Cite as Det. No. 99-283, 20 WTD 25 (2001)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 99-283
. . .	)	UBI No. . . .

[1] RULE 24001; RCW 82.62.030: SALES AND USE TAX DEFERRAL -- APPLICATION BEFORE CONSTRUCTION. RCW 82.62.030 requires that applicants for sales/use tax deferrals apply for the program before construction begins. Taxpayers who apply after construction is finished are not eligible for the program. The fact that a taxpayer is not aware that an area has been designated as a distressed area before construction begins does not justify late application.

[2] RCW 82.32.010; ETA 419: TAXPAYER RIGHTS AND RESPONSIBILTIES ACT. Taxpayers may not rely upon oral advice of Department employees.

[3] RCW 82.32.010; ETA 419: TAXPAYER RIGHTS AND RESPONSIBILTIES ACT -- ESTOPPEL. Despite the Taxpayer Rights and Responsibilities Act and ETA 419, oral instructions may give rise to estoppel. *Emrich v. Connell*, 105 Wn.2d 551, 716 P.2d 863 (1985). "Equitable estoppel" requires three main 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. In addition, when a party seeks to assert equitable estoppel against the Department, that party must also show (4) that equitable estoppel is necessary to prevent a manifest injustice and (5) that the exercise of governmental powers will not thereby be impaired. *Kramarevcky v. DSHS*, 122 Wn.2d 738, 863 P.2d 535 (1993). The standard of proof is clear and convincing evidence. *PUD No. 21 of Douglas County v. Cooper*, 69 Wn.2d 909, 421 P.2d 1002 (1966).

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.

NATURE OF ACTION:

Taxpayer appeals the denial of its application for deferral of sales and use tax for the construction of its new manufacturing facility in . . ., Washington.[1]

ISSUES:

1. Is a Distressed Area Sales Tax Deferral Application timely filed when it is submitted after site work has begun?

2. Should the Department be estopped from enforcing the deadline for filing the application because of inconsistent and confusing statements by state, local and Department officials?

BACKGROUND:

Bianchi, A.L.J. -- . . ., ["product company"] and taxpayer . . . are affiliates, registered in Washington under the latter's tax registration number. Both are held by . . . and both are incorporated [outside Washington]. [Product Company] manufactures [product] in a facility in Canada. In 1997 taxpayer began looking to open a Washington State facility in [Washington City] because approximately 70% of the company's business was in the United States, and because that site was close to the Canadian plant and to the owner's home in [Canada]. The taxpayer also asserts another reason for locating the facility in [Washington City]: the existence of certain deferrals/exemptions from state and local sales and use tax, including the distressed area exemption at RCW 82.60.040.[2]

The taxpayer's representative asserts that the owner of the company learned about these incentives from officials of the Washington State Department of Community Development, Trade and Economic Development, . . ., a private organization assisting companies to locate in the area, and the Economic Development Council of Whatcom County. The taxpayer cannot recall which of these parties informed it that the area was eligible for distressed area treatment.[3]

Prior to making the decision to build in [Washington City], the taxpayer's representative contacted an employee of the Department of Revenue (hereinafter Department), through what he referred to as the "general telephone numbers" of the Department, to discuss potential tax exemptions. The taxpayer requested information regarding a number of exemptions, including

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

[2] Although not technically an exemption, the deferred sales tax on the construction of a qualifying investment project need not be repaid if the taxpayer has met the requirements of the program. RCW 82.60.065.

