Cite as Det. No. 99-342, 19 WTD 608 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 99-342
. . .	)	Unregistered
	)	Use Tax Assessment
	)	MVET Assessment

[1] RULE 178; RCW 82.44.020; RCW 82.12.020: MVET -- USE TAX -- PURCHASE BY RESIDENT OUTSIDE STATE -- PRESUMPTION OF INTENTION TO USE IN STATE. When a Washington resident purchases a motor vehicle outside this state, a presumption is raised, for both use tax and MVET, that the resident intends to use the vehicle in this state. When the facts support presumptive use in this state, the burden is on the resident-taxpayer to prove that he or she has not had possession of or used the vehicle in this state.

[2] RCW 82.32.105(2): DELINQUENCY PENALTY -- WAIVER -- 24-MONTH PROVISION. If no tax returns were due during the twenty-four months immediately preceding the period covered by the return for which waiver of a delinquency penalty is being requested, the Department has no authority under RCW 82.32.105(2) to waive or cancel the penalty.

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:

Washington residents protest the assessment of motor vehicle excise tax (MVET) on a motor home for years prior to the first admitted use in Washington, and protest the amount of MVET and use tax assessed, claiming the value of the vehicle was substantially less than the valuation on which the Department of Revenue (Department) based the assessments.[1]

FACTS:

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

Prusia, A.L.J. -- The taxpayers, husband and wife, are Washington residents. On May 1, 1996, the taxpayers purchased a 1992 . . . motor home in Idaho. They gave their Washington address on the purchase documents. They did not pay Idaho sales tax. On July 12, 1996, the taxpayers registered the motor home in Montana, giving a Montana address as their residential and mailing address.

On April 23, 1998, a trooper with the Washington State Patrol (WSP) observed the motor home with Montana license plates on Interstate 90 in Spokane County, Washington. The motor home was driven by a male, and was towing a vehicle with Washington license plates. The trooper entered the Montana and Washington plate numbers into the WSP computer file, which showed both vehicles were registered to the taxpayers, and the taxpayers had current Washington driver's licenses.

The WSP and the Compliance Division of the Department of Revenue (Department) investigated the matter further. The motor home's Montana registration showed the vehicle was registered in the taxpayers' names to a Montana address, and had an encumbrance in the amount of $. . . . An Idaho certificate of title surrendered to Montana showed an Idaho dealer sold the motor home to the taxpayers on May 1, 1996. Washington driver's license records, vehicle registration records, utility records, and telephone listings indicated the taxpayers were Washington residents. Neither taxpayer had held a Montana driver's license.

On August 6, 1998, the Compliance Division assessed the taxpayers use tax and delinquency penalties on the use of the motor home in Washington, in the total amount of $. . .. The Compliance Division also assessed the taxpayers motor vehicle excise tax (MVET) for the periods May 1996 through July 1996 (in the amount of $. . .), August 1996 through July 1997 (in the amount of $. . .), and August 1997 through July 1998 (in the amount of $. . .), plus delinquency penalties of 20% for each period. Both the use tax assessment and the MVET assessments were based upon the amount of the encumbrance shown on the Montana registration. The assessments remain unpaid.

The taxpayers protested the assessments. They contended they were not the actual owners of the vehicle and had not used the vehicle in Washington, and therefore were not liable for the taxes. Alternatively, they contended the value upon which the assessments were based greatly exceeded the purchase price and actual value of the motor home. In a teleconference with the undersigned, the taxpayers provided facts and argument, and submitted additional documents. After the teleconference, they retained counsel, and submitted a written memorandum modifying their position, with additional supporting documentation.

The taxpayers now concede they were liable for MVET and use tax from the time of first use of the motor home in Washington. They state the first use of the motor home in Washington was in the summer of 1998. They protest the MVET assessment for periods through July 1998, contending they were not required to pay MVET prior to the summer of 1998. They protest the amount of the use tax assessment, contending it should be based on the value of the motor home

in the summer of 1998. They contend the value of the vehicle for purposes of both the MVET and the use tax should be the depreciated value for federal income tax purposes under Internal Revenue Code section 168. They allege that value was $25,870.28 in August 1998. The taxpayers continue to protest the assessment of delinquency penalties and interest, contending their failure to timely pay taxes was due to an honest mistake and misunderstanding of state law.

