

Cite as Det. No. 93-132, 13 WTD 271 (1994).

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

In the Matter of the Petition        )   D E T E R M I N A T I O N  
For Correction of Assessment of        )  
  )                       No. 93-132  
  )  
. . .                                    )   Registration No. . . .  
  )   FY . . . /Audit No. . . .

- [1] RULE 194: BUSINESS AND OCCUPATION TAX -- OUT-OF-STATE SERVICES -- APPORTIONMENT. A taxpayer that does not maintain a place of business outside Washington is entitled to apportion service income when the out-of-state services performed are more than incidental.
- [2] RCW 82.04.4297: BUSINESS AND OCCUPATION TAX -- DEDUCTION FOR COMPENSATION FROM PUBLIC ENTITIES FOR HEALTH & SOCIAL WELFARE SERVICES. Income received from public entities for providing ambulance service is subject to the B&O tax deduction of RCW 82.04.4297 when the ambulance service company is a qualifying "health or social welfare organization."
- [3] MISCELLANEOUS -- ESTOPPEL -- ORAL INSTRUCTIONS FROM DEPARTMENT. The Department cannot be estopped from asserting a tax liability because of claimed oral instructions and information given by a Departmental employee. The taxpayer must show that the Department made a statement or act that was contrary to its later position by more evidence than the word of the taxpayer.

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] petitions for correction of a Department of Revenue (Department) audit assessment that disallowed interstate deductions taken on income earned from transporting patients from Washington into Oregon; assessed retail sales tax on the sale of an ambulance; and, failed to allow tax credit for all bad debts.

#### FACTS:

Lewis, A.L.J. -- The taxpayer's business records were audited for the period January 1, 1988 through June 30, 1992. [The assessment was issued in November 1992 and] included tax and interest. The taxpayer requests abatement of . . . business and occupation (B&O) tax, retail sales tax, and use tax.

The taxpayer, a Washington corporation, and a qualified non-profit corporation for federal tax purposes, operates an ambulance service in . . . Washington. The company serves the residents of [the county] and the neighboring communities which include [areas in Oregon]. The ambulance service not only responds to emergency calls, but also transports stabilized patients to and from [a major Oregon city] for more specialized medical treatment.

#### ISSUES:

The taxpayer presents two legal issues and two factual issues for decision:

- 1) Whether the income derived from transporting patients from Washington into Oregon by ambulance is deductible for B&O tax?
- 2) Whether the Department may be barred from assessing additional tax if erroneous oral instructions were given to the taxpayer by a Department employee?
- 3) Whether retail sales tax should have been collected on the sale of an ambulance?
- 4) Whether the taxpayer should receive additional credit for bad debts?

#### DISCUSSION:

The first issue considered is whether the income derived from transporting patients by ambulance out-of-state is deductible for B&O tax?

Persons engaging in business activities in this state for which no special rate is provided are taxable under RCW 82.04.290, "other business or service activities." WAC 458-20-224 (Rule 24)

is the administrative rule that implements the statute. That rule specifically includes the activity of operating ambulance services.

[1] WAC 458-20-194 (Rule 194) provides:

[w]hen the business involves a transaction taxable under the classification service and other business activities, the tax does not apply upon any part of the gross income received for services incidentally rendered to persons in this state by a person who does not maintain a place of business in this state and who is not domiciled herein. However, the tax applies upon the income received for services incidentally rendered to persons outside this state by a person domiciled herein who does not maintain a place of business within the jurisdiction of the place of domicile of the person to whom the service is rendered.

(Emphasis added.)

Rule 194 thus emphasizes the necessity of maintaining an out-of-state place of business (a nexus contact) only when the services rendered out-of-state might otherwise be deemed "incidental," such that they do not provide taxing nexus to the out-of-state jurisdiction.

On the other hand, when a taxpayer's services performed out-of-state are more than "incidental," apportionment is appropriate regardless of the fact that no out-of-state place of business is maintained.

In this case, the taxpayer's out-of-state activities are fundamental to the ability to earn the revenues in question. The activities performed in Oregon are not incidental to the performance of the service and the revenue generating process. In order to earn the revenues, the ambulance must enter into Oregon and drive upon its roads to pick-up or deliver critically ill patients. Because the revenue earning process requires the ambulance to be physically present in Oregon, the activity performed in Oregon is fundamental to the revenue earning process. Accordingly, the taxpayer will be allowed to apportion its income earned from transporting patients across state lines.

WAC 458-20-194 (Rule 194) also provides instructions for calculating apportionment:

Where it is not practical to determine such apportionment by separate accounting methods, the taxpayer shall apportion to this state that proportion of total income which the cost of

doing business within this state bears to the total cost of doing business both within and without this state.

Apportionment by separate accounting method is preferred. In this case, the taxpayer has represented that the ambulance service revenues are derived from three areas: a base charge, mileage, and equipment and supply charges. The base charge can be allocated based on where the pick-up occurs, the mileage charges can be allocated based on where the miles are traveled, and the equipment and supply costs can be allocated based on where they are used.

[2] RCW 82.04.4297 provides a deduction for compensation from public entities for health or social welfare services:

[i]n computing a tax there may be deducted from the measure of tax amounts received from the United States or any instrumentality thereof or from the state of Washington or any municipal corporation or political subdivision thereof as compensation for, or to support, health or social welfare services rendered by a health or social welfare organization or by a municipal corporation or political subdivision, except deductions are not allowed under the employee benefit plan.

RCW 82.04.431 enumerates the conditions for the B&O tax deduction. First, the taxpayer must be a qualifying "health or social welfare organization."

