Cite as 4 WTD 87 (1987)

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

In the Matter of the Petition For Correction of Assessment/Refund of	)	D E T E R M I N A T I O N
	)	No. 87-298
. . .	)	Registration No. . . .
	)	Tax Assessment No. . . .
	)	
	)	

[1] **RULE 178, RULE 211, RCW 82.04.050(1), RCW 82.12.010, AND RCW 82.12.020:** RETAIL SALE -- USE TAX -- LEASES -- INTERVENING USE -- YACHT -- STORAGE. The taxpayers purchased a yacht, without sales tax. They then stored it and eventually used it for both bare-boat charter leasing and pleasure. Use tax found to be due, because each lease payment represented a separate retail sale and personal use by the taxpayers between lease periods was intervening use; and because the storage preparatory to use was also intervening use.

[2] **RULE 178, RULE 211, RCW 82.04.050(1), AND RCW 82.12.020:** RETAIL SALES --USE TAX -- EXEMPTION. One who purchases tangible personal property for the purpose of reselling it, without intervening use, is exempt from sales or use tax. An exemption in a tax statute must be strictly construed in favor of taxation.

[3] **MISCELLANEOUS:** ABSURD RESULTS. Tax statutes must be construed in such a way as to avoid an absurd result.

[4] **RULE 178, RULE 211, RULE 228, RCW 82.12.020, RCW 82.32.050 AND RCW 82.32.105:** USE TAX -- INTEREST -- ESTOPPEL -- MISINFORMATION FROM OTHER STATE AGENCIES. The Department of Revenue is not estopped from collecting taxes when the failure of a taxpayer to pay was due to misinformation supplied to the taxpayer by another state agency.

[5] **RULE 178, RULE 211 AND RCW 82.12.020:** USE TAX -- LEASE -- APPORTIONMENT. Use tax is measured by the value of the article used. The use tax statute does not allow apportionment when a yacht is used partly for business (leasing) and partly for pleasure.

[6] **RULE 228, RCW 82.32.050 AND RCW 82.32.105:** INTEREST WAIVER -- FAILURE OF DEPARTMENT TO SEND TAX RETURN FORMS. An interest assessment may only be waived, under Rule 228, if the failure to pay taxes when due was the result of written instructions from the Department, or if extension of the due date was for the sole convenience of the Department. Thus, failure of the Department to send tax forms to a taxpayer does not constitute grounds for waiver of interest.

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: May 30, 1987

NATURE OF ACTION:

The taxpayers petition for a refund of use tax and for correction of an interest assessment.

FACTS AND ISSUES:

Normoyle, A.L.J. -- The taxpayers are husband and wife. They are engaged in an equipment and yacht leasing business ("leasing business"), and in interior decorating. The taxpayers' activities

were audited for the periodáfrom January 1, 1982, through December 31, 1985. An assessment was issued for unpaid retail sales tax, retailing business and occupation tax, service B&O, and use tax. Interest at nine percent per annum was also assessed.

There are two issues, both of which relate only to the leasing business. The first is whether the taxpayers are entitled to a refund of use tax paid for use of a yacht. The second is whether interest should have been assessed on the overall tax delinquency.

YACHT

The yacht was purchased in Florida in 1983 for $134,000. Sales tax was not paid to any state. The boat was purchased for two purposes: 1) leasing it as a bare boat charter in Washington; and 2) personal use.

Before the yacht was brought to Washington, the taxpayers entered into an 84 month "Yacht Charter" contract with a corporation. The contract provided that the boat was to be available to the corporation 60 percent of each month, with the taxpayers reserving the right to use the yacht the balance of the time.