The taxpayers describe the circumstances of the purchase of the motor home, and its whereabouts before the summer of 1998, as follows. The taxpayer and his wife were Washington residents at the time of purchase of the motor home, and have continued to be Washington residents. They own a multi-level marketing company. The taxpayer-husband's brother is a downstream sole proprietor in the multi-level network. The brother developed a marketing plan that required him to travel. He wanted to purchase a motor home to reduce his travel costs. The brother located a motor home, but could not qualify for credit required to finance the purchase. The taxpayers signed the purchase and loan documents to make the purchase possible. The purchase price was $. . . . The address the taxpayers gave on the purchase and financing documents was the brother's address in Montana. Upon purchasing the motor home, the taxpayers sold it to the brother, giving him a bill of sale and receiving a promissory note from him. The promissory note obligated the brother to pay the taxpayers monthly installments equal to the amount of the monthly payments on the motor home. The brother took delivery of the motor home and took it to Montana.

The taxpayers state they registered the motor home in their names in Montana to protect their financial interest. The taxpayers have made the payments on the retail installment contract, but the brother has repaid the amounts in accordance with the above-referenced promissory note. The brother works for the taxpayer, and, sometimes, the taxpayer has allowed his brother to trade work for the payments due on the note. The taxpayers have paid the insurance on the motor home part of the time, to protect their financial interest.

The taxpayers state the motor home was predominantly used by the brother on trips to California. The brother at all times has continued to be a Montana resident. They state the motor home was first used in Washington in the summer of 1998, when the brother and the taxpayer-husband traveled together on a recreational trip.

The taxpayers have provided the following documentation in support of their description of events, and their claim that the Compliance Division used an incorrect value in assessing the taxes:

1. A copy of the Idaho dealer's "Retail Buyer's Order" for the motor home. It is dated May 1, 1996. It names the taxpayers as the buyers. It states the selling price is $. . . . It shows no sales tax was collected.

2. A copy of a "Retail Installment Contract, Security Agreement and Disclosure Statement" with the Idaho dealer (hereinafter "retail installment contract"). The document shows the taxpayers as the buyers. It is dated May 1, 1995. It states the cash price of the motor home was

$. . . . $. . . was paid down, leaving an unpaid balance of $. . . . It states installment payments are due monthly beginning June 1, 1996. The total of payments is $. . . .

We note there is an inconsistency between the dates in the retail installment contract. Based upon the purchase date stated on the Idaho certificate of title surrendered upon registration in Montana, the purchase date stated in the Retail Buyer's Order, the beginning date for installment payments, and the taxpayers' statement that the purchase date of the motor home was May 1, 1996, we find the May 1, 1995 date is an error, and the actual purchase date was May 1, 1996.

3. A copy of a bill of sale from the taxpayer-husband to the brother, dated May 2, 1995, and a copy of promissory note from the brother to the taxpayer-husband, with the same date, which provides that the brother is to begin making payments June 2, 1995. Neither of the documents is notarized.

4. A copy of the Montana vehicle registration for the motor home. It shows the taxpayers as the registered owners.

The dates in the bill of sale and promissory note allegedly exchanged by the brothers are inconsistent with the date of sale, and appear to repeat an error in the retail installment contract. The inconsistency puts their genuineness into question. After receiving the documents, the undersigned requested, by letter, that the taxpayers provide other evidence establishing the documents' genuineness. The taxpayers provided no additional evidence in that regard.

In that letter, the undersigned also requested that the taxpayers provide additional evidence supporting their claim that the motor home was in the brother's possession outside Washington and not used in Washington prior to April 1998. The undersigned suggested types of evidence that might establish the motor home's whereabouts, including copies of repair records, statements from the taxpayers' neighbors, and an affidavit from the taxpayer-husband's brother. The taxpayers provided no additional evidence regarding the whereabouts of the motor home prior to April 1998.

