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

In the Matter of the Petition for Refund of	)	D E T E R M I N A T I O N
	)	No. 89-372
. . .	)	Registration No. . . .
	)	Tax Assessment No. . . .

[1] RULE 179: PUBLIC UTILITY TAX -- DISTRIBUTION OF ELECTRICITY -- INCIDENTAL SALES -- REGULATED BUSINESSES. Taxpayer primarily engaged in business as a manufacturer which makes sales of electricity through a substation which it owns and operates is taxable under public utility tax as a light and power business, even though it sells only a relatively small amount of [power] to a single buyer and is not a "public utility" in the sense that it either holds itself out to the public to be in that business or is subject to state regulatory authority. Ruling prospective in nature.

[2] RULE 179 AND RULE 202 -- PUBLIC UTILITY TAX -- POOL PURCHASES -- ELECTRICITY. To qualify as a pool purchase all requirements of Rule 202 must be met, two of which are that each party to the agreement needs to have agreed to accept a specific portion of the shipment, and paid no more than a proportionate amount for that share.

[3] MISCELLANEOUS: ESTOPPEL -- REPRESENTATION TO THIRD PARTY -- REASONABLE RELIANCE. Because an estoppel argument is available only to that person who has been misled or those in privity with him, a person cannot claim reliance on admissions, statements or acts directed at others. Further, reliance would have had to have been reasonable. Inland Finance

Co. v. Inland Motor Car Co. and Liebergesell v. Evans cited.

[4] RULE 112: B&O TAX -- DEDUCTION -- GROSS PROCEEDS OF SALES -- POINTS OUTSIDE THE STATE -- TRANSPORTATION COSTS -- INCURRED BY SELLER. Deduction is allowed when transportation costs are actually incurred by seller through use of its own facilities and employees. There is no requirement that costs be paid to another entity.

[5] RULE 109: B&O TAX -- INTEREST -- IMPUTED. When interest is not specifically provided for in a contract, but is imputed merely for bookkeeping purposes by a taxpayer, excise tax will not be due at the service rate as if it were interest absent statutory or regulatory authority. Weyerhaeuser Company v. Department of Revenue cited.

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 12, 1986

NATURE OF ACTION:

Petition for refunds of public utility tax on electrical power jointly purchased by the taxpayer and another entity, business and occupation tax (Manufacturing classification) assessed because of the disallowance of claimed transportation cost deductions, and business and occupation tax (Service classification) on imputed interest charges from the sales of standing timber on which Real Estate Excise tax was paid.

FACTS:

Bauer, A.L.J. -- The taxpayer, a producer of slush pulp and chemical products, was audited for the period from January 1, 1981 to December 31, 1984. As a result of this audit, the Department issued its final version of Tax Assessment No. . . . on July 22, 1986 assessing tax due in the amount of $ . . . and interest in the amount of $ . . . , for a total of $ . . . . This amount has been paid in full.

One of the taxpayer's divisions and another company ("Company A"), both of which are co-located, have purchased electricity under a "joint power purchase contract" since 1961. Historically, the pulp and paper facility now jointly run by these two entities was run by one legal entity and was constructed, designed, and continues to operate as one integrated operation, even though the taxpayer and Company A are now separate entities.

The taxpayer is in the business of producing and supplying slush pulp to Company A. The two companies share several services, such as janitorial services, engineering and environmental treatment, as well as maintenance and facilities for electricity. In addition to the above services which the taxpayer provides Company A, the two companies jointly purchase electrical power from the local public utility district ("the PUD").

Electrical energy is distributed by the PUD to the taxpayer's own substation, and is further distributed by that substation and transformer to various meters throughout the plant facility. The taxpayer owns and maintains a separate meter for recording the power distributed to Company A, and the monthly meter reading is performed by the taxpayer's employees.

The power is purchased by virtue of a three party contract between the taxpayer, Company A, and the PUD, which was first executed in 1961, and again reexecuted in 1973. The three-party contract provides for variable rates for power.

The taxpayer and Company A executed in 1962 a supplemental agreement for calculating Company A's share of the PUD bill. In this agreement, the taxpayer and Company A agreed to use the PUD's flat rate price schedule for calculating Company A's share of the metered charges[1]. In addition, Company A was to pay a facility charge of 1% per month of the taxpayer's total investment in the electrical distribution equipment, a maintenance charge billed at cost on a one-year retrospective basis, and a percentage of the metered charges equal to the current tax rate of the public utility tax. This supplemental 1962 agreement has remained in effect despite the 1973 reexecution of the three-party contract.

