Cite as 9 WTD 286-85

BEFORE THE INTERPRETATION AND 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. 90-202
. . .	)	Registration No. . . .
	)	Document No. . . .

[1] RULE 179 & MISC: ESTOPPEL - PUBLIC UTILITY AND B&O TAX - "CONTRIBUTIONS IN AID OF CONSTRUCTION" - PRIVATE FOR PROFIT WATER COMPANY. Estoppel denied because an industry organization - not the Department - failed to advise its members that private for profit water companies would not qualify for the "contributions in aid of construction" deduction. Department employee had not given erroneous advice to the organization. Reliance was unreasonable because of the clear language of the statute and rule.

[2] MISC: STATUTE - UNCONSTITUTIONALITY - ADMINISTRATIVE BODY. An administrative body, such as the Department of Revenue, does not have the authority to determine the constitutionality of the law it administers; only the courts have that power. Bare v. Gorton cited.

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: . . .
. . .
. . .
. . .

DATE OF HEARING: February 24, 1987

NATURE OF ACTION:

Petition concerning the "Contributions in Aid of Construction" exemption.

FACTS:

Bauer, A.L.J.-- The taxpayer's business records were examined for the period . . . through . . . . As a result, the above-referenced assessment was issued on . . . in the total amount of $ . . . , including audit interest.

The taxpayer is a private for profit corporation engaged in the business of distributing water for sale.

The tax in question was imposed on income characterized as "Contributions in Aid of Construction." This income was comprised of charges made for connecting future water customers to the taxpayer's existing water system or for extensions of the system. The basis for the assertion of tax was that the exemption of RCW 82.04.417 (as implemented by WAC 458-20-179) did not apply, since the taxpayer was a private "for profit" corporation.

TAXPAYER'S EXCEPTIONS:

The taxpayer objects to the assertion of the tax for two reasons:

1] The taxpayer was misled by what it construes as the Department's confusion regarding applicability of RCW 82.04.417, and contends the Department has issued both verbal and written rulings granting exemption in situations factually identical to that of the taxpayer.

Specifically, the taxpayer refers to the . . . "Report by the Committee on Taxation," published by the Washington State Association of Water Districts (WSAWD)[1], which summarized the results of a "legal challenge brought by N.E. Lake Washington Water & Sewer District, and a protest by KCWD #105" and Determination . . . , on which the taxpayer claims the WSAWD's bulletin was based. The WSAWD "Report by the Committee on

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[1] The WSAWD is an organization which educates its members, offers classes and advice on legislative and tax matters.

Taxation" reported that, as a result of "a legal challenge"[2], contributions in aid of construction were exempt. The WSAWD's "Report by the Committee on Taxation" neglected to advise that the taxpayer had to be a "county, city, town, political subdivision, or municipal or quasi municipal corporation of the state of Washington..." in order to qualify for the exemption.

The taxpayer has had many conversations with fellow members of the WSAWD over the years, and unanimous opinion has consistently
followed the rationale of the WSAWD's "Report by the Committee on Taxation."

In summary, the taxpayer feels that collection of the retroactive tax should be estopped by the Department of Revenue inasmuch as to do otherwise would place the Department in the untenable position of collecting a tax liability it created itself through confusion and contradictory rulings. If this had not occurred, the taxpayer would have reported the tax at the time it was due and would not now be faced with such a potentially damaging large liability.

At the hearing, the taxpayer stressed that the accountant that it had until . . . felt that this was tax-free revenue, and that the WSAWD felt that the information they gave in its "Report by the Committee on Taxation" was correct. The taxpayer stated that other similarly-situated corporations have exempted such income.

The taxpayer had assumed that the WSAWD "Report by the Committee on Taxation" was correct. The taxpayer has never actually read the determination it cited at the hearing, which was published after the WSAWD's "Report by the Committee on Taxation."

The taxpayer began paying tax on this type of revenue effective . . . , and has notified other for profit water companies.

The taxpayer's rates during the audit period were set with the understanding that they weren't taxable. The taxpayer is a regulated corporation which will have no opportunity to pass costs along to its customers after-the-fact, and therefore will never be able to recoup these amounts.

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[2] presumably the one which resulted in Det. . . . .

2] The taxpayer argues that the exemption is blatantly discriminatory since the type of corporate entity - and not the business activity involved - is determinative of the exemption.

ISSUES:

1] Should the Department be estopped from assessing a private for-profit water corporation for business and occupation tax under the service classification when the corporation relied on a bulletin published by a water district association which specifically stated that a for-profit corporation would not qualify for the deduction?

2] Is the "Contributions in Aid of Construction" exemption unconstitutionally discriminatory?

