Cite as 8 WTD 435 (1989)

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

In the Matter of the Petition) D E T E R M I N A T I O N
For Correction of Assessment of)
)
) No. 89-536
)
. . .) Registration No. . . .
) . . . /Audit No. . . .
)

[1] RULE 151: SERVICE B&O TAX -- DENTAL LABORATORIES -- RENDERING PROFESSIONAL SERVICE -- WHOLESALE VENDOR. Dental laboratories render professional services and are not wholesale vendors of merchandise to dentists. The functions of a dental laboratory are simply an extension of and adjunct to those services rendered by a dentist.

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: November 18, 1987

NATURE OF ACTION:

Petition protesting the assessment of additional tax due resulting from the reclassification of income reported by the taxpayer as subject to Wholesaling B&O tax to Service B&O tax.

FACTS AND ISSUES:

Krebs, A.L.J. -- . . . (taxpayer) is engaged in the business of operating a dental laboratory doing dental restoration work by making gold and porcelain crowns as ordered by dentists for their patients.

The Department of Revenue (Department) examined the business records of the taxpayer for the period from January 1, 1982 through March 31, 1986. As a result of this audit, the Department issued the above captioned tax assessment on July 22, 1986 asserting excise tax liability in the amount of $ . . . and interest due in the amount of $ . . . for a total sum of $ . . . . The taxpayer made payment of $ . . . on August 6, 1986 and the balance remains due.

The taxpayer's protest involves Schedule III of the audit report where the auditor reclassified the taxpayer's income as subject to Service business and occupation (B&O) from the taxpayer's reporting of income as subject to Wholesaling B&O tax. The auditor took such action pursuant to WAC 458-20-151 (Rule 151) which declares that "dentists, dental laboratories and physicians primarily render professional services" and are taxable under the Service B&O classification upon the gross income.

The taxpayer asserts that its business activity is wholesaling of dental restorations because it manufactures and wholesales dental prostheses (artificial replacements of teeth) to licensed professionals. The taxpayer contends that it produces a product which it sells as opposed to providing a professional service. The taxpayer asserts that it is not considered a professional by the state of Washington and is not required to be licensed.

If the taxpayer is held subject to Service B&O tax, it claims that it is unfair for retroactive application of the reclassification and assessment of interest. The taxpayer explains that when its principal officer and stockholder first registered a similar predecessor business under the name of . . . in 1978, it was assisted by a Department employee who filled in the blanks of the application for registration and checked "wholesale" as the business activity. In 1980, the same principal officer and stockholder filed another application for registration for a similar business in the name of . . . and reported its business activity as "wholesale" and dental restorations. The taxpayer's current registration was filed in January, 1982 and it again similarly reported "wholesale" and dental restorations. The taxpayer contends that the Department was thus given full knowledge on several different occasions that there was a misclassification and failed to notify the taxpayer of the misclassification or take action with respect thereto. The taxpayer asserts that even the field auditor was initially unsure as to how the

taxpayer's business should be tax classified. The taxpayer further asserts that the Department has not alleged that it willfully misclassified or did so for tax evasion. The taxpayer feels that any change in reporting status should be made effective as of the date of completion of the audit which first brought the misclassification to its attention and to the attention of the Department.

DISCUSSION:

[1] In our view, Rule 151 properly implements the Washington Revenue Act. The Department has previously considered the argument that dental laboratories should not be treated for excise tax purposes as rendering professional services, but should be classified as manufacturers or vendors of merchandise. In each instance, this argument has been rejected.

In 1977, representatives of the Washington State Dental Laboratory Association, seeking tax reclassification from Service B&O to Retailing B&O, met with officials of the Department. After careful consideration of this question, the Department concluded that in view of the longstanding history and precedent established since the inception of the Revenue Act, dental laboratories, along with the other businesses covered by Rule 151 - Dentists and Physicians - should remain classified as in the business of rendering professional services.

Over the years and especially at the time of the initial adoption of Rule 151, all of those covered by the rule considered themselves to be engaged in rendering professional services rather than being vendors of merchandise. Since it is true that at one time virtually everything done by dental laboratories was done by the dentist himself/herself, and even now some dentists do for themselves the kinds of work which dental labs might and can do, it would not be reasonable or proper to classify dentists and dental laboratories differently. The patient seeks the professional help of a dentist for dental health problems -- to be able to chew and digest food properly or to correct diseased, injured, or other oral malfunctions. The professional skills of the dentist are directed to serving these objectives and the functions of the dental laboratory are simply an extension of and adjunct to those of the dentist.

While the product of a dental laboratory is an article of tangible personal property, this is also true of a great many

professional service businesses. A doctor may produce a cast, an attorney a brief, an accountant a set of books and records, and an architect a set of plans or blueprints. But in all of these cases, the article of personal property produced is merely the tangible representation of the professional service and incidental to the professional services rendered.

Accordingly, we must reject the taxpayer's contention that the reclassification from Wholesaling B&O to Service B&O was improper.

With respect to the taxpayer's request for prospective application of the tax reclassification on the basis that a Department employee originally designated its predecessor as engaged in wholesaling, and on the basis that the Department failed to notify the taxpayer of its misclassification or take corrective action prior to the audit, the liability for the correct tax for the audit period under consideration cannot be waived. See Kitsap-Mason Dairymen v. Washington State Tax Commission, 77 Wn.2d 812 (1970) where it is further stated:

> 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.

Accordingly, we must reject the taxpayer's request for prospective application of the reclassification of the tax.

With respect to the taxpayer's request for waiver of the interest assessed on the tax found due because of the reclassification, WAC 458-20-228 (Rule 228) in pertinent part provides:

> 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.

In this case, when the Department's employee aided in completing the application for registration and checked "wholesale" as the business activity, it was tantamount to written instructions which caused the taxpayer to pay the

incorrect tax. Accordingly, we conclude that the interest assessed on the tax found due because of the reclassification shall be waived.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part as indicated in the Determination.

DATED this 12th day of December 1989.