Cite as Det. No. 13 WTD 170 (1993).

BEFORE THE INTERPRETATION AND 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. 93-016
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .

[1] RCW 82.08.0293 and RULE 244: RETAIL SALES TAX -- EXEMPTION -- FOOD PRODUCTS -- DRIED AND POWDERED HERBS SOLD IN CAPSULIZED FORM. The sales tax exemption does not apply to dried or powdered herbs used for perceived health benefits. The rule extends the exemption to "powdered spices and herbs" as well as to herbal extracts. Dietary supplements are preparations taken in addition to one's normal diet for health purposes and are not pure herbs sold for eating or for use in flavoring food.

This headnote is provided as a convenience for the reader and is not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .

DATE OF TELEPHONE CONFERENCE: . . .

NATURE OF ACTION:

Taxpayer, a health food store and distributor of capsulized herb preparations, petitions for correction of retail sales tax assessed on capsulized herb preparations.

FACTS AND ISSUES:

Adler, A.L.J. -- Taxpayer is a health-food store, which includes in its inventory dried and powdered herbs. The products are delivered in bulk, in glassine envelopes and in capsules. In all the protested cases, the products contain only the dried or

powdered herbs; no extraneous vitamins, minerals, or other additives are included.

The protested audit was conducted for the period January 1, 1987 through March 31, 1991. The auditor found the taxpayer had discontinued collection of sales tax on these products in 1990. The tax was assessed for 1990 and the first quarter of 1991. Taxpayer's president complains at length about the "delay" in informing him that his method was wrong, if it was wrong at all. He states he has received prompt calls from the Department in the past informing him of reporting mistakes shortly after the affected returns were filed. He claims that a delay of approximately 18 months between the time he started his new reporting method and when the Department sent him the assessment and explanation is "unacceptable."

He explained that he received advice from another store operator in the area after numerous comments from customers that the other store was not charging sales tax on the same type of products. He talked to the owner who said he was not charging sales tax and had been told this was acceptable by the Department of Revenue. Taxpayer's president then contends he called the Tacoma office and asked if these products were subject to sales tax; he states the employee said they were not and that he repeated the question several times for assurance. He does not have written confirmation from the Department about the call. Taxpayer's president states that only after these contacts did the business discontinue charging sales tax.

Sources for Latin names and some definitions of the products were The People's Herbal, by Michael A. Weiner, Ph.D. (GD/Perigee Books, 1984); The Healing Herbs, by Michael Castleman (Rodale Press); The Healing Foods, by Patricia Hausman and Judith Hurley (Rodale Press); and Webster's New Universal Unabridged Dictionary, Second Edition. The products in question, some provided as exhibits by the taxpayer and copies of labels from others provided as exhibits by the auditor, include the following:

1. Apple powder, made from apples. Two exhibits of the apple powder were submitted: one of powder sold in a glassine envelope and one of powder placed in clear capsules and then sold in glassine envelopes. Apples contain soluble fiber, believed or found to be helpful in controlling cholesterol levels, diabetes, constipation, diarrhea, cancer, and other maladies. As its exhibits, taxpayer submitted various apple forms to show that all but the capsulized apple powder were tax exempt. The exhibits included an apple, two kinds of apple sauces, three kinds of apple juices and the two powdered forms. The apple powder was

not one on which tax was assessed by the auditor and is not being discussed in this Determination.

The following items are sold in bottles and all carry the notation "Guaranteed Pure Herb Food" or "100% Pure Herb Food". Some or all of these products are sold as combinations for weight loss or control and waste elimination:

2. Psyllium Musk. This is sold both in bulk and in capsules containing 500 mg. of blond psyllium musk made from the seeds of Plantago psyllium. Taxpayer's president claims this is one of the "most generic, nothing foods" available, because it has no calories or carbohydrates. It "doesn't do anything for the body besides add some fiber and a little bulk," which acts as a "lubricator" in moving waste through the body more easily.

3. Butternut blend. These capsules contain 430 mg. of butternut tree bark, rhubarb root, cascara sagrada bark, ginger, Irish moss and fennel. This product is used in the same manner as is prune juice.

4. Passion flower. These capsules contain 330 mg. per capsule of passion flower, which is any of the plants of the genus Passiflora, which contain various colored flowers and yellow fruit. Taxpayer's president states it is used to reduce tensions and stresses which impact the body and can result in constipation.

5. Chickweed. These capsules contain 350 mg. per capsule of chickweed or Stellaria Media, which The People's Herbal states is used as an "alterative" or "medicine that alters the process of nutrition and excretion, restoring normal body functions."

6. Echinachea. These capsules contain 350 mg. of the root of the Echinachea pallida, which is also used as an alterative.

