

Cite as 6 WTD 161 (1988)

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

In the Matter of the Petition)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u> <u>N</u>
For Correction of Assessment of)	
)	No. 88-261
)	
. . .)	Registration No. . . .
)	. . . /Audit No. . . .
)	
)	

- [1] **RULE 178:** USE TAX -- CAPITAL ACQUISITIONS -- BUILDING IMPROVEMENTS -- TIME OF TAXABILITY. Use tax is due on capital acquisitions and building improvements as of the time the improvements are put to use.
- [2] **RCW 82.32.050:** EVASION PENALTY. Evasion penalty proper for the knowing underreporting of retail sales.
- [3] **MISCELLANEOUS:** COMMUNITY PROPERTY -- TAX LIABILITY. A tax debt incurred by one spouse on a community business asset is a community debt.

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: . . .

DATE OF HEARING: April 1, 1988

NATURE OF ACTION:

Taxpayer protests evasion penalty and use tax on an assessment.

FACTS AND ISSUES:

Hesselholt, A.L.J. -- Taxpayers are a married couple living separate and apart. In 1983, the wife's father deeded a restaurant, which operation was the subject of this audit, to both husband and wife. (Taxpayer and Mrs. Taxpayer) The Certificate of Registration shows that the restaurant is owned by both husband and

wife, as does the liquor license. Taxpayer operates the restaurant alone.

Upon receiving the restaurant, taxpayer did substantial remodeling and made improvements to the structure. Taxpayer did not receive his registration number until sometime in October or November of 1983. The restaurant opened for business in October 1983.

The Department of Revenue audited the restaurant's records for the period October 20, 1983 through June 30, 1987. This audit revealed up sizable discrepancies in the amounts of sales reported and the amount of sales actually made. This resulted in a sales tax deficiency of \$ [X] for the audit period and a Retailing B&O deficiency of \$ [X]. Taxpayer was also assessed use tax on capital assets on which no sales tax was paid. The audit also included unpaid balance due notices.

Finally, a 50% evasion penalty was added to the entire assessment, because the auditor found that taxpayer "regularly intentionally reported to the Department of Revenue sales amounts that were less than your actual sales as recorded in your records. . . ."

Taxpayer appealed the assessment, arguing:

- (1) That the Use tax assessments in the amount of \$ [X] be deleted for the reason that sales taxes were paid upon the furnishing of the goods and materials. In addition, many of the expenses listed on page 2 of schedule III were incurred prior to the audit period (from July 12, 1883 (sic), through the audit date of October 20, 1983).
- (2) That the evasion penalty in the sum of \$ [X] be deleted from the assessment for the reason that these appellants lacked the requisite intent during all or much of the period covered; and that the imposition of the penalty will work an undue hardship and diminish the likelihood of collecting the delinquent tax.
- (3) That [Mrs. Taxpayer] be deleted as a party in as much as she had no part in the operation of the business or the activities of the taxpayer during the period covered by this audit.

DISCUSSION:

I. Use Tax.

[1] The Use tax was assessed on capital assets and building improvements made by taxpayer. Credit was given in those instances where taxpayer was able to show that sales tax had been paid. If

taxpayer can provide proof that sales tax was paid on the other items, credit will be given against the tax. After the due date, taxpayer can apply for a refund within the statutory period if the records can be found.

Taxpayer further argues that many of the items were purchased before the audit period. The Use tax is imposed on the use of taxable items on which the sales tax has not been paid. WAC 458-20-178. The goods would be used as of the start-up date of the restaurant, or October 20, 1983. Thus the assessment of the Use tax on items purchased prior to the audit period is proper.

II. Evasion Penalty.

[2] Taxpayer admitted at the hearing that although the first underreporting of tax may have been unintentional, the later underreporting was knowingly done. Taxpayer argued, however, that he had been cooperative with the auditor and that because of his current candor he should not be held liable for such a penalty.

The evasion penalty is authorized by RCW 82.32.050 when the Department finds that a deficiency resulted from an attempt to evade the tax due. Taxpayer admits to knowingly underreporting his sales. We find the deliberate underreporting particularly egregious since it involves sales taxes collected by the taxpayer. RCW 82.08.050 provides that sales tax receipts are held in trust by the seller until paid to the Department. One who converts such tax to his own use may be subject to both criminal and civil penalties. We do not find the imposition of the evasion penalty to be inappropriate, and, in fact, find it to be mandated. However, the evasion penalty was calculated on the entire amount of the assessment and should be due only on the Retailing B&O and retail sales tax portions of the assessment.

III. Community Property.

[3] Taxpayer requested that Mrs. Taxpayer be deleted as a party to the assessment, because she does not operate the business, nor did she have any part in the "activities of the taxpayer."

The property was deeded to taxpayer husband and wife. Although the two live separately, taxpayer stated that they remain married for family reasons. Property acquired during a marriage is presumptively community property, unless the transaction falls within a separate property classification. Cross, "The Community Property Law in Washington," 61 Wash. L.R. 13, 28, 1985. The restaurant was deeded to the two by the wife's parents, and the Certificate of Registration and license are in both names. Therefore, we find that the restaurant is community property.

The next question is whether the taxpayer husband's separate actions with respect to the community asset render the wife

financially liable. Community liability attaches where [an action] is done in the management of a community business, or for the benefit of the community. deElche v. Jacobsen, 95 W.2d 237, 245 (1980). Taxpayer husband's actions were done in the management of a community business, i.e., the restaurant, and therefore the community is liable for the financial repercussions, and both the community and the taxpayer husband are separately liable. deElche, at 245. Taxpayer wife's name will not be removed from the assessment.

DECISION AND DISPOSITION:

Taxpayer's petition is denied. The file will be returned to the Audit Section for the issuance of a new assessment with a corrected evasion penalty, to be due on the date specified therein.

DATED this 30th day of June 1988.