

Cite as Det. No. 14-0168, 34 WTD 205 (2015)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition for Correction of )	<u>D E T E R M I N A T I O N</u>
Assessments of )	
) )	No. 14-0168
) )	
... )	Registration No. ...
) )	
... )	Registration No. ...
) )	

[1] RULE 254; RCW 82.32.100: RETAIL SALES TAX – RETAILING B&O TAX – RECORDKEEPING – ESTIMATES. Where Taxpayers failed to make available the required records, the Department issued reasonable estimated assessments, and Taxpayers provided no records to support an adjustment, the assessments are sustained.

[2] RULE 228; RCW 82.32.090: PENALTY – EVASION – INTENTIONAL AVOIDANCE. Evidence that Taxpayer was aware of his tax liabilities based on his long prior history of remitting retail sales tax, his failure to file excise tax returns or pay taxes for the period under review, his substantial understatement of sales when contacted by the Department, and his claim that he was working alone despite evidence showing otherwise, establishes intent to evade.

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.

Margolis, A.L.J. – Sellers of firewood, ([Taxpayer A], succeeded by [Taxpayer B], collectively referred to as “Taxpayers”) appeal assessments of retail sales tax, retailing business and occupation (B&O) tax, and the evasion penalty, on grounds that the estimated measure of taxes are unreasonable and they were unaware of their tax liabilities. We deny the petitions.<sup>1</sup>

### ISSUES<sup>2</sup>

1. Have Taxpayers provided records showing that estimates of firewood sales made per RCW 82.32.100 should be adjusted?

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

<sup>2</sup> Both [Taxpayers] appeal the evasion penalty. However, because [Taxpayer B] was not assessed the evasion penalty, we will only consider this issue with regards to [Taxpayer A].

2. Did [Taxpayer A] evade his known tax liability, subjecting him to the evasion penalty under RCW 82.32.090(7)?

### FINDINGS OF FACT

Taxpayers sold and delivered firewood in [Washington state]. The Department of Revenue's (Department's) Audit Division (Audit) examined [Taxpayer B's] account for the period July 1, 2009 through September 30, 2012, and on May 9, 2013, assessed \$. . . .<sup>3</sup> The assessment was comprised of \$. . . in retail sales tax, \$. . . in retailing B&O tax, \$. . . in delinquent penalty, \$. . . in evasion penalty, \$. . . in 5% assessment penalty, and \$. . . in interest, and included a small business credit of \$. . . . Audit examined [Taxpayer A's] account for the period October 1, 2012 through December 31, 2012, and on May 8, 2013, assessed \$. . . . The assessment was comprised of \$. . . in retail sales tax, \$. . . in retailing B&O tax, \$. . . in delinquent penalty, \$. . . in 5% assessment penalty, and \$. . . in interest, and included a small business credit of \$. . . .

Taxpayers maintain a website that describes the business as follows (in pertinent part):

. . .

<http://www. . . .> (last accessed May 12, 2014).

Taxpayer's website also includes a page that describes "firewood options and prices," which shows images of a large white pick-up truck and a trailer, both painted with Taxpayers' business name and logo, and images of large volumes of both stacked and piled firewood. <http://www. . . .> (last accessed May 12, 2014). It describes the trailer as having a capacity of more than 400 cubic feet. *Id.* It describes options/prices as follows: 2 loose cords of firewood for \$. . . ; 1 cord of firewood (apparently stacked and delivered in the truck with a dump bed) for \$. . . ; 4 cords of firewood delivered [within delivery area specified] (this is accompanied by a picture of the truck and trailer both loaded and stacked, but lists no price); cedar firewood; "you haul" firewood for \$. . . per cord; 3 cords delivered as far as [delivery area specified] for \$. . . ; and campfire bundles for \$. . . . *Id.* Other photos show 2 white trucks and two men working cutting logs, and a large . . . sign near the highway advertising firewood. <http://www. . . .> (last accessed May 12, 2014.) On May 13, 2014, Taxpayers posted an advertisement on Craigslist offering "6-cords +/- of firewood for only \$. . . . delivered in the [delivery area specified]. . . [t]his special is for 1 week only to the first 50 customers. . ." <https://. . . .> (last accessed May 14, 2014).

[Taxpayer A] has a long history of engaging in retail business activities, including doing business as a retailer of sports cards. [Taxpayer A] was registered as a retailer from February 13, 1990 until March 1, 2001, and remitted retail sales tax in the years 1990 through 1995 and from 1999 through 2001.

