BEFORE THE APPEALS DIVISION
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. 96-114
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

[1] RULE 114; RCW 82.04.4282: RETAIL SALES TAX -- DEDUCTIONS -- INITIATION FEES -- BONA FIDE DUES. Bona fide initiation fees or dues are those amounts paid to join a club or association for the right to associate with other members or to support the organization's goals. Charges solely for the privilege of being able to receive goods or services in the future do not constitute bona fide initiation fees or dues.

[2] RULE 224; RCW 82.04.040; RCW 82.04.050: RETAIL SALES TAX -- SERVICE B&0 TAX -- CHARGES FOR RIGHT TO PURCHASE GOODS IN THE FUTURE. Charges for the mere opportunity to buy goods or services in the future for full consideration are subject to the service and other activities B&O tax.

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:

A company that sells cards entitling its customers to receive a 25% discount on car washes and lesser discounts on other

services protests the assessment of retail sales tax and business and occupation (B&O) tax on those charges.[1]

FACTS:

Mahan, A.L.J. -- The taxpayer operates a car wash. Customers can purchase a "discount card" for $25.00 and, thereby, become part of a "discount club." Purchasers of the card are entitled to a 25% discount on the cost of a car wash and a lesser discount on other services over a one year period. The taxpayer did not collect retail sales tax on those charges and deducted those amounts from the measure of its B&O tax liability. The taxpayer also sold script for car washes at a discount. It collected retail sales tax on those sales and reported retailing B&O tax on those amounts.

The Department of Revenue (Department) reviewed the taxpayer's returns for the January, 1994 through January, 1995 period. In April 1995, the Department issued a deficiency assessment. The Department assessed retail sales tax and retailing B&O tax on the discount card charges; it considered that income to be for "prepaid" retail services. In accordance with the Department's instructions, in May, 1995 the taxpayer began collecting and remitting retail sales tax on the income from the discount cards. It also petitioned for a correction of the assessment.

On appeal the taxpayer makes two arguments: (1) the charges are bona fide initiation fees or dues and, therefore, are not subject to tax; and (2) the Department should be estopped from collecting on the assessment because of prior oral advice and ambiguities in the rules promulgated by the Department. With respect to the second argument, an affidavit by the taxpayer's president states:

> [S]hortly after the business was formed in December 1993, I contacted the local Department of Revenue asking whether or not the membership dues would be subject to Sales and B&O tax. I was advised by the local office that they were not taxable. . . . I retained . . . a CPA, and asked him whether or not the membership dues would be subject to Sales tax. He researched the issue and advised me that under WAC 459-

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

20-114, the amounts were not subject to Sales or B&O tax.

At the hearing on this matter, the taxpayer's president stated that the communication with the Department was verbal in nature and he does not recall with whom he talked.

ISSUES:

1. How should income from charges for the right to purchase services in the future at a discount be treated for retail sales and B&O tax purposes?

2. Should the Department be stopped from collecting any sales or B&O tax as a result of prior inconsistent oral advice from the Department?

DISCUSSION:

[1] Under RCW 82.04.4282, "bona fide initiation fees" and "dues" may be deducted from the measure of tax. However, no deduction is allowed to the extent the fees or dues "are in exchange for any significant amount of goods or services rendered by the recipient thereof to members without any additional charge to the member." Id. See generally Red Shingle Bureau v. State, 62 Wn.2d 341, 382 P.2d 503 (1963).

The administrative rule that was in effect during the period in question provided the following definitions:

> "Bona fide" shall have its common dictionary meaning, i.e., in good faith, authentic, genuine.
>
> "Initiation fees" are those initial amounts which are paid solely to admit a person as a member to a club or organization. "Bona fide initiation fees" within the context of this rule shall include only those one-time amounts paid which genuinely represent the value of membership in a club or similar organization. It shall not include any amount paid for or attributable to the privilege of receiving any goods or services other than mere nominal membership.
>
> "Dues" are those amounts paid solely for the privilege or right of retaining membership in a club or similar organization. "Bona fide dues" within the context of this rule shall include only those amounts periodically paid by members which genuinely entitle those persons to continued membership in the club or similar organization. It shall not include any amounts

> paid for goods or services rendered to the member by the club or similar organization.
>
> "Significant amount" relates to the quantity or degree of goods or services rendered and made available to members by the organization. "Significant" is defined as having important meaning or the quality of being important.

