Cite as 1 WTD 203 (1986)

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

In the Matter of the Petition For Correction of Assessment)	D E T E R M I N A T I O N
)	No. 86-259
)	
. . .)	Registration No. . . .
)	Tax Assessment No. . . .
)	

[1] **RULE 193B**: BUSINESS AND OCCUPATION (B&O) TAX -- NEXUS -- OUT-OF-STATE SALES -- INSTALLATION SERVICES. Where an out-of-state seller sends its crew to Washington to install its products in this state, that activity provides sufficient nexus for B&O tax liability.

[2] ESTOPPEL -- ETB 419. Doctrine of equitable estoppel applied where taxpayer had not paid B&O taxes in reliance on advice by Department employees that it did not have B&O tax liability and where numerous Notices of Balance Due had been cancelled because the Department had concluded the taxpayer had no local activity.

These 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: Augustá27, 1986

NATURE OF ACTION:

The taxpayer petitions for a cancellation of a tax assessment for business and occupation tax assessed for the period Januaryá1, 1982 to Septemberá30, 1985. The taxpayer contends its business tax liability should be prospective only.

FACTS AND ISSUES:

Anne Frankel, Administrative Law Judge--The taxpayer is a [out-of state] service corporation [hereinafter referred to as State A] that covers outside bulk commodities to protect them from the environment. The taxpayer registered its business in this state in July of 1980. At that time, the taxpayer sent a letter to the Department noting the possibility the company would be doing work within Washington. The letter requested the appropriate information regarding sales tax and asked for all necessary forms so that the company could comply with Washington's regulations. The letter stated the company was strictly a service company with all wages, unemployment and workmen's compensation paid under . . . [state A]. The letter added that if the Department had any questions, it could call the company collect at the number provided.

According to the taxpayer, sales are solicited by telephone and through trade journals; only "on rare occasions" does a salesperson contact Washington customers. The taxpayer ships all goods from its out-of-state location and has no retail store, wholesale facility, or warehouse in Washington. All of its employees live out of state. In most cases, it does send its employees to install the coverings.

The taxpayer submitted an excise tax return for the third quarter of 1980. The return indicated $22,937.26 in gross retail sales on line 18 and $1,032.18 as tax due. A check for that amount was enclosed.

The Department's audit section adjusted the return to show the gross amount of sales on line 17, retailing. The applicable retailing B&O tax was first posted, but then credited to the taxpayer. The gross amount of sales was listed as a deduction in column three resulting in a taxable amount of zero. A note on the back of the return explaining the deduction said "no local activity per ph/c." The taxpayer was assessed local sales tax which it had failed to collect and remit.

In September of 1981, the taxpayer was issued a second Notice of Balance Due. The vice president called the Department and talked to a named employee. He alleges he told that employee the nature of the company's business in Washington and was told that no B&O tax was due. A notation in the taxpayer's file regarding the phone call states the taxpayer was told "probably no B&O tax due." The taxpayer returned the Notice of Balance Due with a notation that the tax was not due,

naming the Department employee whom he had talked to. The Notice of Balance Due was cancelled on Octoberá27, 1981.

The taxpayer continued collecting and submitting retail sales tax, but paying no B&O tax. Each return indicated the reason for the deduction from B&O tax as "no local activity."

On Marchá9, 1984, the taxpayer was issued another Notice of Balance Due. The explanation stated "sufficient local activity for application of business and occupation tax." Again the taxpayer called the Department, talked to another named employee, and was told the company did not have sufficient activity in this state for B&O tax liability. A credit adjustment was made and the Notice of Balance Due was cancelled on Juneá4, 1984.

On Januaryá4, 1985, the taxpayer was issued a fourth Notice of Balance Due. That explanation stated it was issued because the taxpayer's monthly combined taxable amount exceeded $1,000. Again a credit adjustment was made cancelling the B&O assessment because of "no local activity."

On Januaryá25, 1985, a fifth Notice of Balance Due was issued, again because the taxable amount exceeded $1,000/month. On Februaryá11, 1985, the taxpayer wrote the Department regarding the notice. The letter states, "Please be advised that (the taxpayer corporation) is a [state A]-based corporation with sales offices in [state A]. We have no offices or outlets within the state of Washington. Sales are transpired over the telephone, and crews are dispatched only upon receipt of order." A credit adjustment was again made on Februaryá21, 1985. "B&O not due per file."

Several additional Notices of Balance Due were issued. Each time, the taxpayer responded with the same letter it had sent in February of 1985 and each time the notice was cancelled. After the sixth letter from the taxpayer returning a Notice of Balance Due for January and June of 1985, a Department of Revenue officer responded with the following letter on Octoberá31, 1985:

> I have enclosed copies of WAC 458-20-170 and 193B for your edification.
>
> Be advised that when you sell and install one of your systems it is a retail sale. Also when you send a crew or hire a subcontractor you are acting as the "prime contractor" thus having the

> responsibility to collect the retail sales tax and pay the business and occupation tax (B&O) under the retailing category.
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> The total B&O tax due is $175.82. Use the enclosed envelope to make your remittance before Novemberá15, 1985.
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> If you have any questions, feel free to call me at [number].

