Cite as Det. No. 97-196, 17 WTD 156 (1998)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Tax Ruling of	)	D E T E R M I N A T I O N
	)	No. 97-196
. . .	)	Registration No. . . .

[1] RULE 24001, RCW 82.60.030: RETAIL SALES TAX – DEFERRAL – APPLICATION – DISTRESSED COUNTIES – DUE DATE. An application for a Distressed Area Tax Deferral certificate was untimely when it was submitted after on-site construction work on the project had begun.

[2] RULE 228: APPLICATION DUE DATE – ESTOPPEL – COMMUNICATION – FACTORS. The Department was not estopped from enforcing the due date of a Distressed Area Tax Deferral application even though the taxpayer claimed that it was given incorrect, incomplete oral information by a Departmental employee and also claimed that it was misled by a Departmental Special Notice.

NATURE OF ACTION:

A taxpayer protests the denial of its use tax deferral application for its building of a new warehouse and [manufacturing] facility.[1]

FACTS:

A.L.J. Okimoto -- (Taxpayer) operates a . . . manufacturing plant in Marysville, Washington. Originally, Taxpayer leased space for its manufacturing operation. In early 1996, Taxpayer decided to build a new warehouse and move its existing operations into this new building. Taxpayer purchased the land in April of 1996 and began contacting builders. Because her husband had read several newspaper articles stating that Washington state had recently enacted several tax incentives for manufacturers, Taxpayer called the Department of Revenue's (Department) Everett field office on July 7, 1996 and inquired about the manufacturer's sales tax exemption and related incentive programs aimed at the construction of new buildings.

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

Taxpayer cannot remember exactly what questions were asked, but does state that she received confusing and conflicting information. In fact, Taxpayer asserts that some of the information was obviously incorrect. After conversing with the Department employee for several minutes, Taxpayer finally requested that the person just send written material on the subject to Taxpayer. The employee sent a copy of the Department's Special Notice dated June 28, 1995 entitled "Important Information on the Manufacturing Sales and Use Tax Exemption." The notice, sent to Taxpayer on July 15, 1996, explained the manufacturing, machinery and equipment exemption and also discussed recent legislative changes to existing programs such as the Distressed Area Tax Deferral/Exemption Program.

When Taxpayer received the material, she read it over, but found it to be too confusing and turned the notice over to her accountant to decipher. The accountant was instructed to read the Special Notice and investigate possible exemptions and deferrals for the planned new warehouse facility.

In the meantime, Taxpayer began on-site construction of the new warehouse facility on July 25, 1996.

Taxpayer's accountant read the Special Notice and other materials and then contacted an Audit Supervisor about the tax deferral programs sometime after the initiation of construction on July 25, 1996[2]. After discussing the issues with the Audit Supervisor, Taxpayer's accountant concluded that if Taxpayer were to hire some new full-time employees from the neighboring distressed county of Skagit, Taxpayer would be eligible for a retail sales tax deferral on its new building. Based on that advice, Taxpayer decided that some of its new full-time employees would have to live in Skagit County so that it could qualify for the sales tax deferral. Taxpayer's accountant contacted the Department's Special Programs Division (Special Programs) on August 9, 1996 and requested an application for the Distressed Area Sales Tax Deferral/Exemption. On August 12, 1996 Taxpayer wrote a letter explaining why its application was late and gave the completed deferral application to its accountant. Taxpayer's accountant met with the Audit Supervisor several days later and on August 20, 1996 submitted a completed Distressed Area Sales Tax Deferral Application. By this time the warehouse project was almost 50% completed.

The application listed the project's location as Marysville, Washington in Snohomish County and indicated that Snohomish County was adjacent to the distressed county of Skagit. It listed Taxpayer's current full-time employment statewide as 10, and that 5 additional full-time employees would be created by this project. The application stated that Taxpayer planned to hire 3 full-time employees from the distressed county.

[2] The Field Audit Supervisor recollects that he was not contacted by Taxpayer's accountant until after site construction on the project had begun.

