Cite as 4 WTD 281 (1987)

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. 87-348
. . .)	Registration No. . . .
)	Tax Assessment No. . . .

[1] **RCW 82.04.040 AND 82.04.4298**: RETAIL SALE -- RECREATION AND AMUSEMENT BUSINESSES -- TENNIS -- DUES -- COST SHARING -- HOME OWNER'S ASSOCIATION DISTINGUISHED. A separate, non-profit corporate entity which provides tennis and swimming to its owner/members for a charge, designated as "dues", is engaging in a taxable business. RCW 82.04.4298 only provides a deduction for amounts collected to fund recreation facilities which are commonly owned by an association of owners of residential property.

[2] RULE 183 -- B & O AND RETAIL SALES TAX -- AMUSEMENT AND RECREATION BUSINESS -- TENNIS -- ETB 503 -- HEALTH AND FITNESS.
Tennis is the type of participatory recreational activity intended to be taxed under the retail sales tax classification. The fact that a recreational activity may be pursued for health and fitness reasons does not remove the activity from the retail sales classification.

[3] RCW 82.04.4382 -- DUES -- BONA FIDE DUES DISTINGUISHED FROM DUES PAID FOR SERVICES -- NOTICE. Since July 1979, RCW 82.04.4282 clearly provided that amounts designated as "dues" which are graduated upon or paid for services rendered are not deductible.

[4] **RULE 114**: AMENDMENT -- RETROACTIVITY -- ESTOPPEL. Amendment of an existing administrative rule to clarify and explain the application of existing statutory tax provisions is remedial in nature and such amendments may be applied retrospectively when they pertain to practice, procedure, or remedies and do not affect substantive

rights. The doctrine of estoppel to apply the remedial rule measures will not apply where the Department has made no explicit representation to the claimant contrary to the rule's remedial provisions.

[5] **RCW 82.32.100**: TAXES -- INTEREST AND PENALTIES -- RETROACTIVE ASSESSMENT -- WAIVER -- HARDSHIP -- LACK OF KNOWLEDGE -- ESTOPPEL. Hardship or lack of knowledge of a tax obligation is not identified by statute or rule as grounds for waiver of taxes, interest, or penalties. Retroactive assessment of taxes upheld where taxpayer did not show it had relied on invalid earlier instructions from the Department.

[6] **RULE 114**: RETAIL SALES TAX -- DUES -- MEASURE OF TAX. Assessment based on one of the methods of reporting listed in Rule 114 is valid unless the taxpayer can show either the calculations or the figures used were incorrect. An assessment will not be reduced because on a taxpayer alleges other clubs here received proportionately lower assessments.

[7] RCW 82.08.010 -- RETAIL SALES TAX -- MEASURE OF TAX "SELLING PRICE" -- COSTS INCLUDED. The taxpayer's purchases which it uses in providing recreational activities are not purchases for re-sale, but are non-deductible costs of providing the business activity.

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.

TAXPAYER REPRESENTED BY: . . .
. . .
. . .
. . .

DATE OF HEARING: July 14, 1987

NATURE OF ACTION

The taxpayer protests the assessment of retailing B & O and retail sales tax on a portion of the income received as "dues" for the use of its tennis and swimming facilities.

FACTS AND ISSUES

Frankel, A.L.J. -- The taxpayer's records were examined for the period January 1, 1981 through June 30, 1985. The audit disclosed taxes and interest owing in the amount of $ . . . . Assessment No. . . . in that amount was issued on November 12, 1985. The assessment was later adjusted to delete the interest after August

1985 and to credit the taxpayer with a payment of $ . . . made December 20, 1985. The amended assessment was issued November 4, 1986 for $ . . . .

The taxpayer was organized in 1972 as a tennis club. The club was formed by a few people who wanted to build and maintain courts for their common use. The initial group recruited other members. The courts were completed in 1974.

The taxpayer registered with the Department in 1974. It has paid service B & O on income from lessons and retailing B & O and retail sales tax on its sales of food at its snack bar.

The taxpayer stated that it was organized to allow its members to share the costs of a commonly-owned facility. The taxpayer contends that sharing costs is not "engaging in business." It argues its activities are distinguishable from those of other clubs which offer more elaborate recreational facilities, restaurants and/or lounges for public use.