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[1] Formerly Schedule B-3, Schedule 84 is used by the PUD for industrial users without contracts.

The PUD invoiced the taxpayer and Company A jointly (using the variable rate under the three-party 1973 agreement), and Company A's metered share was calculated according to the flat rate in the taxpayer's and Company A's 1962 supplemental agreement. In addition, the taxpayer billed Company A for costs relevant to the construction and maintenance of its distribution facilities, and the public utility tax. Company A mailed its payments directly to the PUD, and the taxpayer made up the difference.

At the hearing, it was further explained that the "flat" rate payment for Company A's metered electrical energy was adopted for ease in administration. The rates charged by the PUD under the three-party contract vary depending on the time of year and other complex factors over which the taxpayer has no control, and it was the intent of the parties under the contract that the monthly calculation over the course of the contract would reflect their correct proportionate shares.

Although the taxpayer and Company A originally expected that the flat rate would approximate Company A's proportionate share of electricity consumed under the joint purchase contract, that has not always been the case in recent years. In 1981 and 1982 Company A paid a share that was less than the cost of electricity it consumed, but in 1983 and 1984 Company A's paid share was more than the actual cost. The auditor concluded from these facts that the taxpayer was in the business of distributing electric power to Company A.

The public utility tax was paid by the PUD on all electrical power purchased under the joint contract. If the Department's assessment is upheld in this appeal, the tax paid by the PUD will be refunded, and if this happens, the taxpayer claims it will assert a claim against the PUD.

The audit additionally disallowed the taxpayer's deduction of certain "transportation costs" from the "value of products sold" in its calculation of business and occupation tax under the manufacturing classification. The "transportation costs" which the taxpayer deducted consisted of the depreciation expenses of its dock, dredging and maintenance costs, property taxes, manager's salary, utilities, etc., from February 1984 which the taxpayer claims are the actual costs of transportation.

The deep water dock at issue was also used by the taxpayer in a previous audit period, but it was then owned by a

subsidiary. In February 1984, however, the subsidiary merged into the taxpayer. Separate accounting methods have been maintained, so the costs of the dock are still identifiable. The auditor disallowed these costs since they were not "paid to others."

Finally, the auditor taxed imputed interest on the taxpayer's sales of standing timber. In accordance with generally accepted accounting principles, payments received for the standing timber sold during the audit period (which in each case consisted of several installment payments) were entered on the books to indicate that part of the gross sales price was allocated to imputed interest.

In each of the three situations in which service tax was assessed, the sale of standing timber had already been treated by the taxpayer as a sale of real estate, and real estate excise tax was paid on the gross sales prices. The taxpayer thus understood these sales to be exempt from the business and occupation tax.

TAXPAYER'S EXCEPTIONS:

As to the public utility tax issue, the taxpayer argues that no taxable event has occurred because the taxpayer is not in "the business of operating the plant or system for the . . . distribution of electrical energy for hire or sale." RCW 82.16.010(5) (emphasis added). The taxpayer is in the business of producing slush pulp and chemical products and does not hold itself out to the public as being in the power business. It does not solicit "light and power business," as is the case for other businesses subject to the public utility tax.

Further, the pattern of calculating Company A's portion of the PUD bill was done in good faith according to a long-standing formula previously reviewed by the Department, and to the extent a gain was made during the audit period, it was an unintentional gain and could just as easily have been a loss. The public utility tax generally is imposed on public utilities for their services or on businesses engaged in the business of selling electrical power, and not on businesses such as the taxpayer's.

The taxpayer argues that other portions of Washington's excise tax laws also make it clear that to be engaged in a particular business requires intent. In RCW 82.04.140, "business" is defined to mean "all activities engaged in with the object of

gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly" (emphasis added) and "engaging in business" is defined in RCW 82.04.150 to mean "commencing, conducting, or continuing in business...." It is a common canon of construction that similar words used in different parts of a statute are presumed to mean the same throughout, and that although the definition of "business" is not dependent on whether an enterprise is profitable or not, the plain meaning and the statutory definition of "business" infer clear intent to be in the light and power business. The taxpayer has not intentionally engaged in the business of distributing electrical energy.

Finally, the taxpayer argues that it is not distributing electrical energy "for hire or sale" as required by the statute. Another fundamental principle of statutory construction is that absent a special definition, words are given their ordinary, everyday meaning. The ordinary meaning of "hire" is "compensation for the use of a thing, or for labor" and the definition of "sale" is "a contract between two parties, called, respectively, the 'seller' ...and the 'buyer' ...by which the former, in consideration of the payment or promise of payment of a certain price in money, transfers to the latter the title and the possession of property" (Blacks Law Dictionary).