Special Programs reviewed Taxpayer's application and rejected it as untimely since the application had been submitted to the Department after site construction on the project had begun on July 25, 1996.

Although Taxpayer concedes that the deferral application was submitted after on-site-construction had started, it nevertheless argues that the Department should accept the application as timely filed.

In the alternative, Taxpayer maintains that the Department incorrectly advised Taxpayer, that it relied on that incorrect advice to its detriment, and that the Department should be estopped from enforcing an application deadline of July 25, 1996. Taxpayer asserts that it was given incorrect oral advice by a Department employee on July 7, 1996 when it first contacted the Department regarding its impending warehouse project. Taxpayer further asserts that the Special Notice sent to Taxpayer on July 15, 1996 is misleading because it describes the Distressed Areas Sales Tax Deferral/Exemption but does not state that an application must be submitted before construction begins. In fact, Taxpayer emphasizes that the Special Notice specifically states that no formal application is necessary for the related M&E exemption. Furthermore, Taxpayer argues that since the Special Notice is silent on the tax deferral program, it creates the misimpression that no application is necessary for the sales tax deferral application either. Taxpayer asserts that it was mislead into believing that no application was necessary for the Distressed Area Sales Tax Deferral Program by a written publication of the Department, and that it relied upon that publication to its detriment. Thus, Taxpayer contends that the Department should be estopped from enforcing that application deadline. Taxpayer relies on Det. No. 93-300, 13 WTD 396 (1993) and Kramarevcky vs. Department of Social & Health Servs., 64 Wn. App 14, 822 P.2d 1227 (1992) in support of its position.

ISSUES:

1. Is a Distressed Area Sales Tax Deferral Application timely filed when it is submitted after site work had begun?

2. Should the Department be estopped from enforcing the application's deadline?

DISCUSSION:

RCW 82.60.040 allows a sales tax deferral for certain qualified investment projects located in distressed counties or counties adjacent to distressed counties. To be eligible for the tax deferral, a taxpayer must first apply for an application with the Department. RCW 82.60.030 provides:

> Application for deferral of taxes under this chapter must be made before initiation of the construction of the investment project or acquisition of equipment or machinery.

WAC 458-20-24001 (Rule 24001) is the lawfully promulgated rule implementing RCW 82.60 and states:

> (n) "Initiation of construction," for purposes of applying for the investment tax deferral relating to the construction of new buildings, shall mean the date upon which on-site construction work commences.

RCW 82.60.030 clearly states that a retail sales tax deferral application for distressed areas must be submitted prior to the "initiation of construction." For new construction the application deadline date is when on-site construction work begins. Taxpayer freely acknowledges that on-site construction work began on July 25, 1996 and that the application was not submitted until August 20, 1996 when approximately 50% of the construction had been completed. Under these circumstances, we have no alternative but to find that Taxpayer's application was submitted late. See, Det. No. 89-265, 7 WTD 345, (1989)

Nor do we believe Taxpayer's estoppel argument justifies a different result. The Department may not give consideration to a Taxpayer's reliance on incorrect oral instructions even if given by a Department employee. The reasons for this are stated in WAC 458-20-228 (Rule 228) and further clarified in Excise Tax Bulletin 419.32.99 (ETB 419). ETB 419 states:

> . . . 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.
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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.
>
> (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.

Under ETB 419, we cannot give consideration to Taxpayer's claim that it was orally mis-instructed by a Department employee on July 7, 1996.

