Cite as Det. No. 86-285, 1 WTD 331 (1986)

BEFORE THE INTERPRETATION AND APPEALS SECTION
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. 86-285[1]
. . .	)	Registration No. . . .

[1] **RULE 187 AND RCW 82.08.0284(2)**: VENDING MACHINES -- FOOD PRODUCTS --STATUTES, CONSTRUCTION OF -- LEGISLATIVE INTENT. Where the language of a statute is clear, the words used in the statute are to be considered the final expression of the legislature's intent and the Department will not presume that 1981 law waiving the requirement to separately state the retail sales tax from the selling price in the case of food products sold through vending machines was intended by the legislature to apply to all sales through vending machines.

[2] **MISCELLANEOUS**: STATUTES, CONSTRUCTION OF -- RETROSPECTIVE EFFECT. Legislative enactments are presumed to apply prospectively only and will not be held to apply retrospectively unless such legislative intent is clearly expressed or to be implied.

[3] **RULE 187, RCW 82.08.050 AND RCW 82.08.080**: VENDING MACHINES -- STATUTES, CONSTRUCTION OF -- RETROSPECTIVE EFFECT -- LEGISLATIVE HISTORY -- LEGISLATIVE INTENT -- EMERGENCY CLAUSE. Inclusion of an emergency clause is clear evidence of legislative intent that amendment relieving vending machine operators of the requirement to separately state the retail sales tax from the selling price was intended to apply prospectively only.

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: . . .

[1] The reconsideration determination, Det. No. 86-285A, is published at 4 WTD 363 (1987).

DATE OF HEARING: June 26, 1986

NATURE OF ACTION:

A vending machine operator asserts that Chapter 36, Laws of 1986, which excuses persons making retail sales through vending machines from the requirement of separately stating the retail sales tax from the selling price or collecting separately from the buyer, should be applied retroactively.

FACTS AND ISSUES:

Ronald J. Rosenbloom, Administrative Law Judge--The taxpayer operates vending machines, some of which dispense "food products" as defined at RCW 82.08.0293, and others of which are used to sell non-food items. The non-food vending machines do not display stickers separately stating the retail sales tax from the selling price. In an audit covering the period January 1, 1982 through September 30, 1985, the Audit Section determined that the proper measure of the retail sales tax was the gross amount received from such machines. This resulted in the assessment of a retail sales tax deficiency since the taxpayer had factored out the tax from the gross amount received from such machines during the audit period.

TAXPAYER'S EXCEPTIONS:

The taxpayer argues that despite its failure to post stickers separately stating the retail sales tax from the selling price it should nevertheless be permitted to factor out the tax from the gross amounts received from non-food vending machines. The taxpayer recognizes that non-food vending machines were technically required to display such stickers during the audit period, but asserts that the assessment should nevertheless be corrected.

The taxpayer argues that the legislature intended to eliminate the requirement to post such stickers on all vending machines in 1981. Because of legislative oversight, however, the requirement to post such stickers was removed only with respect to food products vending machines.

In 1986, when it became apparent that such stickers were still required to be posted on non-food vending machines, the legislature promptly enacted corrective legislation to eliminate this requirement as well. This, according to the taxpayer, is further evidence that the requirement was supposed to have been eliminated in 1981 and should not now be enforced.

Finally, it was never the intent of the taxpayer to violate any provision of the law. It was the taxpayer's understanding, and others in the industry, that stickers were no longer required following the 1981 legislation. The taxpayer's representative asserts that the Department itself must have operated on this assumption since numerous audits of other vending machines operators have not raised this issue.

DISCUSSION:

During most of the audit period, the law required retail sellers to state the retail sales tax separately from the selling price and it was conclusively presumed that the selling price quoted in any price list, sales document, contract, or other agreement between the seller and buyer did not include the tax. RCW 82.08.050. Another provision of the law prohibited retail sellers from advertising a price as including retail sales or otherwise implying that they were absorbing the tax. RCW 82.08.120. Effective April 15, 1985 the law was amended to allow sellers to advertise a price as including retail sales tax in which case the advertized price shall not be considered the selling price; however, the tax must still be separately stated from the selling price in any sales invoice or other instrument of sale, chapter 38, Laws of 1985 (EHB 601). At all times covered in the audit, however, vending machine operators were allowed different treatment. The law permitted the Department to authorize persons making retail sales through vending machines to pay the tax themselves and waive collection of the tax from the buyer, RCW 82.08.080. Accordingly, the Department promulgated an administrative rule providing that:

> such persons are authorized to absorb the amount of the tax . . . and to pay to the department the retail sales tax on the total amount received from such machines. WAC 458-20-187.

Thus, vending machines operators, unlike other retailers, were permitted to absorb the retail sales tax. For example, assuming a retail sales tax rate of 7 percent, a vending machine operator's retail sales tax liability an $100 in sales would be calculated as follows:

Selling Price		Sales Tax Rate	Tax Absorbed By Seller
$100.00	x	.07	$7.00

Many vending machine operators chose not to absorb the retail sales tax, for the obvious reason that their tax liability could be reduced by "factoring out" the tax from the total amount received from the machines. That is, treating the total amount received from the machines as inclusive of sales tax. Thus:

Selling Price		Sales Tax		Total Machine Receipts
$93.46	+	$6.54	=	$100.00

In this example, this procedure would result in a savings of 46 cents in retail sales tax liability (as well as a smaller savings in Retailing Business and Occupation tax liability). In order to be permitted to factor out the retail sales tax from total machine receipts, however, vending machine operators were required to do what every other retail vender was required to do: separately state the tax from the selling price. This was accomplished by posting stickers on vending machines stating the selling price, the retail sales tax, and the total amount to be deposited in the machine for the desired item. In other words, stickers were never absolutely required on vending machines, they were only required if the operator wished to factor out the retail sales tax rather than absorb it.

