Cite as Det. No. 86-285A, 4 WTD 363 (1987)

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition	)	F I N A L
For Correction of Assessment	)	D E T E R M I N A T I O N
	)	
	)	No. 86-285A[1]
. . .	)	
	)	Registration No. . . .

[1] ESTOPPEL -- ELEMENTS -- BURDEN OF PROOF -- MISTAKE -- MISUNDERSTANDING. The elements of equitable estoppel are: (1) admission, statement, or act inconsistent with a claim afterwards asserted, (2) action on faith of such admission, statement, or act, and (3) injury resulting from the contradiction or repudiation of the admission, statement, or act. The person claiming entitlement to equitable estoppel must show the presence of these elements rather than mere mistake or misunderstanding.

[2] ESTOPPEL -- TAX CASES -- SUFFICIENCY OF EVIDENCE. Mere suppositions and general misunderstandings by a taxpayer of an informal position of the Department of Revenue, which are not uniformly held by others within the industry, will not be sufficient to estop the collection of taxes properly due.

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: . . .
. . .
. . .

HEARING CONDUCTED BY DIRECTOR'S DESIGNEES:

Sandi Swarthout, Assistant Director
Garry G. Fujita, Assistant Director
Edward L. Faker, Sr. Administrative Law Judge

[1] The original determination, Det. No. 86-285, is published at 1 WTD 331 (1986).

DATE AND PLACE OF HEARING: June 17, 1987; Olympia, Washington

NATURE OF ACTION:

The taxpayer appeals from the findings and conclusions of Determination No. 86-285 which was issued on November 7, 1986 after on original appeal conference conducted on June 26, 1986. The taxpayer originally appealed the assessment of uncollected retail sales tax found to be due upon the taxpayer's machine vended sales of tangible personal property. The taxpayer now appeals from the contended failure of the Department to fully properly consider and apply the principle of estoppel in the original Determination.

FACTS AND ISSUES:

Faker, Sr. A.L.J. -- The material facts of this case are not in dispute. Those facts, plus the audit detail and tax assessment information are fully set forth in Determination No. 86-285 and need not be restated here. That Determination is fully incorporated herein by this reference. It correctly outlines the history of legislation which required the posting of sales tax notices (stickers) upon food and non-food vending machines as well as the legislative repeal of such requirements. The Department's position on the merits of sales tax liability of vending machine sales is not challenged.

There is a single issue for our consideration here. Was the Department estopped to assert additional sales tax liability upon non-food item sales through vending machines which were not posted with sales tax stickers, after 1981 when the requirement for posting food vending machines was removed? Restated, does the legal doctrine of estopped prevail under the evidence presented, to prevent the assessment of tax contrary to the Department's earlier allegedly stated position?

TAXPAYER'S EXCEPTIONS:

The taxpayer asserts that its estoppel arguments were summarily treated in Determination No. 86-285 and it seeks specific reconsideration of those arguments in full. The taxpayer's petition to the Director includes the following pertinent statements.

> S.B. 3076, the 1981 legislation assessing vendors sales taxes based on 57% of their food sales also eliminated the sales tax sticker requirement for food machines. However, it was originally intended to repeal the sticker requirement for all vending machines, not just food machines. This intent was clearly set out in a legislative analysis of the bill which was attached to petitioner's original petition for correction of assessment. The requirement was burdensome because of the many dozens of different taxing districts and the fact that these stickers were constantly being defaced and removed. It would have made little sense and been of little benefit to the vending industry to be relieved of the burden of maintaining stickers on food vending machines while having to maintain stickers on non-food machines standing next to them in the same locations. It is the vending industry's considered opinion that the requirement was not repealed because of some oversight in the final drafting or codification of the bill.

While the petitioner recongizes (sic) that such information would not normally be considered, it is offered because it was this oversight that led both the vending industry and, the Department of Revenue at the time, to the understanding that the sales tax sticker requirement had been repealed for all types of vending machines. It is this understanding and the confusion which surrounds it which forms the basis of the petitioners argument against their delinquency assessment.

Vendors believed the new legislation had done as intended and removed any sales tax sticker requirement on vending machines whether they sold food or non-food products. They believed this because of the previously discussed legislative history which was given to the industry officials at the time and because they were told so by then Director (sic) of the Department of Revenue, Mr. . . . .

In a meeting held between Mr. . . . and legislative leaders of the industry after the passage of S.B. 3076, Mr. . . . told these leaders including Mr. . . . of . . . , Seattle, Mr. . . . of . . . , Seattle and Mr. . . . , then of . . . , Seattle, that sales tax stickers would no longer be required on <u>any vending machine</u> whether that machine sold food or non-food products. These gentlemen have signed a statement to that effect which is attached to this appeal. It was because of this meeting and Mr. . . . 's confirmation that one of the original goals of this industry sponsored legislation had been achieved, that the industry came to the understanding that the requirement had finally been repealed. This mistake made not only by the vending industry's but also the Department given the fact that it was Mr. . . . 's interpretation of the legislation which led our industry leaders to this belief.

This understanding was reinforced by almost five (5) years of noncompliace (sic) with the requirement by vendors and nonenforcement of it by the Department. In the dozens of audits of industry members which have occurred since the passage of S.B. 3076, not once has failure to comply with the sales tax sticker requirement been raised. The industry finally discovered that the requirement was still in existence when . . . was issued the deliquency (sic) tax assessment in question. This was the first indication anyone in the industry had that what they had intended to eliminate legislatively in 1981, was still on the books. Once the industry became alerted to the situation it supported new legislation to do away with the sticker requirement for all types of vending machines once and for all. That legislation was signed into the law in March of 1986 and stands as evidence of both the legislature's intent to repeal the requirement in the first instance and the industry's belief that it had been repealed.