The yacht was brought to Washington in late 1983, and stored here until the Spring of 1984, at which time it was used for both business (lease to the corporation) and pleasure. Because the yacht was put to personal use by the taxpayers, and because no sales tax had been paid, the auditor assessed use tax based on the purchase price. The taxpayers appeal from that assessment. Their arguments are three-fold:

1. The taxpayers agree that they personally used the yacht, but argue that there was no "intervening use," as that term is used RCW 82.04.050(1). Their position is that their use, for it to be "intervening," had to come between the purchase and the lease to the corporation. Because their own use came after the charter lease contract was signed, they believe that there was no intervening use.

2. The Department of Revenue should be estopped from collecting the tax due to information the taxpayers received from the Department of Licensing (DOL). When the taxpayers brought the yacht to Washington, they attempted to license it with the DOL. They state that they sent a registration application to DOL and then received a phone call from that department informing them that they were exempt from registration and sales tax. The taxpayers made a note to themselves immediately after the call, reading in part that they were "exempt from registration and sales tax." Subsequently, their registration fee was returned by DOL, accompanied by a copy of part of Washington Administrative Code (WAC) Chapter 308-93, relating to vessel registration. These WAC sections dealt with whether or not the yacht had to be registered in Washington, and whether it was exempt from the watercraft excise tax. Because the boat was a federally documented vessel, the DOL did not require registration. The taxpayers claim that the communication with the DOL led them to believe that they were not subject to sales or use tax. As a result, the argument goes, the Department of Revenue should be estopped from now claiming that use tax is due.

3. If the use tax assessment is sustained, the taxpayers believe that the tax should be apportioned on a 60:40 ratio, because of the charter contract. The result would be that the tax would be measured by 40 percent of the value as that was the largest possible percentage usage which the taxpayers could have had.

INTEREST

The auditor assessed interest on the entire assessment. The taxpayers believe that the interest should be waived. In order to understand the basis for the waiver request, it is helpful to set out the facts in chronological order:

1. In 1975, the taxpayers, as husband and wife, obtained a certificate of registration from the Department of Revenue, to operate the interior decorating business. They were assigned a

registration number, the last three digits of which were 244. They were on an annual reporting period.

2. On April 20, 1983, they applied for another certificate of registration, this time for the equipment and boat leasing business. At that time, and currently, husbands and wives with more than one business were given registration certificates for each, but under the same registration number. Income and taxes from all of the husband and wife businesses are to be reported on one joint return. Due to Department error, the new business was given the number of an unrelated taxpayer (the last three digits of the registration number were 294).

3. On April 20, 1983, the leasing business filed excise tax returns for January, February, and March.[1] Thus, the new business had been in operation since January of 1983, without registration. The Department did not assess a penalty.

4. The error in the registration number was noticed by the Department after the Quarter 1, 1983 tax returns. No further returns were sent by the Department, except the joint return under the original registration number. The taxpayers, not receiving any additional forms, and not aware that they were to report all income from both businesses on the joint return, did not report or pay any retail sales or B&O tax on the leasing business after that first quarter. The taxpayers did, however, continue to pay taxes on income from the interior decorating business. The taxpayers did not make inquiry of the Department as to the reason why tax returns were not sent to them, for the leasing business. Had they done so, they would have been informed that all of the income was to be reported on the one joint return.

5. As a result of the audit, the Department assessed interest on the delinquency. It did not

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[1] For some unknown reason, the returns were dated April 22, 1983, even though they were received by the Department on April 20, 1983.

assess an evasion penalty, even though the taxpayers had not paid taxes on the leasing business (except for Quarter 1, 1983).

Based on these facts, the taxpayers believe that the audit interest should be waived. The arguments are that the Department should be estopped from assessing interest because the Department sent the wrong registration number and failed to supply tax forms to the leasing business; or that the interest should be waived under WAC 458-20-228, as the failure to pay taxes was due to circumstances beyond the taxpayers' control.

DISCUSSION:

THE YACHT

The use tax statutes complement the sales tax by imposing a tax equal to the sales tax on an item of tangible personal property used in this state in cases where the retail sales tax was not paid. WAC 458-20-178.