Nor do we believe relief should be granted based on Taxpayer's contention that the Special Notice was incomplete and misleading. The doctrine of equitable estoppel is based upon the principle that a person should not be permitted to deny what he or she has once solemnly acknowledged. Emrich v. Connell, 105 Wn.2d 551, 716 P.2d 863 (1985). "Equitable estoppel" requires three elements: (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) an action by the other party on faith of such admission, statement or act; and (3) injury to such party resulting from allowing the first party to contradict or repudiate such admission, statement or act. Public Utility District No. 1 of Lewis County v. Washington Public Power Supply System, 104 Wn.2d 353, 705 P.2d 1195 (1985). In addition, when a party seeks to assert equitable estoppel against the Department, that party must also show (4) that equitable estoppel is necessary to prevent a manifest injustice; and (5) that the exercise of governmental powers will not thereby be impaired. Finch v. Matthews, 74 Wn.2d 161, 443 P.2d 833 (1968), Det. No. 93-300, 13 WTD 396 (1993). Because equitable estoppel against the government is disfavored, each of the elements must be established by clear cogent and convincing evidence. Chemical Bank v. WPPSS, 102 Wn.2d 874, 901 n.7, 691 P.2d 524 (1984). An estoppel argument is available only to a person who has been misled to its detriment and to those in privity to that person. Inland Finance Co. v. Inland Motor Car Co., 125 Wash. 301, 216 P. 17 (1913). Such reliance must have been reasonable. Liebergesell v. Evans, 93 Wn.2d 881, 613 P.2d 1170 (1980).

We believe Taxpayer's estoppel argument must fail for the following reasons. First, Taxpayer has not established the first and fundamental element of any estoppel argument, i.e. "an admission, statement or act inconsistent with the claim afterwards asserted." Although Taxpayer asserts that it was misled by the Special Notice sent to it on July 15, 1996, it cannot point to any specific statement that is incorrect or inconsistent with the position Special Programs is now taking. Even though it is true that the Special Notice did not specify that the tax deferral application needed to be filed prior to the initiation of construction, it also did not state that an application was unnecessary or that the application could be filed at a later date. It was merely silent on the issue. We are aware of no authority, nor has Taxpayer cited any, where the omission of an affirmative requirement from published material has estopped the publisher from asserting the omitted requirement. On the contrary, there must be "an admission, statement, or act inconsistent with the claim afterwards asserted." Furthermore, we note that the Special Notice upon which Taxpayer relies was not meant to be a comprehensive discussion of the Distressed Areas Sales Tax Deferral/Exemption program but merely described some recent legislative changes. The section that Taxpayer claims to have relied is entitled "Changes to Existing Tax Incentive Programs." The notice then goes on to describe recent legislative changes in the New Business Tax Deferral Program, the Distressed Counties Tax Deferral/Exemption, and the Tax Deferral/Exemption for High Technology Businesses. The notice is designed to only highlight changes and if further clarification or information was necessary, the reader was expected to refer to the appropriate rules or statutes. It is the responsibility of the taxpayer to know its tax reporting obligations. RCW 82.32A.030.

Finally, we believe that Taxpayer's reliance on Det. No. 93-300, 13 WTD 396 (1993) is misplaced. In that case, the Department issued an " Information and Instruction Pamphlet" that was clearly

incorrect. The pamphlet stated that there was a deduction from hazardous substance taxes for sales of exported fuels when, in fact, the Legislature had repealed the deduction in the previous year. The Department's subsequent position (published in a corrected pamphlet the following year) was that there was no such deduction and was inconsistent with statements made in the earlier published pamphlet. Under these circumstances, the Department acknowledged that the taxpayer had satisfied the initial two elements of estoppel. Subsequently, however, the Department held that the taxpayer in Det. No. 93-300 had failed to prove the injury and manifest injustice elements necessary to establish a case of estoppel and denied relief on those grounds. Taxpayer's case is readily distinguishable on the facts.

We similarly find Kramarevcky v. DSHS, 64 Wn. App.14, 822 P.2d 1227 (1992) to be inapplicable. In that case DSHS had initially found certain public assistance recipients eligible for benefits, paid the benefits to the recipients, and upon a later determination of ineligibility, sought repayment from those previously paid recipients. In Kramarevcky, DSHS took the inconsistent positions of the recipients first being eligible and then being ineligible for benefits. In the current case, Taxpayer has failed to prove by "clear, cogent and convincing" evidence that any Department employee or publication has ever advised Taxpayer that it was not required to file a tax deferral application prior to initiation of construction. Accordingly, we must deny Taxpayer's petition on this issue.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.