

Cite as 9 WTD 276-11

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

In the Matter of the Petition	)	<u>D E T E R M I N A T I O</u>
<u>N</u>		
For Correction of Assessment of	)	
	)	No. 90-127
	)	
. . .	)	Registration No. . . .
	)	. . . /Audit No. . . .
	)	

- [1] **RULE 17001:** FEDERAL CONTRACTORS -- USE TAX -- SETTLEMENT WITH NAVY. Contracts awarded by Navy prior to September 30, 1983, even if still open and in performance after that date, are covered by settlement between Navy and State, thereby relieving contractors of liability for use and sales taxes. Such contracts which remained open after then and were affected by change orders resulting in substantial, additional construction are subject to additional tax.
- [2] **RCW 82.32.050, RCW 82.32.105 AND RULE 228:** WAIVER OF INTEREST -- ORAL INSTRUCTIONS. Audit interest not waived where the failure to pay use tax on materials for federal contracts was found to be neither the direct result of written instructions given by the Department nor for the sole convenience of the Department.
- [3] **ESTOPPEL:** Doctrine of estoppel will not be lightly invoked against the State to deprive it of the power to collect taxes. The doctrine is not favored and requires that every particular be proved with clear, cogent and convincing evidence.

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.

TAXPAYERS REPRESENTED BY: . . .

DATE OF CONFERENCE: . . .

#### NATURE OF ACTION

Petition for refund/set-off of use taxes and for estoppel and waiver of interest levied on a tax assessment.

#### FACTS

De Luca, A.L.J. (successor to Potegal, A.L.J.) -- Taxpayer is in the construction business with a substantial portion of its work devoted to federal government contract work. Taxpayer was audited for the period . . . through . . . and was assessed \$ . . . in use tax and an additional \$ . . . in interest was levied. Taxpayer has paid the assessment, but protests the interest which remains unpaid.

Following the U.S. Supreme Court's decision in Washington v. United States, 460 U.S. 536 (1983), upholding sales and use taxes on materials purchased by federal contractors, the state and the Navy entered into a settlement agreement on or about April 27, 1984.

The settlement covered all taxes due on materials used by the federal contractors or their subcontractors for their maintenance or construction work at naval facilities. Particular to this matter, the settlement covered all subcontracts awarded prior to September 30, 1983, even if still open and in performance after that date. For contracts open after then, the taxes were calculated on the basis of completion for the awarded amount. If there were any change orders or supplemental agreements after that date with respect to contracts covered by the agreement, which caused "substantial, additional construction", then additional taxes would be due the state.

Taxpayer asserts that it has paid use tax on three contracts which it claims are covered by the settlement. The use taxes allegedly paid are in the amounts of . . ., . . . and . . ., respectively. It seeks either a refund or set-off of these amounts against the interest levied on the assessment.

Circumstances regarding the issue of estoppel and waiver of interest follow. On May 15, 1984 taxpayer's bookkeeper called a department auditor to seek clarification about taxpayer's

liabilities and reporting responsibilities regarding the sales and use taxes on federal projects. She claims the auditor advised her that the taxpayer had the option to pay the use tax on a monthly basis or at the end of each project. Allegedly, the only qualification he made was that there might be a risk of paying a higher tax if the latter method was chosen and a tax rate increase occurred in the interim.

Although there were no written instructions or correspondence from the auditor or the Department pertaining to this matter, the taxpayer alleges that it relied on the conversation when it decided to pay the use taxes at the end of each project rather than on the monthly basis. Consequently, when the audit occurred, taxpayer was assessed the use taxes with interest due to its failure to file monthly.

#### ISSUES

- 1) Whether taxpayer is entitled to a refund or set-off if it has paid use taxes which were covered by the settlement agreement between the state and the Navy.
- 2) Whether the state should be estopped from collecting interest on the use tax.

#### TAXPAYER'S EXCEPTIONS

Regarding the refund/set-off matter, taxpayer has provided this office copies of documents in support of its claim of payment of tax on three contracts. As for the interest issue, taxpayer has cited several cases to support its position that the Department should be estopped from collecting the interest because of its reliance on the statements allegedly made by the auditor during the telephone conversation in question.

