

Cite as Det. No. 91-141R, 12 WTD 323 (1991).

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

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| In the Matter of the Petition |) | <u>F I N A L</u> |
| for Correction of Assessment of |) | <u>D E T E R M I N A T I O N</u> |
| |) | |
| |) | No. 91-141R |
| |) | |
| . . . |) | Registration No. . . . |
| |) | . . ./Audit No. . . . |
| |) | |

[1] RULE 164 -- B&O TAX -- INSURANCE AGENT -- EMPLOYEE OR INDEPENDENT CONTRACTOR STATUS -- COMMISSION INCOME. Commission income earned by an insurance agent is taxable under the insurance agents and brokers tax classification unless the agent is a bona fide employee of the insurance company. The insurance agent failed to overcome presumption of Rule 164 that he is a B&O taxable independent contractor. According to the criteria of ETB 546, the agent is not an employee of an insurance company. Accord: Det. No. 86-279, 1 WTD 291 (1986) & ETB 546.04.164

[2] MISCELLANEOUS -- ESTOPPEL. The Department is not estopped from assessing the business and occupation tax on commission income earned by an insurance agent where the taxpayer's only contact with the Department was the filing of a questionnaire. An oversight by the Department that is recently discovered will not relieve taxpayer of its correct tax during the audit period now under consideration. The doctrine of estoppel will not be lightly invoked against the state to deprive it of the power to collect taxes. Kitsap-Mason Dairymen's Assoc. v. Tax Commission, 77 Wn.2d 812 (1970) cited. Accord: Det. No. 88-316, 6 WTD 299 (1988).

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:

Request for reconsideration of Determination 91-141 where business and occupation tax liability was found on the basis that insurance agent is an independent contractor and not an employee.

FACTS AND ISSUES:

Roys, Sr. A.L.J. -- [Taxpayer] is an insurance agent. In December 1990, the Department of Revenue (Department) assessed the taxpayer B & O tax under the insurance agent and broker tax classification for 1986 through 1990. In January 1991, the taxpayer petitioned the Department for administrative review of the assessment contending that his employment with . . . Insurance Company (. . .) was that of employee, as opposed to an independent contractor, during the assessment period.

At the time of the original determination the taxpayer provided a copy of his contract with [the insurance company]. The contract with [the insurance company] specifically stated that "it shall not be construed to and does not create the relationship of employee and employer between you and [the insurance company]..." The taxpayer also provided copies of his IRS W-2 forms for the years at question. Those W-2 forms showed that Social Security tax was withheld from the taxpayer's commissions, while Federal income tax was not. Non-employee compensation received by the taxpayer from [the insurance company] during the period of the assessment was memorialized by IRS form 1099.

Based on the contractual relationship and the fact that [the insurance company] did not withhold Federal income tax, the taxpayer was found to be an independent contractor and subject to business and occupation tax.

[In June 1991] a petition for redetermination was filed. The taxpayer protested the decision that he was not an exempt employee for the following reasons:

- 1) [Insurance company] failed to withhold income tax is not determinative. The taxpayer has no ability to control the conduct of [the insurance company].
- 2) [Insurance company's] contract which states an agent is an independent contractor is not determinative. The facts and circumstances surrounding the relationship must be examined so that form is not elevated over substance.
- 3) [Insurance company] provides employee benefits. This supports the taxpayer's claim of employee status. Eligibility for pensions and other fringe benefits are emoluments normally provided to individuals in employee status.

Second, the taxpayer argues that the Department should be estopped from collecting the tax. He stated that he remitted a questionnaire to the Department in 1983 that disclosed employment information. He contends that Department should have acted on the information if it questioned his employment status. The Department's inaction led him to believe that he was an employee exempt of tax liability.

The issues are: 1) whether the taxpayer is an employee or an independent contractor and 2) even if the taxpayer is found to be an independent agent whether the Department should be estopped from asserting the tax because of a "right to rely upon the treatment which he has received from the Department for over seven years following his full disclosure of his relationship."

