Cite as Det. No. 99-042, 19 WTD 784 (2000)

BEFORE THE APPEALS DIVISION
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. 99-042[1]
. . .	)	Use Tax Assessment
	)	TDO No. . . .

[1] RCW 82.12.020: USE TAX – VEHICLE – ESTOPPEL –ULTRA VIRES ACTS –INCONSISTENT STATEMENT. The Department is not estopped from collecting tax where the petitioner has not shown that the Department made any statement that is inconsistent with the tax being asserted. Further, even if the taxpayer's statement that he told a Department employee he was a Washington resident but the employee nonetheless granted him the nonresident exemption were credible, the Department would not be estopped from collecting the tax because ultra vires acts cannot be a basis to deprive the state of the power to collect taxes.

[2] RULE 178; RCW 82.12.010: USE TAX – VALUE OF VEHICLE – USE OF CPI INDEX. Property acquired outside the state and subsequently used in the state is subject to use tax on the fair market value of the property at the time of first use within this state. Where the initial selling price of a vehicle does not reflect its market value because of extensive renovations made to the vehicle after purchase, the use of price guidebooks in determining the value of property used is acceptable.

[3] RULE 228; RCW 82.32.090; RCW 82.32.050: PENALTIES – INTEREST – WAIVER – GOOD FAITH. Neither the statute nor the rule permits good faith to be the basis for waiving late payment penalties or interest.

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.

[1] The reconsideration determination, Det. No. 99-042LTR, is published at 19 WTD 795 (2000).

NATURE OF ACTION:

Individual protests assessment of use tax with respect to his use of a car in Washington.[2]

FACTS:

C. Pree, A.L.J. (successor to Rene, A.L.J.) -- On September 15, 1995, the Department issued a use tax assessment to . . . ("the petitioner") with respect to his use of a car in Washington. The assessment included use tax of $. . . (based on the Compliance Division's valuation of the car at $358,000), a 20% late payment penalty of $. . ., and interest from September 15, 1991, through September 15, 1995, of $. . . . The assessment totaled $. . . .

Use tax assessment. Since 1976, the petitioner has resided in Washington. In 1982, the petitioner purchased a 1955 [vehicle] for $45,000. The petitioner purchased the car in California, and the car remained in California for restoration. It took approximately seven years for the car to be restored. The petitioner stated that he spent approximately $60,000 on the restoration.

The petitioner stated that in 1982 he decided that he and his wife would move to Florida for their retirement. The petitioner had been to Florida many times on business and had relatives there. In anticipation of the move to Florida, in 1984, the petitioner registered and licensed the car in Florida, although the car remained in California. On the application for certificate of title and/or vehicle registration for the state of Florida, the taxpayer provided a Florida address and represented that he purchased the vehicle from a Florida truck dealership.

The petitioner further stated that between 1989 and 1991, he was a partner in an automobile dealership in Washington. By the spring of 1991, the automobile dealership had become greatly troubled. Further, the petitioner's wife became seriously ill and required a great deal of medical care. As a result, in the spring of 1991, the petitioner stated that he realized that he would not be moving to Florida.

The petitioner explains that he considered his options regarding the car. He considered placing the car for sale in California. He also considered moving it to another location in California because he had relatives in California that would be willing to store it for him. He also considered bringing the car to Washington.

In exploring the option of bringing the car to Washington, the petitioner states that he went to the Seattle office of the Department and explained his situation to a member of that office's staff. The petitioner claims he specifically asked whether he owed use tax. He states that he explained that he was a resident of Washington. He claims the Department employee filled out a form and wrote on it that there was no sales or use tax, and the petitioner signed it.

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

According to the Compliance Division, the form indicated that the petitioner qualified for the non-resident waiver of the use tax. See RCW 82.12.0251. The petitioner does not dispute that he was a resident of Washington at all times relevant to his petition.

The petitioner states that, based on the information he received from the Department, he had the car delivered to Washington in 1991.

The petitioner explains that he received a trip permit from the Department of Licensing, so he could drive the car to the highway patrol for inspection. After the car passed the inspection, on May 8, 1991, the petitioner went to the Department of Licensing and registered the car. According to the petitioner, based on the Declaration of Use Tax that he had obtained from the Department, the Department of Licensing imposed no fees other those that related to the registration of the vehicle.

