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

In the Matter of the Petition for Correction of Assessment	)	D E T E R M I N A T I O N
	)	No. 88-373
. . .	)	Registration No. . . .
	)	Document No. . . .
	)	Warrant No. . . .

[1] **RULE 107, RULE 170, RCW 82.32.070 and RCW 82.08.050:** RETAIL SALES TAX -- RECORDS -- SEPARATELY STATED -- PRESUMPTION. Retail sales taxes paid to a builder must have been separately stated on the invoice, and the invoice be made available to the Department, before a determination can be made that the tax has been paid. Otherwise, under the provisions of RCW 82.32.070 and 82.08.050, it is conclusively presumed that the tax has not been paid.

[2] **RULE 228 and RCW 82.32.090:** PENALTIES -- WARRANT -- ACCESS TO RECORDS. If a warrant is issued by the Department, there shall be assessed a five percent warrant penalty, unless the nonpayment leading to the warrant was caused by circumstance outlined in WAC 458-20-228. A partner's lack of access to the taxpayer-partnership records is not such a circumstance so as to excuse the taxpayer-partnership.

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:

Appeal concerning the assessment of use tax and penalties on the construction of an apartment complex on which there are no records that retail sales tax was paid.

FACTS:

Burroughs, A.L.J. -- As a result of an audit covering the period from February 1, 1986 to March 31, 1988, the taxpayer was assessed $ . . . in use tax and $ . . . in interest, for a total due of $ . . . . Tax warrant number . . . was issued on July 18, 1988 in the amount of $ . . . , which amount included the five percent warrant penalty and interest.

The taxpayer is a general partnership consisting of three partners: [A, Inc.] (45% interest), [B, an individual] (45% interest), and [C, an individual] (10% interest). The partnership was formed to develop certain real estate - in particular the apartment projects referred to as [the first project], [the second project], and [the third project]. The use taxes assessed were on the [third project].

The [third] project was developed by the taxpayer. The contractor was [D], a corporation wholly-owned by [B]. Because of charges by [A] et al, of a breach of fiduciary responsibility on the part of [B], a receiver has been appointed by the court for this and another project in order that a partnership accounting can be made, construction progress evaluated, construction completed, the units rented, and the projects sold. The taxpayer - through the court-appointed receiver - has, to date, not been able to document any sales tax paid on the project by the taxpayer. Thus, use tax has been assessed on the total amounts paid on the project.

[E], who controls [A], during a hearing on July 22, 1988 acknowledged that use tax might be due on the [third] project, but argued that the situation was such that his corporation - as a general partner - should not be liable for any such taxes which the partnership might owe. He explained that, although the prime contractor was originally to be [F] (a corporation also essentially controlled by him), and the subcontractor for the actual construction was to be [G], his partner [B] refused to recognize either of these contracts and established his own wholly-owned corporation - [D] - as the sole contractor. Copies of the contract with [D] have not been provided to the Department; information regarding amounts received on the contract as of March 31, 1988 has been obtained from the court-appointed receiver.

[E] emphasized that in the course of these events during construction of the project, [B], through his corporation [D], kept all the books and records and bank accounts, and then denied that he was a partner at all on the [third] project. [E] thus alleged that [A] completely lost control of not only the project, but also the partnership records, and thus should not be liable for taxes or penalties due. The auditor, in the course of her audit, coordinated with both the court-appointed receiver and his accountant, both of whom indicated that there were no partnership records indicating that sales tax had been paid to [D] as a separately-stated line item.

TAXPAYER'S EXCEPTIONS:

The petition dated August 18, 1988 - written on behalf of [E] and [A] - appeals the assessment on the taxpayer-partnership as a whole, and particularly the assessments on [E] personally and on his corporation [A]. Because [E] has not been personally assessed for taxes due on the [third] project, that portion of the appeal will be disregarded.

