Cite as Det. No. 00-014, 19 WTD 698 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of	)	D E T E R M I N A T I O N
	)	
	)	No. 00-014
	)	
. . .	)	Use Tax Assessment
	)	Motor Vehicle Excise Tax Assessment

RULE 228; RCW 82.32.050; RCW 82.32.090: EVASION PENALTY –USE TAX AND MVET ON MOTORHOME. Where the taxpayer improperly used his dealer plate and failed to properly title and register the motor home, but these actions were not undertaken in an intentional effort to deliberately avoid the payment of the tax due, the evasion penalty does not apply. The taxpayer explained that the sale of the motor home was complicated by his health difficulties, which impacted his ability to run his business, in conjunction with a lack of familiarity with the requirements of acting as a wholesale dealer and the extremely limited market demand for the type of vehicle 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.

NATURE OF ACTION:

Petition for refund of evasion penalty portion of use tax and motor vehicle excise tax (MVET) assessed on a motor home, which the Department of Revenue determined had been improperly registered and titled by the taxpayers.[1]

FACTS:

Kreger, A.L.J. -- . . . (the taxpayer) petitions for the refund of the evasion penalties included on use tax and motor vehicle excise tax (MVET) assessments issued for a 1995 . . . Motor Home. The assessments at issue resulted from an investigation of the taxpayer's business . . ., which was commenced following the receipt of information by the Washington Department of Licensing (DOL) from the Arizona Motor Vehicle Enforcement Agency in January of 1998. This information prompted an investigation of the taxpayer's business activities, and the use of dealer plates in particular, by the DOL. As a result of this investigation, use and MVET assessments were issued to

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

the taxpayer on five different vehicles, including the motor home. The assessments issued on the motor home were the only assessments that included evasion penalties, as this was the only vehicle which was not titled to the corporation.

The taxpayer paid the assessments in their entirety and filed a timely petition seeking refund of the evasion penalties imposed on the motor home. The taxpayer disputes the conclusion that he sought to avoid the payment of the tax due.

In support of the imposition of the evasion penalty, the Tax Discovery Agent (DOR Agent) relies upon the following facts: the motor home was titled to the taxpayer and his wife rather than to the corporation; the taxpayer did not provide evidence establishing that the motor home was a corporate asset; two previous citations for misuse of dealer plates; and, the motor home, along with other vehicles, were maintained in inventory for a period of time substantially longer than normal for wholesale dealers.

The taxpayer was in business operating a used car lot for approximately 30 years and was licensed as a retail dealer. He characterizes his business as a "Mom & Pop" business. In September of 1994, the car lot was closed due to health difficulties the taxpayer was experiencing. At that time, the taxpayer obtained a wholesale license. The taxpayer states that he had limited familiarity with the requirements of being a wholesaler. The taxpayer was seeking to liquidate his remaining inventory of vehicles as his health problems limited his ability to continue his former business activities.

The motor home in question was purchased in the spring of 1995. The taxpayer testifies that it was an inadvertent error that the title was placed in his name rather than that of the company and states that he did not correct the error as he believed it was not significant since he was president of the company. The taxpayer stated that over the course of his career in vehicle sales it was not uncommon to occasionally have a vehicle registered in his name rather than that of the corporation, and that he had never had any difficulty selling such vehicles. The taxpayer asserts that the motor home was purchased for resale and not personal use and that he consistently treated the vehicle as part of his inventory.

The taxpayer states that the motor home was purchased for a very good price, and that he believed he would be able to resell the vehicle at a profit. However, due to his health difficulties, he was not able to arrange for the sale of the motor home in a timely manner. Rather than being able to sell vehicles from a retail establishment, where the customers would come to them, efforts to liquidate the remaining inventory required the taxpayer to seek out potential buyers and occasionally transport the vehicles to locations where the potential buyers could inspect them.

The taxpayer acknowledges that a number of the vehicles remained in inventory longer than is usual for a wholesaler, but explained that his health problems resulted in the delay in selling the vehicles. As a result of this delay, the taxpayer contends that the motor home became less saleable due to the lack of features demanded in the market. The motor home did not contain "slide outs" and was not a wide-body, and the absence of these features impacted the demand for the vehicle. The taxpayer has provided information from "RV News" that provides sales statistics, which indicate a decided preference for motor homes with slide outs. The statistics available indicate that for 1999, motor

homes without the slide outs constituted an average of 3% of the sales of vehicles with the slide out feature.[2]

Due to the difficulty in finding a local purchaser for the motor home the taxpayer believed that he might have better luck selling the motor home in Arizona, because he said that in the winter months many "snowbirds" are in Arizona and so there is a more substantial market for vehicles. The taxpayer particularly hoped that the vehicle could be sold at one of a number of auctions where a motor home can be consigned for sale. He and his wife took the motor home to Arizona in the winter of 1997-98, in the hopes of selling it. However they were unable to do so. The taxpayer stated that he obtained a trip permit to transport the motor home from Washington and that he kept a dealer plate on the vehicle based upon the advice of his insurance agent, who had informed him it was necessary to have a dealer plate on the vehicle for the insurance coverage to be in force.