The petitioner argues that if he had known that use tax would be due on the car, he would have kept the car in California. The petitioner states that Department of Licensing kept his copy of the use tax declaration. The taxpayer argues that neither the Department of Licensing nor the Department of Revenue has been able to produce a copy of the declaration and that both departments are required by statute to maintain their records. With respect to the Department of Revenue, the petitioner cites RCW 82.32.340.

The petitioner states that, until he received the assessment at issue, he believed he had fully complied with Washington law and had paid all taxes, fees, and assessments due as the result of his bringing the car into the state and registering it.

The petitioner concedes that by bringing the car into Washington, the use tax on the value of the car was due. However, the petitioner argues that the state erroneously gave him the waiver, then lost the paper work. Thus, the petitioner argues, "that tax should not now be imposed retroactively because of the circumstances under which [the petitioner] brought the car to this state in May 1991." The petitioner notes that he honestly and completely advised the Department's employee of the fact that he was then and had been a Washington resident, that he had purchased the car in California, where it had been since he purchased it, and that he had registered the car in Florida in anticipation of moving there. The petitioner argues that he sought direction from the Department and was advised that no tax would be due. The petitioner states that he never requested or claimed a 90-day non-resident waiver.

The petitioner states that he had no reason to think that the Department employee made an error. The petitioner argues that he brought the car into Washington in reliance upon the oral and written instruction that he had received from the Department.

The petitioner relies on RCW 82.32A.020(2) and (5). The petitioner argues, "to now, belatedly impose the tax that was due in 19991 [sic] would be inequitable. Pursuant to the authority granted by RCW 82.32.020(2), the Department should waive the tax in question."

Valuation of the car. The Compliance Division valued the car using the "CPI Guide to Cars of Particular Interest." The Compliance Division used the April-May –June 1991 edition to correspond with the date the car was first used in Washington. This book reflects a low value for the type of car at issue of $275,000, a high value of $490,000, and an average value of $358,000. The Compliance Division used the average value for purposes of the assessment. The Compliance Division encouraged the petitioner to submit an appraisal for the car if he disagreed with the source used by the Compliance Division. However, the petitioner did not do so.

The petitioner argues that the car is worth approximately $112,000, based on a recent sale in Arizona. However, in response to questions by the ALJ during the hearing in this case, the taxpayer provided no documentation to support this alternative value.

The petitioner also argues that he paid $45,000 for the car and that he spent "an additional approximate $60,000" for restoration of the car, before bringing it to Washington. The petitioner argues that the Department has provided no basis upon which the value of the car should be determined to be anything higher than the total of $105,000 expended. However, the Compliance Division noted that the petitioner provided it with only "partial documentation" of the extensive multi-year restoration in California. The Compliance Division notes that it has not been able to document the accuracy of the expenses claimed by the petitioner. Further, the Compliance Division notes that it was unable to ascertain whether California sales tax was paid on the restoration. The Compliance Division notes that it asked the petitioner if he had paid sales tax on the restoration, which could be used to offset the use tax assessment. The petitioner stated that he had not. [3]

Alternatively, the petitioner estimates that the car was worth $175,000 at the time he brought it into the state. The petitioner explained that in restoring the car, he made some modifications that he wanted, but that would lower the value of the car to a collector. Again, the petitioner provided no documentation regarding this estimate.

The petitioner argues that RCW 82.12.010(1) "presumes that the consideration paid is the value upon which the tax should be based unless there is an appropriate reason for determining otherwise." The petitioner argues that there is no basis for the Department to determine that the value of the car at the time it was brought into Washington differed from the consideration that the taxpayer paid. Thus, the petitioner argues, if the Department determines that any use tax is due, it must be limited to the tax upon a maximum value of $105,000.

The Compliance Division contends that the petitioner valued the car at $375,000 for insurance purposes. The petitioner states that he let the insurance company pick the value, which was based on the market amount. He says the insurance company told him to put a value on it that

[3] The Compliance Division noted that it erred in failing to credit the petitioner with $364.75 he paid to Florida. The Compliance Division agreed to adjust the assessment and to make other adjustments for any additional sales or use tax that was paid upon receipt of documentation.

was a ceiling, and that's what he did. He "just put a high price on it" because it wouldn't cost much more.

