

Cite as 9 WTD 286-1

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition) <u>N</u> For Correction of Assessments) of))) . . .))))	<u>D E T E R M I N A T I O</u> No. 90-144 Registration No./Audit No./Audit No. . . .
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[1] RULE 230: TAX ASSESSMENT -- TIME LIMITATION -- UNREGISTERED TAXPAYER. While generally a tax assessment is limited to a four year period, the time limitation does not apply to a taxpayer who was not registered with the Department.

[2] RCW 82.08.050: RETAIL SALES TAX -- PRIMARY LIABILITY OF BUYER -- ABUSE OF DISCRETION FOR DEPARTMENT TO PROCEED AGAINST BUYER -- BURDEN TO SHOW WHETHER SELLER COLLECTED AND/OR REMITTED TAX. The Department may proceed directly against the buyer where there is no evidence to show that the buyer had paid the sales tax to the seller. It is not an abuse of discretion for the Department to do so where it is in the best interest of the state and the buyer has primary liability for the tax. The Department does not have the burden to establish that the seller never collected and/or remitted the sales tax before proceeding against the buyer for the tax.

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: . . .

NATURE OF ACTION:

Petition protesting assessment of taxes beyond the four year limitation and sales tax liability imposed on the taxpayer/buyer without first establishing that the seller had neither collected nor remitted the sales tax.

FACTS AND ISSUES:

Krebs, A.L.J. -- [The Taxpayer] was engaged in business individually as a broker of aircraft from . . . until . . . when his business activities were assumed by his corporation, . . ., which registered with the Department of Revenue (Department) effective . . . (. . .) until The taxpayer individually had not been registered prior to . . . , but resumed business activities individually after the closing of the corporation's registration.

The Department examined the taxpayer's business records for the period from . . . through As a result of this audit, the Department issued the above captioned tax assessments on . . . asserting excise tax liability in the combined amount of \$. . . plus interest due in the combined amount of \$. . . and penalty due in the amount of \$. . . for a combined total sum of \$. . . which remains due.

The taxpayer protests the assessment of any tax liability for the years . . . , . . . and . . . as being barred under RCW 82.32.050 and WAC 458-20-230 (Rule 230) which provide that no assessment for additional taxes may be made by the Department "more than four years after the close of the tax year."

The taxpayer also protests the assessment of use tax for the tax years . . . , . . . and . . . as not being due under four alternate theories:

(1) The assessment is contrary to RCW 82.08.050 because there has been no determination that any of the alleged sellers of services and materials failed to remit sales tax to the Department or that the taxpayer failed to pay sales tax to the sellers.

(2) The Department's decision to exercise its discretion in proceeding directly against the taxpayer was an abuse of discretion because there had been no determination as stated in (1) above.

(3) The Department cannot impose the burden of proof upon the taxpayer to prove under RCW 82.08.050 that sales tax was paid because imposing such a burden of proof in such circumstances is contrary to law and the Department's own rules.

(4) The taxes assessed by the Department under RCW 82.04.050, RCW 82.08.050 and RCW 82.12.020 are "unconstitutionally vague when read in pari materia to impose liability" upon the taxpayer.

DISCUSSION:

The facts are undisputed. The taxpayer was engaged in business as a broker of aircraft from . . . through . . . with a gross income of \$ During that period of time, the taxpayer was not registered with the Department and paid no business tax.

Administrative regulation WAC 458-20-101 (Rule 101) in pertinent part provides:

(18) Penalties for noncompliance. The law provides that it shall be unlawful for any person to engage in any business without having obtained a certificate of registration. To do so constitutes a gross misdemeanor.

It is each individual's responsibility to be aware of any tax implications resulting from activities conducted within this state. Department of Revenue personnel are available to answer any inquiries without charge pertaining to such matters and information is readily available. The taxes imposed by this state's Revenue Act are of a self-assessing nature and the burden is placed upon a business to correctly inform itself of its obligations under the Act.

Thus, the taxpayer should have filed the Application for Certificate of Registration in . . . and filed excise tax returns regularly thereafter. Had this happened, the taxpayer would have avoided being delinquent and the resultant build-up of past due taxes and consequential interest and penalties.

