Cite as Det. No. 13-0329, 33 WTD 156 (2014)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of Assessment of . . .	)	D E T E R M I N A T I O N No. 13-0329 Registration No. . . .

[1] RULE 228 – PENALTIES – EVASION – RETAIL SALES TAXES -- COLLECTED BUT NOT REMITTED. Evasion penalty is upheld when evidence indicated that a landscaper knowingly charged and collected retail sales taxes from its customers and did not report them as taxes due on its excise tax returns, but instead filed his taxes under the service and other activities classification of the B&O tax.

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.

Bauer, A.L.J. – A landscaping company objects to the imposition of the evasion penalty for its failure to remit retail sales taxes collected from its clients. We uphold the penalty.[1]

ISSUE

Under WAC 458-20-228 (Rule 228), did the Department validly assess an evasion penalty when the evidence indicated that a landscaper collected but did not remit retail sales tax to the Department?

FINDINGS OF FACT

The Audit Division (Audit) of the Department of Revenue (Department) conducted a compliance audit of . . . (Taxpayer) for the period July 1, 2012 through June 30, 2012 (audit period) to verify that Taxpayer was properly reporting its business activities on its excise tax returns.

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

During the audit period, Taxpayer provided landscape care and maintenance services, and installed trees, shrubs, plants, lawns, and gardens. When invoicing its clients, Taxpayer charged and collected taxes on the invoice amounts. Taxpayer, however, did not report its receipts under the retailing classification of the business and occupation (B&O) tax or remit the retail sales taxes it had invoiced and collected. Taxpayer instead reported under the service classification. Audit correctly advised Taxpayer that landscaping, under RCW 82.04.050, is a retail service.

Audit issued the above-referenced tax assessment on October 30, 2012, in which the following totals amounts were assessed:

$. . .	Small business Credit
. . .	Retail Sales Tax
. . .	Retailing B&O Tax
. . .	Service & Other Activities B&O Tax
. . .	Use Tax
. . .	Total Tax
. . .	50% Evasion Penalty
. . .	Interest
. . .	5% Substantial Underpayment Penalty
. . .	Total Due

On November 7, 2012, Taxpayer appealed the $. . . evasion penalty to the Appeals Division of the Department of Revenue. Taxpayer paid $. . . of the assessment on August 9, 2013, and closed its account with the Department on August 29, 2013.

ANALYSIS

Chapter 82.32 RCW governs the general administrative authority of the Department and defines the Department's authority with respect to the imposition and waiver of penalties. According to RCW 82.32.090(7),[2] a 50% evasion penalty must be added to a tax assessment if the Department finds that the deficiency resulted from an intent to evade the payment of the tax.

WAC 458-20-228(5)(f) (Rule 228(5)(f))[3] provides further guidance on the evasion penalty.

> 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

[2] RCW 82.32.090(7) 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 must be added."
[3] Effective April 23, 2010.

> 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.
>
> . . . (ii) What actions may establish an intent to evade? The following is a nonexclusive list of actions that are generally considered to establish an intent to evade a tax liability. This list should only be used as a general guide. A determination of whether an intent to evade exists may be ascertained only after a review of all the facts and circumstances.
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> . . . (B) The willful failure of a seller to remit retail sales taxes collected from customers to the department . . . [4]

Rule 228(5)(f) (emphasis added.) 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 two 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 determining intent, 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 does 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

[4] Rule 228(5)(e)(ii), as in effect 2/234/00 through 3/11/01, provided an identical example:

> (ii) The following is a nonexclusive list of actions that are generally considered to establish an intent to evade a tax liability. This list should only be used as a general guide. A determination of whether an intent to evade exists may be ascertained only after a review of all the facts and circumstances. . . . (B) The willful failure of a seller to remit retail sales taxes collected from customers to the department of revenue. . .

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. *See* Det. No. 90-314, 10 WTD 111 (1990); Det. No. 94-007, 14 WTD 174 (1995).

In this case, Taxpayer's invoices demonstrated that it charged and collected retail sales taxes. This was clear evidence that Taxpayer knew of the retail sales tax imposed on the sales price of his work. Taxpayer, however, instead of reporting its work under the retailing classification of the B&O tax and remitting the collected retail sales tax, reported it under the service and other activities classification, a classification that does not require a retail sales tax charge or an entry of retail sales taxes on the Excise Tax return. Based on this evidence, we find that Audit established the two required elements of evasion – knowledge and intent -- for the assessment of the evasion penalty.

Once the penalty was assessed, it then becomes Taxpayer's burden to come forward with evidence of honest mistake, ignorance of the law, negligence, or some other fact which might rebut the Department's evidence. Taxpayer declares that it did not try to evade the taxes, but simply reported all of its receipts based on how its predecessor reported. Taxpayer's owner admits he was naïve and didn't look into the legalities, but merely obtained the client list and books and records kept by the Taxpayer's prior owner. Although Taxpayer had a separate accountant, the accountant did not file Taxpayer's quarterly taxes. Taxpayer's owner asserts that by reporting all of its receipts under the service and other activities tax classification on all amounts received -- including the collected retail sales taxes -- thought he was doing everything correctly.

In spite of Taxpayer's contentions to the contrary, the objective facts here show that Taxpayer knowingly charged and collected retail sales taxes, willfully retained the amounts so collected and consciously did not report them as taxes due when it filed its tax returns. We conclude these objective facts evidence a willful intent to evade payment of the tax to the Department. We therefore hold that Audit's imposition of the evasion penalty was appropriate.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 6th day of November 2013.