Taxpayer's president contends that if these products are taxable, all foods should be, especially if the state is experiencing a budget shortfall.

Further, he states that the powdered herbs are being taxed but herbal extracts are not. He argues that the herbs are first powdered and then mixed with other ingredients to create the extracts. He reasons that, since the powder stage comes first, the herb in this form should be considered an even purer, less-adulterated product than the extract. He concludes the reason extracts are exempt is that the economic impact is smaller, since extracts represent about 5% of such products sold, while powdered or dried herbs represent about 95%.

DISCUSSION:

[1] RCW 82.08.0293 provides, in part:

> "Food products" include cereals and cereal products, oleomargarine, meat and meat products including livestock sold for personal consumption, fish and fish products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, spices and salt, sugar and sugar products, coffee and coffee substitutes, tea, cocoa and cocoa products.
>
> . . .
>
> "Food products" do not include medicines and preparations in liquid, powdered, granular, tablet, capsule, lozenge, and pill form sold as dietary supplements or adjuncts.

Pursuant to RCW 82.32.300, the Department promulgated WAC 458-20-244 (Rule 244). It has the same force and effect as the law itself unless overturned by a court. It states, in part:

> (1) Introduction. . . . Under the changes in the law [Effective on June 1, 1988], the intent is to tax such product sales or exempt them from tax in a uniform and consistent manner so that the tax either applies or not equally for all sellers and buyers. Generally, it is the intent of the law, as amended, to provide the exemption for groceries and other unprepared food products with some specific exclusions. . . . It also explains special tax exemption provisions for food purchased with food stamps.
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> (2) Definitions. As used herein and for purposes of the sales tax and use tax exemptions, the following definitions apply:
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> (a) "Food products" means only substances, products, and byproducts sold for use as food or drink by humans. . . . The term includes, but is not limited to, the following items: . . . Spices and herbs . . .
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> (b) "Nonfood products" means certain substances which may be sold at food and grocery stores and which may be ingested by humans but which are not treated as food for purposes of the tax exemptions. Tax exempt food products do not include any of the following nonfood products: . . . Dietary supplements or adjuncts as defined below . . . Tonics, vitamins . . .

> (c) "Dietary supplements or adjuncts" are medicines or preparations in liquid, powdered, granular, tablet, capsule, lozenge, or pill form taken in addition to natural or processed foods in order to meet special vitamin or mineral needs. Dietary supplements or adjuncts are not food products entitled to tax exemption. However, the term "dietary supplements or adjuncts" does not include products whose primary purpose is to provide the complete nutritional needs of persons who cannot ingest natural or processed foods. Also, this term does not include food in its raw or natural state which has been merely dried, frozen, liquified, fortified, or otherwise merely changed in form rather than content.
>
> Such substances as dried milk, powdered spices and herbs, brewers yeast, desiccated liver, powdered kelp, herbal extracts, and the like are not dietary supplements or adjuncts subject to tax.

(Emphasis supplied.)

In taxpayer's case, the products found to be subject to sales tax were pure herb preparations, either single ones or those packaged as herb combinations and sold for health purposes and not merely for seasoning or as food. No minerals, vitamins, or other products are mixed with them. The herbs are powdered and sold either in capsules, to make swallowing easier, or in envelopes.

Vitamins and minerals are subject to tax. RCW 82.08.0293 states that tax-exempt food products do not include "preparations in . . . powdered, . . . capsule . . . and pill form sold as dietary supplements or adjuncts." However, the statute also includes spices in its "nonexclusive" list of exempt food products.

Rule 244 expands on the statute to explain the application of the law. It has not been overturned by a court. There has been no amendment to RCW 82.08.0293 indicating that the legislature concluded that Rule 244 exceeded its original intent. Rule 244 clearly states, without qualification, that the exemption applies to "spices and herbs." The rule adds the extra comments:

> . . . this term ["dietary supplements or adjuncts"] does not include food in its raw or natural state which has been merely dried, frozen, liquified, fortified, or otherwise merely changed in form rather than content.
>
> Such substances as dried milk, powdered spices and herbs, brewers yeast, desiccated liver, powdered kelp,

> herbal extracts, and the like are not dietary supplements or adjuncts subject to tax.

(Emphasis and brackets supplied.)

