Cite as Det. No. 93-300, 13 WTD 396 (1994).

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

In the Matter of the Petition For Refund of	)	D E T E R M I N A T I O N
	)	No. 93-300
. . .	)	Registration No. . . .
	)	. . . /Audit No. . . .

[1] EQUITABLE ESTOPPEL -- ELEMENTS -- IN GENERAL. The elements of equitable estoppel are: (1) an admission, statement, or act inconsistent with a later claim; (2) an act by another party in reliance on the admission, statement, or act; and (3) an injury to the other party resulting from the first party's contradiction or repudiation of the admission, statement, or act.

[2] EQUITABLE ESTOPPEL -- DEPARTMENT OF REVENUE -- ELEMENTS -- ADDITIONAL ELEMENTS. To assert equitable estoppel against the Department of Revenue, a party must show, in addition to the usual three elements, that equitable estoppel: (1) is necessary to prevent a manifest injustice and (2) will not impair the exercise of governmental powers.

[3] EQUITABLE ESTOPPEL -- DEPARTMENT OF REVENUE -- PROOF -- BURDEN OF PROOF. Because application of the doctrine of equitable estoppel against the Department of Revenue is disfavored, a party seeking to invoke the doctrine has the burden of proving each of the five elements by clear, cogent and convincing evidence.

[4] EQUITABLE ESTOPPEL -- DEPARTMENT OF REVENUE -- PROOF -- STANDARD OF PROOF. Clear, cogent, and convincing evidence is that which establishes the fact in issue as "highly probable" or "positive and unequivocal."

[5] EQUITABLE ESTOPPEL -- DEPARTMENT OF REVENUE -- RELUCTANCE TO INVOKE. Although courts should be "most reluctant" to find the Department equitably estopped,

the law does not prevent application of the doctrine in appropriate cases.

[6] EQUITABLE ESTOPPEL -- DEPARTMENT OF REVENUE -- ELEMENTS -- INJURY -- CHANGE IN POSITION. For purposes of applying the doctrine of equitable estoppel against the Department of Revenue, the injury element is satisfied if there was a change in position by a taxpayer with limited resources in reasonable reliance on the Department's error when the Department had a duty to provide accurate information.

[7] EQUITABLE ESTOPPEL -- DEPARTMENT OF REVENUE -- ELEMENTS -- MANIFEST INJUSTICE -- FACTORS. For purposes of applying the doctrine of equitable estoppel against the Department, the manifest injustice element focuses on the impact on the particular parties involved. Among the factors that may be considered are: (1) the extent of the financial burden imposed in light of the parties' income and resources; (2) which party was at fault; (3) whether circumstances might have alerted the party seeking to assert equitable estoppel to the error; and (4) whether any reasonable inference can be drawn that the party seeking to assert equitable estoppel attempted to abuse a lawful tax provision.

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.

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NATURE OF ACTION:

Petition for refund of Hazardous Substance Tax paid on petroleum products purchased in Washington and exported [out of state] for use or sale as motor vehicle fuel.

FACTS:

Prather, A.L.J -- Taxpayer's books and records were audited by the Department of Revenue (Department) for the period January 1, 1989, through December 31, 1992, resulting in an assessment of Hazardous Substance Tax (HST) on receipts from sales of motor vehicle fuel purchased from refineries in Washington and sold to retail stores [out of state].

Taxpayer does not dispute the amount of the tax assessment itself. Rather, taxpayer claims an exemption from the HST based

upon an "Information and Instruction Pamphlet" (the pamphlet), which it received from the Department in September, 1989.[1] The pamphlet provided the following information regarding the deduction:

> HAZARDOUS SUBSTANCE TAX DEDUCTION (WAC 458-20-252)
>
> FUEL CARRIED OUT-OF-STATE
> Amounts received for petroleum products exported for use or sale as fuel outside this state.
>
> There are no other deductions for this classification.

(Emphasis added.)

Since taxpayer exported the motor vehicle fuel . . . "for use or sale as fuel outside this state," it believed it was entitled to the exemption. Taxpayer was not aware that Ch. 82.22 RCW, the statute granting the exemption, was repealed effective March 1, 1989. The Department, in its response to taxpayer's petition, acknowledged that the pamphlet was incorrect. The record before us indicates that the error was perpetuated in subsequent pamphlets but was corrected by the Department in the December 1990 pamphlet.

ISSUE:

Is the Department barred from assessing the Hazardous Substance Tax or audit interest by the doctrine of equitable estoppel?

DISCUSSION:

[1] Taxpayer raises an estoppel argument, although not advanced as such in either the petition or during the teleconference. In order to create an equitable estoppel against the Department, the burden is on the taxpayer to establish the following three elements: (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. Shafer v. State, 83 Wn.2d 618, 521 P.2d 736 (1984).

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[1] The pamphlet is published by the Department and is sent periodically to all registered taxpayers to assist them in preparing their returns. The pamphlet contained a notation that it had been revised effective August 1989.

[2] When a party seeks to assert equitable estoppel against the Department, that party must also show (1) that equitable estoppel is necessary to prevent a manifest injustice; and (2) that the exercise of governmental powers will not thereby be impaired. Finch v. Matthews, 74 Wn.2d 161, 443 P.2d 833 (1968).