DISCUSSION:

[1] The requirements necessary to establish employee status are found in WAC 458-20-164 (Rule 164) and ETB 546.04.164 (Excise Tax Bulletin). The taxpayer submitted an affidavit which explained his working relationship with . . . Insurance Company. [The Insurance Company], like other insurance companies, exercises quite a bit of control over his work. The taxpayer also receives benefits from the company, such as insurance and retirement benefits, which make his status with the company closer to that of an employee than the relationship that exists with many independent contractor relationships.

Nevertheless, we do not agree that the taxpayer has met the requirements set forth in Rule 164 and ETB 546. He was not treated as an employee for Federal income tax purposes and his contract gave him control of the day-to-day details of the business. Details of work include whether the agent has fixed hours of work and whether the agent is free to exercise independent judgment as to persons from whom he or she would solicit insurance.

The fact that . . . Insurance Company sets the rates, provides him with leads as to prospective customers and requires him to follow-up and report on the leads does not preclude a finding of independent contractor status. We are not aware of any insurance company that does not set the rates for insurance premiums. Most insurance agents who are "captive agents" consider their status to be more like an employee of the insurance company. That situation existed when the legislature set a special rate for insurance agents. RCW 82.04.260(14) states that the B&O tax applies "[u]pon every person engaging within this state as an insurance agent, insurance broker, or insurance solicitor licensed under chapter 48.17 RCW." The taxpayer is an insurance agent licensed under chapter 48.17.

Exemptions to tax are narrowly construed. We do not believe the taxpayer met the exemption provided for "employees" in RCW 82.04.360. Accordingly, the taxpayer's commission income was subject to tax during the audit period.

[2] Nor do we find that the Department is estopped from assessing tax that is properly due because it did not respond to the questionnaire submitted by the taxpayer. To create an estoppel, three elements must be present: (1) an admission, statement, or act inconsistent with the claim later asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act. Harbor Air Service, Inc. v. Board of Tax Appeals, 88 Wn.2d 359, 366-67 (1967).

The Court has stated that "[t]he doctrine of estoppel will not be lightly invoked against the state to deprive it of the power to collect taxes." Kitsap-Mason Dairymen's Association v. Tax Commission, 77 Wn.2d 812, 818 (1970). Relief based on estoppel, therefore, applies narrowly to a taxpayer who reasonably relied to his or her detriment on written correspondence from the Department. That situation did not happen in the present case, as the Department did not write the taxpayer informing him that he was exempt from B&O tax.

The Department did realize that some insurance agents were not registered because of the questionnaire that had been sent out in previous years. To encourage insurance agents to register, the Department sent a memo to unregistered insurance agents advising them that if they voluntarily registered between March 24 and June 1, 1989, the Department would only assess taxes and interest for the previous four years plus the current year. Insurance agents who failed to voluntarily register were assessed taxes, interest and penalties for a seven year period. In this case, the taxpayer's assessment did not go back for seven years and he was not assessed late payment penalties.

The taxpayer attached a copy of the questionnaire which he said he mailed to the department in 1983. Question number two asked, "Do you have any liability for the expenses or maintaining an office or place of business, or for overhead or for compensation of employees." His answer indicated that he did. Based on that answer, the taxpayer was "engaging in business" at the time he submitted the questionnaire. If the Department's failure to respond to the taxpayer was based on inadvertence or mistake, the Department is not estopped from issuing a tax assessment for a subsequent period. Kitsap-Mason Dairymen's Association v. Tax Commission, 77 Wn.2d at 818.

DECISION AND DISPOSITION:

The taxpayer's petition for reconsideration is denied.

This final determination is the final action of the Department of Revenue. You may pay the tax and petition for a refund in Thurston County Superior Court in accordance with RCW 82.32.180. In the alternative, you may file a petition with the Board of Tax Appeals (PO Box 40915, Olympia, Washington 98504-0915) pursuant to RCW 82.03.190. If you choose this alternative your petition must be filed with the Board within thirty (30) days of this final determination.

DATED this 12th day of August 1992.