In the taxpayer's case, the herbs are natural products, which humans can ingest. Nothing is being done to them other than drying them and turning them to powders for addition to food, addition to water as teas and other drinks, or powders put into capsulized form so they can be taken alone. They are not being changed in content, only in form, from their natural state. It is also true, as shown in The People's Herbal, The Healing Herbs, and The Healing Foods, that many popular spices and herbs, as do other foods, have perceived health benefits: thyme is used mainly as a seasoning, but it also has antiseptic, expectorant and bronchodilator effects and releases gas, making it effective for use in colic and flatulence; ginger can be used to relieve pain; garlic can lower blood pressure, relieve insect stings, and earaches; cayenne pepper is used as a laxative.
However, it is a rule of law that exemptions to a tax are narrowly construed; taxation is the rule and exemption is the exception. Budget Rent-a-Car vs. Department of Rev., 81 Wn.2d 171, 174 (1972). In this case, the legislature clearly did not extend the sales tax exemption to every item that could possibly be ingested safely by humans. Here, we are persuaded by the literature and taxpayer's comments that they are being used for their perceived health benefits, not as a source of food.

We note, finally, that the rule separates vitamins, medicines and preparations which are taken for special purposes from spices and herbs:

> (c) "Dietary supplements or adjuncts" are medicines or preparations in liquid, powdered, granular, tablet, capsule, lozenge, or pill form taken in addition to natural or processed foods in order to meet special vitamin or mineral needs.

We find the taxpayer's foods are "preparations" which are being taken in addition to natural or processed foods in order to meet supplement diets or provide for special needs. In this respect, the products sold by taxpayer do not differ from remedies, preparations and medicines sold to those seeking the type of treatment offered by persons practicing naturopathic medicine, which includes counseling in nutrition. The unappealed proposed decision which became final in John Bastyr College v. Department of Rev., Docket No. 37685 (Board of Tax Appeals, reported at 9 WTD 300-1 (1990)), supports this result. In that case, the Board found, as a matter of law, that the college was engaged in the business of operating a college to train students in the practice

of naturopathic medicine and nutrition. As a part of the training, the college operated a controlled dispensary. From this, the naturopaths and students prescribed medicines, preparations, and other remedies, some of which were available elsewhere and some of which are only available through licensed naturopaths. The college argued that its naturopaths and students were qualified as medical "practitioners" and all of their preparations were entitled to sales tax exemption as "prescription drugs." We believe these products, in addition to not qualifying as tax-exempt prescription drugs under RCW 82.08.0281, also do not qualify as tax-exempt food items. They are included in the definition of "nonfood products" under Rule 244:

> (b) "Nonfood products" means certain substances which may be sold at food and grocery stores and which may be ingested by humans but which are not treated as food for purposes of the tax exemptions. Tax exempt food products do not include any of the following nonfood products: . . . Dietary supplements or adjuncts as defined below . . . Tonics, vitamins . . .

We find that the legislature has made the decision to draw the tax-exemption line between preparations taken in addition to the foods eaten for flavor, nutrition, or survival. Because tax exemptions must be narrowly construed, we do not believe we have the authority to speak for the legislature in interpreting this statute more broadly, particularly where the legislature has not disturbed Rule 244, the administrative rule implementing its action.

As to taxpayer's assertion that the products are "space food," or a modern space-age type of food, we still must refer the company and others similarly situated to the legislature for relief. The legislature is deemed to know the consequences of its acts. When the sales tax exemption for food was reinstated, the legislature did not indicate an intention to extend the exemption to items which, while arguably edible, were not conventional food products. Despite several legislative sessions, no such expansion has been added to the law. If taxpayer and others believe the legislature should now expand the exemption to include this type of product, they can approach the legislature for an amendment to the statutes. Such action was undertaken recently by persons leasing oxygen concentrator equipment, previously denied the sales or use tax exemptions granted for liquid oxygen. They convinced the legislature that the equipment was merely a modern form of delivering the same product, and the statutes were amended to specifically include them in the exemptions. RCW 82.08.0283 and RCW 82.12.0277, amended during the 1991 legislative session.

Taxpayer also contends that the "delays" by the Department in informing it of the improper reporting and by the Appeals division in resolving this case are "unacceptable." Unfortunately, with over 275,000 businesses operating in this state and with under 200 auditors to cover them, it is impossible for every taxpayer to be informed of errors at the time it changes reporting methods. It is the obligation of taxpayers in this state to correctly inform themselves of the tax consequences of their activities.

Taxpayer states that he would not have changed his treatment of sales tax absent the information from his competitor and absent the oral instructions from the Department's employee. Excise Tax Bulletin 419.32.99 (ETB 419) addresses the issue of whether the oral instructions of its employees are binding upon the Department. That bulletin states that the Department

> gives consideration, to the extent of discretion vested in it by law, where it can be shown that failure of a taxpayer to report correctly was due to written instructions from the department or any of its authorized agents. The department cannot give consideration to claimed misinformation resulting from telephone or personal consultations with a department employee.
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> There are three reasons for this ruling:
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> (1) There is no record of the facts which might have been presented to the agent for his consideration.
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> (2) There is no record of instructions or information imparted by the agent, which may have been erroneous or incomplete.
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> (3) There is no evidence that such instructions were completely understood or followed by the taxpayer.

