

Cite as 6 WTD 27 (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. 88-220
)	
)	
)	Registration No. . . .
. . . )	Tax Assessment Nos. . . .
.	
)	
)	

[1] **RULE 228, RCW 82.32.090 AND RCW 82.32.105:** PENALTY -- WAIVER -- UNREGISTERED TAXPAYER -- UNAWARE OF RELOCATION OF EMPLOYEE -- CIRCUMSTANCE BEYOND CONTROL OF TAXPAYER. Taxpayer's unawareness that an employee had been relocated to Washington to solicit sales in Washington, which required registration and tax liability consequences, is not a circumstance beyond its control to justify waiver of late payment penalty mandated by statute.

[2] **RCW 82.32.050:** EVASION PENALTY -- INTENT TO EVADE TAX -- KNOWLEDGE OF TAX CONSEQUENCES -- UNAWARE OF RELOCATION OF EMPLOYEE. To sustain the fifty percent tax evasion penalty, there must be a finding that the taxpayer intended to evade the tax due. Where the out-of-state taxpayer had knowledge of Washington's excise tax laws but was unaware that an employee had been relocated to Washington to solicit sales in Washington giving rise to tax consequences, it cannot be said that there was an intent on the part of the taxpayer to evade the tax due.

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:

Petition for waiver of twenty percent late payment penalty and fifty percent tax evasion penalty on taxes due during a period of time when the taxpayer was not registered.

FACTS AND ISSUES:

Krebs, A.L.J. -- [The taxpayer], headquartered in . . . , Pennsylvania, manufactures and sells aerospace and industrial fasteners. The taxpayer has plants in . . . , California; . . . , Pennsylvania; and . . . , Ohio. The taxpayer has one salesperson who moved into the state of Washington in September 1980 and who solicits sales in Washington as a resident employee.

In June 1985, the Department's auditor first contacted the taxpayer, who was not registered with the Department, with a letter requesting that a Business Activities Statement be completed and returned. After a second request made by the Department on February 14, 1986, the taxpayer responded with a completed Business Activities Statement. In April 1986, the Department requested the taxpayer to register and furnish an annual schedule of its taxable Washington sales for the period commencing January 1, 1979 through the end of the most recent full calendar quarter.

By completed Application for Certificate of Registration dated May 13, 1986, the taxpayer registered with the Department.

Based upon the taxpayer's report dated May 13, 1986 as to its taxable sales (subject to future audit), the Department issued Tax Assessment No. . . . on August 12, 1986 for the tax period of September 1, 1980 through December 31, 1981 asserting excise tax liability in the amount of \$ X, interest due in the amount of \$ X, and late payment penalty (20% of the tax) plus evasion penalty (50% of tax) in the amount of \$ X for a total sum of \$ X. The taxpayer made payment of \$ X on September 9, 1986 against this assessment and \$ X remains due. The Department also issued Tax Assessment No. . . . on August 28, 1986 for the tax period of January 1, 1982 through March 31, 1986 asserting excise tax liability in the amount of \$ X, interest due in the amount of \$ X, and late payment penalty (20% of the tax) plus evasion penalty (50% of the tax) in the amount of \$ X for a total sum of \$ X. The taxpayer made

payment of \$ X on September 9, 1986 against this assessment and \$ X remains due.

The taxpayer requests relief from the penalties, \$ X and \$ X in the total amount of \$ X for the following reasons as stated in its petition:

1. The Corporate Office Tax Department here in . . . , PA did not know, and was never informed by our Western Division plant in California that they had moved one of their sales persons from California to the state of Washington. In fact, we did not learn of this transfer until we received your Questionnaire of Washington Business Activities early in this year 1986. This may have been an oversight on the part of our company, but it substantiates the fact that we were not knowledgeable of any tax liability and we did not intentionally or willfully fail to register with the State of Washington.
2. Secondly, we were very cooperative and complied with all of your Department's request for information concerning our activities in Washington. Furthermore, we then complied and spent a great amount of time and effort to research our records and to compile all the sales into the State of Washington by categories from the year 1980 up through the 1st quarter of 1986.

This was all done on our part, and was in accordance with the request of your Revenue Auditor, . . . , per his letter of April 14, 1986.

3. Also, we feel that the Evasion Penalty Charge of 50%, plus the Delinquent Penalty Charge of 20% is simply outlandish.

The issue is whether the 20 percent late payment penalty and 50 percent tax evasion penalty can be waived under the circumstances in this case.

#### DISCUSSION:

1. Twenty Percent Late Payment Penalty.

RCW 82.32.290 provides in pertinent part:

(1)(a) It shall be unlawful:

(i) For any person to engage in business without have obtained a certificate of registration as provided in this chapter;

. . . .

(b) Any person violating any of the provisions of this subsection (1) shall be guilty of a gross misdemeanor in accordance with chapter 9A.20 RCW.

It is each individual's responsibility to be aware of any tax implications resulting from activities conducted within this state. Department of Revenue personnel are available to answer any inquiries pertaining to such matters and information is readily available. The taxes imposed by the Revenue Act are of a self-assessing nature and the burden is placed upon a person to correctly inform himself of his obligations under the Act.

Thus, the taxpayer should have filed the Application for Certificate of Registration in September 1980 and filed regular excise tax returns thereafter. Had this happened, the taxpayer would have avoided being delinquent and the resultant build-up of past due taxes and consequential penalties.

[1] The statute as recited below makes mandatory the assessment of penalties upon delinquent payment of taxes.

