

Cite as Det. No. 13 WTD 166 (1993).

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

In the Matter of the Petition	)	<u>F I N A L</u>
For Reconsideration of the	)	<u>D E T E R M I N A T I O N</u>
Tax Assessment on	)	
	)	No. 92-295R
	)	
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .
	)	
	)	

[1] RULE 254, RCW 82.32.070: RECORDS -- DOCUMENTATION -- RETENTION --- BARRED FROM QUESTIONING ASSESSMENT. Taxpayers are required to keep records that are necessary to determine their tax liability. Taxpayers who fail to keep and present such records to the Department of Revenue will bar the taxpayer from questioning the correctness of the assessment.

[2] RCW 82.32.300: DEPARTMENT OF REVENUE -- ADMINISTRATION OF STATUTE LAW -- PRESUMED CONSTITUTIONALITY OF STATUTES. A Statute is presumed constitutional. An Administrative body does not have the authority to determine the constitutionality of the law it administers. Accord: Bare v. Gorton, 84 Wn.2d 380, 282 (1974).

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: . . .

NATURE OF ACTION:

Petition for reconsideration of Determination No. 92-295 that sustained the assessment of retailing business and occupation (B&O) tax and retail sales tax on construction income.

FACTS:

Lewis, A.L.J. -- [Taxpayer's] business records were audited by the Department of Revenue (Department) for the period January 1, 1987 through December 31, 1990. The audit resulted in an assessment of retailing B&O tax, retail sales tax, and interest . . . . Determination No. 92-295 was issued October 28, 1992, which upheld the tax assessed. The taxpayer filed a timely petition for reconsideration.

The undisputed facts are discussed in detail in Determination No. 92-295 and are adopted herein. The taxpayer derives income as a speculative and custom builder. The taxpayer's business records were kept on a fiscal year ending [in June] for financial and federal income tax purposes. The taxpayer, used the "completed contract," which recognizes income only when the contract is complete, or substantially complete, for the period July 1, 1986 through June 30, 1987. The taxpayer made a [June 1987] fiscal year end adjustment to its business records, thereby recognizing . . . previously unrecognized income. The taxpayer protests the Department's assessment of retailing B&O and retail sales tax on this previously unrecognized income.

#### ISSUE:

Whether the Department erred in making a tax adjustment in 1987 for income that had actually been earned and was taxable in 1986?

#### DISCUSSION:

[1] The taxpayer contends that the income recognized by the [June 1987] journal entry should not have been taxed because: 1) there is no evidence that the money was received in 1987; 2) the income was received in 1986, but taxed in 1987 the wrong year; and, 3) if 1986 tax is collected under a 1987 assessment, any 1986 duplicate payments are not recoverable due to the statutory limitation on refunds, thus the assessment violates the due process and equal protection guarantees of the U.S. and State Constitution.

RCW 82.32.070 provides:

Every person liable for any fee or tax imposed by chapters 82.04 through 82.27 RCW shall keep and preserve, for a period of five years, suitable records as may be necessary to determine the amount of tax for which he may be liable, which records shall include copies of all federal income tax and state tax returns and reports made by him. All his books, records, and invoices shall be open for examination at any time by the department of revenue. . . . Any person who fails to comply with the requirements of this section shall be forever barred from questioning, in any court action

or proceedings, the correctness of any assessment of taxes made by the department of revenue based upon any period for which such books, records, and invoices have not been so kept and preserved.

Additionally, WAC 458-20-254 (Rule 254), the administrative rule that implements the statute provides in pertinent part:

Record Keeping. (1) Every person liable for an excise tax imposed by the laws of the state of Washington for which the department of revenue has primary or secondary administrative responsibility, . . . shall keep complete and adequate records from which the department may determine any tax for which such person is liable.

(2) General requirements.

(a) It is the duty of each taxpayer to prepare and preserve all books of record in a systematic manner conforming to accepted accounting methods and procedures. Records are to be kept, preserved, and presented upon request of the department which will demonstrate:

(i) The amounts of gross receipts and sales from all sources, however derived, including barter or exchange transactions, whether or not such receipts or sales are taxable. These amounts must be supported by original source documents including but not limited to all purchase and sale invoices and contracts or such other documents as may be necessary to substantiate gross receipts and sales.

...

(c) All such records shall be open for inspection and examination at any time by the department, upon reasonable notice, and shall be kept and preserved for a period of five years. RCW 82.32.070.

...

(6) Failure of taxpayer to maintain and disclose complete and adequate records. Any person who fails to comply with the requirements of RCW 82.32.070 or this section shall be forever barred from questioning, in any court action or proceeding, the correctness of any assessment of taxes made by the department based upon any period for which such books, records, and invoices have not been so kept and preserved. RCW 82.32.070

Determination 92-295 allowed the taxpayer thirty days to provide suitable records to support the contention that the income taxed in 1987 actually was earned and taxable in 1986. Despite the

opportunity, the taxpayer did not provide a schedule of progress billings, accounts receivable journal, or other substantive evidence to support the contention that the income in question was earned and taxable prior to January 1, 1987.

The contested tax adjustment was made on the basis of entries made in the taxpayer's business records in 1987, the taxpayer has not provided evidence to rebut the presumption that the taxpayer recorded the entry in 1987 because that is when the income was earned and should be recognized. Contrary to the taxpayer's contention, the Department did not make a tax assessment outside the period allowed by statute.

[2] The taxpayer has also contended that 1986 tax was collected under a 1987 assessment and that because any 1986 duplicate payments are not recoverable due to the statutory limitation on refunds the assessment violates the due process and equal protection guarantees of the U.S. This argument is without merit. The Department was allowed by statute to audit the taxpayer's business records for 1987, the taxpayer's business records were reviewed, a 1987 accounting entry was found which recognized previously unreported income. The tax assessment was based on the income recorded and recognized in the taxpayer's 1987 business records. Similarly, if the auditor had encountered an accounting entry in 1987 that reduced sales rather than increased them, an appropriate tax credit would have been allowed, if the sufficient evidence was presented to show the sales reduction occurred in 1987.

Finally, the Department is charged by the legislature with administering the excise tax laws. The statutes that the Department administers are presumed Constitutional and under Bare v. Gorton, 84 Wn.2d 380, 383 (1974) "an administrative body does not have the authority to determine the constitutionality of the law it administers; only the courts have that power."

#### DECISION:

The taxpayer's petition for correction of assessment is denied. Document No. . . . in the amount of \$ . . . plus extension interest . . . is due for payment . . . . A penalty of 10% of the amount due will be assessed if payment is not received by the due date.

This final determination is the final action of the Department of Revenue. You may pay the tax and petition for a refund in Thurston County Superior Court in accordance with RCW 82.32.180.

In the alternative, you may file a petition with the Board of Tax Appeals [P.O. Box 40915, Olympia, Washington 98504-0915]

pursuant to RCW 82.03.190. If you choose this alternative your petition must be filed with the Board within thirty (30) days of this final determination. Your further appeal, however, will not extend the due date for payment or stay the collection of the amounts due.

DATED this 1st day of July 1993.