Cite as Det. No. 93-159, 13 WTD 316 (1994).

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

In the Matter of the Petition For Correction of Assessment of . . .) FY . . . /Audit No. . . .	D E T E R M I N A T I O N No. 93-159 Registration No. . . .

[1] RULE 170; RCW 82.04.050: CONSTRUCTION MANAGEMENT SERVICES -- SERVICES IN RESPECT TO CONSTRUCTION -- RETAIL SALE. A taxpayer who contracts to perform construction management services for a consumer, and who provides an on-site crew to supervise construction, who reviews the progress of construction, who has the authority to agree to on-site change orders on behalf of the owner and who performs some construction work itself on the same project, provides services in respect to construction, as well as actual construction itself, and as such makes a retail sale of those services to the consumer. Those services will be taxed at the retailing B&O rate and are subject to retail sales tax.

[2] RCW 82.08.050: RETAIL SALES TAX -- SELLER FAILS TO COLLECT THE RETAIL SALES TAX -- DEPARTMENT'S REMEDY. In case any seller fails to collect the tax herein imposed, regardless of the reason for the failure, the seller shall, nevertheless, be personally liable to the state for the amount of the tax.

[3] ETB 419.32.99: ESTOPPEL -- ORAL INSTRUCTIONS. In the absence of a writing containing instructions from the Department of Revenue to the taxpayer, or in the absence of sufficient corroborating information to substantiate oral instructions from the Department of Revenue to the taxpayer, the Department will not be estopped on the grounds that the taxpayer alleges it received erroneous oral instructions regarding its tax liability.

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:

A corporation appeals the assessment of retailing B&O and retail sales tax on construction management services.

FACTS AND ISSUES:

Gray, A.L.J. -- The taxpayer is a corporation engaged generally in the business of commercial construction. The Department of Revenue (Department) audited the taxpayer for the period January 1, 1988 through December 31, 1991. The Department assessed retail sales tax against the taxpayer for services as a prime contractor, [as well as a] retailing B&O tax, and gave credits to the taxpayer for previously reported B & O tax under the wholesaling classification, the service/other activities classification, and for use tax. The Department also imposed audit interest.

This appeal primarily involves uncollected and unremitted retail sales tax. The taxpayer did not collect the tax. The taxpayer alleges that its contracts with the buyers required the buyers to assume the ultimate tax liability, if any. The taxpayer said that it was a start-up company and that it tried to do the right thing. The president is currently the sole shareholder.

The Department compared the amounts that were recorded in the taxpayer's books and records with the amounts actually reported in its tax returns. The auditor reclassified amounts previously reported as "service" to "retail." The amounts came primarily from two construction management services contracts: [Project A and Project B]. The differences became the measure of the retail sales tax. The auditor said the taxpayer incorrectly reported construction income under the service and other classification, and that the income should have been reported under the retailing classification.

The taxpayer appealed, asking the Department to relieve it of the assessment and to pursue collection from some specifically identified taxpayers. The taxpayer said that it performed work as a construction manager on two projects for two taxpayers. The taxpayer performs mostly commercial general construction work. As a general contractor, it is ultimately responsible for construction by itself and by the subcontractors. It performs some carpentry, form and concrete work, general labor, and earthwork itself; otherwise, it subs out the contract. As a

construction manager, it provided administration and supervision services. On behalf of the owner, it bid out the project, acted as the owner's representative with the general and subcontractors, submitted its own bids for subcontract work, reviewed bids with the owner, awarded contracts, provided the on-site supervision for the project, reviewed and approved (or rejected) change orders on site on behalf of the owner. The taxpayer also provided some indirect equipment rentals; e.g., water, power, portable toilets.

The taxpayer alleged that at the time the contracts were written, there was uncertainty in the way the Department treated "service contracts." The taxpayer's president said that he telephoned the Department for clarification and was told that construction management services were a "gray area," and that the Department currently treated construction management services the same as architectural and engineering services. Although the taxpayer made notes at the time of the telephone conversation, he cannot now locate the notes. The telephone call was between the taxpayer and a Department employee in Olympia.

The taxpayer asked the Department to cancel the assessment against it and to pursue collection of the sales tax from the buyers. The taxpayer cited RCW 82.08.050 in support of this position.

DISCUSSION:

RCW 82.08.050(2) defines "retail sale" to include construction related services:

> The term "sale at retail" or "retail sale" shall include the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following: . . . (b) the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, and shall also include the sale of services or charges made for the clearing of land and the moving of earth excepting the mere leveling of land used in commercial farming or agriculture; . . . .