The taxpayer also contends that the purpose of the facility is for the members' health, fitness, and relaxation as distinguished from amusement and recreation. The taxpayer relies on WAC 458-20-183 (Rule 183) which states that health and fitness activities are not taxable as retail sales.

If the taxpayer is found to be liable for retailing B & O and retail sales tax on a portion of its "dues" income, it contends the assessment should be applied prospectively only from the date WAC 458-20-114 (Rule 114) was amended. The taxpayer argues Rule 114 failed to give notice that "dues" could be subject to retailing B & O and retail sales tax until amended in 1984. The taxpayer submitted evidence that a swimming club was allowed to report prospectively under similar circumstances.

The taxpayer also seeks prospective application because of the hardship the assessment for the prior periods poses. The taxpayer has no reserve or funds to pay the assessment. Because of the significant turnover in membership each year, a majority of the current members were not members in the early audit period. The taxpayer relies in part on Bond v. Burrows, 103 Wn.2d 153, 164 (1984) in support of its argument that a tax assessment should not be applied retroactively if it would result in substantial financial and administrative hardship. The taxpayer contends it would be inequitable to ask the current members to pay a tax for periods in which most of them were not members.

The taxpayer also argued that if the assessment of sales tax on a portion of the funding for its facilities is upheld, the taxpayer would be deemed to be "selling" the maintenance and availability of their own facilities to themselves. The taxpayer argues its purchases of goods and services should have been exempt from retail

sales tax as sales for resale. The taxpayer seeks a refund, credit, or offset of the sales taxes it paid at source on its purchases.

Finally, the taxpayer disputed the amount of the assessment on grounds it is much higher than assessments for other tennis clubs in the area. The taxpayer contends a major tennis club with more income and many more members received a lower assessment than it did.

DISCUSSION

1) The taxpayer's primary argument is that it is not engaging in business. At the beginning of each year an estimate is made of the anticipated costs for maintaining the common property for that year. The estimate is divided by the number of owner/members who contribute their respective shares as "dues." The taxpayer contends that the sharing of expenses of commonly owned property by the owner/members does not constitute a taxable activity.

A deduction is provided for dues, fees, or assessments used solely for the repair, maintenance, replacement, management, or improvement of residential structures and commonly held property. RCW 82.04.4298. The commonly held property can include recreation rooms, swimming pools and small parks or recreation areas. The deduction only applies, however, to property that is held in common by an association of owners of residential property. There is no statutory deduction for amounts collected to fund commonly owned recreation facilities that are separate from such associations.

The taxpayer is not a condominium or homeowner's association. Instead, the taxpayer is a separate, nonprofit corporate entity which provides tennis and swimming for a charge, designated as "dues." The statutory definition of "business" including "all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly." RCW 82.04.140 That definition is clearly comprehensive enough to include the taxpayer's activity.

Furthermore, RCW 82.04.040 defines the term "retail sale" for purposes of the retail sales tax and the B & O tax. The definition of retail sale includes:

> . . . the sale of or charge made for personal business or professional services including amounts designated as interest, rents, fees, admission, and other service emoluments however designated, received by persons engaging in the following business activities: (a) Amusement and recreation businesses including but not limited to golf, pool, billiards, skating, bowling, ski lifts and tows and others; . . .

In this case, the club members pay "dues" which entitles them to use the recreational facilities offered by the club. Because the members are charged "at cost" does not make the charges fall outside the definition of retail sale. The taxpayer corporation is a separate "person" from its members and taxable upon its business activities. RCW 82.04.030. The fact that the taxpayer's facilities are used only by its members and not the general public is not dispositive. The taxpayer offers tennis and swimming to its members for a charge and such activity is both "business" and "retail sale" under the applicable statutes.

2) We do not agree that the taxpayer is not offering amusement and recreational activities if its members are primarily interested in swimming and tennis for health and fitness reasons. Rule 183 is the administrative rule which discusses the tax liability of amusements and recreation businesses and distinguishes such activity from health and fitness activities. The rule states that health and fitness activities, "such as body building, exercise rooms and classes, weight lifting, nautilus facilities, saunas, massages, and the like" are not taxable as retail sales. We do not agree that tennis is a "like" activity.

