

Cite as Det. No. 89-452, 8 WTD 209 (1989)

THIS DETERMINATION HAS BEEN OVERRULED OR MODIFIED IN WHOLE OR PART BY DET. NO. 98-218, 18 WTD 46 (1999)

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

In the Matter of the Petition)	<u>D E T E R M I N A T I O N</u>
For Refund of)	
)	No. 89-452
)	
...)	Registration No. ...
)	
)	

[1] RULE 146 AND RCW 82.04.4292: B&O TAX -- INTEREST ON LOANS SECURED BY A 1ST MORTGAGE OR DEED OF TRUST -- SERVICE RELEASE PREMIUM. Amounts received as service release premiums may not be deducted from the measure of tax. Such amounts are not derived from interest but are gains from the sale of loans. Accord: Determination No. 88-255, 6 WTD 123 (1988).

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: October 12, 1988

NATURE OF ACTION:

The taxpayer, a broker of residential real estate loans, petitioned for a refund of business and occupation tax paid on discount points, loan origination fees, and service release premiums.

ISSUES:

Potegal, A.L.J. -- 1. The taxpayer contends that discount points and loan origination fees are "amounts derived from interest received on investments or loans primarily secured by first mortgages or trust deeds on nontransient residential properties." Because it is engaged in a financial business such amounts may be deducted from the measure of its business and occupation tax liability. RCW 82.04.4292.

2. The taxpayer makes the same argument with respect to service release premiums. Service release premiums arise when the taxpayer sells loans to larger lenders or to other investors. The purchasers pay the taxpayer a lump sum amount called a service release premium. The service release premium is computed as a percentage of the loan balance. The taxpayer contends that this is prepaid interest because it is accepting the lump sum amount rather than keeping the interest income over the term of the loan.

3. The taxpayer asserts that another company in the same business, [A], was audited by the Department and was found not to be subject to tax on discount points, loan origination fees, or service release premiums. Yet another company, [B], asked for and received a refund on these items because it learned of that audit. Since similarly situated taxpayers should be taxed similarly, the taxpayer seeks the same treatment these other taxpayers received.

DISCUSSION:

The issues will be discussed in the same order presented above.

1. The matter of discount points and loan origination fees is controlled by the decision in Determination No. 89-280, ___ WTD ___ (1989), To the extent discount points and loan origination fees meet the requirements for deduction expressed in that decision, the taxpayer's petition will be granted as to this item.

[1] 2. The matter of service release premiums is controlled by the decision in Determination No. 88-255, 6 WTD 123 (1988). Although service release premiums are not specifically dealt with in that decision, the discussion beginning at the last paragraph of 6 WTD 130 is applicable. A service release premium is a gain from the sale of a security. Furthermore, since it is not paid by the borrower it would not be interest because it is not a charge for the use or forbearance of money. The taxpayer's petition will be denied as to this item.

3. The fact that the auditor did not tax service release premiums in the [A] audit is not a basis to grant relief to the taxpayer here. The audit report contains no discussion of service release premiums. The auditor and audit supervisor, after reviewing their records of the audit, have no recollection that the issue of service release premiums came up during the audit.

The Washington Supreme Court has stated:

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.

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.

Kitsap-Mason Dairymen's Association v. Washington State Tax Commission, 77 Wn.2d 812, 467 P.2d 312 (1970).

The court held that the taxing authority could assert tax even though it had failed to do so previously under the same circumstances against the same taxpayer. The taxpayer in this appeal is in an even weaker position than the taxpayer in Kitsap-Mason because the Department has taken no previous action against it with respect to the question of service release premiums.

As to the refund granted to [B], it likewise presents no basis for granting relief to the taxpayer. The refund request simply stated that the taxpayer did not deduct interest received on first mortgages and trust deeds. It did not mention service release premiums. Also, the document which the Department sent along with the refund contained this statement, "Subject to verification by future field audit."

The taxpayer's petition will be denied as to this item.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part. This matter is referred to the Department's audit staff for a determination of the amount of refund, plus interest, which will be issued to the taxpayer.

DATED this 13th day of September 1989.