Thus, it is argued, the taxpayer is not engaged in the light and power business "for hire," and the taxpayer and Company A have not entered into a contract of "sale" with each other for the distribution of power. They simply have executed a joint purchase contract with the PUD due to historical practice and for administrative ease. It is contended that, in the everyday sense of the words, the taxpayer is not in the light and power business for hire or sale.

The taxpayer does concede, however, that even if it is determined that it was not in the business of selling electrical power, amounts received for facility and maintenance charges are properly taxable. The taxpayer contends these amounts should be taxed at the lower business and occupation tax service rate.

The taxpayer further argues that, even should the public utility tax be held applicable, estoppel should apply, since the PUD's joint purchase contract with the taxpayer and Company A was the subject of a 1962 audit conducted by the Department. The taxpayer claims reliance on an internal Departmental memorandum (obtained from an unknown source) in

which the Supervising Revenue Auditor wrote on October 22, 1962:

> Refer to your inter-office of October 19 regarding a joint contract between subjects (...[Company A and taxpayer]...) and the PUD for purchase of electrical energy.
>
> ...(the former Assistant Director of the Department of Revenue and Director of the Interpretation and Appeals Division) has read your inter-office and is of the opinion that the AAA Commissioner Order sets the precedence for this being nontaxable on the energy transferred to [the Paper Company] by [the taxpayer].
>
> Should the taxpayers desire evidence for his file and possible future audits to this effect, we suggest that they put the facts in writing and receive a reply from Olympia.

The taxpayer did not request a formal written determination in 1962 because the issue had already been resolved favorably at the audit level and was not raised again until this audit.

The taxpayer claims it relied on the long-established tax treatment by the Department and has continued to purchase power jointly with Company A because of this tax treatment. The Department's inter-office correspondence was written well after the January 24, 1962 agreement, which sets forth the formula for calculating Company A's portion of the PUD bill. The taxpayer alleges it has been prejudiced as a result of its reliance on the Department's position as set forth in the October 22, 1962 inter-office correspondence, and that the Department is thus estopped from assessing tax.

The taxpayer, in contending that its expenses of maintaining its deep water dock should be deductible from its sales as transportation expenses, argues that the Department, in a prior final determination, held that identical expenses were deductible when incurred by and paid to its subsidiary. The taxpayer takes the position that the same expenses should still be deductible, even though now the expenses are its own. The taxpayer contends that WAC 458-20-112 does not require that costs need to be paid to a separate transportation company in order to be deductible, or that a third person perform the transportation.

In arguing that imputed interest on the taxpayer's sale of standing timber should not be taxed, the taxpayer relies on Weyerhaeuser Company v. State of Washington Department of Revenue, Docket No. 51479-8, dated August 21, 1986. In that case, Weyerhaeuser sold standing timber under "lump sum" contracts whereby purchasers were typically required to pay 10 percent down, with the balance in three or four annual installments which is a trade custom. The Court held,

> The contracts did not specifically provide for interest. No interest was separately contracted for with the corporation's timber buyers and no interest was separately "received". Weyerhaeuser's own interest computations were merely an internal bookkeeping device. Because WAC 458-20-109 applies only to "[p]ersons who receive ... interest", that section can not be construed to apply to imputed interest. ... Where an installment contract for the sale of timber does not provide for interest, the Department of Revenue may not impute such interest without specific statutory or regulatory authority.

In addition, the taxpayer contends these amounts cannot be held taxable because real estate excise tax has already been paid on the total amount of these transactions.

ISSUES:

There are five issues for our resolution:

1. Whether the taxpayer, being primarily a manufacturer, and being neither regulated by any public utility commission nor held out to the public as a light and power business, can properly be taxed for public utility tax.

2. Whether the taxpayer was eligible for the "pool purchase" deduction provided by WAC 458-20-202.

3. Whether the Department is estopped from asserting public utility tax because of an inter-office memo regarding a previous audit.

4. Whether the taxpayer's expenses attributable to its deep water dock were improperly allowed as a deduction from the measure of manufacturing tax.

5. Whether the Department properly assessed service tax on imputed interest from the taxpayer's sales of standing timber.

DISCUSSION:

As to the taxpayer's argument that no taxable event has occurred because the taxpayer is not in "the business of operating the plant or system for the . . . distribution of electrical energy for hire or sale," we must disagree.

RCW 82.16.020 imposes the public utility tax as follows:

(1) There is levied and there shall be collected from every person a tax for the act or privilege of engaging within this state in any one or more of the businesses herein mentioned....

