

Cite as Det. No. 14-0121, 33 WTD 405 (2014)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition for Correction of ) DETERMINATION  
Assessment of )  
 ) No. 14-0121  
... )  
 ) Registration No. . . .  
)

[1] RULE 228; RCW 82.32.090: RETAIL SALES TAX – EVASION PENALTY – UNREMITTED RETAIL SALES TAX – TAXPAYER’S INTENT – DEPARTMENT’S BURDEN – CLEAR, COGENT, AND CONVINCING EVIDENCE. An audit of the taxpayer’s business records showed that the taxpayer charged and collected retail sales tax over a five-year period. Taxpayer, however, did not remit the collected retail sales tax to the Department. Audit added the evasion penalty to the taxpayer’s assessment. Appeals affirmed Audit’s decision, finding that the facts of the case supported the conclusion that the taxpayer had the requisite intent to evade a 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.

Valentine, A.L.J. – [Taxpayer] appeals the assessment of the evasion penalty assessed as a result of the Washington Department of Revenue’s (Department) audit of his Washington business activity. Taxpayer’s petition is denied.<sup>1</sup>

ISSUE

When a taxpayer charges and collects retail sales tax, but fails to register with the Department and does not remit the tax, is the Department authorized to assess the evasion penalty pursuant to RCW 82.32.090 and WAC 458-20-228?

FINDINGS OF FACT

Taxpayer is a sole proprietor based [outside of Washington]. Taxpayer’s Washington business activity consists of upholstering restaurant booths and chairs. Taxpayer purchased the existing

<sup>1</sup> Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

business in 2008. Although Taxpayer had Washington customers during the audit period, Taxpayer did not register the business with the state of Washington prior to the Department's instigation of contact.

The Department's Audit Division (Audit) audited Taxpayer's Washington business activity for the period of January 1, 2009, through March 31, 2013. Audit assessed Taxpayer a total of \$... as a result of the audit. The total amount assessed includes retailing business and occupation tax, retail sales tax, interest, and multiple penalties, including the evasion penalty in the amount of \$. . .

Audit imposed the evasion penalty because Taxpayer collected, but did not remit, \$. . . in retail sales tax from its Washington customers.<sup>2</sup> Audit reports that the \$. . . in collected retail sales tax was separately stated and collected on a combined 187 invoices.<sup>3</sup>

Taxpayer explains on his appeal petition that he accepts the audit results and appeals the evasion penalty only. Taxpayer contends that he was not in charge of the bookkeeping duties during the audit period. Taxpayer reports that he now has an accountant helping him fulfill his reporting and remitting obligations to the state of Washington. Taxpayer also asks for extra time to pay the final amount owed.

#### ANALYSIS

RCW 82.32.090(7) describes the circumstances under which the Department is required to assess the evasion penalty: "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 *must* be added."

(Emphasis added.)

WAC 458-20-228(5)(f) outlines the elements of intentional evasion and establishes the Department's standard of proof:

**Evasion.** If the department finds that all or any part of the deficiency resulted from an intent to evade the tax due, a penalty of fifty percent of the additional tax found to be due will be added. RCW 82.32.090(6). The evasion penalty is imposed when a taxpayer knows a tax liability is due but attempts to escape detection or payment of the tax liability through deceit, fraud, or other intentional wrongdoing. An intent to evade does not exist where a deficiency is the result of an honest mistake, miscommunication, or the lack of knowledge regarding proper accounting methods. The department has the burden of showing the existence of an intent to evade a tax liability through clear, cogent and convincing evidence.

<sup>2</sup>Audit reports Taxpayer charged its Washington customers retail sales tax of 8 percent, which, according to Audit, is close to the correct rate for each Washington location where work was performed.

<sup>3</sup>Audit obtained this information from Taxpayer's QuickBooks Transaction Report.

The “clear, cogent, and convincing evidence” standard of proof requires that “the trier of fact be convinced that the fact in issue is ‘highly probable.’”<sup>4</sup> WAC 458-20-228(5)(f)(ii)(B) lists the “willful failure of a seller to remit retail sales tax collected from customers to the department” as an action that establishes the intent to evade payment.

Thus, to sustain an assessment of the evasion penalty, the Department must show that it is highly probable that Taxpayer had both knowledge of the retail sales tax liability and the willful intent to withhold remittance.

For the following reasons, Audit determined Taxpayer had the requisite knowledge and intent:

1. Taxpayer operated a retail business in which he charged Washington customers retail sales tax of 8 percent, which is close to the correct rate for each Washington location where work was performed.
2. Taxpayer charged Washington customers \$7,300.00 in retail sales tax over a five-year period but never registered with the Department.
3. During the audit period, Taxpayer itemized retail sales tax on 187 invoices to Washington customers.
4. Taxpayer collected the itemized retail sales tax.
5. Taxpayer did not remit the collected retail sales tax to the Department.

We agree with Audit that these facts illustrate Taxpayer’s understanding of the requirement to collect retail sales tax from Washington customers. Even if legitimate confusion occurred over a different type of tax liability, Taxpayer clearly itemized and collected retail sales tax in the administration of his Washington business activity. Taxpayer did not, however, remit the collected retail sales tax to the Department. We determine there has been no reasonable explanation offered for Taxpayer’s failure to remit the collected retail sales tax to the Department. We do not find it reasonable or likely that a sole proprietor collected retail sales tax over a five year period, but did not understand the requirement to remit the collected tax to the Department.

Thus, we conclude the record shows that Taxpayer had knowledge of the retail sales tax liability, and there is clear, cogent, and convincing evidence of willful intent to withhold remittance. We therefore sustain the evasion penalty.

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<sup>4</sup> *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wash.2d 726, 853 P.2d 913 (1993) citing *In re Sego*, 82 Wash.2d 736, 513 P.2d 831 (1973).

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**DECISION AND DISPOSITION**

Taxpayer's petition is denied.

Dated this 1<sup>st</sup> day of April 2014.