[3] Because application of the doctrine of equitable estoppel against the Department is disfavored, a party seeking to invoke the doctrine has the burden of proving each of the five elements by clear, cogent, and convincing evidence. Chemical Bank v. Washington Public Power Supply System, 102 Wn.2d 874, 691 P.2d 524 (1984); Kramarevcky v. Department of Social & Health Services, 64 Wn.App. 14, 822 P.2d 1227 (1992).

[4] Clear, cogent, and convincing evidence is that which establishes the fact in issue as "highly probable" or "positive and unequivocal." Colonial Imports, Inc., v. Carlton Northwest, Inc., 121 Wn.2d 726, 853 P.2d 913 (1993).

[5] Where public revenues are involved, a general rule has been articulated that, at least in tax cases, courts should be "most reluctant" to find the Department equitably estopped. Harbor Air Service, Inc. v. Board of Tax Appeals, 88 Wn.2d 359, 560 P.2d 1145 (1977). However, the law does not prevent the application of equitable estoppel against the Department in appropriate cases. Kramarevcky, supra; See, e.g., Det. No. 89-77, 7 WTD 171 (1977).[2]

The Department prepared and distributed the pamphlet for the specific purpose of assisting taxpayer in preparing its returns. In so doing, the Department included incorrect written instructions regarding the availability of an exemption from the HST. The error was not corrected until December 1990. In reliance upon these instructions, taxpayer prepared and filed its

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[2]This view is consistent with RCW 82.32A.020, which states:

> The taxpayers of the state of Washington have:
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> . . .
>
> (2) the right to rely on specific, official written advice and written tax reporting instructions from the department of revenue to that taxpayer, and to have interest, penalties, and in some instances, tax deficiency assessments waived where the taxpayer has so relied to their proven detriment.

(Emphasis added.)

returns, unaware that the exemption had been repealed. On the basis of these facts, we are satisfied that taxpayer has established, at least with regard to its pre-December 1990, tax liability, the first two elements of equitable estoppel. However, taxpayer must establish all five elements in order to prevail. We find proof of the "injury" and "manifest injustice" requirements lacking.[3]

[6] In Kramarevcky, supra, a case in which former recipients of public assistance sought judicial review of an administrative decision permitting the Department of Social and Health Services to recoup overpayments of benefits, the court said:

> . . . in analyzing the injury requirement, we look to see if there was a change in position by a party reasonably relying on an agency's silence in the face of a duty to accurately inform the party invoking equitable estoppel. Despite DSHS' duty to inform [recipients] it seeks to require them to repay debts which they had no reasonable basis to anticipate and for which they made no provision.

Other than the auditor's assessment of statutory interest on the unpaid HST, there has been no showing by taxpayer of any injury as a result of the Department's action. If anything, taxpayer has enjoyed a windfall. The fact that taxpayer must now pay a tax which, by statute, it should have paid during the audit period, is not an injury sufficient to justify invoking the doctrine of equitable estoppel against the state, thereby relieving taxpayer of its obligation to pay the proper tax. Furthermore, taxpayer has not proven that its reliance upon the Department's initial error was justified after its receipt of the December 1990 pamphlet, when the error was corrected.

[7] Taxpayer has also failed to prove that application of the doctrine of equitable estoppel is necessary to avoid manifest injustice. Among those factors to be considered in determining whether the manifest injustice element has been proven are: (1) the extent of the financial burden imposed in light of the taxpayer's income and resources; (2) which party was at fault; and (3) whether circumstances might have alerted the party seeking to assert equitable estoppel to the error. Kramarevcky, supra.

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[3]Because we find taxpayer failed to establish the injury and manifest injustice elements of equitable estoppel, we do not reach the question of whether application of the doctrine in this case would result in an impairment of governmental functions.

Applying these criteria to the facts of this case, we find that no manifest injustice will result from upholding the assessment of HST. Although the Department was in error in issuing the September 1989 pamphlet, the error was corrected in December 1990. Thus, circumstances existed which should have alerted taxpayer to the error. Moreover, no evidence has been presented that payment of the tax would result in any sort of financial burden to taxpayer.

Having failed to prove by clear, cogent, and convincing evidence the existence of all five elements of equitable estoppel, taxpayer's petition as to the assessment of HST should be denied. We do, however, find that taxpayer is entitled to a cancellation of that portion of the interest assessment incurred through December 1990. WAC 458-20-228, which implements the directive of RCW 82.32A.020 regarding waiver or cancellation of interest, provides in pertinent part:

> (7) Waiver or cancellation of interest. The following situations will constitute circumstances under which a waiver or cancellation of interest upon assessments . . . will be considered by the department:
>
> (a) The failure to pay the tax prior to issuance of the assessment was the direct result of written instructions given the taxpayer by the department.

Since taxpayer would not have incurred any interest but for its reliance on the Department's erroneous written reporting guidelines, interest through December 31, 1990, should be cancelled.

DECISION AND DISPOSITION:

Taxpayer's petition is granted in part and denied in part. This matter shall be remanded to the Audit Division for processing consistent with this determination.

DATED this 23rd day of November, 1993.