Penalties and interest. Finally, the petitioner argues that all penalties and interest should be waived. The petitioner argues that the late payment was due to circumstances beyond his control. Specifically, he contends the delinquency was due to erroneous written information given to him by a Department officer or employee.

ISSUES:

1. Whether the Department is estopped from issuing the use tax assessment.

2. Whether the value of the car should be reduced from the $358,000 valuation used by the Compliance Division in issuing the use tax assessment.

3. Whether penalties or interest should be waived based on the taxpayer's argument that his failure to pay use tax resulted from oral and written instructions from the Department.

DISCUSSION:

[1] Use tax assessment. The petitioner explains that he now understands that by bringing the car into the state, use tax based on the value of the car is due. However, the petitioner argues that the tax should not now be imposed "retroactively" because of the circumstances under which he brought the car to Washington in May 1991.

RCW 82.12.020(1) imposes the use tax as follows:

> There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a consumer: (a) Any article of tangible personal property purchased at retail . . . .

There is no dispute that the petitioner purchased the car at retail. See RCW 82.04.050, which defines a sale at retail. Further, the petitioner does not dispute that he used the car in Washington. RCW 82.12.010(2) defines "use" as having its ordinary meaning. According to the statute, use includes storage or "any other act preparatory to subsequent actual use or consumption within this state." Further, the petitioner does not dispute that he was a resident at the time he brought the car into Washington. As such, the exemption for nonresidents does not apply. See RCW 82.12.0251. Finally, the petitioner has not set forth any additional substantive arguments as to why the use tax should not be due. In short, there is no dispute that the petitioner should have paid use tax when he brought the car into Washington.

However, the petitioner argues that if he had known that use tax would be due on the car, he would have kept the car in California. He argues that he believed he had fully complied with Washington law and had paid all taxes, fees, and assessments due as the result of his bringing the

car into the state and registering it. Finally, he argues that he relied on the Department's instructions that no tax would be due. The petitioner relies on RCW 82.32A.020(2) and (5) in arguing that the Department should waive the tax in question. In essence, the petitioner argues that the Department is estopped from assessing the tax.

The Washington Supreme Court recently addressed the prerequisites for estoppel in Department of Ecology v. Theodoratus, 135 Wn. 2d 582, 599, 957 P.2d 1241 (1998). The court stated:

> To establish equitable estoppel requires proof of (1) an admission, statement or act inconsistent with a claim later asserted; (2) reasonable reliance on that admission, statement, or act by the other party; and (3) injury to the relying party if the court permits the first party to contradict or repudiate the admission, statement or act. Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wash. 2d 816, 831, 881 P.2d 986 (1994). Equitable estoppel against the government is not favored. Kramarevcky v. Department of Social & Health Serv., 122 Wash. 2d 738, 743, 863 P.2d 535 (1993). Therefore, when the doctrine is asserted against the government, equitable estoppel must be necessary to prevent a manifest injustice, and the exercise of government functions must not be impaired as a result of estoppel. Id. Each element must be proved by clear, cogent, and convincing evidence. Id. at 744.

With respect to state taxes, ultra vires acts cannot be a basis 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").

In this case, for a number of reasons, we find that the Department is not estopped from collecting the tax. The petitioner has not shown that the Department made any statement that is inconsistent with the tax being asserted. Even if the petitioner had provided a copy of the use tax declaration form, we could not find estoppel because we do not know what information the petitioner gave the Department when the Department filled out the form. We find the petitioner's statement that he told the Department's employee that he was a resident, but the employee nonetheless granted him a nonresident exemption, to be incredible. Even if we found such statement to be credible, we could not abate the tax because the law does not permit, the abatement of a tax or the cancellation of interest on the basis of a taxpayer's recollection of oral instructions by an agent of the department. ETA 419. ETA 419 provides:

> 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:

> (1)There is no record of the facts which might have been presented to the agent for his consideration.
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> (2)There is no record of instructions or information imparted by the agent, which may have been erroneous or incomplete.
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> (3)There is no evidence that such instructions were completely understood or followed by the taxpayer.

