BEFORE THE 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. 93-287R
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

MISCELLANEOUS -- UNPUBLISHED DETERMINATIONS -- STARE DECISIS. Except for purposes of collateral estoppel in subsequent proceedings involving the same taxpayer, unpublished determinations are not precedent, may not be cited as such in proceedings before the Department, and do not become part of the body of administrative law governing Departmental actions.

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:

Taxpayer seeks reconsideration of Det. No. 93-287 which held that the elements of equitable estoppel against the Department of Revenue (Department) based upon oral instructions were not established.[1]

FACTS:

Prather, A.L.J -- The facts are fully stated in the original determination. We will not restate those facts here except to the extent necessary to address the issues raised in the petition for reconsideration.

ISSUES:

The numerous assignments of error raise but three issues:

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

1. Did the Department err in not conducting an appeal hearing?

2. Is the Department bound by unpublished determinations?

3. Were the criteria set forth in ETB 419.32.99 satisfied?

DISCUSSION:

1. Failure to hold an appeal hearing.

The decision whether to grant or deny a taxpayer's request for an appeal hearing rests solely with the Department. WAC 458-20-100. Such requests are routinely granted. In this case, however, the decision to forego the hearing was not imposed upon taxpayer. Rather, Taxpayer's representative agreed, after a discussion with the Administrative Law Judge, that a hearing would not be necessary because the relevant testimony was adequately set forth in the affidavits of Taxpayer.

Perhaps more to the point, however, is the fact that no quantum of additional testimony, whether live or by affidavit, would have affected the result since, as more fully explained below, there was insufficient objective evidence from which to determine what transpired during the discussions between Taxpayer and the Department's employee. Accordingly, failure to conduct an appeal hearing was not error.

2. Unpublished determinations as precedent.

[1] RCW 82.32.410 confers upon the Department sole authority to decide which determinations will be deemed precedent. In exercising this authority the Department has established the policy, uniformly and consistently applied, that except for purposes of collateral estoppel in subsequent proceedings involving the same taxpayer, unpublished determinations are not precedent, may not be cited as such in proceedings before the Department, and do not become part of the body of administrative law governing Departmental actions. Accordingly, we do not recognize taxpayer's citations to the unpublished determinations.

3. Satisfaction of ETB 419.32.99 criteria.

In Professional Promotion Services, Inc. v. Department of Revenue, BTA Docket No. 36912, 9 WTD 219 (1990), the Board of Tax Appeals (Board) upheld the Department's position, as announced in Excise Tax Bulletin 419.32.99 (ETB 419),[2] regarding the circumstances under which instructions to taxpayers will be sufficient to

[2]A copy of ETB 419 was provided to taxpayer's representative with Det. No. 93-287.

establish equitable estoppel against the Department. Relevant to our inquiry here are the following excerpts from ETB 419:

> . . . the department has determined that it cannot authorize, nor does the law permit, the abatement of a tax or the cancellation of interest on the basis of a taxpayer's recollection of oral instructions by an agent of the Department.
>
> The department of revenue 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 conversations 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.

(Emphasis in the original).

In applying the criteria set forth in ETB 419, the Board in Professional Promotion Services said:

> The Department's position focuses on the standard of proof which must be met before estoppel will be applied. In effect, the Department argues that the first element of estoppel -- a statement inconsistent with a claim later asserted -- must be proven by evidence greater than the testimony of the allegedly wronged taxpayer as to his or her recollection of a conversation with a Department employee. We agree. . . . The factors listed in ETB 419 . . . are important considerations in administering the tax system fairly and efficiently. Without some objective evidence of actual statements, the Department, this Board, and the courts have no way of evaluating the claim of inconsistent statements or inaccurate and misleading information being imparted to a taxpayer. Questions of tax liability are frequently complicated and often turn on nuances of fact or law not immediately apparent to the taxpayer or the Department. For these reasons, this Board has uniformly refused to apply estoppel where the alleged misinformation was imparted in oral conversations between the taxpayer and a Department employee.

(Emphasis added).

In this case, no quantum of testimony can change the fact that there simply is no evidence, other than the recollections of Taxpyayer, from which we can determine what transpired during their conversations with the Department's employee. Contrary to taxpayer's argument, the placement of an "X" in the registration application by the Department employee tells us nothing about the substance of the conversations that lead to the placement of that "X." As a result, the application itself does not constitute a "written instruction" within the meaning of ETB 419.

Taxpayer has failed to meet its burden of proving each of the elements of equitable estoppel by clear, cogent, and convincing evidence. As a result, its claim must fail.

DECISION AND DISPOSITION:

Taxpayer's petition for reconsideration is denied.

DATED this 27th day of January, 1994.