Thus while some may view the sticker posting procedure as cumbersome, it was never mandatory upon vending machine operators but merely optional. Any operator was free to choose whether to post stickers and factor out retail sales tax, or to post no stickers and absorb the tax. Some in the industry were dissatisfied with these choices; they wanted to be allowed to factor out the retail sales tax without having to post the stickers. This goal was realized in part when the legislature amended RCW 82.08.0284 by enacting Chapter 18, Laws of 1981 (SSB 3076) pertaining to vending machine food sales. The primary purpose of that legislation was to eliminate uncertainty and confusion as to whether or not retail sales tax applied to sales of food through vending machines. Under prior law, the application of the tax depended upon the location and surroundings of each machine. To resolve this problem, it was determined that all sales of food through vending machines would be subject to retail sales tax, but that the selling price for purposes of determining the amount of the tax would be fifty-seven percent of the gross receipts RCW 82.08.0284(2) (as amended by SSB 3076).

The legislature went one step further, however, to declare "(f)or tax collected under this subsection, the requirement that the tax be collected from the buyer and that the amount of tax be stated as a separate item are waived." Id. The Department has interpreted this to mean that the retail sales tax due on sales of food through vending machines may be factored out of the 57 percent of gross receipts that is subject to tax, even though no sticker is displayed.

Thus, sales of food products through vending machines were treated uniquely among retail sales as a result of SSB 3076. Vending machine operators were permitted to factor out retail sales tax, i.e. treat amounts received from their buyers as inclusive of the tax, even though they were not required to separately state the tax from the selling price by posting stickers.

The taxpayer's first argument is that it should be allowed to factor out retail sales tax from gross amounts received from non-food vending machines even though no stickers were displayed because that was the result really intended by the legislature in enacting the 1981 legislation. The taxpayer's petition supplies the committee analysis of SSB 3076 which concludes:

> Another department requirement is that stickers be applied to all machines with taxable items. Such stickers would show the retail price plus the tax for a total price. These are constantly being removed by unauthorized persons and the vending machine operator is reprimanded. This bill eliminates this requirement.

Presumably, we should infer from this that the legislature intended to eliminate the so-called sticker requirement from all sales through vending machines, and not just from sales of food products. If the statute was ambiguous, this legislative history might be of some assistance in construing it. However, a statute which is plain needs no construction. King County v. Seattle 70 Wn.2d 988 (1967). The language of the statute in question plainly and unambiguously refers only to sales of food products through vending machines and is susceptible of no other interpretation. The pertinent provisions provide:

> (2) Subsection (1) of this section notwithstanding, the retail sale of food products is subject to sales tax under RCW 82.08.020 if the foods products are sold through a

> vending machine, and in this case the selling price for purposes of RCW 82.08.020 is fifty-seven percent of the gross receipts.
>
> . . .
>
> For tax collected under this subsection, the requirements that the tax be collected from the buyer and the amount of tax be stated as a separate item are waived. RCW 82.08.0284 (Emphasis ours.)

The requirement to separately state the tax (i.e post a sticker) is waived as to the "tax collected under this subsection," which is the retail sales tax on "food products . . . sold through a vending machine." There is simply no reasonable interpretation under which SSB 3076 can be construed to extend to sales of non-food items through vending machines.

[1] Where the language of a statute is clear, the words used in the statute are to be considered the final expression of the legislative's intent. Rasor v. Retail Credit Co. 87 Wn.2d 516 (1976). We therefore decline the taxpayer's invitation to presume that the legislature, in enacting SSB 3076, intended to eliminate the so-called sticker requirement for all sales through vending machines.

The taxpayer's second argument is that chapter 36, Laws of 1986 (SHB 1480), which does eliminate the so-called sticker requirement for all sales through vending machines, should be applied retroactively.

[2] In Washington legislative enactments are presumed to apply prospectively only and will not be held to apply retrospectively unless such legislative intent is clearly expressed or to be implied. Baker v. Baker 80 Wn.2d 736 (1972). No such intent is expressed in SHB 1480.

Nor may such intent be reasonably implied, particularly if one considers the legislative history of the bill. The original draft (HB 1480) contained no emergency clause, so if it had been passed into law the effective date would have been June 11, 1986, ninety days after the last day of the legislative session. the substitute bill, which ultimately became the law, did contain an emergency clause, and so became effective immediately upon the governor's signing it, i.e. March 10, 1986.

[3] The inclusion of an emergency clause is very clear evidence that legislation is intended to apply prospectively only. Obviously, there would be no point in including such a clause in statute that is intended to be applied retrospectively. See Agency Budget v. Wash. Ins. Guar. Ass'n., 93 Wn.2d 416 (1980). We conclude that the legislature, by including an emergency clause in SHB 1980 intended that it apply prospectively only.

Finally, the fact that taxpayer's and others in the industry mistakenly assumed that the 1981 legislation eliminated the so-called sticker requirement for all vending machine sales is irrelevant. There is no evidence whatever that the Department contributed to this mistake by word or deed.

Moreover, the possibility that this issue may have been overlooked in prior audits of this or other taxpayers does not excuse this taxpayer from paying the correct amount of taxes lawfully due for

the audit period now under consideration. See Kitsap-Masen Dairymen's Association v. Tax Commission 77 Wn.2d 812 (1970). "The doctrine of estopped will not be lightly invoked against the state to deprive it of the power to collect taxes." Id. at 818.

DECISION AND DISPOSITION:

The taxpayer's petition for correction is denied.

DATED this 7th day of November 1986.