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

In the Matter of the Petition)	<u>D E T E R M I N A T I O N</u>
For Correction of Assessment of)	
)	No. 90-314
)	
. . .)	Notice of Use Tax Due
)	Unregistered Taxpayers
)	

[1] RCW 82.32.050: PENALTY -- EVASION -- INTENT TO EVADE.
In order to assess the 50% evasion penalty the Department must show by clear, cogent and convincing evidence that the taxpayer intended to evade a tax liability. An assessment of the evasion penalty upheld where the taxpayers misrepresented their residence and admitted improper motive for registering vehicles out of state.
TO THE EXTENT THAT PREVIOUS DEPARTMENTAL DETERMINATIONS ARE INCONSISTENT, THIS DETERMINATION IS CONTROLLING.

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:

The taxpayers appeal the imposition of a 50% evasion penalty in connection with an assessment of use tax and motor vehicle excise tax.

FACTS AND ISSUES:

Heller, A.L.J. -- The taxpayers (husband and wife) received notices of use tax due and motor vehicle excise tax due on . . ., asserting use tax and motor vehicle excise tax on four automobiles owned at various times by the taxpayers between the years 1981 and 1987. The taxpayers also received notices of use tax due for two boats, two motors and a trailer all purchased in 1987. Tax was asserted in the aggregate amount of \$. . ., including evasion penalties of \$

Each of the automobiles and vessels in question were titled and registered in Oregon at the time they were purchased. The taxpayers gave a . . . , Oregon address as their residence on the Oregon title applications. At various times the taxpayers offered documentation to support their contention that they were Oregon residents, but no documentation was forthcoming.

Utility records summoned by the Department of Revenue ("Department") indicate that the taxpayers began residential utility service in Washington on . . . , and then later for a new Washington address on This later address was where the taxpayers were living at the time of the assessments in question. Voter records indicate that the husband registered to vote in the State of Washington in 1984 and later voted in Washington elections in 1984 and 1985. In addition, the taxpayers each have been issued Washington drivers licenses using a Washington address.

At the supervisory conference the taxpayer and the Tax Discovery Officer agreed on the following facts:

- 1) the taxpayers are Washington residents;
- 2) the taxpayers used a parent's Oregon address for purposes of licensing the automobiles and boats in Oregon;
- 3) the taxpayers have not filed State of Oregon income tax returns;
- 4) the taxpayers have filed their federal income taxes using their Washington address;
- 5) the taxpayers licensed a 1979 MGB in Washington.

When asked by the Tax Discovery Officer why the taxpayers had registered their vehicles and vessels in Oregon, the husband replied "Washington taxes are too high, so I used my mother's address."

The taxpayer has now conceded and paid the use tax and motor vehicle excise tax amounts, but protests the imposition of the evasion penalty.

TAXPAYER'S EXCEPTIONS:

The taxpayers' petition sets forth the following argument in support of their position:

During the time period 1981 to [the] present [my wife] and I have been part time residents of the State of Washington.

[My wife] is a flight attendant and was based in . . . during that time working for . . . , although she now works for

During 1981 - 1984 I was a fisherman in Alaska and now work as a consultant, spending about three weeks out of the month out of state.

We have owned property in the State of Washington and have used Washington as home base.

We don't deny any of the allegations, although the vehicles mentioned have been in the State of Washington one-half of the time at best and the boats not at all.

The reason we are appealing is not for past sale or use taxes, but the penalties incurred. I've had to sell our home to satisfy the taxes and penalties.

(Brackets supplied.)

DISCUSSION:

[1] Chapter 82.32 RCW is the law governing the general administrative authority of the Department and defines the Department's authority with respect to the imposition and waiver of penalties. Chapter 82.32 RCW is expressly made applicable to the administration of the use tax by RCW 82.12.080. According to RCW 82.32.050, a 50% evasion penalty shall be added to a tax assessment if the Department finds that the deficiency resulted from an intent to evade the payment of the tax.

The Department considers tax evasion to be a specific type of fraudulent behavior. The imposition of the evasion penalty requires a showing of the following:

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.

In order to sustain an assessment of the evasion penalty, the Department must first present evidence of each of the foregoing elements. The burden is on the Department to prove the existence of these elements by clear, cogent and convincing evidence. In order 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.

In upholding an assessment of the evasion penalty we must find that the taxpayer acted with intent. For this purpose, the Department must show that the taxpayer acted with the specific purpose of escaping a tax liability which the taxpayer knew to exist. Although the subjective intent of a person is difficult to ascertain, it may be determined from objective facts such as the actions or

statements of the taxpayer. However, intent to evade does not exist where a deficiency was due to an honest mistake, an unsuccessful attempt at legitimate tax avoidance, inefficiency, or ignorance of proper accounting methods. Even gross negligence will not rise to the level of intent to evade. There must be proof of a deliberate attempt on the part of the taxpayer to evade a tax liability.

Once the Department has clearly demonstrated the existence of each of the elements of evasion, a burden of production is imposed on the taxpayer to come forward with evidence of honest mistake, ignorance of the law, negligence, or some other fact which tends to rebut the Department's evidence. Mere subjective and self-serving statements by the taxpayer regarding intent without more are insufficient to meet this burden of production. Any evidence presented by the taxpayer must be weighed against that presented by the Department. Because the burden placed on the taxpayer is one of production only, the burden of proof as to evasion still rests with the Department. The evidence of evasion presented by the Department when viewed alone, or along with the taxpayer's evidence, must weigh heavily in favor of upholding the assessment. Here, the taxpayers registered their vehicles and vessels in Oregon on the basis of false representations concerning their place of residence. In the case of one vehicle registration, the taxpayers certified that the information concerning residence was correct, when in fact it was not. In six separate cases the taxpayers misrepresented their residence address. The nature and repetitiveness of these statements tends to negate any claim of honest mistake or negligence. Perhaps the most significant fact is the husband's own statement that the parent's address was used to register the vehicles in Oregon because Washington taxes are too high.

While it is not evasion to seek to lower one's taxes through legitimate means, deliberate attempts to escape detection of a tax liability by falsely claiming exemption from tax does constitute evasion. The false statements regarding residence, along with the husband's asserted motive, convince us that the taxpayers were aware of their tax obligations at the time the vehicles and vessels were first used in Washington. The uncontroverted evidence presented by the Department clearly demonstrates an intent to evade the payment of tax. We find this evidence to be clear, cogent and convincing.

Instead of controverting the allegations of evasion, the taxpayer asks us to waive the penalty based on a claim of financial hardship. As stated above, the imposition of the evasion penalty is governed by RCW 82.32.050. This statute provides in part:

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.

(Emphasis supplied.)

According to the statute, the assessment of the evasion penalty is mandatory if the Department finds that a basis for assessment exists. The only authority of the Department to cancel or waive penalties is found in RCW 82.32.105. This statute allows the Department to waive or cancel interest or penalties only if the failure of a taxpayer to pay any tax when due was the result of circumstances beyond the control of the taxpayer. Because the evasion penalty is assessed in those circumstances where a taxpayer intentionally evades the payment of tax, RCW 82.32.105 does not apply. A finding of intent to evade will always involve circumstances within the control of the taxpayer. We have no authority to waive a proper assessment of the evasion penalty.

DECISION AND DISPOSITION:

The taxpayers' petition for correction of assessment is denied.
DATED this 17th day of August 1990.