Cite as Det. No. 99-285, 19 WTD 492 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of	)	D E T E R M I N A T I O N
	)	
	)	No. 99-285
	)	
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .
	)	
	)	
	)	

[1] RULE 100; RCW 82.32A.020; RCW 82.32.105: INTEREST -- WAIVER -- REQUEST FOR WRITTEN OPINION -- FAILURE TO RESPOND. Neither RCW 82.32A.020 nor Rule 100 authorizes the Department to cancel or waive interest that may be causally linked to the Department's failure to respond to a taxpayer's request for a written opinion of future tax liability. RCW 82.32.105 does not authorize waiver or cancellation under that circumstance either.

[2] EQUITABLE ESTOPPEL: INTEREST -- SILENCE. While silence can work an equitable estoppel against the government, all elements of an equitable estoppel must be met before the doctrine can apply.

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 taxpayer requests a refund of audit interest assessed and paid, contending the underlying tax deficiency was due to the Department's failure to respond to the taxpayer's request for an advance ruling on its tax liability.[1]

FACTS:

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

Prusia, A.L.J. -- The taxpayer is engaged in a manufacturing business in [Washington]. In October 1996, the taxpayer purchased a mezzanine structure that it attached inside its manufacturing plant for the purpose of storage. The purchase price was $. . . .

On November 21, 1996, before paying the bill for the mezzanine, the taxpayer sent the Department of Revenue (Department) an e-mail request for an opinion as to whether the purchase was exempt from Washington retail sales tax under an exemption granted manufacturers. The taxpayer believed the mezzanine might qualify, because other items it had purchased for storage (shelving and adjustable racks) had qualified.

An auditor in the Department's Audit Division telephoned the taxpayer in response. After discussing the purchase with the taxpayer, the auditor advised the taxpayer that, in the auditor's estimation, the mezzanine was an industrial fixture that would not qualify for the exemption. The auditor suggested the taxpayer write a specific Department employee for an official ruling.

On December 16, 1996, the taxpayer wrote to the employee named by the auditor. The taxpayer's letter presented the following question: "Is the purchase of a mezzanine for the express purpose of temporarily storing materials used in production and temporarily storing parts made from production exempt from sales tax by authority of the Manufacturers Machinery and Equipment Exemption." The taxpayer provided additional details concerning the mezzanine, and referenced the auditor's opinion that the mezzanine probably would not qualify.

On December 30, 1996, the Department employee to whom the taxpayer sent the letter discussed the ruling request with the taxpayer by phone. The Department employee told the taxpayer a ruling would be sent within two weeks. The taxpayer did not receive a ruling, or any further response to its request. The taxpayer did not follow up on the matter.

The taxpayer paid for the mezzanine, without paying retail sales tax on the purchase.

The Audit Division of the Department of Revenue (Department) subsequently examined the taxpayer's records for the period January 1, 1995 through June 30, 1998. The examination revealed that the taxpayer owed additional taxes, including sales tax on the purchase of the mezzanine, and interest on the tax deficiencies. During the investigation, the taxpayer paid the additional taxes, but not the interest because it contested a portion of the interest -- the interest added to the sales tax due on the mezzanine. On November 13, 1998, the Audit Division issued Document No. FY . . . against the taxpayer, in the amount of $. . ., consisting of interest due on the additional taxes revealed in the investigation. The taxpayer subsequently paid the assessment in full.

The taxpayer petitions for refund of the interest assessed and paid on the sales tax due on its purchase of the mezzanine. It does not contest the underlying tax assessment. The taxpayer asserts the Department should cancel the interest because the Department failed to respond to the taxpayer's December 16, 1996 request. The petition states:

> We feel that if our question to the [Department] had been responded to we would have paid the tax due in a timely manner and not incurred interest charges for not paying the tax at the time of the service. We feel that it is only proper to remove the interest from our responsibility since we were delinquent in paying the tax due only because we did not get a clear written direction from the Department.

ISSUES:

1. May the Department cancel the interest under these circumstances?

2. Is the Department barred from assessing audit interest by the doctrine of equitable estoppel?

DISCUSSION:

RCW 82.32A.020(5) provides that a taxpayer has "[t]he right to receive, upon request, clear and current tax instructions, rules, procedures, forms, and other tax information." WAC 458-20-100 (Rule 100), subsection 9, specifically addresses a taxpayer's right to request a written opinion of future tax liability, as follows:

> **Rulings of prior determination of tax liability.** Any taxpayer may make a written request to the department for a written opinion of future tax liability. Such a request shall contain all pertinent facts concerning the question presented and may contain a statement of the taxpayer's views concerning the correct application of the law. The department shall advise the taxpayer in writing of its opinion. The opinion shall be binding upon both the taxpayer and the department under the facts presented until the department changes the opinion by a determination or subsequent opinion issued to the taxpayer, or the legal basis of the opinion has been changed by legislative, court, or WAC rule action. . . .

