

Cite as Det. No. 93-065R, 13 WTD 242 (1994).

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

In the Matter of the Petition	)	<u>D E T E R M I N A T I O N</u>
For Reconsideration of the	)	
Tax Assessment of	)	No. 93-065R
	)	
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .
	)	

[1] RULE 178; RCW 82.04.050(1)(a), 82.12.020: RETAIL SALES TAX -- USE TAX -- DIES -- INTERVENING USE. The taxpayer purchased and used dies to manufacture labels. The taxpayer "used" the dies to produce the labels before they were actually sold to the customer. Use tax found to be due, because the taxpayer's use of the dies before sale constituted intervening use.

[2] MISCELLANEOUS -- ESTOPPEL. Three elements must be present to create an estoppel: 1) an admission, statement, or act inconsistent with claim afterwards 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.

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:

The taxpayer has petitioned for a redetermination of Determination No. 93-065 which sustained an audit assessment of use tax on the purchase and use of dies that are later sold to customers.

## FACTS:

Lewis, A.L.J. -- This final determination incorporates by reference the facts, findings, discussion, and decision as stated in Determination No. 93-065.

The Department of Revenue (Department) issued [an assessment in November 1992], asserting tax liability and interest due . . . . The taxpayer protested \$ . . . of tax (plus related interest) assessed by Schedule IV (Use Tax On Consumable Items) of the audit report. [In February 1993] Det. No. 93-065 was issued. It upheld the protested tax and related interest and ordered payment of the audit assessment and extension interest . . . . The taxpayer filed a timely appeal for a reconsideration of whether use tax is due on the purchase and sale of dies that are later sold to customers.

The taxpayer manufactures and sells labels and printed items. Dies are used by the taxpayer in the production of the customers' orders. The taxpayer makes two arguments why use tax should not be assessed against the value of the specially ordered dies which are used to produce the customers' orders. First, the taxpayer contends that the specially ordered dies were sold to the customer when the order was written. Thus, since they belonged to the customer when they were used no use tax should be due from the taxpayer. Second, the previous auditor did not explain to the taxpayer that the dies must be billed before they are used to avoid use tax liability.

## ISSUES:

Taxpayer raises two issues:

- 1) Whether the specially ordered dies used by the taxpayer are exempt from use tax because they were purchased for resale and there was no "intervening use?"
- 2) Whether the Department is estopped from assessing use tax because of Department's incomplete instructions?

## DISCUSSION:

[1] In Det. No. 93-65 we found that use tax was correctly assessed on the value of the dies because the taxpayer put the dies to "intervening use" when they were used to produce the labels for the taxpayer's customers. Now, the taxpayer maintains that the use tax assessment was in error because the dies were really "sold" when the order was written and thus they belonged

to the customer, and not the taxpayer, at the time of their first use in Washington.

RCW 82.12.020 imposes the use tax upon:

...the privilege of using within this state as a consumer any article of tangible personal property...

RCW 82.04.050 defines "retail sale" as:

...every sale of tangible personal property... other than a sale to a person who (a) purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person.

(Emphasis added.)

Thus, the legislature clearly intended to allow an exemption in cases of "purchases for resale" only where there is no "intervening use." Excise Tax Bulletin 418.12.102.178.

There is no question that if the taxpayer is to remain in business it must recover its cost of producing the product it sells. Specially produced dies are a necessary tool required to produce the labels sold by the taxpayer and those costs must be recovered. The taxpayer has chosen to make a separate charge for this piece of equipment at the time the order is taken. The fact that the taxpayer details the cost of necessary piece of equipment at the time the order is taken does not alter the fact that the taxpayer makes substantial intervening use of the tool as a consumer prior to sale.

In summary, the taxpayer uses the dies as tools to produce its customers' orders. The taxpayer orders, purchases, and uses the dies for its own use. It is only after the order is produced that the taxpayer bills its customer for the goods and the dies used to produce the order. Accordingly, we find that there was intervening use by the taxpayer and the use tax was correctly assessed.

[2] The taxpayer also argues that the Department should be estopped from asserting the use tax because although the previous auditor told that taxpayer that they must bill for the dies to avoid imposition of both the use tax and the sales tax the previous auditor said nothing about the timing of the bill as being required before the invoice was prepared for the print order.

To create an estoppel, three elements must be present: 1) an admission, statement, or act inconsistent with the claim afterwards 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, 356-357 (1977).

The previous audit covered the period January 1983 through September 1986. Schedule IV of the audit report made an adjustment entitled - Use tax due on Consumable and Capital Assets. The Auditor's Detail of Differences and Instructions to Taxpayers explained the adjustment. The auditor stated in pertinent part:

If cutting dies are put to use prior to their sale, you incur a use tax liability on the full purchase price of the dies. [Taxpayer] is responsible for collection of retail sales tax unless the die is to be resold by your customer without intervening use.

If a specific die must be purchased in order to complete a job, and ownership and possession of the die transfers to your customer, you must charge your customer retail sales tax and invoice them prior to putting them to use. By doing this, you avoid use tax liability.

In this case, the taxpayer was not misled. The previous auditor gave accurate and clear instructions for future reporting. Contrary to the taxpayer's contention, the auditor did address the necessity of the taxpayer invoicing its customer for the die and charging sales tax prior to putting them to use if use tax liability was to be avoided. Because accurate written instructions were given to the taxpayer at the conclusion of the last audit, the taxpayer has not been misled and the Department will not be estopped from collecting tax that is due.

#### DECISION:

The taxpayer's petition 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, WA 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. Your further appeal, however, will not extend the due date for payment or stay the collection of the amounts due.

DATED this 29th day of June 1993.