WAC 458-20-114 (Rule 114)(emphasis added).[2]

Under this rule, bona fide dues or initiation fees are those amounts paid to join or continue membership in a club or organization solely for the right to associate with other members or to support the organization's goals. For example, fees paid solely to join a service or benevolent organization are bona fide initiation fees. In contrast, the fees charged by the taxpayer were solely for the privilege of being able to receive services in the future. As recognized by Rule 114, such fees do not constitute bona fide initiation fees or dues.

[2] This does not mean, however, that such fees are subject to retail sales tax. The taxpayer's clients do not necessarily receive any goods or services in exchange for the fees. What they receive is merely the right to receive services at a discount in the future should they elect to use the taxpayer's services. The mere opportunity to purchase services at retail is not in and of itself a retail sale. As stated in Det. No. 89-426, 8 WTD 165 (1989):

> RCW 82.04.040 defines a sale as the transfer of ownership, title, or possession of property for a valuable consideration or as any activity classified as a retail sale under RCW 82.04.050. RCW 82.04.050 defines a retail sale as every sale of tangible personal property or the sale of or charge for a variety of specified services. None of the defined services include the mere opportunity to buy goods or services for a consideration to be paid at the time the goods are transferred or services are rendered.

[2]Rule 114 was repealed effective December 2, 1995, and the provisions of that rule were made part of WAC 458-20-183 (Rule 183). Rule 183's definitions of the terms "dues" and "initiation fees" are not materially different from those previously found under Rule 114, as quoted above.

In that case, the income was, instead, subject to the catch-all service and other activities B&O tax. See WAC 458-20-224 (Rule 224). More recently, in a case involving memberships for discounts at various restaurants, we stated:

> In this case, the purchaser of the taxpayer's memberships is buying the service that the taxpayer has provided by arranging for all of the discounts available to the purchaser of the membership.
>
> We believe that taxpayer's activity is not covered under any specific tax classification and, therefore, falls under the service and other classification of the B&O tax. RCW 82.04.290.

Det. No. 89-009A, 12 WTD 1 (1993).

Similarly, in this case the income from memberships for the right to receive discounts on services in the future is not subject to retail sales tax. Instead, it is subject to the service and other activities B&O tax.

With respect to the taxpayer's estoppel claim, the elements of such a claim are:

> (1) an admission, statement, or act inconsistent with a claim afterward asserted, (2) action by another in reasonable reliance upon that act, statement or admission, and (3) injury which would contradict or repudiate the prior act, statement or admission.

Colonial Imports, Inc. v. Carlton Northwest, Inc., 121 Wn.2d 728, 734, 853 P.2d 913 (1993); Harbor Air Serv., Inc. v. Board of Tax Appeals, 88 Wn.2d 359, 560 P.2d 1145 (1977); Department of Rev. v. Martin Air Conditioning, 35 Wn. App. 678, 668 P.2d 1286 (1983). An estoppel claim must be proven by clear, cogent and convincing evidence. Colonial Imports, supra at 734. Such claims cannot be lightly invoked against the state as a means to deprive the state of the power to collect taxes. Kitsap-Mason Dairymen's Assoc. v. Tax Comm., 77 Wn.2d 812, 818, 467 P.2d 312 (1970)("The state cannot be estopped by unauthorized acts, admissions, or conduct of its officers."). The doctrine of estoppel also cannot be asserted to enforce a promise which is contrary to the statute. King County Employees' Assoc. v. State Employees' Retirement Bd., 54 Wn.2d 1, 11-12, 336 P.2d 387 (1959).

The Department has taken the position that oral instructions alone do not provide the quantum of proof necessary to sustain an estoppel claim. It set forth its reasons in Excise Tax Bulletin 419.32.99 (ETB 419), as follows:

> (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.

This position has consistently been followed by the Department and it has been upheld by the Board of Tax Appeals. Professional Promotion Services, Inc. v. Department of Revenue, BTA Docket No. 36912, 9 WTD 219 (1990); Det. No. 92-004, 11 WTD 551 (1992) and the determinations cited therein.

In the present case, the taxpayer had the right to rely on the written instruction given as part of the audit. Accordingly, it will not have further liability to the extent it accurately followed those instructions prior to the issuance of this determination. However, for the periods prior to May 1995, the alleged oral advice by the Department does not provide a basis on which to grant relief on the taxpayer's B&O tax liability.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part. The assessment is remanded to the Audit Division for adjustment whereby the retail sales and retailing B&O tax are deleted and service and other activities B&O tax is imposed on the subject income. A revised assessment will be issued, due for payment by the date stated thereon.

DATED this 23rd day of July, 1996.