[Taxpayer A] did not file excise tax returns and pay taxes for the periods under review, and after Audit contacted [Taxpayer A], he formed [Taxpayer B] ([Taxpayer B]'s filing date is September 26, 2012). [Taxpayer A] provided sales figures to Audit for September, 2009 through 2011, which show 7 cords sold in 2009, 8 cords sold in 2010, and 32 cords sold in 2011, for a total of 47 cords. Audit sought records to substantiate income, including federal income tax returns,

<sup>3</sup> This is an amended assessment. It replaced an assessment for \$. . . , issued on February 1, 2013.

check registers, sales journals, sales invoices, bank statements, asset invoices, and supporting documentation for expenses. Taxpayers provided only partial records, and the records that they did provide show that the Taxpayers' figures substantially understated sales. For example, 1099s from [Community Support Services] total \$. . . for 2011, which is not compatible with sales of only 32 cords . . . , and bank deposit records for May 15, 2011 through December 15, 2011 show deposits of \$. . . , but sales figures provided for that period indicate sales of only \$. . . . Bank statements provided for 2012 show deposits of \$. . . .<sup>4</sup> Taxpayers provided no sales invoices or receipts to substantiate total firewood sales, and minimal information regarding firewood material purchases. Taxpayers assert that the firewood business is a one man operation, yet in 2011 the Department of Labor and Industries (L&I) cited [Taxpayer A] for having three individuals acting as employees at his previous business location.<sup>5</sup>

Audit estimated sales and assessed retail sales tax and retailing B&O tax based on an average price per cord of \$. . . . Audit estimated that [Taxpayer A] sold 125 cords in July-December 2009 for \$. . . , 500 cords in 2010 for \$. . . , 500 cords in 2011 for \$. . . , and 375 cords in January-September 2012 for \$. . . . Audit estimated that [Taxpayer B] sold 125 cords in October-December 2012 for \$. . . .

### ANALYSIS

Businesses liable for Washington taxes have the responsibility to keep accurate and complete business records. RCW 82.32A.030(3); RCW 82.32.070. WAC 485-20-254 (Rule 254) repeats and clarifies these responsibilities. Rule 254(3)(b) provides, in pertinent part:

It is the duty of each taxpayer to prepare and preserve all records in a systematic manner conforming to accepted accounting methods and procedures. Such records are to be kept, preserved, and presented upon request of the department or its authorized representatives which will demonstrate:

- (i) The amounts of gross receipts and sales from all sources, however derived, including barter or exchange transactions, whether or not such receipts or sales are taxable. These amounts must be supported by original source documents or records including but not limited to all purchase invoices, sales invoices, contracts, and such other records as may be necessary to substantiate gross receipts and sales.
- (ii) The amounts of all deductions, exemptions, or credits claimed through supporting records or documentation required by statute or administrative rule, or other supporting records or documentation necessary to substantiate the deduction, exemption, or credit.

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<sup>4</sup> Taxpayers assert that bank deposits include [Taxpayer A]'s mother's social security and disability payments, but have provided no records that support this claim.

<sup>5</sup> At the hearing, Taxpayers said that the L&I assessment was in error, and that L&I incorrectly assumed that [Taxpayer A]'s friends were employees and fined Taxpayers because employees were not wearing eye protection. This explanation, absent any supporting evidence, is unpersuasive.

(iii) The payment of retail sales tax or use tax on capital assets, supplies, articles manufactured for your own use, and other items used by the taxpayer as a consumer.

If a person fails to keep and preserve suitable records, then RCW 82.32.100 provides:

(1) If any person fails or refuses to make any return or to make available for examination the records required by this chapter, the department shall proceed, in such manner as it may deem best, to obtain facts and information on which to base its estimate of the tax; and to this end the department may examine the records of any such person as provided in RCW 82.32.110.

Pursuant to RCW 82.32.100, Audit has the authority to estimate tax in the manner it deems best, as long as it does so reasonably. Det. No. 99-341, 20 WTD 343 (2001).