(a) Railroad, express, railroad car, sewerage collection light and power, and telegraph businesses: ... [Emphasis added.]

RCW 82.16.010(5) defines "light and power business" as follows:

"Light and power business" means the business of operating a plant or system for the generation, production or distribution of electrical energy for hire or sale. [Emphasis added.]

[1] Thus, any person falling within the statutory definition, i.e., a person who operates a system for the distribution of electrical energy for sale, is taxable under the public utility tax. This is so even though the taxpayer is primarily engaged in another business or sells only a relatively small amount of energy to a single buyer. Nor is it relevant that the taxpayer is not a "public utility" in either the sense that it is subject to state regulatory authority or makes sales to the public at large.

The Department has thus held that taxpayers with limited distribution of electrical energy or water, e.g., private water districts, homeowners' associations, companies engaged in other primary business activities, etc., are subject to the public utility tax even though they are not otherwise considered to be public utilities.

The taxpayer owns and operates a substation and related distribution facilities for the distribution of power to Company A. Company A remits its payments - including the facility and maintenance charges - directly to the PUD, thus reducing the taxpayer's proportionate share of the PUD

billing. The taxpayer pays the portion of the bill that remains. The taxpayer, having gained a benefit from its distribution of power to Company A, falls squarely within the definition of RCW 82.16.010(5), and is taxable under the provisions of RCW 82.16.020 for payments received. Such payments include payments for facility and maintenance charges, whether or not separately itemized or billed.

The amounts or value paid by Company A to the PUD thus accrue to the benefit of the taxpayer in reducing its own proportionate share of the PUD billing. Billing or invoicing arrangements by the PUD do not control the question of whether the taxpayer has engaged in a taxable event with Company A.

Because there has historically been confusion in this area, however, the Department is prepared to rule prospectively on this issue in the following particulars:

1. Businesses such as the taxpayer and persons similarly situated, whose activities fall within the statutory definitions of Chapter 82.16 RCW (Public Utility Tax) in whole or in part, but which are otherwise neither regulated nor held out to the public as a public utility, are subject to the public utility tax from the date of this determination.

2. Businesses described in 1 above, which have not been expressly instructed to pay public utility tax, and which have not paid that tax, will be assessed or allowed to report business and occupation tax under the service classification for past periods, and will be subject to public utility tax prospectively from the date of this determination. Likewise, businesses who have paid business and occupation tax under the service classification will not be reclassified and assessed for higher public utility tax until after the date of this determination. Businesses which have properly paid the public utility tax in past periods will not be entitled to a refund or adjustment. The Department is currently amending WAC 458-20-179 to further clarify this statutory requirement.

In this case, because the parties understood their agreement to be a "pool purchase" instead of a sale from the taxpayer to Company A, the public utility tax for metered service received by Company A was remitted by the PUD instead of the taxpayer. Because the Department received the public utility tax on all metered charges by the PUD, albeit through the wrong taxpayer, the assessment against the taxpayer will be abated as to those amounts.

As to the amounts received by the taxpayer for facility and maintenance charges, the taxpayer has conceded that no tax has been paid. For periods prior to the date of this determination, business and occupation tax under the service classification will be due and owing on these amounts. Public utility tax will be due prospectively on these amounts, even though they may be separately invoiced or billed from regular metered service, since such charges accrue from the performance of the taxpayer's engaging in the "light and power business." RCW 82.16.010(12).

The taxpayer has argued that WAC 458-20-202 (Rule 202), concerning "pool purchases," provides a deduction against the public utility tax. In order for the taxpayer to qualify for the pool purchase deduction, the requirements of Rule 202 must be met. The rule states as follows:

> The term "pool purchase" means the joint purchase by two or more persons, engaging in independent business activities, of commodities in carload or truck load quantities or the purpose of obtaining a purchase price or freight rate which is less than when purchased or delivered in smaller quantities.
>
> This deduction is allowed only when all of the following conditions are met:
>
> 1. The amount received is included in gross proceeds of sales.
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> 2. The pool purchase agreement was entered into prior to the time of placing the order for the commodities purchased.
>
> 3. The pool purchase agreement provides that each member shall accept a specific portion of the shipment.
>
> 4. Division of the shipment is made prior to warehousing of the commodities by a member of the pool.
>
> In no event will a "pool purchase" deduction be allowed when an agreement relative to the amount of the share to be distributed to any member is made after the date of the purchase order, or where one member of a pool pays an amount for his portion in

> excess of the proportionate amount paid by another member. [Emphasis added.]

