Cite as Det. No. 03-0147, 22 WTD 274 (2003)

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. 03-0147 |
| | ) | |
| . . . | ) | Registration No. . . . |
| | ) | . . . /Audit No. . . . |
| | ) | . . . /Audit No. . . . |
| | ) | Docket No. . . . |

[1] RULE 228; RCW 82.32.090: EVASION PENALTY -- INTENT. Corporation writing "NO SALES" on tax returns, which resulted in the corporation being placed on active non-reporter status, intentionally misrepresented that the corporation did not charge and collect sales tax.

[2] RULE 228; RCW 82.32.090: CUMULATIVE PENALTIES -- EVASION -- EXCESSIVE. The 50% evasion penalty plus the 20% late-payment penalty are not excessive under RCW 82.32.090(6).

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.

M. Pree, A.L.J. – A Construction company billed and collected retail sales tax. It reported "no sales" to the Department of Revenue (DOR), and did not remit the retail sales tax to DOR. The Audit Division of DOR assessed the tax and interest, which are not disputed. The Audit Division concluded the taxpayer willfully intended to evade the tax and added the 50% evasion penalty plus a 20% delinquent penalty to the assessment. The taxpayer contends it was misinformed by an outside bookkeeper, and the penalties were excessive punishment. We sustain the penalties.[1]

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

## ISSUES

1. Does a corporation, which knowingly bills and collects retail sales tax, and then reports "no sales" to DOR and fails to remit the tax, intend to evade the tax when it relies upon an outside bookkeeper?

2. Were the penalties excessive?

## FINDINGS OF FACT

. . . (taxpayer) builds residential homes in Washington. The taxpayer acted as a prime contractor.[2] It included retail sales tax in its charges to the homeowners, who paid the tax to the taxpayer.

DOR audited the taxpayer's books and records for the period from 1991 through June 30, 1994. The audit resulted in credits for retail sale tax and business and occupation tax on over-reported income with additional retail sales/use tax assessed on materials and office supplies purchased without payment of retail sales tax. These adjustments were discussed with the taxpayer's vice president-treasurer.

In 1995, the taxpayer hired a bookkeeper from its CPA firm who prepared the taxpayer's combined excise tax returns. No returns were submitted in 1995. In 1996, the bookkeeper wrote "NO SALES" on the taxpayer's combined excise tax return for the first quarter of 1996. A similar return with "NO SALES" was prepared and signed by the taxpayer's secretary-treasurer[3] for the second quarter of 1996. On August 26, 1996, DOR put the taxpayer on non-reporting status and ceased sending it tax forms.

In 2001, DOR contacted the taxpayer and audited the taxpayer's books and records for the period from January 1, 1995 through March 31, 2002. The auditor commented that the taxpayer was very cooperative during the audit. As a result of the audit, in 2002, DOR's Audit Division issued two assessments, one for the 1995 through 1997 period, plus one for the above referenced assessment for 1998 through March 31, 2002. Both assessments included the late payment penalties[4] and the evasion penalty.

The taxpayer appealed, contending the assessment of penalties "does not reflect the reality of the case, and is excessive in punishment." The taxpayer does not dispute either the taxes or interest assessed. Statements submitted by two of the officers indicate that they relied upon the outside

[2] Prime contractors construct buildings for consumers on their land. WAC 458-20-170.

[3] The secretary- treasurer was a different individual than the vice president-treasurer, both of whom submitted statements regarding this appeal. These office titles were obtained from Department of Licensing as of March 18, 2003.

[4] The late-payment penalty was assessed beginning in the third quarter of 1996, when the taxpayer discontinued filing any returns.

bookkeeper for their taxes. They assert that they were merely negligent, and did not willfully evade payment of the tax.

Yet one of the officers signed a return in which she wrote “NO SALES” on the face of the return. During that period, the taxpayer clearly made sales. The taxpayer added retail sales tax on its invoices, and collected the retail sales tax. The other officer had met with the DOR auditor and discussed the audit of the prior period. While the officers may have been ignorant of more complex tax issues, we find they knew they had taxable sales during the audit period, and were aware returns were being filed to the contrary. They discussed the taxability of similar sales in a prior audit, billed and collected sales tax, but submitted returns without the tax, stating "no sales."

## ANALYSIS

DOR's authority for imposing the evasion penalty is found in RCW 82.32.090(5), which provides: “If 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 shall be added.” Use of the word "shall" by the legislature indicates that the penalty is mandatory if an intent to evade is found. Although the subjective intentions of a person are difficult to ascertain, they may be determined from objective facts, including the actions or statements of the taxpayer. Det. No. 87-188, 3 WTD 219 (1987).

To impose the evasion penalty, the Department must prove: 1) a tax liability which the taxpayer knows is due; and 2) an attempt by the taxpayer to escape detection through deceit, fraud, or other intentional wrongdoing. *See, e.g.*, Det. No. 98-065, 17 WTD 359 (1998); Det. No. 94-007, 14 WTD 174; Det. No. 90-314, 10 WTD 111 (1990). The Department has the burden of proving both elements of evasion by clear, cogent, and convincing evidence. *Id.* 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. 94-007. 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).

With respect to the 1995 through March 31, 2002 periods, we conclude that the Audit Division provided clear, cogent, and convincing evidence of both elements necessary to sustain the evasion penalty. First, the taxpayer’s officers knew they made taxable sales. The taxpayer was audited for the 1991 through the June 30,1994 period and the auditor discussed that assessment with the taxpayer’s vice president-treasurer. The assessment involved precisely the type of income, which the taxpayer subsequently omitted.

Second, the taxpayer attempted to escape detection through deceit, fraud, or other intentional wrongdoing. Specifically, the taxpayer reported “NO SALES” on two returns. Yet the taxpayer’s officers clearly knew from the prior audit its sales were taxable. They demonstrated this knowledge from 1995 through 2002 by charging its customers retail sales tax. They

collected the tax. The misrepresentation of sales resulted in DOR placing the taxpayer's Washington DOR account on active non-reporting status. By not reporting any sales to DOR, the taxpayer escaped detection of the retail sales taxes it collected from its customers. We conclude that the taxpayer intentionally evaded payment of its taxes from 1995 through March 31, 2002.

Both the evasion penalties and the late-payment penalties were assessed in accordance with RCW 82.32.090. The 50% evasion penalty was assessed under subsection (5) and the 20% late-payment penalty was assessed under subsection (1). Both subsections use the word "shall," which mandates imposing the penalties. *See* Det. 88-349, 6 WTD 367 (1988).

The legislature addressed the cumulative nature of penalties in RCW 82.32.090. Two subsections cap the aggregate penalty amount. Subsections (6) and (7) limit the total amount of penalties assessed under RCW 82.32.090:

> (6) The aggregate of penalties imposed under subsections (1), (2), and (3) of this section shall not exceed thirty-five percent of the tax due, or twenty dollars, whichever is greater. This subsection does not prohibit or restrict the application of other penalties authorized by law.
>
> (7) The department of revenue may not impose both the evasion penalty and the penalty for disregarding specific written instructions on the same tax found to be due.

The only penalty assessed under subsections (1), (2), and (3) was the 20% late-payment penalty. Therefore, the aggregate of those subsections is less than 35%.

The 10% penalty for disregarding specific written instructions (RCW 82.32.090(4)) was not assessed. We conclude the 50% evasion penalty plus the 20% late payment penalty were both appropriate. The cumulative penalty was mandatory, and not excessive under the law.

## DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 29th day of April 2003