#### DISCUSSION

[1] It is not disputed that the settlement agreement occurred between the state and the Navy. Based on Appendix "A" of that agreement, contract nos. . . . and . . . (use taxes claimed to have been paid: . . . and . . . , respectively) are included in the settlement. The remaining contract presented by taxpayer, . . . (use tax claimed to have been paid: . . . ), does not appear on Appendix "A".

Thus, this issue is merely a factual determination as to whether taxpayer has sufficient records to support its claim that it is entitled to a refund or set-off. It appears that taxpayer participated in at least two contracts covered by the

settlement. As for the remaining contract the burden is on the taxpayer to prove that it also is included in the agreement.

[2] The next issue is estoppel and the waiver of interest. The Department has issued Excise Tax Bulletin 419.32.99 which declares its policy regarding oral instructions or interpretations by Department employees. The Department has determined that it cannot authorize, nor does the law permit, the abatement of a tax or a cancellation of interest on the basis of a taxpayer's recollection of oral instructions by an agent of the Department. Furthermore, it cannot give consideration to claimed misinformation resulting from telephone conversations or personal consultations with a Department employee. 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.
- (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.

. . . . See also Professional Promotion Services, Inc. v. Department of Revenue, . . . .

Moreover, the only authority to cancel or waive interest which is levied pursuant to RCW 82.32.050, is found in RCW 82.32.105. The statute allows the waiver of interest if the payment by the taxpayer of a tax less than that properly due was the result of circumstances beyond the control of the taxpayer. The same statute requires the Department to prescribe rules for the cancellation or waiver of interest in accordance with the statute. The administrative rule which implements the statute is WAC 458-20-228 (Rule 228) and it lists the only two situations for waiver of interest:

1. The failure to pay the tax prior to issuance of the assessment was the direct result of written instructions given the taxpayer by the department.
2. Extension of the due date for payment of an assessment was not at the request of the

taxpayer and was for the sole convenience of the department.

Because the late payment of the tax was neither the direct result of written instructions given to the taxpayer by the Department nor for the sole convenience of the Department, we find the two situations listed inapplicable to the taxpayer's case. Det. 87-136, 3 WTD 67 (1987) and Det.87-306, 4 WTD 131 (1987).

[3] The several cases cited by taxpayer which discuss estoppel are unanimous in their holding that "[t]he doctrine of estoppel will not be lightly invoked against the state to deprive it of the power to collect taxes." Kitsap-Mason Dairymen v. Tax Comm'n, 77 Wn.2d 812, 467 P.2d 312 (1970), Pioneer National Title v. State, 39 Wn.App. 758, 695 P.2d 996 (1985).

The cases describe the required elements of estoppel as: (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. Group Health v. Department of Revenue, 106 Wn.2d 391, 407, 722 P.2d 787 (1986).

Of the cited cases, only Harbor Air v. Bd. of Tax Appeals, 88 Wn.2d 359, 560 P.2d 1145 (1977) estopped the state from collecting a tax. The case though is readily distinguishable from the matter before us because it involved a letter written by the Department to the taxpayer who relied on it when it took subsequent steps. Taxpayer argues that in the vast majority of cases where the courts refuse to estop authorities from collecting taxes, it is because of state inaction as opposed to an affirmative representation. Instead, the test of whether to invoke estoppel requires the application of the listed elements. As stated in Pioneer National Title v. State, supra, at 760-761: "[t]he doctrine is not favored, however, and requires that every particular be proved with clear, cogent and convincing evidence." Applying this standard to the facts before us, without written instructions from the Department or the auditor, the taxpayer has failed to prove the first part of the three elements of estoppel, which is the alleged statement by the auditor. See Professional Promotion Services, Inc., supra.

DECISION AND DISPOSITION

Taxpayer's petition for estoppel and waiver of interest levied on the assessment is denied.

DATED this 23rd day of March 1990.