(Emphasis original.) Moreover, even if we found the taxpayer's explanation that he told the employee he was a Washington resident, but the employee granted him the nonresident exemption to be credible, the Department would not be estopped from collecting the taxes because ultra vires acts cannot be a basis to deprive the state of the power to collect taxes. Kitsap-Mason Dairymen, 77 Wn.2d 812 at 818. The granting of a nonresident exemption to a person who admitted to being a Washington resident would be an ultra vires act.

Finally, even if the facts were as stated by the petitioner, we find that he could not have reasonably relied on his entitlement to a nonresident exemption, after explaining to the employee that he was a Washington resident.

Thus, while we agree that taxpayers have the right to rely on written advice from the Department (See RCW 82.32A.020), we are not convinced that the petitioner was given erroneous advice in this case. The petitioner's petition is denied with respect to the use tax liability issue.

[2] Value of the car. The next issue is whether the Compliance Division erred in valuing the car based on the CPI guide. RCW 82.12.010(1)(a) defines the "value of the article used" for purposes of the use tax. It provides in part:

> "Value of the article used" shall mean the consideration. . . paid. . . by the purchaser to the seller for the article of tangible personal property, the use of which is taxable under this chapter. . . . **In case the article used** . . . **is sold under conditions wherein the purchase price does not represent the true value thereof, the value of the article used shall be determined as nearly as possible according to the retail selling price at place of use of similar products of like quality and character under such rules as the department of revenue may prescribe.**

(Emphasis added.) Property acquired outside the state and subsequently used in the state is subject to use tax on the fair market value of the property at the time of first use within this state. Det. No. 90-298, 11 WTD 67 (1990). In this case, the selling price of the car ($45,000) did not reflect the value of the car when it was first used in Washington because a number of years had passed since its purchase, and the car had been extensively restored.

We have previously relied on price guidebooks in determining the value of property used. See, e.g., Det. No. 89-375, 8 WTD 129 (1989); Det. No. 90-298, 11 WTD 67 (1990). In Det. No. 90-298, we explained:

> When equipment is acquired and used outside the state for an extended period of time and is then subsequently brought into and used inside the state of Washington, we believe that it is acquired under conditions wherein the original purchase price does not represent the true value of the equipment at the time of first use within Washington. Under such circumstances, the statute provides that the value upon which use tax is to be computed is the retail selling price at place of use of similar products of like quality and character. The Department has consistently interpreted this as meaning the fair market value of the article at the time and location of first use within the state.
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> . . .
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> We would consider third party appraisals, evidence of comparable sales from such publications as Forke Brothers, The Auctioneers Blue Book. . . .

In this case, in the absence of any credible appraisal or other source of information from the petitioner, the Compliance Division properly relied on the CPI guide. However, as the Compliance Division noted, if the petitioner provides an appraisal or other source of information regarding the value of the car at the time of first use in this state, the Compliance Division will consider such information. Unless such information is provided, and the Compliance Division considers such information to be credible, the petitioner's petition is denied with respect to this issue.

[3] Penalties and interest. The final issue is whether the late payment penalty and interest should be waived. The petitioner argues that all penalties and interest should be waived because the late payment was due to circumstances beyond his control. Specifically, he contends the delinquency was due to erroneous written information given to him by a Department officer or employee. RCW 82.32.090(1) addresses the imposition of the late payment penalty. It provides in part:

> If payment of any tax due on a return to be filed by a taxpayer is not received . . . on or before the last day of the second month following the due date, there shall be assessed a total penalty of twenty percent of the amount of the tax.

RCW 82.32.050(1) addresses the imposition of interest. It provides in part:

> If upon examination of any returns or from other information obtained by the department it appears that a tax or penalty has been paid less than that properly due, the department shall assess against the taxpayer such additional amount found to be due and shall add thereto interest on the tax only.

The legislature, through its use of the word "shall" in RCW 82.32.050 and .090, has made the assessment of the late payment penalty and interest mandatory. See Det. No. 98-047, 17 WTD 186 (1998); Det. No. 88-168, 5 WTD 253 (1988); Det. No. 87-300, 4 WTD 101 (1987); Det. No. 86-238, 1 WTD 125 (1986). As an administrative agency, the Department is given no discretionary authority to waive or cancel penalties or interest. See Det. No. 87-300, supra; Det. No. 86-238, supra. The mere fact of nonpayment within a specified period of payment requires the penalty and interest provisions of RCW 82.32.050 and .090 to be applied. Det. No. 88-188.