RCW 82.12.020 imposes a tax "for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail." (Emphasis added.) That statute also states that the tax rate shall be "in an amount equal to the value of the article used by the taxpayer multiplied by the rate in effect for the retail sales tax."

RCW 82.12.010 defines "value of the article used" as meaning the consideration (here, money) paid by the purchaser to the seller. That statute also supplies the definition for the word "using." It means "the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and shall include installation, storage . . . or any other act preparatory to subsequent actual use . . . within this state." (Emphasis added.)

One who uses tangible personal property is a "consumer." RCW 82.04.190(1).

Here, the taxpayers are "consumers," they used "the yacht" in Washington, and the retail sales tax was not paid. This brings us to the threshold question: Was the yacht "purchased at retail"?

RCW 82.04.050(1) reads are follows, in pertinent part:

> "Sale at retail" or "retail sale" means every sale of tangible personal property . . . to all persons irrespective of the nature of their business . . . other than a sale to a person who (a) purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person . . . The term shall include every sale of tangible personal property which is used or consumed or to be used or consumed in the performance of any activity classified as a "sale at retail" or "retail sale" even though such property is resold or utilized as provided in (a) . . . above following such use.

A lease of tangible personal property is a retail sale. RCW 82.04.050(4).

[1] The taxpayers' first argument is that the use tax does not apply because the yacht was not purchased at retail under RCW 82.04.050(1). They claim that it was purchased for resale (lease) to the lessee (Yacht Charter Corporation) without intervening use by the taxpayers. Because the yacht was first used by the lessee, the argument continues, there was no intervening use by the taxpayers; thus no retail sale to them and no use tax is due. The argument fails because there was intervening use in two different ways.

First, each successive lease payment represented a separate retail sale. RCW 82.08.020(2). Any time that the taxpayers used the yacht between lease periods (i.e., between each retail sale) there was intervening use.

WAC 458-20-211 supports this conclusion. The Rule then in effect stated that "The retail sales tax does not apply upon sales of tangible personal property to persons who purchase the same <u>solely</u> for the purpose of renting or leasing such

property.[2] Because the taxpayers did not purchase solely for the purchase of leasing the yacht, and because retail sales tax has not been paid to the state of Washington, use tax was due.

[2] Additionally, the Washington Supreme Court, in Duncan Crane v. The Department of Revenue, 44 Wn.2d at 684 (1986), treated that part of RCW 82.04.050(1) which reads "other than a sale to a person who a) purchases for the purpose of resale as tangible personal property in the regular course of business, without intervening use by such person" as an exemption from the sales and use tax.[3] The significance of this holding is that "an exemption in a revenue statute must be strictly construed in favor of taxation and against the claim of exemption." Wn.2d 684 at 688.

[3] Finally, we are required to interpret a statute in such a way as to avoid an absurd result. Yakima First Baptist Homes v. Gray, 82 Wn.2d 295 (1973). Here, to follow the interpretation urged by these taxpayers would lead to an absurd result.[4]

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[2]The Rule was amended in 1987, but the changes do not affect our result.

[3]While the court ruled against the Department in that case, the facts are distinguishable. The issue there was whether or not there was intervening use by the crane company, which leased the cranes to others and supplied the operator, but did not otherwise use the cranes themselves. On those facts, the Court ruled that there was no intervening use. The facts are obviously different in this case in that the taxpayers did use the yacht themselves.

[4] If the taxpayers' interpretation is correct, a taxpayer under the following example would not have any intervening use and hence would pay no sales or use tax:

> A taxpayer contracts to buy a Rolls Royce, without paying sales tax. Prior to

The second basis for a finding that there was intervening use is the storage of the yacht prior to its use by the lessee and the taxpayers. Storage of the yacht, preparatory to its use, brings this case squarely within the ambit of RCW 82.12.010, quoted above. Thus the mere act of storage by a consumer was an intervening use.

