

Cite as Det. No. 97-238, 18 WTD 215 (1999)

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>
Assessment of)	
)	No. 97-238
)	
...)	Registration No. . . .
)	FY . . . /Audit No. . . .
)	
)	

RULE 228; RCW 82.32.090: PENALTY -- EVASION -- DECEIT. A corporate president who deceived an auditor on numerous occasions, intended to evade payment of tax and subjected the corporation to the evasion penalty.

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:

A contractor protests the assessment of the evasion penalty on retail sales tax collected, but not remitted.¹

FACTS:

Pree, A.L.J. -- The taxpayer is a Washington corporation that built single family residences. Most of the houses were built upon land owned by purchasers for whom the taxpayer acted as a prime contractor. As prime contractor, the taxpayer was responsible for charging and collecting retail sales tax. Some of the houses were "spec homes," that is they were built on land purchased by the taxpayer to be sold as part of the real estate without retail sales tax. The taxpayer's president ([The President]) had been involved with several other corporations (affiliates) in home construction in the past as both president, treasurer, and principle owner. Most of the entities had tax problems stemming from substantial errors and delinquencies in reporting and payment.

A tax discovery auditor from the Department of Revenue's (Department) Audit Division reviewed building permits in the county where the homes were constructed. The auditor noticed that many of the permits showed an affiliate as the contractor, but the affiliate was not filing tax

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

returns with the Department. In October 1995, the auditor contacted [The President] to conduct an audit. [The President] postponed the audit. [The President] told the auditor that the records were [out-of-state] with a co-owner and officer (Co-owner) of one of the affiliates. When [The President] told the auditor that the records were still unavailable, the auditor indicated that he would use the building permits to make an estimated assessment. Because one affiliate was shown as the contractor on the permits and the funds of the affiliates were commingled in a single account, the auditor included estimated receipts for all of the entities in a single, combined assessment. The Audit Division issued a combined assessment on March 6, 1996.

On May 21, 1996, [The President] filed returns for the taxpayer for the second and third quarters of 1995 paying the taxes due from the taxpayer at that time.² [The President] made the records of the taxpayer and the affiliate available to the auditor. The auditor then revised the assessment and issued several assessments based upon the actual records of each entity. On March 7, 1997, the Department's Audit Division issued the above referenced assessment against the taxpayer. The assessment included an evasion penalty of \$22,015. The evasion penalty was not imposed upon the total amount of additional taxes in the assessment, but only upon retail sales taxes collected in 1995, which were not reported until the returns were filed May 21, 1996.

The Audit Division explained that the taxpayer would not have filed excise tax returns if the auditor had not contacted [The President] to review the books and records of the taxpayer and the affiliated companies. [The President] states that he was not aware of his state tax obligations until after he was contacted by the auditor. Specifically, [The President] indicates that his bookkeeper first informed him of the nature and meaning of the excise reports in January of 1996. After that, [The President], with the assistance of the taxpayer's bookkeeper and new attorney, struggled to comply with the tax requirements for all of the entities. Prior to that, [The President] states that he simply lacked knowledge that he had to file returns with the state, or remit any tax to the state.

The Audit Division noted that the Department had filed a tax lien against [The President] in 1985, which he finally satisfied in 1989. [The President] organized another corporation in 1988. The Department's computer records show that someone, either by return or phone call, communicated to the Department on four different occasions in 1989 and 1990 that no tax was due.³

The Audit Division points out that 1995 contracts between the taxpayer and home buyers contained the following statement:

The contract price includes Washington State Sales Tax.

² Most of the taxes due from the affiliates have not been paid. [The President] and the affiliates have entered a payment agreement with the Department. The taxpayer generates the funds to meet their obligations under the agreement.

³ The Audit Division indicates that returns that old, showing zero balance due, were not copied or kept.

[The President] states:

In contracts with clients, “sales tax included” language was included to satisfy a client that she might have to pay sales tax. I assured her that no sales tax was due. At her request, “sales tax included” language was added.

It appears that the taxpayer, rather than the buyers, drafted the contracts. While the buyers were different, all of the computer generated contracts had the same appearance. For instance, they had the same font, format, etc. The affiliates’ 1994 and 1995 contracts contained similar “sales tax included” language.

Likewise, the taxpayer’s invoices also included retail sales tax. The Audit Division provided a number of invoices showing the separately stated tax. [The President] states:

On a few occasions sales tax was shown as due on a client’s bill. This was a mistake in the office procedure, done by a secretary, and was later corrected.