ETB 419 follows the Washington Supreme Court's holding in King County Employees' Assoc. v. State Employees' Retirement Board, 54 Wn.2d 1, 11-12 (1959):

> Estoppel will never be asserted to enforce a promise which is contrary to the statute and to the policy thereof.

We are without authority to grant relief from the assessment without written proof of such improper tax collection instructions given directly to the taxpayer from the Department.

Taxpayer is not entitled to rely on alleged oral information received from the Department or on the information received from the competitor. Additionally, although we sympathize with taxpayer's complaint that it obtained the information from a departmental employee as well as the competitor and that the failure to detect the error immediately resulted in hardship,

> the 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 v. Tax Commission, 77 Wn.2d. 812, 818 (1970).

As to taxpayer's argument that he received information from his competitor that the competitor is not charging sales tax on similar products and was told this was acceptable during a prior audit, we are unwilling to discuss with the taxpayer's representative any of the particulars of the competitor's dealings with the Department of Revenue. Our state's legislature has chosen to protect the privacy of every taxpayer in this state by enacting RCW 82.32.330, with its strong language. That statute provides, in pertinent part:

> Returns and tax information shall be confidential and privileged, and except as authorized by this section, neither the department of revenue nor any officer, employee, agent, or representative thereof nor any other person may disclose any return or tax information.

The statute contains several exceptions, permitting the Department to give out information to certain authorized persons. The representative does not qualify under any of the exceptions. RCW 82.32.330 further states:

> any person acquiring knowledge of any return or tax information in the course of his or her employment with the department of revenue . . . who discloses any such return or tax information to another person not entitled to knowledge of such return or tax information . . . shall upon conviction be punished by a fine . . . and, if the person guilty of such violation is an officer or employee of the state, such person shall forfeit such office or employment and shall be incapable of holding any public office or employment in this state for a period of two years thereafter.

(Brackets supplied.)

Even if we were inclined to argue the truth of taxpayer's assertions about the competitor's reporting methods, which we are not, we would not do so out of respect for the competitor's privacy and in compliance with the law prohibiting discussion of it with an unrelated party.

A correct assessment would not be overturned on grounds of selective enforcement. The responsibility for properly reporting taxes rests on persons in business, not on the state. In Frame Factory v. Dept. of Ecology, 21 Wn.App. 50 (1978), the Washington Court of Appeals rejected a claim that the defendant had engaged in "selective enforcement" against the plaintiff. The court noted that

> The Frame Factory does not allege that it was selected for "prosecution" on the basis of some prohibited grounds such as race, religion or other arbitrary classification. But it asserts there is no justifiable reason why it was selected for enforcement.

The court upheld the enforcement of the regulation against the Frame Factory. Here, the taxpayer does not allege that it was selected for assessment for any prohibited reason, and we do not think this was the case. The proposed assessment cannot be cancelled on grounds of selective enforcement.

Finally, taxpayer complains about the assessment of audit interest as well as extension interest for the period during which taxpayer pursued its appeal. Upon discovery of taxpayer's reporting error, the auditor correctly assessed tax and interest for the portion of the audit period during which the mistake occurred. Additionally, because the taxpayer elected to pursue an appeal without first paying the tax, it is required to pay interest for the period during which it elected to extend the date of its payment.
RCW 82.32.050 requires mandatory assessment of interest when taxes are not paid in a timely manner:

> the department shall assess . . . interest at the rate of nine percent per annum. . .If payment is not received by the department by the due date . . . the department shall add a penalty of ten percent of the amount of the additional tax found due.

The use of the word "shall" in the statute makes assessment of the interest mandatory. As an administrative agency, the Department of Revenue has no discretionary authority in this case to waive or cancel interest, unless, pursuant to RCW 82.32.105, the circumstances resulting in the mistake were beyond the

control of the taxpayer. Similarly, the assessment of extension interest during taxpayer's appeal was not caused by circumstances beyond the taxpayer's control, since it could have paid the tax to avoid assessment of interest and appealed for a refund. Instead, it elected to risk assessment of the interest in the case where, as here, it failed to prevail in the appeal.

Because we find that the tax is proper, we are without authority to waive audit interest based on taxpayer's contention that it received erroneous instructions regarding its tax liability or extension interest based on taxpayer's election not to pay the assessment prior to the due date.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 26th day of January 1993.