Although tennis is not specifically listed in the statute or in Rule 183 as one of the named recreational activities, it is similar to the types of activities intended to be taxed under the retail sales tax classification. As Rule 183 states:

> . . . Thus, while certain activities are specifically included within the statutory definition (golf, pool, etc.) it is clear that the types of activities and businesses intended to be taxed under the retail sales tax classification are those in which payment is for participation.
>
> . . .

Providing an activity such as golf, skating, skiing, swimming, or tennis is not excluded from the definition of amusement or recreation business if the activity is pursued primarily for health and fitness reasons. Arguably, all of those activities could be pursued vigorously and more for health and fitness than for pleasure.

Webster's Dictionary defines tennis as "a game played with a ball and racket on a court divided by a net." "Game" is defined as "amusement, diversion, sport, fun." Furthermore, ETB 503.04.114.183 issued in 1976, did specifically list tennis as one of the recreational activities subject to retailing business tax and retail sales tax. (A copy of this bulletin was provided to the taxpayer.)

3) We next turn to the taxpayer's argument that any liability for retail sales taxes should apply only after Rule 114 was amended in 1984. The taxpayer challenges the retroactive application of the retail sales tax because of the inconsistency in the Department's position before Rule 114 was amended. The taxpayer also provided evidence that another club was allowed to report retail sales tax on a portion of its dues prospectively. (. . . .) The taxpayer contends the failure to follow that prospective application ruling would discriminate unfairly against the taxpayer and would inflict additional inequity and hardship on its members.

RCW 82.04.4282 is the statutory provision which was amended effective July 1, 1979 to distinguish between tax deductible, bona fide dues and other amounts designated as dues which are graduated upon or paid for services rendered. The statute provides that:

> In computing tax there may be deducted from the measure of tax amounts derived from bona fide initiation fees, dues, contributions, donations, tuition fees, charges made for operation of privately operated kindergartens, and endowment funds. This paragraph shall not be construed to exempt any person, association, or society from tax liability upon selling tangible personal property or upon providing facilities or services for which a special charge is made to members or others. If dues are in exchange for any significant amount of goods or services rendered by the recipient thereof to members without any additional charge to the member, or if the dues are graduated upon the amount of goods or services rendered, the value of such goods or services shall not be considered as a deduction hereunder.

From the date of that amendment, the Revenue Act clearly provided that a business tax deduction was not applicable for all amounts designated as dues. Many organizations have been reporting and paying retailing B & O and retail sales tax on a portion of their "dues" income since 1979.

[4] Although Rule 114 was not amended until April 1984, the Department levied and sustained tax upon many different golf and tennis clubs "dues" after the statute was amended in 1979. The amendment to Rule 114 did not change the law, but only provided methods a taxpayer could use to calculate the portion of the dues subject to tax. Allowing retroactive application of the rule guidelines for allocating dues was done to assist taxpayers. In most cases, the application of the guidelines reduced the tax liability. We find the auditor correctly applied the law in finding the taxpayer is engaging in business and in assessing the tax for the prior periods.

The taxpayer relied on Hansen Baking Co. v. Seattle, 48 Wn.2d 737, 296 P.2d 670 (1956) and Group Health Cooperative v. State Tax

Commission, 72 Wn.2d 422, 433 P.2d 201 (1968) for support that the tax should be imposed only prospectively. We do not find either case supports the taxpayer's position.

The issue in Hanson Baking Co. was the measure of Seattle's B & O tax on the taxpayer's manufacture of bread which was transported out of the city. The taxpayer had relied on an earlier letter from the Seattle city comptroller which stated acceptable methods of valuing products shipped out-of-state. In a subsequent audit, the taxpayer was told those methods were incorrect. The court found the earlier letter constituted an administrative ruling. The court stated that an administrative agency may not retroactively impeach its own general rules because of its own errors.

Group Health protested retroactive assessments on income which the Department had previously treated as deductible. The court found the principle announced in Hanson Baking Co. was applicable. The court, however, did not extend its holding to any lawful assessment levied after the date of the amendment to RCW 82.04.430(9), the statute that was at issue.

