Cite as Det. No. 97-105R, 18 WTD 168 (1999)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

| | | |
|---|---|---|
| In the Matter of the Petition For Correction of Assessment for | ) | F I N A L D E T E R M I N A T I O N |
| | ) | No. 97-105R |
| . . . | ) | Registration No. . . . |
| | ) | FY. . ./Audit No. . . . |

RULE 228; RCW 82.32.090: SALES TAX -- EVASION -- MISREPRESENTATION TO DEPARTMENT. The Department found a taxpayer who collected , but did not remit retail sales tax, intended to evade payment of the tax, when the taxpayer denied billing or collecting the tax in response to the auditor's specific question.

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 taxpayer requests reconsideration of a determination upholding the evasion penalty in an audit assessment.[1]

FACTS:

M. Pree, A.L.J. -- . . . (the taxpayer), performed landscaping activities for individual homeowners and business owners. The Department of Revenue (Department) audited the taxpayer's books and records for the period January 1, 1992, through June 30, 1996. As a result of this review, the Department's Audit Division issued a tax assessment, Document No. . . . , on October 16, 1996. The assessment was for $ . . . tax, $ . . . interest, plus an evasion penalty of $ . . . for a total of $ . . . . The taxpayer appealed the assessment of the evasion penalty only. In Determination No. 97-105 we upheld the assessment, finding that the taxpayer intended to evade payment of the retail sales tax.

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

On reconsideration, the taxpayer has provided additional evidence, to explain some of the taxpayer's actions. Specifically, the taxpayer provided: (1) Declaration from one of the taxpayer's customers, a certified public accountant (CPA) who provided some advice to the taxpayer, (2) Declaration from the manager of a nursery where the taxpayer purchased many of his landscaping supplies, and (3) The taxpayer's records of sample transactions. However, our understanding of the taxpayer's actions remains unchanged and will be restated with the taxpayer's explanations.

The taxpayer primarily mowed lawns. The taxpayer's customers were consumers. As the result of a law change,[2] after July 1, 1993, the taxpayer was required to collect retail sales tax on his charges to his customers and remit the tax to the Department. One of the taxpayer's customers, a CPA, advised the taxpayer to collect retail sales tax. The CPA advised the taxpayer to collect sales tax, but does not recall advising the taxpayer how to record the transactions or how to file excise tax returns. The taxpayer began charging his customers retail sales tax. He collected the sales tax, but did not remit the tax to the Department.

The taxpayer, who has a high school diploma and studied geology in college, kept the books. He prepared the combined excise tax returns and paid business and occupation (B&O) tax on the total collected. For instance, if he billed a customer for $100.00 to mow the customer's lawn, he added $8.00 on the invoice for sales tax. The invoice showed $108.00 due. The customer paid $108.00. The taxpayer reported $108.00 on the services and other activities line for B&O tax, but did not report the sales tax on the applicable line on the return. The taxpayer states that he was surprised during the audit to learn that this was wrong. The taxpayer acknowledges that his business practices were unsophisticated and his records were rudimentary.

The Audit Division acknowledged the taxpayer over-reported his receipts by including the retail sales tax in the measure of service B&O tax. In fact, the assessment provides a credit for the overstated B&O tax.

At the first meeting with the auditor, the auditor asked the taxpayer if he collected sales tax. The taxpayer told the auditor that sales tax was neither billed nor collected. After reviewing the taxpayer's income log, the auditor asked him again about the collection of sales tax. At that meeting the taxpayer said that he was not sure. At a third meeting, the taxpayer acknowledged charging customers sales tax around the time of the law change.

The taxpayer explains that he did not understand the meaning of the auditor's questions. He states he could have been confused by use of the term "retail," as in "retail sales tax"; or the terms "charge," "collect," "include," "gross receipts," or "revenues." As an illustration, the taxpayer's supplemental filing to the petition offers the following:

[2] RCW 82.04.050 was amended to include landscape maintenance in the definition of retail sale (subsection (3)(e)).

> For a person who does not conceptually differentiate between excise tax, sales or use tax, and business and occupation tax, the difference between comprehension and misunderstanding can be as thin as the difference between the question "did your gross receipts include retail sales tax collected" and the question "did your customers pay tax on the work you did."