Amounts received for services are generally taxable to the service provider at the service B & O rate and are not subject to retail sales tax, as stated in WAC 458-20-138, "personal services rendered to others." Where the legislature has included services within the definition of "retail sale," the service provider is

taxed at the retailing B & O rate and must collect and remit retail sales tax. For example, in Determination No. 90-123, 11 WTD 045 (1990), the Department held that engineering services were "in respect to construction" and thus a retail sale when the taxpayer furnished a construction manager and oversaw daily construction, among other things.

We see no difference between that case and the instant case. The taxpayer supplied copies of the contracts for the two major projects that formed the basis for the bulk of the tax assessment. On [Project A], the taxpayer was identified as the "construction manager." The contract specified the contract manager's services, dividing them into three distinct phases: design phase, construction phase, and additional services.

In the design phase, the taxpayer agreed to provide services for consultation during project development, scheduling, project construction budget, coordination of contract documents, and construction planning. In the construction phase, the taxpayer agreed to provide services for project control (including monitoring work, maintaining a competent full-time staff at the project site for coordination and general direction, progress meetings with contractors, and determination of the adequacy of contractors' personnel and materials), provision of facilities, cost control, change orders, payments to contractors, permits and fees, owner's consultants, review of work and safety, document interpretation, shop drawings and samples, reports and project site documents, determination of substantial completion, final completion and delivery of warranties to the owner. The taxpayer also agreed to provide, for example, services related to investigation, appraisals or valuations of existing conditions, facilities or equipment, services for tenant or rental spaces, services related to construction performed by the owner, services made necessary by a contractor's default, etc.

On [Project B], the taxpayer agreed to provide the same services identified above . . . . This contract was signed [in May 1988]. [Later], the taxpayer also entered into a construction contract with the same owner and agreed to perform actual construction. In the latter contract, the taxpayer was also identified as the contract manager.

RCW 82.04.050 broadly defines retail sale to include "services in respect to construction." These construction management services are plainly related to actual construction activities. In WAC 458-20-170, the Department provides guidance to the general public on contractors' tax liability. In subsection (1)(e) of that rule, the Department defined the phrase "constructing, repairing, decorating, or improving." It says, in part:

The term ["constructing, repairing, decorating, or improving"] includes the sale of or charge made for all service activities rendered in respect to such constructing, repairing, etc., regardless of whether or not such services are otherwise defined as "sale" by RCW 82.04.040 or "sales at retail" by RCW 82.04.050. Hence, for example, such service charges as engineering fees, architectural fees or supervisory fees are within the term when the services are included within a contract for the construction of a building or structure. The fact that the charge for such services may be shown separately in bid, contract or specifications does not establish the charge as a separate item in computing tax liability.

The taxpayer's services come within that broad definition, and will be treated as a retail sale with the consequence that gross income from those projects will be taxed at the retailing B&O rate and will be subject to retail sales tax.

[2] In both projects, the taxpayer has apparently obtained written agreement from the owner that, if "a determination is made that sales tax is due and payable on the cost of the construction management services and fee," the owner will pay the amount of the tax. Taxpayer urged the Department to proceed directly against the owner. The Department is not in a position here to disclose what action, if any, is being taken with regard to other taxpayers. See, RCW 82.32.330. However, RCW 82.08.050 authorizes the Department to proceed against the seller as well as the buyer in this situation.

[3] The taxpayer has raised an estoppel argument, although not advanced as such in either the petition or at the hearing. The taxpayer said that it tried to do the right thing and called the Department to learn how to report the gross income from the construction management services contracts. 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 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.

There are three reasons for this ruling:

(1) There is no record of the facts which might have been presented to the agent for his consideration.

(2) There is no record of instructions or information imparted by the agent, which may have been erroneous or incomplete.

(3) There is no evidence that such instructions were completely understood or followed by the taxpayer.

There is no memorandum, letter, or other memorialization of the conversation between the taxpayer and the Department's employee. We cannot tell what was asked, whether the employee understood the taxpayer, or what the exact response was from the employee.

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.

Further, in Kitsap-Mason Dairymens' Association v. Tax Commission, 77 Wn.2d 812, 818 (1970), the state supreme court held:

> 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 acts, admissions, or conduct of its officers.

We cannot find that the Department should be estopped from assessing the tax against the taxpayer.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 28th day of May, 1993.