The petition argues that the taxpayer-partnership has paid [D] the sales tax owing. No evidence supporting this claim, however, has been submitted, and [E] and his attorney testified on July 22, 1988 on behalf of [A] that they do not have access to the taxpayer-partnership's books and records. In light of this fact, we see no purpose in holding a hearing before an Administrative Law Judge.
At the hearing on July 22, 1988, it was additionally argued by [E], on behalf of [A], that the penalties should not apply since [B] and his corporation had been in sole possession of the books and records concerning the development.

DISCUSSION:

[1] RCW 82.32.070 provides:

> Every person liable for any fee or tax imposed by chapters 82.04 through 82.27 RCW shall keep and preserve, for a period of five years, suitable records as may be necessary to determine the amount of any tax for which he may be liable, which records shall include copies of all federal income tax and state tax returns and reports made by him. All his books, records, and invoices shall be open for examination at any time by the department of revenue. . . . any person who fails to comply with the requirements of this section shall be forever barred from questioning, in any court action or proceedings, the correctness of any assessment of taxes made by the department of revenue based upon any period for which such books, records, and invoices have not been so kept and preserved. (Emphasis added.)

Thus, the burden is clearly on the taxpayer to provide records to the Department documenting that taxes have been properly paid. It is not the Department's burden to prove that they have not been so paid.

RCW 82.08.050 further provides in pertinent part:

> . . . The tax required by this chapter to be collected by the seller shall be stated separately from the selling price in any sales invoice or other instrument of sale. For purposes of determining the tax due from the buyer to the seller and from the seller to the department it shall

> be conclusively presumed that the selling price quoted in any price list, sales document, contract or other agreement between the parties does not include the tax imposed by this chapter . . . (Emphasis added.)

Thus, retail sales taxes paid to a builder must have been separately stated on the invoice, and the invoice be made available to the Department, before a determination can be made that the tax has been paid. Otherwise, it is conclusively presumed that the tax has not been paid.

[E] and his attorney, on behalf of [A], have already testified that they have had no access to the partnership's books and records. Neither the court-appointed receiver or his accountant have in their possession any records which would support the payment of sales tax to [D] as a separately-stated line item.

Although [D] itself may have paid some of its suppliers retail sales tax (an audit of this entity has been scheduled), it is clear that any refund due [D] through an erroneous payments of its own retail sales tax burden would not enure to the taxpayer-partnership, even though the partnership may have actually "covered" or paid those costs in nonitemized payments. Any retail sales tax burden which was properly payable by [D] - as contractor - in the course of the project would likewise not apply towards the taxpayer's burden.

[2] As to the five percent warrant penalty, Washington's Revenue Act in RCW 82.32.090 provides as follows:

> If a warrant be issued by the department of revenue for the collection of taxes, increases, and penalties, there shall be added thereto a penalty of five percent of the amount of the tax . . .

As an administrative agency, the Department does not have discretion to change the law. The only authority to cancel such a penalty is found in RCW 82.32.105. That statute allows the Department to waive or cancel interest or penalties if the failure of a taxpayer to pay any tax on the due date was the result of circumstances beyond the control of the taxpayer. The statute also requires the Department to prescribe rules for the waiver or cancellation of interest and penalties.

The administrative rule which implements the above law is found in WAC 458-20-228 (Rule 228, . . .). Rule 228 lists the situations which are clearly stated as the only circumstances under which a cancellation of penalties will be considered by the Department.

[E] has argued on behalf of both himself and his corporation [A] (one of the partners in the taxpayer-partnership) that only [B] had access to the records in the course of the development, and that

therefore the penalties assessed should be excused. One partner's lack of access to the partnership records, however, is not such a circumstance as to excuse the partnership from penalties.

We thus hold, because there has been no evidence provided that retail sales tax was paid by the taxpayer on the construction of the [third] project, that use tax is due. Because a warrant was issued, and because none of the situations for waiver of penalties in Rule 228 apply, the imposition of the warrant penalty is likewise upheld.

DECISION AND DISPOSITION:

The taxpayer's petition for correction of assessment and warrant is denied.

DATED this 29th day of September 1988.