The auditor explains his question was clear, "Have you ever billed or collected sales tax?" The auditor recalls the taxpayer's response at the first meeting. The taxpayer responded adamantly, "No." The auditor contends his question was simple, and there was no hint of confusion in the taxpayer's response.

At the third meeting, the taxpayer supplied the auditor a master invoice list showing sales tax billed and collected both before and after July, 1, 1993. The taxpayer had not remitted the tax to the Department. The auditor included the unremitted sales tax in the assessment, but allowed a credit for B&O tax, reducing the measure of the tax as well as reclassifying the receipts from service and other activities to the retailing classification.

Also at the first meeting, the auditor asked the taxpayer whether or not he paid sales tax on all purchases, or if he ever issued a resale certificate. The taxpayer stated that he paid tax on his purchases and never issued a resale certificate. The auditor assumed that the taxpayer would have a large "tax paid at source" credit to offset his retail sales tax liability.

At the third meeting, the taxpayer provided the auditor all of his purchase invoices from 1993 through June of 1996 (bills for 1992 were not provided). The taxpayer did not pay sales tax on a majority of his purchases. In fact, invoices from his main suppliers showed that they had resale certificates from the taxpayer on file. The resale certificates relieved the suppliers of their duty to collect sales tax from the taxpayer, and allowed the taxpayer to purchase materials from the vendors without paying sales tax. The taxpayer did not resell the materials, but rather used them to perform his services.

The declaration from the nursery manager states that generally, when the issue of resale certificates or landscapers' discounts is raised, the nursery shows landscapers resale certificates. The nursery explains what information is necessary to complete the form. The manager's declaration does not state that the nursery advised the taxpayer to sign a resale certificate. The taxpayer suggests that he may have confused the resale reference with retailers' discounts or as landscapers' discounts. The taxpayer attributes the misunderstanding "entirely on the explanation of others."

While the taxpayer admits that he collected the sales tax, and failed to remit the tax to the Department, he denies this was due to a "formulated and considered plan to evade tax." The taxpayer asserts that his failure to pay the retail sales tax resulted from a combination of lack of sophistication in business matters, poor recordkeeping, failure to seek professional help for the

preparation of tax returns, and lack of understanding about how state excise tax returns are completed; specifically, the proper reporting of sales tax.

The taxpayer concludes that he lacked the requisite "intent to evade the tax" for imposition of the penalty. The taxpayer alleges that his records do not reflect concealment of the collection of sales tax, only its untimely payment. His responses to the auditor's questions were simply a result of his lack of sophistication and lack of understanding.

The Audit Division assessed the taxpayer for unremitted sales tax. The taxpayer was given credit for over-reported B&O tax. The Audit Division concluded that the taxpayer's activity indicated an attempt to escape detection of tax liability, which the taxpayer knew was due, through deceit or other intentional wrongdoing.

ISSUE:

Did the taxpayer intend to evade payment of tax?

DISCUSSION:

The taxpayer does not dispute the additional tax due in the assessment. The Department is required to add an evasion penalty of 50% of the additional tax if it finds that all or any part of the deficiency resulted from an intent to evade the tax. RCW 82.32.090 and WAC 458-20-228(4)(e). 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).

Imposition of the evasion penalty requires proof 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. The burden is on the Department to prove each of these elements by clear, cogent, and convincing evidence. WAC 458-20-230 (Rule 230).

The taxpayer contends that the Department has not provided proof of a deliberate attempt on the part of the taxpayer to evade tax liability. The taxpayer explains that he followed the advice of the CPA in preparing his invoices, and the nursery personnel regarding the resale certificates. He reported the tax, albeit incorrect, as receipts subject to B&O tax on his excise tax return.

What the taxpayer fails to adequately explain are his responses to the auditor's questions. We do not agree that the question, "Have you ever billed or collected sales tax from your customers?" is confusing. The auditor was present to clarify, or answer any questions. The auditor recalls the taxpayer's adamant denial, indicating a clear understanding of the question.