For all of the above reasons, we reject the taxpayers' contention that there was no intervening use.

The taxpayers' second claim is that the Department should be estopped from collecting the use tax, due to information that the taxpayers received from the DOL. This argument also fails.

The parts of WAC sent to the taxpayers, chapter 308-93, dealt with the watercraft excise tax (RCW 84.49), not the sales or use tax.[5] Vessels primarily engaged in commerce and which are documented by the United States are exempt from the watercraft excise tax. RCW 82.49.020 and 88.02.030(10). There is no general exemption from

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> delivery, he contracts with a third party to rent the car for one hour. Immediately upon delivery and before any use was put to the car by the taxpayer, the third party did rent the car. After that one rental, the taxpayer uses the car solely as his personal vehicle. Under this taxpayer's theory, no sales or use tax would be due because the use of the car by the taxpayer was not "intervening" i.e., it did not come between the purchase and the resale (rental) of the car. In this way, sales tax could be avoided simply by renting the car out prior to the first use by the taxpayer. Such a result would obviously contravene the legislative intent to impose use tax on individuals who use personal property in Washington without payment of sales tax.

[5] The question of the watercraft excise is not now before the Department and we do not pass on that question.

sales or use tax for such vessels. To the extent that a DOL employee advised the taxpayers to the contrary, the advice was incorrect.

[4] A failure to pay taxes because of misinformation received from others, including the DOL, is not a defense to a later assessment for delinquent taxes under case law or any statute. 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 at 359, 366-67 (1977). See also, Kitsap-Mason Dairymen's Association v. Tax Commission, 77 Wn.2d 812 (1970), where the court stated, at p. 818, "The doctrine of estoppel will not be lightly invoked against the state to deprive it of the power to collect taxes."

Here, the taxpayers did not receive any information from the Department of Revenue. Therefore, none of the three elements are met. Even if we were to place the DOL in privity with the Department of Revenue, we would not find that estoppel applies because the third element (injury) is missing. All that occurs here is that the taxpayers are simply being required to pay in 1987 what they should have paid in 1983 or 1984, when they first used the yacht. Further, the interest portion on the use tax assessment represents payment to the state of interest on funds (use tax) which should have been paid to the state in the first place. Therefore, the taxpayers cannot claim that they were "injured." The use tax assessment is for taxes properly due, and the interest on the use tax portion of the assessment is for use of the money which the taxpayers retained (see RCW 82.32.050).

[5] The taxpayers third and last argument relating to the use tax assessment is that the tax, if it is applicable, must be apportioned between the lease (60 percent) and the personal use (40 percent). This claim also fails, as the use tax statutes do not provide for apportionment. The tax is measured

by the value of the article used. RCW 82.12.020. The value of the article used is the consideration (money) paid for the yacht. RCW 82.12.010.

INTEREST

The taxpayer believes that the interest assessment for the balance of the delinquency (retailing and service B&O, and unpaid retail sales tax) should be waived because of estoppel or WAC 458-20-228 (Rule 228). The estoppel theory is that the Department should be prevented from assessing interest because the Department was at fault in a) sending the wrong certificate of registration to the taxpayers, and b) not sending quarterly tax return forms.

The Rule 228 argument is similar--the delinquency was due to circumstances beyond the taxpayers' control (the Department's failure to send the returns).

First, as to estoppel, the taxpayers have failed to explain how they were injured by the fact that the Department supplied them with the wrong registration number. The real issue seems to be whether the Department is estopped from charging interest, when the Department failed to send tax return forms to the taxpayers.

[6] Washington's excise taxes are of a self-assessing nature. Each taxpayer is required to report income and remit the proper tax. The Department of Revenue maintains regional offices and a taxpayer information office in Olympia. The taxpayers made no phone calls after they paid the taxes for the first quarter of 1983, either to request more forms or to inquire as to why they had not received any. There is nothing in the statutes or in the case law that supports the argument that the Department is estopped from assessing interest on unpaid taxes, simply because the Department did not send returns. It would strain the meaning of estoppel to say that the omission of the Department, i.e., not sending forms, is "an admission, statement, or act inconsistent with the claim afterwards asserted."