ISSUES:

1. When was the first use of the motor home in Washington by the taxpayers?

2. For what periods do the taxpayers owe MVET, and on what value?

3. On what value should the use tax be assessed?

4. Should the Department waive the delinquency penalty and interest?
5. What is the effect of the passage of Initiative 695 on collection of any MVET that may be owing?

DISCUSSION:

MVET and use tax liability; first use in Washington

Washington's vehicle licensing requirements are set out in chapter 46.16 RCW, and the related MVET provisions are in chapter 82.44 RCW. RCW 46.16.028(3) requires a Washington resident to license in this state any vehicle to be operated on the highways of the state. A resident generally must register a vehicle before they operate it upon the highways of the state. RCW 46.16.010.[2] Vehicles generally must be registered for a year at a time. RCW 46.16.006.

RCW 82.44.020 imposes the MVET "for the privilege of using in the state any motor vehicle," with specified exceptions for nonresidents, persons operating under the authority of a trip permit, and licensed dealers. The tax must be paid at the time of registration, and is based on the registration year. RCW 82.44.060. The annual amount of the MVET is two and two tenths percent (2.2%) of the value of the vehicle. RCW 82.44.020(1) and (2).

A Washington resident using a motor vehicle in this state cannot avoid Washington's licensing requirements or MVET by licensing it in another state. RCW 82.44.020(7) provides:

> Washington residents, as defined in RCW 46.16.028, who license motor vehicles in another state or foreign country and avoid Washington motor vehicle excise taxes are liable for such unpaid excise taxes. The department of revenue may assess and collect the unpaid excise taxes under chapter 82.32 RCW, including the penalties and interest provided therein.

The use tax is imposed on the privilege of using within this state as a consumer tangible personal property purchased at retail, or acquired by lease, gift, repossession, or bailment. RCW 82.12.020. The use tax is a "compensating" tax; it is imposed when the sales tax has not been paid. See Henneford v. Silas Mason Co., 300 U.S. 577 (1937); Northern Pacific Railway Co. v. Henneford, 9 Wn.2d 18, 113 P.2d 545 (1941). Use tax liability arises when the property is "first put to use in this state." WAC 458-20-178 (Rule 178).

A Washington resident who owns a motor vehicle that is never brought into the state is not required to license the vehicle in Washington or pay MVET.

[1] Although the taxpayers now concede liability for MVET and use tax, they continue to dispute the amount of the assessments. They contend they were not liable for either tax prior to April 1998, when their first admitted use of the motor home in Washington occurred. To determine whether the taxpayers were liable for MVET prior to then, and the amount of their use tax liability, we must determine when they first used the motor home in Washington.

To resolve that question, we rely on a presumption, first articulated by the Board of Tax Appeals in Rimer v. Department of Revenue, BTA Docket No. 5867, and followed by the Department in

[2] New residents are allowed thirty days to procure Washington registration. RCW 46.16.028(3).

Det. No. 86-252, 1 WTD 183 (1986). We stated the presumption as follows, in Excise Tax Advisory No. 476.12.178 (ETA 476):

> The Board of Tax Appeals has held that there is a presumption that a Washington resident purchases tangible personal property for possession and use within Washington, even though the resident purchases such property outside the state. To escape the use tax, the burden is on the resident to prove that he does not intend to use the property in Washington and that he has not, in fact, had possession of or used the property in this state; it is not necessary for the state to prove actual use within the state to impose the use tax. [citing Rimer].

We qualified use of this presumption in Det. No. 86-252, supra. We stated that a taxpayer is not required to prove that property purchased outside this state for use outside this state has never been used in this state, absent facts supporting presumptive use of the property in this state.

While the presumption apparently has been applied only with respect to use tax, we believe it is applicable to MVET assessments as well.

Do the facts support presumptive use of the motor home in this state prior to the WSP sighting? We have few objective facts to go on, but they support the presumption. The motor home was registered in the taxpayers' names, so they had the legal right to use it. If it was not in their possession, it was in the possession of the brother, who worked for the taxpayer and lived in a nearby state, so the taxpayers certainly had opportunity to use it. The taxpayers have resided continuously in Washington, so it is likely that if they did use the motor home, they used it in Washington. We know for a fact that the taxpayer used the motor home in Washington on at least the one occasion. We conclude that the facts support the presumption that the taxpayers used the motor home in Washington from the time of purchase.