[1] Rule 230 implements RCW 82.32.050 and in pertinent part provides:

No assessment...for additional taxes due may be made by the department of revenue more than four years after the close of the tax year, except:

1. Against a taxpayer who has not registered as required by chapter 82.32 RCW. (Emphasis supplied.)

In this case, the taxpayer had not registered in 1980 as required by statute and regulation, and remained unregistered through the audit period ending Thus, the Department's assessment period was not limited to four years. Accordingly, we must reject the taxpayer's contention that the tax liability for the years . . . , . . . and . . . are barred by Rule 230 and RCW 82.32.050.

In Schedules IV and V of the audit report, use tax/deferred sales tax was assessed on the taxpayer's purchases of computers and software (capital asset items), and on purchases of labor and materials for the taxpayer's personal residence without payment of sales tax. The purchases came to the attention of the auditor upon an examination of the taxpayer's check register. The auditor has given the taxpayer the opportunity to demonstrate that he has paid sales tax to the vendor/contractor or that the vendor/contractor has paid the sales tax to the Department so that the taxpayer could receive a credit for any amounts so paid. The taxpayer has not presented supporting documentation but seeks to pass the burden to the Department.

The Department does not have the burden of showing that the vendor/contractor did not pay the sales tax to the Department before proceeding against the taxpayer-purchaser for collection of the tax where the taxpayer cannot show that he paid the sales tax by proper records and documentary proof. The fact that the taxpayer cannot show that he paid sales tax raises a presumption that the vendor/contractor did not pay the tax to the Department.

This is a reasonable presumption since there is no evidence that the taxpayer paid the sales tax. The Department has consistently held that the burden of overcoming this presumption is on the taxpayer, not the Department.

[2] RCW 82.08.050 in pertinent part provides:

Where a buyer has failed to pay to the seller the [sales] 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, 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 seller, regardless of when the tax may be collected by the department;...(Bracketed word and emphasis supplied.)

The penalty referred to in the above section of the law has not been assessed against the taxpayer but there is no question as to the legislative intent with respect to the propriety of assessment of tax on purchases made without payment of sales tax; that is, the right of the Department to proceed directly against the buyer who cannot show that sales tax was paid. RCW 82.08.050, contrary to the taxpayer's contention, makes it very clear that the buyer is primarily obligated for the payment of the tax. The seller's obligation is merely to collect the tax on behalf of the state. The obligation to collect the tax is placed on the seller for the reason that most retail sales are made to unregistered consumers over whom the Department can exercise little control. Requiring sellers to collect the retail sales tax simply ensures that it gets paid. If the seller neglects to perform this duty, he becomes secondarily liable for payment of the tax. Under the law, however, he has recourse against the buyer who is primarily liable.

In this case, the audit report reveals that the taxpayer made taxable purchases from about 50 different vendors. We do not believe that there was an abuse of discretion in proceeding against the taxpayer/buyer because it would not serve the best interests of the state to try to audit all of the vendors to try to establish whether they collected sales taxes from the taxpayer. In 1976, the legislature considered adding a proviso to the "discretionary" section which would have read "provided further that the Department must exhaust all legal remedies against the seller prior to proceeding against the buyer". However, apparently when it became aware of the immensity of the auditing required, the matter was dropped.

The Department stands ready to receive from the taxpayer paid statements, bills, invoices, etc. showing that sales tax was charged by the vendor and taxpayer's corresponding checks in payment thereof in order to give credit for payment of the sales tax.

We do not agree with the taxpayer's assertion that the cited statutes are "unconstitutionally vague when read in pari materia to impose liability upon the taxpayer. RCW 82.04.050

defines what constitutes a "retail sale"; RCW 82.08.050 imposes sales tax liability upon the buyer -- "the tax hereby imposed shall be paid by the buyer to the seller" -- and RCW 82.12.020 imposes the use tax upon the consumer when retail sales tax was not paid on the purchase. In this case, the taxpayer was the buyer/consumer.

Furthermore, the Department of Revenue, as an administrative agency, must presume the constitutionality of the laws it administers. The Department will not and may not rule upon such assertions of unconstitutionality. The Washington State Supreme Court has directly expressed this position in Bare v. Gorton, 84 Wn.2d 380 (1975) as follows:

An administrative body does not have the authority to determine the constitutionality of the law it administers; only the courts have that power.

Accordingly, we must decline to rule on the alleged unconstitutional vagueness of the cited statutes when construed with reference to each other.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this the 28th day of March 1990.