[3] From May 1, 1997, to April 30, 1998, Whatcom County was eligible for the sales and use tax deferral program as a county adjacent to a distressed area. This designation would have required the taxpayer to hire one new employee for every $750,000 of qualified investment and seventy-five percent of the new employees would have had to be recruited in Skagit County. Special Notice, August 11, 1997. Therefore, in August of 1997, the taxpayer was technically eligible for the exemption for a $2,400,000 construction project in [Washington City], located in Whatcom County. No information has been presented to us regarding whether or not it was feasible for the taxpayer to draw 2-3 new employees from Skagit County to [Washington City]. Knowledge about this program, however, may have been the source of the taxpayer's initial belief that the area was eligible for the exemption.

the distressed area exemption. Following the telephone conversation, the Department sent the taxpayer a New Business Handbook and a copy of a Special Notice, dated June 28, 1995. The New Business Handbook did not address the exemptions at all except to advertise the availability of a publication entitled "Deferrals, Credits and Exemptions," and a Special Notice regarding "Eligible areas for tax exemptions and credits." The Special Notice the taxpayer received principally advised taxpayers about the Machinery & Equipment exemption.[4] The Notice also contained information about recent changes in legislation relating to the distressed area exemption. No general directions for how to access that program or applications for the exemption were sent. According to the taxpayer's representative, the taxpayer received no other Special Notice regarding the exemption nor was the representative told that the taxpayer had to apply for that exemption before it could begin construction.[5]

At some later date, but before construction began, the taxpayer learned from the Economic Development Council of Whatcom County that neither [Washington City] nor Whatcom County was designated as an official distressed area eligible for distressed area sales and use tax exemptions.[6] In light of this information, the taxpayer did not inquire again about eligibility before the company began construction in June of 1998. A few weeks after construction began, however, the taxpayer discovered that the area had been designated a distressed area. The taxpayer immediately submitted an application on July 20, 1998.

TAXPAYER'S EXCEPTIONS:

The company contends it was not practicable, while planning the construction, to keep calling the Department to learn whether the proposed site was designated a distressed area. Further, the taxpayer complains that it requested all information regarding the distressed area exemptions, but no one from the Department and no document provided to the taxpayer by the Department informed the taxpayer that the application had to be submitted before construction began.

DEPARTMENT'S POSITION:

Special Programs contends that the information officially designating the area as distressed was available from the Department as of mid-April, 1998, although it was not published as a Special Notice until August 12, 1998. The list of areas designated as distressed is determined annually

[4] The taxpayer did successfully take the Machinery and Equipment exemption.

[5] It is unfortunate that the taxpayer did not receive these notices. Both the 1997 and the 1998 Special Notices clearly delineate eligibility of specific areas and state:

> Because the list of eligible areas is revised annually, businesses making investment or hiring decisions should understand that a given area may not be on the list from one year to the next. Before making a final investment or hiring decisions based on these programs, the business should verify the eligible status of the area. This information can be obtained from the Special Programs Division by calling (360) 753-5545. In addition, applications must be made prior to initiation of construction or hiring.

[6] This advice was accurate for the period before June, 1998. Had taxpayer called the Department in mid-April of 1998, it would have learned that both Whatcom County and [Washington City] would become eligible areas, shortly. [Washington City] was designated an eligible timber impact area for the period between July 1, 1998, through June 30, 1999, and Whatcom County was designated a distressed area for the period between June 6, 1998 and June 5, 1999. Special Notice, August 12, 1998.

based on unemployment numbers, income levels and other information provided by the Employment Security Department and the Office of Financial Management. Because the taxpayer admits it did not apply for the exemption until July of 1998, after construction had begun, Special Programs had no choice but the deny the exemption.

ANALYSIS:

[1] The governing statute requires that application for this deferral be made before the construction begins. RCW 82.60.030 states:

> Application for deferral of taxes under this chapter must be made before initiation of the construction of the investment project or acquisition of equipment or machinery. The application shall be made to the department in a form and manner prescribed by the department. The application shall contain information regarding the location of the investment project, the applicant's average employment in the state for the prior year, estimated or actual new employment related to the project, estimated or actual wages of employees related to the project, estimated or actual costs, time schedules for completion and operation, and other information required by the department. The department shall rule on the application within sixty days. [Emphasis added].

Washington Administrative Code 458.20.24001 (Rule 24001), likewise, requires that application be made before construction begins:

> (4) Application procedure. An application for sales and use tax deferral under this program must be made prior to the initiation of construction, as defined above…. Application forms will be supplied to the applicant by the department upon request. [Emphasis added].