The burden is on the taxpayers to show there was no use in the state prior to the observed use in 1998. The only evidence produced by the taxpayers was the bill of sale to the brother, the genuineness of which is questionable, and the taxpayers' self-serving statements. That evidence is unreliable and insufficient to overcome the presumption of use.

Therefore, we find that the taxpayers' first use of the motor home in Washington occurred contemporaneously with the purchase. We have found the purchase date to be May 1, 1996. The MVET is owed from May 1996, and the use tax should be based upon the value of the motor home in May 1996.

Valuation issues

For purposes of the MVET, the value of a motor vehicle is the manufacturer's base suggested retail price reduced by a statutory percentage for years of service. RCW 82.44.041(3) provides:

> For the purpose of determining the tax under this chapter, the value of a motor vehicle other than a truck-type power or trailing unit shall be the manufacturer's base suggested retail price of the vehicle when first offered for sale as a new vehicle, excluding any optional equipment, applicable federal excise taxes, state and local sales or use taxes, transportation or shipping costs, or preparatory or delivery costs, multiplied by the applicable percentage listed in this subsection based on year of service of the vehicle.

The amount paid by the taxpayer for the vehicle generally does not enter the MVET computation. Therefore, whether the taxpayers paid $. . . for the vehicle, or $. . ., is irrelevant for MVET. We will remand the file to the Compliance Division for adjustment of the MVET assessment, in accordance with RCW 82.44.041(3).

Value is calculated differently for use tax purposes. RCW 82.12.020 provides that the use tax "shall be levied and collected in an amount equal to the value of the article used by the taxpayer multiplied . . ." RCW 82.12.010(2) provides that "used" means "the first act in this state by which the taxpayer . . ." Thus, the relevant value is the value at the time the article is first put to use in the state. See Det. No. 86-223, 1 WTD 43 (1986). We have found that the first use in Washington was on or about May 1, 1996.

The "value of the article used" is defined in RCW 82.12.010(1) as "the consideration . . . paid or given or contracted to be paid or given by the purchaser to the seller for the article of tangible personal property, the use of which is taxable under this chapter." When the purchase price does not represent the true value of the article, the statute allows the value to be determined by alternative means.

As noted above, the $79,000 value the Compliance Division placed on the vehicle for use tax purposes was based on the amount of the encumbrance shown on the Montana registration. The Compliance Division did not have information on the consideration actually paid by the taxpayers. The taxpayers have shown they paid $46,500. We will remand the file to the Compliance Division to determine whether the purchase price represented the motor home's true value in May 1996, and for possible adjustment of the use tax assessment.

Waiver of penalties and interest

The taxpayers contend their failure to timely pay MVET and use tax was an honest mistake and misunderstanding of state law. They request that the Department waive delinquency penalties and interest on that basis.

RCW 82.32.090 provides that if any tax due is not received by the Department by the due date, there shall be assessed a penalty. RCW 82.32.050 imposes interest on taxes due. Tax liability for the use tax arises at the time the purchaser takes or assumes dominion or control over the article. Rule 178. Payment of the use tax, along with the required return, is due within twenty-five days after the end of the month in which the taxable activities occur. RCW 82.32.045(1). Because the taxpayers did not

file a use tax return and pay the tax by June 25, 1996, they incurred a delinquency penalty and interest.

The Department's only authority to cancel penalties or interest is found in RCW 82.32A.020(2) and RCW 82.32.105. RCW 82.32A.020(2) authorizes the Department to waive interest and penalties when a taxpayer has detrimentally relied upon specific, official written advice and written tax reporting instructions from the Department. That statute does not apply here, because the taxpayer did not receive any written advice.

