Cite as 4 WTD 97 (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. 87-299
. . .)	Registration No. . . .
)	Tax Assessment No. . . .

[1] **RULE 174 AND RCW 82.12.0254:** USE TAX -- EXEMPTION -- INTERSTATE COMMERCE -- MOTOR VEHICLES -- USED IN SUBSTANTIAL PART. To be entitled to the use tax exemption for motor vehicles transporting property for hire across the state's boundaries, a taxpayer must show that the vehicles cross the state's borders at least 25 percent of the time. UPS v. Department of Revenue, 102 Wn.2d 355 (1984).

[2] **MISCELLANEOUS:** PRIOR AUDIT -- FAILURE TO TAX -- EFFECT OF -- ESTOPPEL. The Department is not estopped from assessing tax, based on its failure to do so because of oversight in a previous audit. Kitsap-Mason Dairymen v. Tax Commission, 77 Wn.2d 812 (1970).

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: March 4, 1987

NATURE OF ACTION:

Petition for abatement of use tax assessed on trucks engaged in interstate hauling.

FACTS AND ISSUES:

Dressel, A.L.J. -- . . . (taxpayer) is a trucking company which hauls tangible personal property including household goods, paper boxes, sheet rock, lumber, steel, etc. Its books and records were

audited by the Department of Revenue (Department) for the period January 1, 1982 through December 31, 1985. As a result, the above referenced tax assessment was issued July 10, 1986 in the amount of $ . . . . The taxpayer has paid the unappealed portion of said assessment.

At issue here is use tax assessed on three vehicles, a 1982 Comet "dry van," a 1984 Volvo truck, and a 1985 Freightliner truck. The taxpayer has not previously paid sales tax on said vehicles believing that, as the holder of a permit issued by the Interstate Commerce Commission (#MC, ICC . . .), it was exempt. The Department, on the other hand, bases its assessment on its belief that there was insufficient use of the subject vehicles in interstate commerce to justify the sales/use tax exemption. Whether that exemption should be granted is the sole issue to be decided herein.

DISCUSSION:

Provision for the referenced use tax exemption is made in RCW 82.12.0254 which reads in part:

> **Exemptions--Use of airplanes, locomotives, railroad cars, or watercraft used in interstate or foreign commerce or outside the territorial waters of the state--Components thereof--Use of motor vehicle or trailer in the transportation of persons or property across state boundaries--Conditions--Use of motor vehicle or trailer under one-transit permit to point outside state.** The provisions of this chapter shall not apply in respect to . . . and in respect to the use by the holder of a carrier permit issued by the Interstate Commerce Commission of any motor vehicle or trailer whether owned by or leased with or without driver to the permit holder and used in substantial part in the normal and ordinary course of the user's business for transporting therein persons or property for hire across the boundaries of this state if the first use of which within this state is actual use in conducting interstate or foreign commerce; . . . (Emphasis added.)

See also WAC 458-20-174 (Rule 174).

[1] Since at least 1975 the Department has used the "25% rule." It has interpreted "in substantial part" to mean that on at least 25% of its trips, a particular vehicle crosses a state boundary. Although not codified in the Washington Administrative Code, the Washington Supreme Court has specifically upheld the use of this test. UPS v. Department of Revenue, 102 Wn.2d 355 (1984). The Department has also applied the "25% test" to the amount of revenue earned by a certain vehicle. If at least 25% of the income

generated by a particular unit is from interstate commerce, that unit is exempt of use tax.

Here the auditor has determined that the taxpayer's vehicles were utilized in interstate commerce 7%, 4.5%, 0%, and 2% of the time for the years 1982, 1983, 1984 and 1985 respectively. The taxpayer has confirmed that these figures are generally accurate and that they are reasonably reflective of the interstate use of the three particular vehicles at issue. Consequently, because the vehicles were used less than 25% of the time in interstate commerce, they are deemed as not used "in substantial part" for transporting across state boundaries and are not eligible for the exemption for which provision is made in RCW 82.12.0254 and Rule 174. Because the vehicles were used in this state, were purchased without the payment of sales tax and are not specifically exempt under interstate commerce or other grounds, use tax is due and was properly assessed by the Department in accordance with Rule 174 which reads in part:

USE TAX

> The use tax applies upon the actual use within this state of all articles of tangible personal property purchased at retail and upon the acquisition of which the retail sales tax has not been paid to this state, unless such use is exempt from use tax under the provisions of chapter 82.12 RCW.

[2] The taxpayer's major argument for relief, however, is that it was never informed of the "substantial use" clause and that it was not taxed on this basis in previous audits, so the Department should be estopped from doing so now. The only other audit contained in the taxpayer's Department of Revenue file was completed in 1975. No mention is made therein of the ICC-related use tax exemption at issue here or the "substantial use" requirement. If, indeed, the taxpayer was using trucks at that time on which it had not paid sales or use tax which trucks were not substantially used in interstate commerce, the auditor's failure to assess the tax was undoubtedly an oversight. The oversight may have benefited the taxpayer materially for past periods; however, it must not be continued or allowed for the current audit period. The Washington Supreme Court addressed a similar situation in Kitsap-Mason Dairymen v. Tax Commission, 77 Wn.2d at 818. It observed that:

> . . . This is not a case in which auditors changed their interpretation of a statute or rule. It is one in which they overlooked through ignorance, neglect or inadvertence Kitsap's error in computing the tax. The fact that the oversight only recently has been discovered does not relieve Kitsap of its liability for the correct tax during the audit period now under consideration.

[5] 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. Wasem's Inc. v. State, 63 Wn.2d 67.

DECISION AND DISPOSITION:

For the above reasons, the taxpayer's petition is denied.

DATED this 8th day of September 1987.