"Initiation of construction" means the commencement of on-site construction work. Rule 24001(3)(n). The taxpayer failed to apply prior to the initiation of construction. No statutory or regulatory authority permits the Department to award the exemption in the absence of timely application by the taxpayer. See also Det. No. 89-265, 7 WTD 345 (1989).

We are sympathetic with the taxpayer's plight in discovering, shortly after it began construction, that the area had been recently designated a distressed area after all. The taxpayer was not aware that the distressed areas required annual redesignation. Because the designation is based on a variety of factors, such as the prior three years of unemployment statistics in an area, the median household income for the three prior years, whether the area exceeds by 20% the statewide unemployment average, and whether the area is designated as a timber impact area, by necessity, this list must be updated annually. RCW 82.60.020(3). Further, the taxpayer appears to have received contradictory and misleading advice about the eligibility of the area from non Department of Revenue employees assisting it in the development process.

Nevertheless, it is the responsibility of the taxpayer to determine its tax reporting obligations. The Taxpayer Rights and Responsibilities Act, RCW 82.32A.030(2), requires taxpayers to "[k]now their tax reporting obligations, and when they are uncertain about their obligations, seek instructions from the department of revenue."

[2] Regarding taxpayer's complaint that Department employees gave the taxpayer confusing information, the taxpayer could not remember whether a Department employee or some other individual originally advised the taxpayer that the area was eligible for the exemption which impacted the taxpayer's decision to locate the facility in [Washington City]. Whoever rendered it, that advice was technically correct at the time it was given.[7] More importantly, taxpayer's reliance on oral advice, even if such advice came from a Department employee, cannot prevail. The Taxpayer Rights and Responsibilities Act permits a taxpayer to rely upon the "written" statements of Department employees. RCW 82.32A.010. *See also* WAC 458-20-228 (Rule 228) and Excise Tax Advisory 419.32.99 (ETA 419). ETA 419 states:

> . . . The department has determined that it cannot authorize, nor does the law permit, the abatement of a tax or the cancellation of interest on the basis of a taxpayer's recollection of oral instructions by an agent of the department.
>
> The department of Revenue gives consideration, to the extent of discretion vested in it by law, where it can be shown that failure of a taxpayer to report correctly was due to written instructions from the department or any of its authorized agents. The department cannot give consideration to claimed misinformation resulting from telephone conversations or personal consultations with a department employee.

Such a result is necessary. In cases of oral advice, the important facts may not have been fully presented by the taxpayer to the agent, yet there is no record of the facts presented. There is no record of instructions or information imparted by the agent to the taxpayer, which may or may not have been erroneous or incomplete. Finally, there is no evidence that such instructions were completely understood or followed by the taxpayer. Under ETA 419, we cannot give consideration to the taxpayer's claim that it received incorrect oral advice from a Department employee prior to June of 1998. The written advice provided by the Department contained nothing that was erroneous. Nothing in the Business Handbook or the Special Notice dated June 28, 1995 gave the taxpayer written instructions contrary to what was required.

[3] Nor may relief be granted based on Taxpayer's suggestion that the Special Notice sent to the taxpayer was incomplete and misleading. Despite the statute and ETA cited above, which provide relief only when the taxpayer relies on the written advice of the Department to its detriment, under certain circumstances a taxpayer's reliance on oral advice could implicate the doctrine of equitable estoppel. This doctrine 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 Wn.2d 551, 716 P.2d 863 (1985). "Equitable estoppel" requires three main elements: (1) an admission, statement, or act

[7] See footnote 2 above.

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. In addition, when a party seeks to assert equitable estoppel against the Department, that party must also show (4) that equitable estoppel is necessary to prevent a manifest injustice and (5) that the exercise of governmental powers will not thereby be impaired. *Kramarevcky v. DSHS*, 122 Wn.2d 738, 863 P.2d 535 (1993).