For purposes of RCW 82.04.4297, the term "health or social welfare organization" means an organization, including any community action council, which renders health or social welfare services as defined in subsection (2) of this section, which is a not-for-profit corporation under chapter 24.03 RCW and which is managed by a governing board of not less than eight individuals none of whom is a paid employee of the organization or which is a corporation sole under chapter 24.12 RCW. Health or social welfare organization does not include a corporation providing professional services as authorized in chapter 18.100 RCW. In addition, a corporation in order to be exempt under RCW 82.04.4297 shall satisfy the following conditions:

(a) No part of its income may be paid directly or indirectly to its members, stockholders, officers, directors, or trustees except in the form of services rendered by the corporation in accordance with its purposes and bylaws;

(b) Salary or compensation paid to its officers and executives must be only for actual services rendered, and at

levels comparable to the salary or compensation of like positions within the public service of the state;

(c) Assets of the corporation must be irrevocably dedicated to the activities for which the exemption is granted and, on the liquidation, dissolution, or abandonment by the corporation, may not inure directly or indirectly to the benefit of any member or individual except a nonprofit organization, association, or corporation which also would be entitled to the exemption;

(d) The corporation must be duly licensed or certified where licensing or certification is required by law or regulation;

(e) The amounts received qualifying for exemption must be used for the activities for which the exemption is granted;

(f) Services must be available regardless of race, color, national origin, or ancestry; and

(g) The director of revenue shall have access to its books in order to determine whether the corporation is exempt from taxes within the intent of RCW 82.04.4297 and this section.

The second requirement for the deduction is that the qualifying organization provide one of the statute's nine enumerated activities. One of the enumerated activities is providing "health care services." The services provided by a fully equipped ambulance, staffed by trained and certified medics, qualifies as "health care service." The ambulance provides more than transportation services - it provides health care. It is only because of the special equipment and training of the personnel that the ambulance is used. Furthermore, ambulance companies and their personnel must be registered and licensed by the state and abide by the laws and regulations regarding Emergency Medical Services (EMS). If only transportation services were being provided, any vehicle would serve to transport the patient.

Accordingly, if the taxpayer can document that it meets the elements necessary for the deduction, credit will be allowed for income received from public entities.

[3] The second issue considered is whether the Department may be barred from assessing additional tax if erroneous oral instructions were given to the taxpayer by an employee of the Department. The taxpayer maintains that approximately four years ago it was advised by a Department employee that income derived from transporting patients into Washington was subject to B&O

tax. Additionally, the taxpayer was advised that income derived from transporting patients out-of-state was deductible.

Three elements must be present to create an estoppel: 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. The Board of Tax Appeals, 88 Wn.2d 359, 366-367, 560 P.2d 1145 (1977).

Excise Tax Bulletin 419.32.99 states the Department's position that oral instructions or interpretations by employees of the Department are not binding. It states that the Department "cannot give consideration to claimed misinformation resulting from telephone conversations or personal consultations with a Department employee." The reason for this is that there is no record of the facts given to the employee; there is no record of the instructions given by the employee; and there is no evidence that the taxpayer completely understood what the employee told him.

This ETB has been affirmed by the Board of Tax Appeals in Professional Promotion Services, Inc. v. Department of Rev., Docket No. 36912 (BTA 1990).

In that case, the Department argued that to prove estoppel, a taxpayer must show a statement "inconsistent with a claim later asserted" by "evidence greater than testimony of the allegedly wronged taxpayer as to his or her recollection of a conversation with a Department employee." PPS at 7.

In this case, even if we accept that the taxpayer did speak with a Department employee, the relief requested cannot be granted because the taxpayer has not proven the elements necessary for estoppel. Nothing has been presented to indicate what information the taxpayer gave to the Department employee as a basis in advising the taxpayer of its liability. We do not know if the information given was accurate or inaccurate. We do not know if the information received was understood or misinterpreted. Likewise, we do not know whether the taxpayer understood the Department's instruction or, if understood, whether they were followed.

Excise Tax Bulletin 310.32.101.230 (ETB 310) states:

[e]mployees of the Tax Commission are specially trained in administering the provisions of the revenue act and, in the absence of documentary proof to the contrary, the Commission

must presume that information given by them to the taxpayer is correct according to the statute.

Although we sympathize with the taxpayer's contention that the additional tax liability resulted from reporting the tax according to incorrect and incomplete instructions given by an employee of the Department:

[t]he doctrine of estoppel will not be lightly invoked against the state to deprive it of the power to collect taxes. The state cannot be estopped by unauthorized action, admissions or conduct of its officers.

Kitsap-Mason Dairymen's Association v. Washington State Tax Commission, 77 Wn.2d 812, 818, 467 P.2d 312 (1970).

The remaining issues, concerning the collection of sales tax on the sale of an ambulance and whether all available credit has been allowed for bad debts, are factual matters. Both these issues are remanded to the audit division for further fact finding. Credit will be allowed for any sales tax that the taxpayer can show was collected on the sale of the ambulance and remitted to the Department. Likewise, the audit division will review any additional records the taxpayer may provide and will allow additional tax credit if due.

DECISION:

The taxpayer's petition is denied regarding the availability of an interstate deduction for revenue earned. However, the taxpayer will be allowed to apportion its income. Additionally, the taxpayer will be able to take a deduction for income received from public entities if the taxpayer qualifies as a "health and social welfare organization" and thus meets the requirements of the B&O deduction provided by RCW 82.04.4297.

The taxpayer's petition regarding the tax due on the sale of the ambulance and the availability of bad debt deductions is remanded to the audit division for examination of additional documentation. Tax credit will be allowed consistent with the findings resulting from the review of the additional records.

DATED this 30th Day of April 1993.