessment should be refunded.

TAXPAYERS' ARGUMENTS:

Taxpayers claim the Department of Licensing charged them the wrong amount of use tax on their motor home, and that they have complied in good faith with written instructions of the Department.

Taxpayers' petition for refund (undated, but postmarked September 15, 2000), states:

We purchased this vehicle in late 1999 with intentions to move out of state of Washington and travel the country. This move did not occur due to massive mechanical/electrical problems that were discovered with this vehicle.

This vehicle at best may be worth around 15,000\$[sic], unfortunately we were defrauded at the time of purchase for a higher dollar amount.

Based on our good faith in paying the assessment, we do here by request the department to hear our case, and grant us relief on the assessment itself, penalties and interest charges included with the assessment.

In the teleconference, [Mr. Taxpayer] explained that the [three automobiles] had been sitting in their driveway – unlicensed -- while they traveled overseas. He contends they had a fourth Washington-licensed vehicle that they drove when they were home.

According to Taxpayers, a private individual had consigned the motor home to the [Washington dealership-seller] . Taxpayers contend they financed the motor home's purchase from the [Washington dealership-seller] by borrowing \$20,000 from a bank and placing the remaining \$8,000 on a credit card. [Mr. Taxpayer] further explains that, when he discovered the motor home's many electrical problems, he returned it to the [Washington dealership-seller]., cancelled his bank loan and received an \$8,000 credit on his credit card. According to [Mr. Taxpayer], he was able to work out a direct purchase from the motor home's consignor later that year for a sales price of "\$15,000."

When asked if he could supply any documentation concerning this version of events, [Mr. Taxpayer] stated that he has no time to do so, and that his wife is taking care of a baby. According to [Mr. Taxpayer], he and his wife have not maintained good records since the birth of their second baby. He states that he is now willing to pay use tax on the full \$28,000 if the Department will waive all interest and penalties. He justifies his request for waiver of interest and penalties on RCW 82.32.090(4), pointing to his “good faith effort to comply with the specific written instructions provided by the department. . . .” Taxpayers do not dispute they were Washington residents at the time of their motor home’s purchase.

DISCUSSION:

Taxable measure. RCW 82.32.070(1) provides:

Every person liable for any fee or tax imposed by chapters 82.04 through 82.27 RCW shall keep and preserve, for a period of five years, suitable records as may be necessary to determine the amount of any tax for which he may be liable. . . . Any person who fails to comply with the requirements of this section shall be forever barred from questioning, in any court action or proceedings, the correctness of any assessment of taxes made by the department of revenue based upon any period for which such books, records, and invoices have not been so kept and preserved.

Taxpayers in this case have chosen not to produce records documenting the claimed return of their motor home to the [Washington dealership-seller] and its subsequent purchase from the individual consignor for a lower price of \$14,875. Because they have not met this burden of proof, we must find they made a retail purchase from the [Washington dealership-seller] in the amount of \$28,000 and, as residents, owed retail sales tax on that amount at the time they took delivery on it.

10% “failure to pay sales tax” penalty.

RCW 82.08.050 provides:

Where a buyer has failed to pay to the [Washington dealership-seller] the tax imposed by this chapter and the [Washington dealership-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, in which case a penalty of ten percent may be added to the amount of the tax for failure of the buyer to pay the same to the [Washington dealership-seller], regardless of when the tax may be collected by the department; and all of the provisions of chapter 82.32 RCW, including those relative to interest and penalties, shall apply in addition; and, for the sole purpose of applying the various provisions of chapter 82.32 RCW, the twenty-fifth day of the month following the tax period in which the purchase was made shall be considered as the due date of the tax.

Based on the finding that Taxpayers, as residents, made a retail purchase from the [Washington dealership-seller] in the amount of \$28,000, they clearly owed retail sales tax when they purchased

their motor home and took delivery in this state. We find the 10 % “failure to pay sales tax” penalty was lawfully imposed.

20% delinquency penalty.

RCW 82.32.090(1) provides:

If payment of any . . . tax is not received on or before the last day of the second month following the due date, there shall be assessed a total penalty of twenty percent of the amount of the tax.

Taxpayers’ payment of their tax underpayment occurred well after the commencement of the 20% penalty period. We find this penalty was lawfully imposed.

50% evasion penalty.

RCW 82.32.090(5) provides:

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.

In Det. No. 00-014, 19 WTD 698 (2000) we described the standard used to impose an evasion penalty under RCW 82.32.090(5):

The Department will impose an evasion penalty when the failure to pay the proper amount of the tax "resulted from an intent to evade the tax." RCW 82.32.090(5). The Department has the burden to show the elements of evasion by clear, cogent, and convincing evidence. Det. No. 90-314, 10 WTD 111 (1990). Clear, cogent, and convincing evidence has been described as evidence convincing the trier of fact that the issue is "highly probable," or, stated another way, the evidence must be "positive and unequivocal." *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 735, 853 P.2d 913 (1993).

Evasion requires that the taxpayers: (1) know they have a tax obligation; and (2) intentionally do something, which is false or fraudulent to evade that obligation. Det. No. 92-133, 12 WTD 171 (1992). The Department has the burden to prove each element of evasion by clear, cogent, and convincing evidence. Det. No. 90-314, 10 WTD 111 (1990).