[1] Neither the statute nor the rule authorizes the Department to cancel or waive interest that may be causally linked to the Department's failure to respond to a taxpayer's request.

The Department's only authority to cancel interest on a deficiency assessment is found in RCW 82.32A.020(2) and RCW 82.32.105. RCW 82.32A.020(2) authorizes the Department to waive interest when a taxpayer has detrimentally relied upon specific, official written advice and written tax reporting instructions from the Department. That statute does not apply here, because the taxpayer did not receive any written advice.

RCW 82.32.105 authorizes the Department to waive or cancel interest on a deficiency under the following circumstances:

> (3) The department shall waive or cancel interest imposed under this chapter if:
>
> (a) The failure to timely pay the tax was the direct result of written instructions given the taxpayer by the department; or

> (b) The extension of a due date for payment of an assessment of deficiency was not at the request of the taxpayer and was for the sole convenience of the department.

Neither circumstance applies in this case.

Thus, the Department is without statutory authority to cancel the assessed interest. As an administrative agency, the Department of Revenue is given no discretionary authority to waive or cancel interest. See Det. No. 98-85, 17 WTD 417 (1998); Det. No. 87-344, 4 WTD 261 (1987).

The only remaining possibility is that the common law doctrine of equitable estoppel might bar the Department from asserting interest under these circumstances.

Courts sometimes apply the doctrine of equitable estoppel to bar a person from taking a position that is inconsistent with an earlier position upon which someone has relied. The doctrine is defined in Bennett v. Grays Harbor County, 15 Wn.2d. 331, 130 P.2d 1041 (1942), as follows, at page 341:

> The doctrine of equitable estoppel . . . rests upon the principle that, where a person wrongfully or negligently by his acts or representations causes another who has a right to rely upon such acts or representations to change his condition, to his detriment or prejudice, the person performing such acts or making such representations is precluded from pleading the falsity of his acts or representations for his own advantage, or from asserting a right which he might otherwise have had.

A person asserting an equitable estoppel must establish three elements: (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. Shafer v. State, 83 Wn.2d 618, 521 P.2d 736 (1984). The state has limited or qualified immunity from the doctrine of equitable estoppel. When a party seeks to assert equitable estoppel against the state, the party must show, in addition to the above three elements, that (1) equitable estoppel is necessary to prevent a manifest injustice; and (2) the exercise of governmental powers will not thereby be impaired. Finch v. Matthews, 74 Wn.2d 161, 443 P.2d 833 (1968). The Department has adopted these guidelines for applying estoppel. See Det. No. 93-300, 13 WTD 396 (1994).

Application of the doctrine to deprive the state of the power to collect taxes is disfavored. Washington courts have articulated a general rule that courts should be "most reluctant" to find the Department equitably estopped when it is acting in its taxing capacity and for the enforcement and collection of taxes imposed by the Legislature. Wasem's, Inc. v. State, 63 Wn.2d 67, 70, 385 P.2d 530 (1963); Harbor Air Service, Inc. v. Board of Tax Appeals, 88 Wn.2d 359, 560 P.2d 1145 (1977); Kitsap-Mason Dairymen's Assoc. v. Tax Comm'n, 77 Wn.2d 812, 818, 467 P.2d 312 (1970).

An estoppel claim must be proven by clear, cogent, and convincing evidence. Chemical Bank v. Washington Public Power Supply System, 102 Wn.2d 874, 691 P.2d 524 (1984); Kramarevcky v. Department of Social & Health Services, 64 Wn.App. 14, 822 P.2d 1227 (1992); Colonial Imports, Inc., v. Carlton Northwest, Inc., 121 Wn.2d 726, 853 P.2d 913 (1993).

[2] Estoppel does not always require an affirmative act on the part of government. Silence, coupled with knowledge of another's reliance on that silence, can work an estoppel against the government. Board of Regents of the Univ. of Wash. v. Seattle, 108 Wn.2d 545, 741 P.2d 11 (1987); Conversions and Surveys, Inc. v. Dept. of Revenue, 11 Wn. App. 127, 521 P.2d 1203 (1974).

In this case, we find that neither the second element of estoppel (justifiable reliance), nor the additional "manifest injustice" requirement, is met. Before the taxpayer sent the written request for a ruling, the taxpayer had already been advised by a Department auditor that the mezzanine likely would not qualify for the M&E exemption. Given that circumstance, the taxpayer had no right to rely on the Department's silence. A negative opinion from one Department employee, plus no response to a written request for an opinion from another employee, does not equal a probable "yes" answer. The taxpayer's failure to follow up on its request, when it did not receive the promised ruling, also undercuts its claim.

Certainly, the Department should have responded to the taxpayer's request. The taxpayer was ill served. However, the Department is unable to cancel interest on a deficiency assessment when cancellation is neither authorized by statute nor required under the doctrine of equitable estoppel.

DECISION AND DISPOSITION:

The taxpayer's petition for refund is denied.

Dated this 26th day of October, 1999.