In these matters, Taxpayers failed to make available the required records, including records to substantiate gross receipts and sales per Rule 254(3)(b)(i). Thus, Audit estimated Taxpayers' liability as required under RCW 82.32.100. Taxpayers appeal these estimates, asserting that the business is a one man operation, and at 45 years old, "he can deliver an average 3-4 cords a day when he is working" (which is less than 7 days per week). [Taxpayer A]'s Appeal Petition, Page 2. Given the large scale of Taxpayers' business as described in the pictures and text of the website, which indicates that Taxpayers can deliver at least 4 cords in a single trip; the 1099s for [Community Support Services] showing income of \$. . . in 2011; bank deposits of \$. . . in 2012; the assessment by L&I which indicates that Taxpayer had 3 employees; and Taxpayers' assertion that [Taxpayer A] alone can deliver an average 3-4 cords per day, we find that Audit was reasonable in estimating sales of 500 cords per year, or approximately 10 cords per week. Because Taxpayers have provided no records to support an adjustment to the estimate, we sustain the estimated assessments.

With respect to [Taxpayer A]'s evasion penalty, RCW 82.32.090(7) provides that "[i]f 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 *must* be added." (Emphasis added.) The evasion penalty is further addressed in WAC 458-20-228(5)(f) as follows:

The evasion penalty is imposed when a taxpayer knows a tax liability is due but attempts to escape detection or payment of the tax liability through deceit, fraud, or other intentional wrongdoing. An intent to evade does not exist where a deficiency is the result of an honest mistake, miscommunication, or the lack of knowledge regarding proper accounting methods. The department has the burden of showing the existence of an intent to evade a tax liability through clear, cogent and convincing evidence. . . .

Thus, in order to sustain an evasion penalty, the Department must show, by clear, cogent and convincing evidence, that (1) Taxpayer knew a tax liability was due, and (2) Taxpayer attempted to escape detection or payment through intentional wrongdoing. *Id.* Clear, cogent, and convincing evidence has been described as evidence convincing the trier of fact that the fact in issue is "highly probable," or, stated another way, the evidence relied upon must be "clear,

positive and unequivocal in [its] implication.” *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 735, 853 P.2d 913 (1993).

To meet this burden, the Department must present objective and credible evidence that clearly demonstrates intent to evade a known tax liability; mere suspicion of intent to evade is not enough to meet this burden. Det. No. 03-0147, 22 WTD 274, 276 (2003). “Intent is a state of mind. As such, it must usually be proved by circumstantial evidence.” *State v. LaRue*, 5 Wn. App. 299, 306, 487 P.2d 255 (1971). Circumstantial evidence of intent may be gathered from the outward manifestations of the person entertaining it, and the facts or circumstances surrounding the alleged offense. *State v. Gaul*, 88 Wash. 295, 301, 152 P. 1029 (1915); see Det. No. 04-0098, 23 WTD 331, 338 (2004).

First, we consider whether [Taxpayer A] was aware of his tax liability. [Taxpayer A] has a long history of reporting retailing B&O tax and retail sales tax to the Department, including in connection with his sports cards business. This shows that [Taxpayer A] was aware of his liability for taxes on Washington sales of tangible personal property. Further, he would have been aware of his tax liability when he provided understated sales figures to Audit and claimed that he was acting alone. [Taxpayer A] argues that he thought sales of firewood were not subject to tax, on grounds that other firewood sellers told him so and they do not charge retail sales tax.<sup>6</sup> Such self-serving statements not supported by any evidence are not credible. Further, this does not apply to [Taxpayer A]’s awareness during the audit. [Taxpayer A] knew that he made sales of firewood during the audit period and did not report any of that income to the Department.

Second, we consider whether [Taxpayer A] attempted to escape detection or payment through intentional wrongdoing. Intent to evade payment of taxes can be inferred from false or misleading responses and actions. See Det. No. 87-188, 3 WTD 219, 221 (1987); Det. No. 94-7, 14 WTD 174 (1994). [Taxpayer A] did not report any sales on excise tax returns during the audit period, and then provided Audit with sales figures that were far less than what was subsequently revealed by his records. He also stated that he was acting alone, yet the L&I assessment and pictures on his website, which show 2 large white pick-up trucks and 2 individuals working at the log yard, show otherwise. This conduct shows that [Taxpayer A] sought to deceive or mislead the Department with the intent to evade paying the taxes he knew were due. We find, therefore, that [Taxpayer A] intended to evade paying the taxes due and conclude that Audit properly imposed the evasion penalty.

## DECISION AND DISPOSITION

Taxpayers’ petitions are denied.

Dated this 21st day of May 2014.

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<sup>6</sup> Taxpayers also assert that they were unfairly targeted by the Department. The assertion of selective enforcement, however, is not grounds for overturning an assessment. See *Frame Factory v. Dept. of Ecology*, 21 Wn. App. 50, 56-57 (1978); Det No. 86-249, 1 WTD 161, 165-166 (1986).