RCW 82.32.090 provides in pertinent part:

If payment of any tax due is not received by the department of revenue by the due date, there shall be assessed a penalty of five percent of the amount of the tax; and if the tax is not received within thirty days after the due date, there shall be assessed a total penalty of ten percent of the amount of the tax; and if the tax is not received within sixty days after the due date, there shall be assessed a total penalty of twenty percent of the amount of the tax. . . . (Emphasis supplied.)

In this case, the taxpayer has made payment of taxes due for the period from September 1, 1980 through March 31, 1986 on a date (September 9, 1986) more than sixty days after the due date for the period involved. Accordingly, the statutory (RCW 82.32.090) penalty of twenty percent applied.

The legislature, through its use of the word "shall" in RCW 82.32.090, has made the assessment of the penalty mandatory. The mere fact of nonpayment within a specified period of payment requires the penalty provisions of RCW 82.32.090 to be applied.

As an administrative agency the Department of Revenue is given no discretionary authority to waive or cancel penalties. The only authority to waive or cancel penalties is found in RCW 82.32.105 which in pertinent part provides:

If the department of revenue finds that the payment by a taxpayer of a tax less than that properly due or the failure of a taxpayer to pay any tax by the due date was the result of circumstances beyond the control of the taxpayer, the department of revenue shall waive or cancel any interest or penalties imposed under this chapter with respect to such tax. The department of revenue shall prescribe rules for the waiver or cancellation of interest or penalties imposed by this chapter. (Emphasis supplied.)

Administrative Rule WAC 458-20-228 (Rule 228), . . . , states the only seven situations under which a cancellation of penalties will be considered by the Department. None of the seven situations apply to the taxpayer. Essentially, the failure of a taxpayer to pay any tax by the due date must be the result of circumstances beyond the control of the taxpayer to warrant waiver or cancellation of the penalties. RCW 82.32.105.

It is unfortunate that the taxpayer was not timely aware of the transfer of its salesperson from California to the state of Washington which caused its failure to timely register. However, they are circumstances strictly within the control of the taxpayer and have been uniformly so held by the Department of Revenue.

For the reasons stated and the applicable law, we conclude that the assessed twenty percent late payment penalties were proper and cannot be waived.

## 2. Fifty Percent Tax Evasion Penalty.

[2] RCW 82.32.050, in pertinent part, 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. (Emphasis supplied.)

The Department assessed the tax evasion penalty in this case because it appeared rather obviously that the taxpayer was knowledgeable of Washington's excise tax laws as they apply to out-of-state firms selling goods to persons in Washington based on the taxpayer's statement in a letter dated May 13, 1986 that:

. . . we recommenced activities in the state of Washington when we moved our one salesman into the state in September 1980. Before that time we had pulled our salesperson out of Washington and had no activities in Washington that would subject us to the B&O tax. Please refer to the U.S. Supreme Court decision ( . . . ) in the case of . . . v. Washington Dept. of Revenue. [. . .].

The taxpayer furnished the above statement to explain why it had reported sales commencing September 1980 instead of sales commencing January 1, 1979 as requested by the Department in April 1986. It was not furnished to indicate that it was previously aware that an employee had been relocated to Washington in 1980.

In order to sustain the evasion penalty, there must be a finding that the taxpayer intended to evade the tax due. While there is abundant evidence that the taxpayer failed to meet its tax responsibilities to Washington, there is equally abundant evidence that when the taxpayer became aware and knowledgeable of its proper tax responsibilities it carried them out. In any event, mere failing to meet tax obligations is not the same as intention to evade the tax due.

When the taxpayer furnished a completed Business Activities Statement on February 27, 1986 at the Department's request, it furnished answers relevant to which the Department in its request letter of June 27, 1985 stated the following:

After the answers have been reviewed you will be given a written opinion concerning the taxable status of business conducted here.

The taxpayer was thereby alerted to possible tax consequences. If the taxpayer intended to evade tax liability, any false or

misleading answer would be the way to go. However, the taxpayer gave the following answers to questions:

1. Do you make sales in or into the state of Washington?

(answer) Yes

5. Are sales solicited on your behalf from Washington customers?

(answer) Yes

If Yes, by whom are sales solicited?

(answer) Resident Employee.

6. Sales are made to consumers and U.S. Government or its agencies.

Clearly, the taxpayer's answers demonstrated that it was subject to tax consequences in Washington. It is also clear that the taxpayer's forthright answers, subjecting it to tax consequences, do not exhibit any intent to evade tax liability.

The taxpayer's cooperation with the Department by registering and submitting the Business Activities Statement showing taxable activities is inconsistent with an intent to evade tax. While the taxpayer was knowledgeable of Washington's excise tax laws, it had no previous knowledge that its Western Division plant in California had moved one of its salespersons from California into Washington. There is no evidence to the contrary.

"Intent" is defined in Black's Law Dictionary as follows:

Design, resolve, or determination with which person acts. Witters v. United States, 106 F.2d 837, 840, 70 App.D.C. 316, 125 A.L.R. 1031; being a state of mind, is rarely susceptible of direct proof, but must ordinarily be inferred from the facts. State v. Walker, 109 W.Va. 351, 154 S. E. 866, 867. It presupposes knowledge. Reinhard v. Lawrence Warehouse Co., 41 Cal.App.2d 741, 107 P.2d 501, 504.

In this case, there was an absence of design, resolve and determination on the part of the taxpayer to evade the tax. We conclude that the element of "an intent to evade the tax" is lacking. Accordingly, the evasion penalty is rescinded.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part as indicated below.

1. Twenty Percent Late Payment Penalty. The taxpayer's petition is denied.

2. Fifty Percent Tax Evasion Penalty. The taxpayer's petition is granted. The tax evasion penalty is rescinded.

DATED this 20th day of May 1988.