[2] At the time of the assessments, RCW 82.32.105 authorized the Department to waive or cancel penalties if the failure to timely pay taxes by the due date was the result of circumstances beyond the control of the taxpayer, or if the taxpayer timely filed and remitted payment on all tax returns due for that tax program of a period of 24 months immediately preceding the period covered by the return for which the waiver is requested. WAC 458-20-228 (Rule 228) lists the only circumstances under which the Department will consider cancellation of penalties under the "circumstances beyond" provision. We have reviewed those circumstances, and find that none applies under the facts of this case.[3] Rule 228 states in its introduction: "[t]axpayers have a responsibility to become informed about applicable tax laws and to correctly and timely report their tax liability." See also RCW 82.32A.002 et seq. The taxpayers' lack of knowledge of a tax liability is not a basis for waiving penalties. See Det. No. 90-126, 9 WTD 277 (1990).

The twenty-four month provision of RCW 82.32.105 does not apply, because the use tax was due in a single month. No returns were due during the previous 24 months, so there is no history of timely filing and remitting.[4]

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[3] The listed circumstances are:

(i) The return was filed on time but inadvertently mailed to another agency.

(ii) The delinquency was due to erroneous written information given the taxpayer by a department officer or . . . .

(iii) The delinquency was caused by death or serious illness of the taxpayer or his immediate family, or illness or death of his accountant or the accountant's immediate family, prior to the filing date.

(iv) The delinquency was caused by unavoidable absence of the taxpayer . . . .

(v) The delinquency was caused by the destruction by fire or other casualty of the taxpayer's place of business or business records.

(vi) The taxpayer, prior to the time for filing the return, made timely application to the Olympia or district office, in writing, for proper forms and these were not furnished in sufficient time to permit the completed return to be paid before its delinquent date.

(vii) The delinquency penalty will be waived or cancelled on a one time only basis if the delinquent tax return was received under the following circumstances:

(A) The return was received by the department with full payment of tax due within 30 days after the due date; i.e., within the five percent penalty period prescribed by RCW 82.32.090, and

(B) The delinquency was the result of an unforeseen and unintentional circumstance, not immediately known to the taxpayer, which circumstances will include the error or misconduct of the taxpayer's employee or accountant, confusion caused by communications with the department, failure to receive return forms timely, natural disasters such as a flood or earthquake, and delays or losses related to the postal service.

[4] RCW 82.32.105(2) reads:

At the time of the assessments, RCW 82.32.105(3) authorized waiver or cancellation of interest on a deficiency under the following circumstances:

> (3) 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 applies in this case.

Thus, the Department is without statutory authority to cancel the penalty or interest. As an administrative agency, the Department of Revenue is given no discretionary authority to waive or cancel interest. See Det. No. 98-85, 17 WTD 417 (1998); Det. No. 87-344, 4 WTD 261 (1987).

The effect of the passage of Initiative 695

Section 3 of Initiative 695 repealed RCW 82.44.020, effective January 1, 2000. That statute incorporates the provisions of Chapter 82.32 for purposes of enforcing collection of unpaid MVET, including interest and penalties. The initiative omitted a savings provision. As a result of the passage of Initiative 695, the Department will no longer have authority to collect MVET that was assessed, but not paid, prior to January 1, 2000. Even though this Determination upholds the assessment of MVET in the taxpayer's case, the assessment will not become final until after January 1, 2000. Therefore, the Department will make no effort at this time to collect the MVET or MVET interest and penalties owed.

The validity of Initiative 695 is currently being litigated. In the event the Department's authority to collect unpaid MVET is restored, the Department may issue supplemental assessments adding extension interest to the MVET assessment authorized by this Determination. A final decision in the litigation is not expected until the end of 2000.

DECISION AND DISPOSITION:

The department shall waive or cancel the penalty imposed under RCW 82.32.090(1) when the circumstances under which the delinquency occurred do not qualify for waiver or cancellation under subsection (1) of this section [circumstances beyond the control provision] if:

(a) The taxpayer requests the waiver for a tax return required to be filed under . . . ; and

(b) The taxpayer has timely filed and remitted payment on all tax returns due for that tax program for a period of twenty-four months immediately preceding the period covered by the return for which the waiver is being requested.

The taxpayers' petition is granted in part and denied in part. This matter is remanded to the Compliance Division for possible adjustment of the use and MVET assessments consistent with this Determination, and for collection consistent with the Department's authority.

Dated this 29th day of December 1999.