During the hearing, the taxpayer's vice president stated he accepted that ruling, paid the assessment and began paying B&O tax at that time. On February 3, 1986, the Department sent the taxpayer the tax assessment at issue. The assessment was based on an examination of the taxpayer's account for the period Januaryá1, 1982 to September 30, 1985 and assessed Retailing B&O taxes and interest in the amount of $4,889.36.

The taxpayer petitioned for a correction of that assessment. The vice president who had previously contacted the Department on numerous occasions said that upon receiving the statement, "to say that I was shocked would be a gross understatement." He contends he had been reporting and paying Washington taxes as he had been previously told by the Department on numerous occasions. The taxpayer requests prospective application of B&O tax, contending the Department should not be able to assess a tax which it previously told the taxpayer it did not have to pay.

DISCUSSION:

[1] WAC 458-20-193B (Rule 193B) is the administrative rule dealing with sales of goods originating in other states to persons in Washington. The rule contains the rationale of numerous court decisions which dealt with the Constitutional limits upon a state's ability to impose excise taxes upon such sales.

Rule 193B lists examples of activities which are of sufficient local nexus for application of the business and occupation tax. Example six provides the basis for concluding the taxpayer performs sufficient activity in Washington to make its sales to persons in this state subject to Washington's business and occupation tax. Example six states:

> Where an out-of-state seller either directly or by an agent or other

> representative in this state installs its products in this state as a condition of the sale, the installation services shall be deemed significant services for establishing or maintaining a market in this state for such installed products and the gross proceeds from the sale and installation are subject to business tax.

The taxpayer now understands that sending a crew to Washington to install the coverings provides sufficient nexus for Washington business tax liability on the gross proceeds of its Washington sale. The taxpayer contends, however, that the assessment should be prospective only.

The taxpayer believed it did not have sufficient local activity for a retailing tax because it did not perform direct sales activity in Washington. In its phone calls and correspondence to the Department, it stressed it had no facilities, warehouses, or employees in Washington and that almost all of its sales were made by phone orders. The notation regarding one of the phone conferences in which the taxpayer was advised it did not have sufficient local activity indicates the decision was based on a discussion of the taxpayer's sales activity in Washington.

The taxpayer also stated it informed the Department from the beginning that it installed its product in Washington. Its business activities statement confirms that assertion. Question eight on the statement asked if the business performed maintenance and repair services in Washington. The taxpayer checked yes, adding "if needed." Question nine asked if the business erected or installed articles of tangible personal property in Washington. The taxpayer checked yes, adding "short term storage."

At the bottom of the statement, the taxpayer was asked to briefly describe its business, other than activities noted in the preceding questions, which applied to the State of Washington. The taxpayer wrote, "All our employees are [state A] based, both sales and service people. No offices are located in Washington, therefore we have no local activity. Crews receive all direction from [state A]." Even though the taxpayer had indicated its crews installed its products, it was told on numerous occasions it did not have sufficient local activity for B&O tax liability.

The Department's position is that oral instructions or interpretations by employees of the Department are not binding. This position was set forth in ETB 419.32.99 which states in part:

> . .á.á[T]he 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 or 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.
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> There are three reasons for this ruling:
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> (1) There is no record of the facts which might have been presented to the agent for his consideration.
>
> (2) There is no record of instructions or information imparted by the agent, which may have been erroneous or incomplete.
>
> (3) There is no evidence that such instructions were completely understood or followed by the taxpayer.

In the present case, the reasons for ruling that oral instructions or inter-pretations by employees of the Department are not binding do not apply:

1. There is a record (the Business Activities Statement) which was presented to the Department for consideration;

2. There is a record of Department instructions that the taxpayer did not have enough local activity for B&O tax liability; and

3. On numerous occasions, Notices of Balance Due were cancelled on the basis of no local activity.

Because the Department employees overlooked the fact that the taxpayer's installation of its products in Washington established sufficient nexus for imposition of the B&O tax, does not relieve the taxpayer of its liability for the correct tax. See Kitsap-Mason Dairymen's Assoc. v. Tax Commission, 77 Wn.2d 812, 818 (1970). The taxpayer agrees that the Department is not estopped from collecting the tax prospectively, even though it was told previously it had no business tax liability. It contends, however, that the state should be estopped from collecting the tax for the back periods because it was told the tax was not due.

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 359, 366-67 (1977).

In view of the cumulative effect of the information given to the taxpayer at the time of registration, and the numerous times assessments were cancelled because the Department found "no local activity," we believe the taxpayer should be granted the benefit of any doubts which might be raised under the rationale of Harbor Air Service, supra. We agree that the taxpayer's business tax liability should begin with the Notice of Balance due which was issued on Octoberá31, 1985.

DECISION AND DISPOSITION:

The taxpayer's petition is granted. Tax Assessment No. . . . shall be cancelled.

DATED this 24th day of September 1986.