Even if we were to find that the first and second elements of estoppel are present, the taxpayers would still lose on this issue for two reasons: 1) The third element is not met, in that the taxpayers were not injured, for the same reasons as those stated above; and 2) estoppel will only prevent the state from collecting public revenues when all of the elements are present and applying the doctrine is necessary to prevent a manifest injustice. Harbor Air v. Board of Tax Appeals, 88 Wn.2d at 359, 367 (1977). Here, it does not appear manifestly unjust to require the taxpayer to pay interest on a tax delinquency which arose because the taxpayers, for more than two years, failed to ask the Department why they were not receiving tax forms.

We now discuss the Rule 228 argument. The interest was assessed under RCW 82.32.050, which reads in part:

> If upon examination of any returns or from other information obtained by the department it appears that a tax or penalty has been paid less than that properly due, the department shall assess against the taxpayer such additional amount found to be due and . . . shall add thereto interest at the rate of nine percent per annum from the last day of the year in which the deficiency is incurred until date of payment.

The only statutory authority which the Department has to waive interest is RCW 82.32.105. That statute provides for a waiver only if the failure to properly pay taxes "was the result of circumstances beyond the control of the taxpayer." The statute also directs the Department to enact an administrative rule to implement this law.

WAC 458-20-228 states, in pertinent part:

> The following situations will constitute circumstances under which a waiver or cancellation of interest upon assessments pursuant to RCW 82.32.050 will be considered by the department:

1. The failure to pay the tax prior to issuance of the assessment was the direct result of written instructions given the taxpayer by the department.

2. Extension of the due date for payment of an assessment was not at the request of the taxpayer and was for the sole convenience of the department.

Because neither of the above circumstances are present, the interest cannot be waived under Rule 228.[6]

Even if we were to consider the delinquency to be due to a circumstance beyond the taxpayer's control, we would only consider a waiver of interest from Aprilá1, 1983 to December 31, 1983. The rationale would be that there could have been bona fide confusion by the taxpayers as to their reporting requirements for the leasing business, due to the Department first supplying the taxpayers with a new certificate of registration and the Quarter 1, 1983 tax returns; and then telling the taxpayers that the certificate was incorrect, without any known follow-up by the Department as to how and when the taxpayers were to report the income from the leasing business. Prior to the first quarterly return filed by the taxpayers for the new business (Quarter 1 of 1983), all of the taxpayers' returns had been on an annual basis. Coupling that fact with the confusion surrounding the issuance of the incorrect number could have led a taxpayer to reasonably conclude that the leasing company income for the balance of 1983 was not to be reported until January of 1984, when the 1983 annual return was due. Thus, it would appear that the taxpayers have at least a plausible excuse for not paying the 1983 income, when due, and we might be inclined to consider the failure to pay on time

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[6] Rule 228 also contains reference to the failure of the Department to send tax return forms to a taxpayer. However, that part of the Rule is only applicable in cases where a penalty assessment is at issue.

as being the result of circumstances beyond the taxpayers' control, under RCW 82.32.105.[7]

However, the preceding is academic because the taxpayers were not charged interest on any 1983 delinquencies until December 31, 1983. The audit interest incurred is computed from the last day of the year in which we tax liability was incurred (here, December 31, 1983). RCW 83.32.050. The net result is that, even if we held for the taxpayers on this issue, there is no 1983 interest to waive, because it didn't begin to accrue until January 1, 1984.

DECISION AND DISPOSITION:

The taxpayers' petition is denied in its entirety.

DATED this 31st day of August 1987.

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[7]We would not consider waiver of 1984 and 1985 interest because the taxpayers certainly had a duty to inquire after not receiving any annual forms for 1983.