The taxpayer acknowledged a 1992 DOL citation for misuse of a dealer plate on a vehicle used for personal use and a verbal warning issued in 1994 for misuse of a dealer plate on a vehicle owned by the taxpayer's son, which had been consigned to the taxpayer for sale. The taxpayer stated that these instances occurred while he was still a dealer and involved different circumstances and that while he was generally aware of the requirements and limitations for proper use of a dealer plate he was not aware that his conduct in this instance was improper. The taxpayer stated that his business underwent an inspection of their dealer license, bond and insurance by the DOL in September of 1997, at which time they were informed that they were operating correctly by the inspector and so he was unaware that his actions were not proper.

The taxpayer testified that he always intended to sell the motor home and at no time had any intent to avoid the payment of tax. He was unaware that having the vehicle titled to him personally rather than the company was a significant factor as in previous business transactions he had occasionally sold items that were titled to him personally, rather than to the company, and had experienced no difficulties. The taxpayer said that the shift to acting as a wholesaler in an effort to liquidate his inventory required that he actively seek out buyers, which made it necessary to transport the vehicles to locations where they could be observed by potential buyers. He was not familiar with this type of activity and acknowledges making errors but contends that he never intended to avoid the payment of any tax due.

ISSUE:

Has the Department established that the taxpayer knew of the Washington tax liability and intentionally sought to evade that liability based upon failure to correctly title the motor home and the improper use of dealer plates?

DISCUSSION:

The use tax assessment includes the imposition of a $. . . evasion penalty. The MVET assessment includes a $. . . evasion penalty. Chapter 82.32 RCW is the Department's statutory authority for the

[2] Statistics provided break down of 1999 sales on a monthly basis.

imposition and waiver of penalties. RCW 82.12.080 renders this chapter on penalties applicable to the assessment of use tax. The same provisions are made applicable to the MVET by RCW 82.44.020(2).

Under RCW 82.32.050(5) and RCW 82.32.090(5), an evasion penalty of 50% of the tax assessed "shall be added" if the Department shows that the taxpayer knew of the tax liability and that the deficiency resulted from "an attempt by the taxpayer to evade the tax payable." The use of the word "shall" indicates that the penalty is mandatory if an intent to evade is found.

In this case the taxpayer does not contest the underlying tax liability, but rather asserts that he had no intent to evade the tax imposed and contends the imposition of the evasion penalties was improper. The taxpayer acknowledges having made errors but contends that he did not at any time intend to avoid the payment of tax due. The taxpayer explained that the sale of the motor home was substantially complicated by health difficulties he was experiencing at the time, which substantially impacted his ability to run his business, in conjunction with a lack of familiarity with the requirements of acting as a wholesale dealer and the extremely limited market demand for vehicles of this nature.

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.)

The evidence in this case establishes, and the taxpayer acknowledges, having made errors in seeking to sell his remaining business inventory. The DOR issued assessments on vehicles that were deemed to have excessive mileage and/or were held for extended periods in inventory. The imposition of the evasion penalty at issue is supported by the fact that taxpayer had previously received a citation and a warning for misuse of a dealer plate, that the vehicle was improperly titled, and that it was not listed as a corporate asset.

The taxpayer has explained that the delay in selling the vehicles resulted from his health difficulties and that extremely limited demand for the type of motor homes at issue required taking the vehicle to locations where potential buyers were located. The taxpayer's explanation about the limited marketability of the motor home is credible and supported by evidence, which also supports the need for attempting to sell the vehicle outside of Washington. With regard to the title being placed in his name personally rather than that of his business, the taxpayer contends that this was an unintentional oversight. He stated that he did not realize this was a serious error because in the course of his previous business activities it was not unusual for a vehicle to be listed under his name rather than that of the business, as he was the president of the business. The taxpayer asserted that he always considered the motor home as an item of inventory and did not seek to avoid the payment of any tax due.

In this case, there is no evidence establishing that the taxpayer knowingly provided false information to avoid payment of tax. *See eg.*, Det. No. 87-188, 3 WTD 219, 221 (1987)(Use of knowingly false address to license vehicle in another state supports imposition of evasion penalty). The evidence establishes that the taxpayer improperly used his dealer plate and failed to properly title and register the motor home, but it does not establish that these actions were undertaken in an intentional effort to deliberately avoid the payment of the tax due. The taxpayer vehemently contests such an assertion and has offered a credible explanation for the facts and circumstances that led to the errors he made. Nothing in the audit report or materials offers any evidence that provides proof of the necessary intent to evade a known tax liability.

The evidence available in this case does not establish that the taxpayer's actions were undertaken with the intent to fraudulently avoid payment of Washington tax and therefore, does not support the imposition of the evasion penalty. We therefore, reverse the imposition of the evasion penalty on the use tax and MVET assessments issued on the motor home and grant the taxpayer's request for refund.

DECISION AND DISPOSITION:

The taxpayers' petition is granted.

Dated this 31st day of January, 2000.