In the instant case, the taxpayer has not established the first and fundamental element of any estoppel argument, i.e. "an admission, statement or act inconsistent with the claim afterwards asserted." Although the taxpayer asserts that it was mislead by the Special Notice dated June 28, 1995, no specific statement in the Notice is incorrect or inconsistent with the position Special Programs took in denying the application. Even though it is true that the Special Notice sent by the Department did not specify that the tax deferral application needed to be filed prior to the initiation of construction, it also did not state that an application was unnecessary or that the application could be filed at a later date. It was merely silent on the issue. We are aware of no authority, nor has Taxpayer cited any, where the omission of an affirmative requirement from published material, which does not purport to contain the full requirements, has estopped the Department from asserting the omitted requirement. On the contrary, there must be ”an admission, statement, or act inconsistent with the claim afterwards asserted.”

Furthermore, we note that the Special Notice upon which Taxpayer relies was not meant to be a comprehensive discussion of the Distressed Areas Sales Tax Deferral/Exemption program but merely a description of some recent legislative changes. The section that Taxpayer highlights was entitled “Changes to Existing Tax Incentive Programs.” It described recent legislative changes in the New Business Tax Deferral Program, the Distressed Area Tax Deferral/Exemption, and the Tax Deferral/Exemption for High Technology Businesses. The notice was designed to only highlight changes and, if further clarification or information was necessary, the reader was expected to refer to the appropriate rules or statutes. *See* RCW 82.32A.020.

3. Finally, the taxpayer alleges that the Department purported to send it all relevant notices regarding the distressed area exemption, but failed to do so. Had the taxpayer received the Special Notice dated August 11, 1997, it would have learned that it needed to check with the Department annually regarding eligibility and to apply before construction began. The taxpayer contends the Department’s promise to send all relevant notices and that its failure to do so constituted conduct upon which it relied to its detriment.

The taxpayer cannot recall either the exact date of, or the other party to, the telephone conversation in which this promise was made. The Department does not keep records of telephone calls received through the general information line or notes about information that may be sent in response to such calls. The taxpayer only knows it received the June 28, 1995 Special Notice sometime in August of 1997. No evidence has been presented that the other Special Notice, which was not published until August 11, 1997, even existed at the time of the telephone call. The 1996 notice designating distressed areas would not have been an accurate statement of eligibility in August of 1997.

Therefore, at the time of the telephone call, no accurate notice regarding the distressed area exemption may have existed to send.

Where estoppel is sought against a governmental entity, its elements must be proven by clear and convincing evidence. *PUD No. 21 of Douglas County v. Cooper*, 69 Wn.2d 909, 421 P.2d 1002 (1966). In that case, several landowners protested the decision of a PUD to condemn their land in fee simple rather than obtain flowage easements. The protesters contended that the PUD had promised in several oral conversations that only flowage easements would be taken except in cases of prime necessity. The documentary evidence of such a promise was completely void. The testimonial evidence was highly contradictory. The Supreme Court held that the protesters were required to prove by clear, cogent and convincing evidence that such promises had been made. In the absence of any documentary evidence and where testimonial evidence conflicted, the protesters could not meet the clear and convincing standard. Under the evidence presented here, we cannot conclude that the taxpayer has proven by clear and convincing evidence either that the Department promised to send it all notices relevant to the distressed area exemption or that it failed to do so. Accordingly, the Department is not equitably estopped from collecting the tax.

Finally, we also doubt that the second element of equitable estoppel has been met. It appears from the evidence that the taxpayer decided to build in [Washington City] because of the location's proximity to the owner, its Canadian facility, and the bulk of its customers, and not in reliance upon eligibility to obtain a distressed area exemption.

DECISION AND DISPOSITION

Because the taxpayer's application was submitted after it began construction and there is no clear and convincing evidence that the taxpayer relied on either incorrect written or oral assertions by the Department to the taxpayer's detriment, the Department's denial of the application for the distressed area exemption is affirmed.

Dated this 30th day of September 1999.