The Audit Division provided copies of several handwritten invoices showing separately stated tax. The writing style and slant match that of [The President]. The Audit Division alleges that [The President], was directly involved in inserting the sales tax on the documents.

The taxpayer signed resale certificates, exempting it from paying retail sales tax to its suppliers and subcontractors. The resale certificates stated:

I certify that I am purchasing the items listed on line 6 for resale in the regular course of business without intervening use.

[The President] indicates that the suppliers routinely sent him the resale certificates, which he filled out per the vendors’ request. He states that they consistently indicated that since the products were being resold, no sales tax was due, but they needed a resale certificate on file. That explanation by [The President] has not been corroborated with any statements from the vendors.

[The President] incorporated the first affiliate corporation in 1990, and obtained a contractor’s license the next year. [The President] renewed the corporate registration and contractor’s license annually for the next five years. [The President] states, “At no time did any state agency indicate any further reporting was due.”⁴

⁴ To put the statement in context, [The President] goes on to state that he was first notified of additional requirements on July 6, 1995, acknowledging that after that time he began to become aware of the additional requirements.

According to the auditor, the taxpayer postponed the initial meeting because Co-owner had the records [out-of-state]. A handwritten note on the affiliate's letterhead, allegedly signed by Co-owner, was received by the local revenue office stating that the affiliate was no longer in business as of the end of 1994. A revenue agent called Co-owner and Co-owner told her that he was not involved with the business, and never had any of its records. Co-owner only put money into one of the affiliate's accounts initially, and never participated in managing the business. Co-owner never received anything from the affiliate. The revenue agent concluded that Co-owner had no knowledge of the note. The writing on the note appears similar to that on the invoices, probably that of [The President].

ISSUE:

Did the taxpayer intend to evade payment of retail sales tax?

DISCUSSION:

In the case of a deficiency, the Department is required to add a penalty of fifty percent if any part of the deficiency resulted from an intent to evade payment of the tax. RCW 82.32.090. The penalty is referred to as the evasion penalty. See, WAC 458-20-228(4)(e). The taxpayer does not contest the deficiency. The taxpayer contends that [The President] lacked the requisite intent to evade payment of the tax.

When applying the evasion penalty, the Department must find (1) that the taxpayer knew the tax was due, and (2) that the taxpayer attempted to escape detection through deceit, fraud, or other intentional wrongdoing. Det. No. 90-314, 10 WTD 111, 113 (1990). The burden is on the Department to prove the existence of each of these elements by clear, cogent, and convincing evidence. Id. We find that the Audit Division has met this burden. Once the Department finds these elements, the taxpayer bears the burden of explaining the deficiency with objective evidence. Id. at 114. The taxpayer's self-serving statements of ignorance are insufficient in light of the history of tax problems and misrepresentation.

First, [The President] states that he did not know the taxpayer needed to file combined excise tax reports until January of 1996 when his bookkeeping service so advised him. Yet, as a proprietor, ten years prior to the period in question, under the threat of the Department's tax lien, [The President] filed returns and paid taxes. During the period in question, he personally added sales tax to contracts and invoices, then collected it from his customers. Clearly, [The President] knew that tax was due.

The Audit Division has documented how the taxpayer attempted to escape detection through deceit, fraud, and misrepresentation. The taxpayer told the Department that when sales tax was added to a client's bill, it was a secretary's mistake. However, the handwriting on the bill is clearly that of the taxpayer. Likewise, the sales tax contract language that [The President] attributed to a single customer was added in the taxpayer's format to numerous contracts for

other customers. Similarly, [The President] attributed the misuse of resale certificates to vendors. They had no interest in routinely obtaining a waiver of the taxpayer's obligations. Only the taxpayer benefited from the improper use of the certificates. [The President] signed Co-owner's name on the note stating that the records were in Washington D.C. to delay the audit. [The President] consciously deceived the Department regarding his actions, meeting the second element of evasion.

The taxpayer's self-serving claim of ignorance is unsupported by any objective evidence. In fact, the Audit Division provided evidence to the contrary. [The President] had failed to file and pay taxes before. He organized other entities with similar requirements. It is most likely, that [The President] received correspondence from the Department regarding tax obligations. [The President] was not ignorant of the taxpayer's obligations to the Department.

In short, [The President] knew tax was due. He acted evasively to escape detection. He was not ignorant of his obligations. The Audit Division properly found that the taxpayer intended to evade payment of the tax due, requiring application of the evasion penalty.

DECISION AND DISPOSITION:

We deny the taxpayer's petition.

Dated this 25th day of November 1997.