The Department's only authority to waive or cancel penalties and interest is set forth in RCW 82.32.105. That statute provides in pertinent part as follows:

> (1) If the department of revenue finds that the payment by a taxpayer of a tax less than that properly due or the failure of a taxpayer to pay any tax by the due date was the result of circumstances beyond the control of the taxpayer, the department of revenue shall waive or cancel any penalties imposed under this chapter with respect to such tax.
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> . . . .
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> (3) The department shall waive or cancel interest imposed under this chapter if:
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> (a) The failure to timely pay the tax was the direct result of written instructions given the taxpayer by the department; or
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> (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. . . .

WAC 458-20-228 (Rule 228) further addresses the waiver of penalties as follows:

> (6) **Waiver or cancellation of penalties.** The department will waive or cancel the penalties imposed under RCW 82.32.090 and interest imposed under RCW 82.32.050 upon finding that the failure of a taxpayer to pay any tax by the due date was due to circumstances beyond the control of the taxpayer. The department has no authority to cancel penalties or interest for any other reason. Penalties will not be cancelled merely because of ignorance or a lack of knowledge by the taxpayer of the tax liability.
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> . . .
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> (b) The following situations will be the only circumstances under which a cancellation of penalties will be considered by the department:
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> (i) The return was filed on time but inadvertently mailed to another agency.
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> (ii) The delinquency was due to erroneous written information given the taxpayer by a department officer or employee. A penalty generally will not be waived when it is claimed that erroneous oral information was given by a department employee. The reason for not canceling the penalty in cases of oral information is because of the uncertainty of the facts presented, the instructions or information imparted by the department employee, or that the taxpayer fully understood the information received. Reliance by the taxpayer on

incorrect advice received from the taxpayer's legal or accounting representative is not a basis for cancellation of the penalty.

(iii) The delinquency was caused by death or serious illness of the taxpayer or his immediate family, or illness or death of his accountant or in the accountant's immediate family, prior to the filing date.

(iv) The delinquency was caused by unavoidable absence of the taxpayer, prior to the filing date.

(v) The delinquency was caused by the destruction by fire or other casualty of the taxpayer's place of business or business records.

(vi) The taxpayer, prior to the time for filing the return, made timely application to the Olympia or district office, in writing, for proper forms and these were not furnished in sufficient time to permit the completed return to be paid before its delinquent date.

(vii) The delinquency penalty will be waived or cancelled on a one time only basis if the delinquent tax return was received under the following circumstances:

(A) The return was received by the department with full payment of tax due within 30 days after the due date; i.e., within the five percent penalty period prescribed by RCW 82.32.090, and

(B) The delinquency was the result of an unforeseen and unintentional circumstance, not immediately known to the taxpayer, which circumstances will include the error or misconduct of the taxpayer's employee or accountant, confusion caused by communications with the department, failure to receive return forms timely, natural disasters such as a flood or earthquake, and delays or losses related to the postal service.

The petitioner contends the delinquency was due to erroneous written information given to him by a Department employee. However, as explained above, we did not find this argument to be credible. The petitioner also argues that he acted in good faith in his belief that he had paid all of the tax that was due. However, neither the statute nor the rule permits good faith to be the basis for waiving late payment penalties or interest. See also Det. No. 87-300, supra, ("The legislature . . . has not chosen good faith or financial hardship as a basis under the law for relief from the penalty.").

In summary, we have considered all of the circumstances in which the legislature permits us to waive the penalties and interest. The petitioner's circumstances do not fall within any of the circumstances under which we are allowed to waive penalties or interest. Accordingly, we must deny the petitioner's petition with respect to this issue.

However, because the delay in issuing this determination was for the sole convenience of the Department, interest on the assessment will be waived for the period commencing November 2, 1996 (the date that is one year after the petitioner filed his petition for correction of assessment). See RCW 82.32.090(3).

DECISION AND DISPOSITION:

The petitioner's petition is denied. The file is remanded to the Compliance Division for adjustment in accordance with this decision.

Dated this 25th day of February 1999.