Given the course of events and the confusion surrounding the sales tax sticker requirement for non-food machines, confusion partially created by the Department's own statements and perpetuated by its pattern of nonenforcement over the years, it is not difficult to see why . . . believed the requirement had been repealed. Everyone in the industry did.

> The petitioner contends that the facts and circumstances surrounding their noncompliance with the sales tax sticker including the Department's involvement, supports its position that it would be inequitable in this situation to enforce the assessment against it and that the department should be estopped from doing so in this instance. To punish them now for an unintentional mistake everyone including state officials made would serve no useful purpose and would be unfair.

At the June, 1987 hearing the taxpayer reiterated its position from the petition and emphasized that the machine posting requirement had not been enforced against other machine vending businesses, nor had tax deficiencies been assessed.

The taxpayer generally referred to the legal elements of the estoppel doctrine and stressed that it had relied upon the Department's statement which has now been denied to the taxpayer's serious detriment. The taxpayer asserted that the Department's position that no machines need be posted after 1981 was widely known throughout the industry. Industry wide publications assertedly included statements to that effect.

On the merits of the tax law question the taxpayer reasserted that, as a practical matter, for purposes of posting sales tax stickers, there was no basis whatever for distinguishing between machines which vend food products and those which vend any other kind of goods.

Finally, the taxpayer recognized that it has not paid any portion of the tax assessment. It seeks a waiver of any interest assessed during the inordinate length of time taken by the Department to respond to its original appeal petition and finally resolve these matters.

DISCUSSION:

[1] Determination No. 86-285 rather summarily disposes of the taxpayer's estoppel contentions with the following statements:

> Finally, the fact that taxpayer's and others in the industry mistakenly assumed that the 1981 legislation eliminated the so-called sticker requirement for all vending machine sales is irrelevant. There is no evidence whatever that the Department contributed to this mistake by word or deed.
>
> Moreover, the possibility that this issue may have been overlooked in prior audits of this or other taxpayers does not excuse this taxpayer from paying the correct amount of taxes lawfully due for the audit period now under consideration. See Kitsap-Masen (sic) Dairymen's Association v. Tax commission 77 Wn.2d 812 (1970). "The doctrine of estopped will not be lightly invoked against the state to deprive it of the power to collect taxes." Id. at 818. (Det. 86-285 at page 6. Emphasis supplied.)

We are not convinced by the taxpayer's arguments nor have we been presented with any persuasive evidence that this is not the correct resolution of the issue before us. It may be that the Determination statements failed to recognize the claimed involvement of a former Assistant

Director in any confusion which may have prevailed between 1981 and 1985. That alone however, even if affirmatively established, could not serve to estop the state from collecting sales taxes properly due and owing.

As to the involvement of the former Assistant Director, who has retired from state service, the various meetings with vending machine businesses took place both before and after the 1981 legislation was enacted. There were several different legislative bills proposed and considered during that time period. Some drafts of proposed legislation were more plenary than others in removing the requirement to show retail sales tax separately from the selling price. Since there is no written memorialization of any representation by the Department that no machines would be required to be posted with sales tax shown separately after 1981, that conclusion was conjectural at best. Moreover, on more than one occasion during the interim between 1981 and 1985 legislative representatives for the vending machine marketing industry sought the Department's guidance in drafting proposed language to extend the exclusionary provision for the benefit of non-food vending machine sales. Under such circumstances the presence of the elements of estoppel is highly suspect. The doctrine of equitable estoppel is never casually or lightly invoked to prevent the state from collecting taxes due. See Kitsap-Mason Dairymen's Association v. Tax Commission, 77 Wn.2d 812 (1970). Even if the oral conclusions of the Department's former Assistant Director could be established with clarity, it would have merely consisted of a mistaken understanding of law.

The Department does not question the veracity of the statements provided by others within the industry to the effect that they understood the 1981 legislation to cover all vending machines. (See the affidavit attached as Exhibit "A"). However, those statements, even if weighed most heavily in the taxpayer's favor, do not satisfy the requisite elements for equitable estoppel. Those elements are:

> (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. (See Harbor Air v. Board of Tax Appeals, 88 Wn.2d 359 (1977)).

[2] There is no evidence that the taxpayer received any ruling from the Department based upon which it removed any sales tax postings from its vending machines. Furthermore, others in the industry maintained such postings on their vending machines. Even some of the taxpayer's affiants continued to post their machines as revealed by Department investigations. The taxpayer's assertion that the Department discontinued enforcing this posting requirement after 1981 is simply not correct. Again, others within the industry have been audited during the same period in question here and found not to be tax deficient precisely because sales tax stickers were posted on their non-food vending machines. There has been no selective enforcement in this case.

The courts of this state are extremely reluctant to find the state equitably estopped to enforce its tax collection authority, see Wasem's, Inc. v. State, 63 Wn.2d 67 (1963). We do not find sufficient support for the imposition of the estoppel doctrine in the case before us here.

Because of the inordinate delay in processing the taxpayer's appeal to final administrative resolution, and pursuant to the provisions of RCW 82.32.105, no interest will be assessed for any periods subsequent to March 31, 1987. This is a period of time allowing for three full months after the taxpayer's petition to the Director and within the Department's discretion under the law.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 18th day of December 1987.

See hard copy for attachment.