The taxpayer personally wrote tax on the invoices. He added the tax to the amounts due. He received the tax. Prior to his discussions with the CPA, the taxpayer did not bill or collect sales tax.

After the CPA advised the taxpayer to bill and collect the tax, the taxpayer changed his invoices to include a charge for the tax. Clearly, the taxpayer knew he billed and collected the tax.

It is also clear the taxpayer intended to deceive the auditor at the first meeting when he denied he ever billed or collected retail sales tax. If the auditor relied on the taxpayer's response, the assessment would not have included the collected, but not remitted, retail sales tax. Such reliance would have allowed the taxpayer to keep nearly $50,000 collected as sales tax during the audit period.

The resale certificates corroborate the pattern of deception regarding the taxpayer's responses to the auditor. The auditor specifically asked the taxpayer whether he paid sales tax on all of his purchases. The taxpayer replied that he paid tax on all of his purchases and that he never issued a resale certificate. He completed and signed resale certificates. Consequently, he did not pay retail sales tax on most of his purchases. Again, if the auditor had relied on the taxpayer's verbal misrepresentation that he paid sales tax on all of his purchases, the taxpayer may have received a substantial credit.

In Det. No. 97-105, we quoted a prior determination addressing the situation of taxpayers who knew to collect retail sales tax, but did not remit it:

> The taxpayer knew enough to collect the sales tax for four years and enjoyed the benefits of the sales tax by spending it himself. The taxpayer never contacted the Department, either by telephone or in writing, to inquire when he should remit the sales tax or to inquire why the Department supposedly told the assistant to report under the wholesaling classification when the taxpayer knew that he was making retail sales and collecting the sales tax. This activity went on from at least 1989 through 1992. The assistant did not appear to report first-hand her contacts with the Department. We conclude that the taxpayer attempted to avoid detection by reporting under the wholesaling classification. This activity constitutes more than "negligence" or even "gross negligence." The evasion penalty is affirmed.

Det. No. 94-7, 14 WTD 174, 178 (1994). In our situation, the taxpayer personally prepared the billings, computing and adding tax to the amount due. The taxpayer's responses to the auditor's questions make a stronger case for evasion than was evident in Det. No. 94-7.

At issue in this case is more than whether the taxpayer knew tax was due and failed to remit it. Here the auditor asked the taxpayer whether tax was billed and collected, and the taxpayer responded that he had not billed or collected any tax. Further, when specifically asked whether he paid retail sales tax on his purchases, the taxpayer responded that he paid sales tax on everything. Questions of this nature are not complex in nature. The auditor was there, in person, to clarify any confusion regarding the questions asked. Yet, the auditor recalls the taxpayer's adamant denial to both

questions, without leaving any indication of uncertainty. The taxpayer intended to deceive the auditor.

The U.S. Supreme Court considered "willfulness" regarding felony federal income tax evasion.[3] Spies v. U.S., 317 U.S. 492 (1943). Such "willfulness" could be inferred from conduct:

> Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished 'in any manner'. By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries of alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime.

Id., p. 499. The U.S. Tax Court has found that fraud may be inferred where the taxpayer makes false and inconsistent statements to revenue agents. Grosshandler v. Commissioner, 75 T.C. 1, 20 (1980). We can apply the logic of these federal tax cases to our situation.

Intent to evade payment of taxes can be inferred from the taxpayer's false and inconsistent statements to the auditor. By denying that he billed or collected sales tax, the taxpayer attempted to conceal the collected sales tax from the auditor. Similarly, the taxpayer's statement that he paid sales tax on all of his purchases could have misled the auditor regarding credits. Those false statements are objective facts, from which the taxpayer's intent can be determined. See, Det. No. 87-188, 3 WTD 219 (1987). We find that the taxpayer intended to evade the tax under RCW 82.32.090(5). The Audit Division properly added the penalty of 50% of the additional tax.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

---

[3] The Court was considering subsection 145(b) of the Revenue Act of 1936, 49 Stat. 1648, 1703, which provided:

> 'Any person required under this title (chapter) to collect, account for, and pay over any tax imposed by this title (chapter), who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title (chapter) or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.'

DATED this 30th day of January, 1998.