[2] The basic premise underlying the exemption of Rule 202 is that where two or more persons get together and jointly make up an order for goods to be purchased, the principal member in whose name the order is placed will not be deemed to be making a sale to the other joint purchaser(s). To qualify as a pool purchase, all requirements of Rule 202 must be met, two of which are that each party to the agreement needs to have agreed to accept a specific portion of the shipment, and each has paid no more than a proportionate amount for his share.

The purchase agreement at issue did not provide that each member would accept a specific portion of the total power used.
Additionally, it is clear that Company A did not pay a proportionate share of the PUD billings, both because of application of the separate "flat" fee agreement between the taxpayer and Company A and the amounts paid to the taxpayer for power distribution facilities and their maintenance. This disqualifies the transaction as a pool purchase. The taxpayer's petition as to this issue is denied.

The taxpayer has claimed that the Department should be estopped from asserting public utility tax because of its reliance on a 1962 interdepartmental memorandum which concluded that tax was not due in a prior audit. 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 Wash.2d 551 (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 (1985). Further, an estoppel argument is available only to a person who has been misled to his hurt and to those who are in privity[2] with him. Inland Finance Co. v. Inland Motor Car Co., 125 Wash. 301

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[2] Privity is the mutual or successive relationship to the same rights of property. Duffy v. Blake, 91 Wash. 140 (1916).

(1913). Such reliance must have been reasonable. Liebergesell v. Evans, 93 W.2d 881, 613 P.2d 1170 (1980).

[3] Because an estoppel argument is available only to the person who was misled or those in privity with him, a person cannot claim reliance on admissions, statements or acts directed at others. Further, such reliance must have been reasonable.

In this case, the taxpayer was not misled, because the correspondence on which the taxpayer claims to rely was neither addressed to nor intended for the taxpayer's use. Further, the body of the correspondence itself precluded reasonable reliance, in that it was clearly stated that, should the taxpayer require evidence for its file or for use in future audits, the claimed facts should be put in writing for a formal written ruling.

Although this may on its face seem to be a technical ruling, it must be recognized that there is nothing on the face of the correspondence itself to reveal what facts, perceptions, or considerations were before the Department employee when he wrote the memorandum at issue. What is clear from the language of the memorandum is that a formal written opinion based on written disclosure of all material facts supplied by the taxpayer would be necessary to bind the Department for future audit periods. This was not done. The taxpayer's petition as to this issue is therefore denied.

The fourth issue - whether the taxpayer's expenses attributable to its deep water dock were improperly allowed as a deduction from the measure of manufacturing tax - involves WAC 458-20-112 (Rule 112). That rule provides, in pertinent part, as follows:

> SALES TO POINTS OUTSIDE THE STATE. In determining the value of products delivered to points outside the state there may be deducted from the gross proceeds of sales so much thereof as the taxpayer can show to be actual transportation costs from the point at which the shipment originates in this state to the point of delivery outside the state.

[4] The business and occupation tax deduction granted by Rule 112 does not contemplate only separate costs paid to others or separate itemizations on sales invoices in order to substantiate a claim to the deduction. Instead, the rule merely requires that a taxpayer incur actual transportation

costs in delivering manufactured goods to points outside Washington. The amount to be deducted is limited to what actual costs can be shown to have been incurred.

Here, the taxpayer maintains its own deep water dock, and has attempted to deduct the costs of owning, maintaining and operating it. The taxpayer's costs relative to the same docking facility were expressly found to be deductible by the Department in Det. 83-141A when the facility was run by an affiliate. There is no reason to now deny a deduction simply because costs for supplying the same services were not paid to another entity, but were absorbed instead by the taxpayer. If it can be shown that the taxpayer, as the present owner and operator of the dock, has actually incurred the costs sought to be deducted, the taxpayer's petition as to this issue will be granted.

The question remains whether the amounts deducted were reasonable and in line with the costs actually incurred. This matter appears to be strictly factual in nature, subject to verification by audit personnel.

[5] As to the imputed interest question, the Washington Supreme Court in Weyerhaeuser Company v. Department of Revenue, 106 Wn.2d 557 (1986) has since the audit period settled this issue in favor of the taxpayer. Under the holding of that case, when interest is not specifically provided for in a contract, but is imputed merely for bookkeeping purposes by a taxpayer, excise tax will not be due at the service rate as if it were interest absent statutory or regulatory authority. Because no such statutory or regulatory authority exists to date, the taxpayer's petition as to this issue is granted.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part. The case is referred back to the Audit Section for a determination of the amount of refund which, with statutory interest, will be issued by the Department in due course.

DATED this 20th day of July 1989.