Cite as Det. No. 94-152, 15 WTD 41 (1995).

BEFORE THE INTERPRETATIONS 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. 94-152
. . .	)	Registration No. . . .
	)	FY. . . ./Audit No. . . .

RCW 82.32.300: MISCELLANEOUS -- EXAMPLES IN RULES. When an example in an administrative rule conflicts with the text of the rule, the text of the rule controls.

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 protests the assessment of business and occupation (B&O) tax on core charges claiming that the Department's rule contains an example showing core charges are not subject to the tax.[1]

FACTS:

Coffman, A.L.J. -- The taxpayer is in the business of manufacturing brake shoes. The taxpayer was audited for the period January 1, 1988, through June 30, 1992. As a result of the audit the Department of Revenue (Department) issued the above-referenced tax assessment because the taxpayer had failed to pay B&O taxes on core deposits and credits.[2] The taxpayer

[1]Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

[2]The Audit Division also found that the taxpayer had miscalculated the multiple activities tax credit and that use tax was due on consumable supplies and fixed assets. The taxpayer

filed a timely appeal based on the contention that an example under WAC 458-20-250 (Rule 250), subsection (25)(e), states that core charges are exempt from B&O taxes.

A prior audit of the taxpayer resulted in a tax assessment of B&O taxes on the core deposits and credits. The taxpayer appealed that assessment and argued that the trade-in deduction was available under WAC 458-20-247 (Rule 247). We held that the deduction under Rule 247 applies only to the measure of the retail sales tax and did not apply to the B&O tax in a previously issued determination to this same taxpayer.

After we issued the previous determination, the taxpayer paid B&O taxes on core deposits and credits through the first quarter of 1990. The taxpayer stopped paying the B&O tax thereafter. The taxpayer contends that its accountant found the example in Rule 250[3] and ceased paying the tax. The taxpayer did not submit a refund claim even though the example was added to the rule in 1989.

ISSUE:

Is the Department estopped from assessing and collecting the B&O tax because of the examples found in Rule 250(25)(e)?

DISCUSSION:

RCW 82.08.036 and .12.038 exempt core deposits and credits from the retail sales tax and use tax. Rule 250(25) implements the exemption. The rule states that retail sales tax and use tax do not apply to core deposits or credits. Rule 250 addresses the B&O tax and core deposits and credits at subsections (25)(d) and (e). These state:

> (d) Business and occupation tax. The core deposit and credit exemptions apply only to the amount of retail sales tax and use tax to be collected and paid. <u>There is no core deposit or credit exclusion for B&O tax</u>. It is important to note that the base for B&O tax and retail sales tax may be different amounts. Thus, the gross receipts under the appropriate classification of B&O tax, retailing, wholesaling, manufacturing, etc., continues to include the value of core deposits and credits. Battery core charges are included as gross receipts in the retailing classification of the B&O tax.
> (e) Examples:

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does not protest these amounts and we will not further address them.

[3]The example in Rule 250 existed at the time the previous determination was issued.

> (ii) A customer wishes to purchase a new replacement battery which sells for $62.00. The customer has no returnable battery core to exchange. Thus, a battery core charge of $5.00 or more must be added to the sales price for a total of $67.00 or more. Both retail sales tax and B&O tax apply to the actual price paid by the customer.
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> (iii) In example (ii) above, the customer returns to the store within 30 days with a proof of purchase and a used battery of equivalent size. The seller must refund the $5.00 or more battery core charge plus the sales tax paid [on] the $5.00 or more. B&O tax is due upon the value of the battery, $62.00.

(Emphasis added.)

The taxpayer claims that it followed the emphasized portion of example (iii). However, the taxpayer did not seek clarification of the obvious conflict between the two emphasized sentences.

We note that the addition of paragraph (25) to Rule 250 was the result of the adoption of RCW 82.08.036 and 82.12.038 in 1989.[4] However, the Governor vetoed Section 44 of the bill which would have excluded core charges from the measure of the B&O tax. Therefore, the B&O tax continued to apply to core deposits and credits. To the extent that example (iii) implies that the B&O tax does not apply to core deposits and credits it conflicts with the statutes. RCW 82.32.300.

The taxpayer claims that the Department may not assess the taxes against it because it relied on the example to its detriment. This is an estoppel argument.

In order to create an equitable estoppel against the Department, 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, 560 P.2d 1145 (1977).

The application of the doctrine of equitable estoppel against the government or an agency thereof is not favored, therefore, each element must be proved by clear, cogent and convincing evidence. Pioneer National Title v. State, 39 Wn.App. 758, 695 P.2d 996 (1986). 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,

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[4]Sections 45 and 46 of Chapter 431, Laws of 1989.

Inc., 121 Wn.2d 726, 853 P.2d 913(1993). We will address only the last two of the elements of estoppel.

1. Reliance.

The faith or reliance of the taxpayer on the statement of the Department must be reasonable. Liebergesell v. Evans, 93 Wn.2d 881, 613 P.2d 1170 (1988) and Det. No. 89-372, 8 WTD 115 (1989).

We find that the taxpayer's reliance on the example was not reasonable for two reasons. First, in P.H.S. Properties, Inc. v. State of Washington, Dept. of Rev., BTA Docket No. 38894 (1991)[5] the Board stated:

> [I]t would be unreasonable for a constructive knower of the law to rely upon a rule which is clearly in conflict with the governing statute. A reasonable person, perceiving such a conflict, would seek clarification from either an attorney or the agency charged with administering the law. P.H.S. did neither--until it was too late. We find that the second element of estoppel has not been met.

In the taxpayer's case the taxpayer had actual knowledge of the law. The taxpayer chose to rely on only part of the rule while the same rule stated a different result. This inconsistency is apparent on the face of the rule. In view of the inconsistency the taxpayer could not reasonably rely on it. This is especially true in light of the second reason for finding reliance unreasonable.

Second, the taxpayer previously sought a ruling on the same subject matter. Although the taxpayer made a technically different argument in the earlier appeal, the substance of the argument was the same. We did not grant relief in the earlier appeal.

The taxpayer's actions in this case fail to meet the legal standard of reasonableness. A reasonable person under these circumstances would have sought clarifying information. A reasonable person would have contacted the Department and perhaps the ALJ who heard the original appeal to determine if a change had occurred. The taxpayer did not do so.

2. Injury.

In Det. No. 93-300, 13 WTD 396 (1993) we said:

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[5]This decision is not of precedential weight, but is analytically persuasive.

> Other than the auditor's assessment of statutory interest on the unpaid [tax], 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.

We find that the taxpayer was not sufficiently injured to estop the Department from assessing taxes properly due.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 19th day of August, 1994.