The Board of Tax Appeals (BTA) has also addressed the Department’s burden of proof, stating that the intent to evade must be established by “objective and credible evidence,” as the “mere suspicion of intent to evade” is insufficient to sustain the penalty. *Hicks v. Department of Rev.*, BTA Docket No. 92-69 (1995). The *Hicks* decision went on to state:

In upholding an assessment of the evasion penalty we must find that the taxpayer acted with intent. For this purpose, the Department must first show that the taxpayer

acted with the **specific purpose of escaping a tax liability which the taxpayer knew to exist**. Although the subjective intent of a person is difficult to ascertain, it may be determined from objective facts such as the actions or statements of the taxpayer. However, intent to evade does not exist where a deficiency was due to an honest mistake, an unsuccessful attempt at legitimate tax avoidance, inefficiency, or ignorance of proper accounting methods. Even gross negligence will not rise to the level of intent to evade. There **must be proof of a deliberate attempt** on the part of the taxpayer to evade a tax liability. (Emphasis added.)

In this case, Taxpayers, who were undisputedly residents of Washington, submitted out-of-state drivers' licenses and an Oregon address to the [Washington dealership-seller] in order to avoid payment of the retail sales tax lawfully due. The Oregon address they used was the same address they had previously used to unlawfully license other vehicles that had previously been subject to Departmental assessments. It is inconceivable that Taxpayers were unaware that their use of this Oregon address for [the] purpose of claiming an out-of-state residency to avoid vehicle taxes was unlawful. They further used what was apparently an altered version of what may itself have been a fabricated bill of sale in order to pay only a fraction of the use tax which would have otherwise been due. We see no evidence of an "honest mistake, an unsuccessful attempt at legitimate tax avoidance, inefficiency, or ignorance of proper accounting methods." We find the evidence in this case clearly supports a knowing and deliberate attempt on Taxpayers' part to evade their proper sales tax liability, and therefore find the evasion penalty to have been properly assessed.

Waiver of Penalties. RCW 82.32.090(4) provides:

If the department finds that all or any part of a deficiency resulted from the disregard of specific written instructions as to reporting or tax liabilities, the department shall add a penalty of ten percent of the amount of the additional tax found due because of the failure to follow the instructions. A taxpayer disregards specific written instructions when the department of revenue has informed the taxpayer in writing of the taxpayer's tax obligations and the taxpayer fails to act in accordance with those instructions unless the department has not issued final instructions because the matter is under appeal pursuant to this chapter or departmental regulations. The department shall not assess the penalty under this section upon any taxpayer who has made a good faith effort to comply with the specific written instructions provided by the department to that taxpayer. Specific written instructions may be given as a part of a tax assessment, audit, determination, or closing agreement, provided that such specific written instructions shall apply only to the taxpayer addressed or referenced on such documents. Any specific written instructions by the department of revenue shall be clearly identified as such and shall inform the taxpayer that failure to follow the instructions may subject the taxpayer to the penalties imposed by this subsection.

Taxpayers contend all penalties and interest should be waived under the "good faith" standard provided by RCW 82.32.090(4) because they made a "good faith effort to comply with the specific written instructions provided by the department," supposedly in that they paid the Department's assessment. Taxpayers' reliance on RCW 82.32.090(4) for waiver of their penalties and interest assessed is misguided. The "good faith effort" defense articulated in that subsection is only

applicable to the 10% penalty actually assessed under RCW 82.32.090(4) for the “disregard of specific written instructions as to reporting or tax liabilities.” Taxpayers have not been assessed this particular penalty. We also note that mere payment of an assessment, once an underpayment is discovered, would never be considered a “good faith effort to comply with written instructions” under this subsection.

RCW 82.32.105(1) provides for the waiver of penalties imposed by chapter 82.32.RCW:

If the department of revenue finds that the payment by a taxpayer of a tax less than that properly due or the failure of a taxpayer to pay any tax by the due date was the result of circumstances beyond the control of the taxpayer, the department of revenue shall waive or cancel any penalties imposed under this chapter with respect to such tax.

Taxpayers have offered no evidence their failure to pay the retail sales tax was the result of circumstances beyond their control. Thus, there is no justification for the waiver of penalties.

Imposition of Interest. RCW 82.32.050(1) provides:

If upon examination of any returns or from other information obtained by the department it appears that a tax or penalty has been paid less than that properly due, the department shall assess against the taxpayer such additional amount found to be due and shall add thereto interest on the tax only.

Because Taxpayers did not pay retail sales tax when they purchased their motor home, less tax was paid than that which was properly due. We find that interest was properly assessed.

Waiver of Interest. RCW 82.32.050(3) provides for the waiver of interest:

The department shall waive or cancel interest imposed under this chapter if:

(a) The failure to timely pay the tax was the direct result of written instructions given the taxpayer by the department; or

(b) The extension of a due date for payment of an assessment of deficiency was not at the request of the taxpayer and was for the sole convenience of the department.

Neither circumstance articulated in RCW 82.32.050(3) apply in this case. We find there is no basis for the waiver of interest.

DECISION AND DISPOSITION:

Taxpayers’ petition for refund is denied.

Dated this 28th day of December, 2000.