DISCUSSION:

RCW 82.04.417 provides as follows:

> The tax imposed by chapters 82.04 and 82.16 RCW shall not apply or be deemed to apply to amounts or value paid or contributed to any county, city, town, political subdivision, or municipal or quasi municipal corporation of the state of Washington representing payments of special assessments or installments thereof and interests and penalties thereon, charges in lieu of assessments, or any other charges, payments or contributions representing a share of the cost of capital facilities constructed or to be constructed or for the retirement of obligations and payment of interest thereon issued for capital purposes.

[Emphasis added.]

WAC 458-20-179 carries out this code section as follows:

> (15) Deductions. Amounts derived from the following sources do not constitute taxable income in computing tax under the public utility tax:
>
> . . .

> (f) Amounts or value paid or contributed to any county, city, town, political subdivision, or municipal or quasi municipal corporation of the state of Washington representing payments of special assessments or installments thereof and interests and penalties thereon, charges in lieu of assessments, or any other charges, payments or contributions representing a share of the cost of capital facilities constructed or to be constructed or for the retirement of obligations and payment of interest thereon issued for capital purposes. The business and occupation tax is likewise inapplicable to such amounts. Service charges shall not be included in this exemption even though used wholly or in part for capital purposes.

[Emphasis added.]

[1] The language in both the statute and rule is clear. The exemption applies only to a taxpayer which is a "county, city, town, political subdivision, or municipal or quasi municipal corporation of the state of Washington." The determination cited by the taxpayer, and on which certain of the information in the WSAWD "Report by the Committee on Taxation" was based, concerned a taxpayer which was never disputed to be in this category of persons. The case involved another question - the type of income involved, and the determination clearly quoted the language of both the statute and rule which limited the exemption to a "county, city, town, political subdivision, or municipal or quasi municipal corporation of the state of Washington." The Administrative Law Judge did not specifically discuss this matter, since that issue had not been raised.

The WSAWD "Report by the Committee on Taxation," on which the tax-payer relied (. . .) credited the Department's Supervising Field Auditor for supplying information on various exemptions applicable to water companies, one of which was "contributions-in-aid-of construction." The report, in listing the exemptions, did not specify that a taxpayer had to be a "county, city, town, political subdivision, or municipal or quasi municipal corporation of the state of Washington" in order to be eligible for that particular exemption.

Another paragraph in the bulletin added:

> There is still possible confusion stemming from the language of the enacting law and WSAWD will work

> with the Department of Revenue to clarify language and introduce legislation in the 1985 session.

Clearly, the WSAWD's Committee on Taxation was already familiar with the tax laws impacting on its members. Nevertheless, it also did not advise in its report that the "contributions-in-aid of construction" deduction was not available to private for-profit corporations.

[2] For estoppel to apply, there must be three elements: (1) admission, statement or act inconsistent with a claim afterwards asserted, (2) action on faith of such admission, statement, or act, and (3) injury resulting from the contradiction or repudiation of the admission, statement or act. Public Utility District No. 1 of Lewis County v. Washington Public Power Supply System, 104 Wn.2d 353 (1985). Such reliance must have been reasonable. Liebergesell v. Evans, 93 W.2d 881, 613 P.2d 1170 (1980).

First, in this case the taxpayer was advised by a bulletin put out by an industry organization of which it was a member, and not by the Department itself.

Second, the Department did not impart erroneous or inconsistent information to that organization. Information for the bulletin was apparently gathered from a Department employee by a committee whose members were already familiar with the statutes, regulations, and many of the rulings which applied to its members. The Department employee, in not specifically stating that private for profit corporations could not utilize the deduction, was not imparting erroneous or inconsistent information. He was speaking to a committee already knowledgeable regarding the statutes, regula- tions, and rulings applicable to water companies, and could assume that his mention of the deduction did not have to be qualified.

Third, reliance on the bulletin by the taxpayer was not reasonable in light of the clear language of both the statute and rule regarding what types of water companies qualify for the deduction.

There could be found no evidence that the Department has ever issued contradictory rulings on this matter. In many cases - such as the determination which the taxpayer claims formed a basis for the advisory bulletin it relied on - it was not an issue and therefore not discussed by the Administrative Law Judge.

There is no basis for relief simply because the taxpayer cannot recover the tax from its customers.

[3] Finally, we cannot rule on the taxpayer's contention that it should not be denied the exemption because it is discriminatory. An administrative body, such as the Department of Revenue, does not have the authority to determine the constitutionality of the law it administers; only the courts have that power. Bare v. Gorton, 84.Wn.2d 380 (1975).

DECISION AND DISPOSITION:

The taxpayer's petition for correction of assessment is denied.
DATED this 14th day of May 1990.