In the present case, the taxpayer did not rely on any earlier instructions by the Department which were later changed; nor was the taxpayer previously advised that its "dues" income was deductible. We do not find, therefore, that the Department is estopped from assessing the tax retroactively.

To create an estoppel, 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, 366-67 (1977). These elements are not present in this case.

We do not find prospective application is warranted because the taxpayer provided evidence that a swimming club was allowed to report prospectively after it voluntarily registered in 1984. In this case, the taxpayer did not voluntarily begin paying retail sales tax on a portion of its dues income after Rule 114 was amended in 1984. Even if it had, though, the Revenue Act does not provide for prospective tax application in such a case. As stated above, the Department has sustained the tax on many tennis, golf, and other recreational clubs since 1979. Rule 114 did not announce new law when it was amended in 1984.

The Revenue Act does provide a non-claim period for retroactive assessments. RCW 82.32.100. The Department may not make an assessment more than four years after the close of the tax year, with certain exceptions which we do not find applicable. (unregistered taxpayers or intent to evade) In the present case,

the assessment was made in 1985 and did not exceed the statutory four-year period. RCW 82.08.050 provides that a seller who fails to collect the retail sales tax is personally liable to the state for the amount of the tax. As an administrative agency, we do not have discretion to change the law and grant relief.

Our decision to deny relief does not mean that the Department does not recognize the hardship the imposition of the tax, interest and penalties places on the taxpayer. In most cases, when a non-profit business as the taxpayer has been underreporting its tax liability because of a lack of knowledge or good faith belief that its activity was not taxable, the taxpayer protests the assessments because the assessment poses a substantial hardship. Hardship or lack of knowledge of a tax obligation, however, is not identified by statute or rule as grounds for waiver of taxes, interest, or penalties.

In Bond v. Burrows, 103 Wn.2d 153, 690 P.2d 1168 (1984), the court held that RCW 82.04.2902(1) and (2) were unconstitutional as they permitted a lower sales tax rate in border counties than applied in the rest of the state. Retailers and the Department had both relied on the statute. Because it would have been practically impossible for the border county retailers to collect the tax on transactions occurring prior to the court's ruling, it stated the decision would apply prospectively only. Id. We find that case is also distinguishable. In the present case, the applicable statute during the audit period clearly provided only amounts collected for bona fide dues were deductible. Also, the Department was requiring other clubs to pay retail sales tax on dues collected for providing services.

If the taxpayer needs to make a special assessment to pay the tax liability and maintain the club's solvency, the Department has construed such an assessment as a contribution or donation rather than an initiation fee or dues upon which tax may be due. 1 WTD 111 (1986).

[6] Measure of Tax -- Rule 114 provides three alternative methods for determining the tax liability of persons who receive non-deductible initiation fees and/or dues. In this case, the auditor used the actual records of facilities usage. He and the taxpayer's accounting manager selected the months of May, June, August and November 1984 for a test period. The average monthly use figure was multiplied by the typical charge for similar area facilities ($1.00 for swimming, $3.00 for tennis before January 1984 and $4.00 per use after that date).

The taxpayer does not contend that one of the alternative methods should have been used, but that its assessment is unfairly high compared to the assessments for other clubs. If the taxpayer's members are primarily interested in tennis and swimming, a greater percent of the dues income may be found to be for those activities

than at another club where members are less active or more interested in social activities. We find the auditor's "value per game" figures were reasonable. The assessment shall not be reduced, as the taxpayer has not shown that the calculations or the figures used were incorrect.

[7] Sales tax refund -- Finally, we do not agree that the taxpayer's purchases of comsumables and services are purchases for resale. The retail sales tax applies to the "selling price" without any deduction on account of the cost of the property sold, cost of materials used, labor costs or any other expenses. RCW 82.08.010. The auditor used a test period of 1984 and found the taxpayer had purchsed string clamps, a ball machine, a circuit breaker, cones, a subscription, and repairs without paying retail sales tax. Deferred sales tax or use tax was assessed on these items. The taxpayer's purchases which allow it to offer the recreational activities are non-deductible costs of providing the business activity.

DECISION AND DISPOSITION

The taxpayer's petition is denied.

DATED this 20th day of November 1987.