

Cite as 9 WTD 286-45

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. 90-165
)	
. . . )	Registration No. . . .
)	. . . /Audit No. . . .
)	

**[1] MISCELLANEOUS:** ORAL REPRESENTATION. A taxpayer will not be relieved of tax or interest liability because of a claimed oral representation of the Department. This is so in this case notwithstanding the fact that the taxpayer's accountant allegedly took notes of the cited telephone conversation.

**[2] MISCELLANEOUS:** B&O TAX -- MISINFORMATION -- BY DEPARTMENT EMPLOYEE -- EXCISE TAX RETURN -- ESTOPPEL. Where a Department employee filled out a taxpayer's excise tax return incorrectly by using a line for an inapplicable B&O category, the taxpayer was entitled to rely on that writing. The Department is estopped from collecting B&O tax at a different, higher classification where the taxpayer relied on such instruction to its detriment.

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: January 20, 1988

NATURE OF ACTION:

Request to cancel B&O tax based on misinformation from Department employees.

## FACTS AND ISSUES:

Dressel, A.L.J. -- [The Taxpayer] is a general building contractor specializing in commercial and industrial construction. Its books and records were examined by the Department of Revenue (Department) for the period . . . through . . . . As a result a tax assessment, identified by the above-captioned numbers, was issued for \$ . . . . The taxpayer appeals part of the assessment.

The taxpayer is headquartered [out-of-state]. Apparently, until . . . it had conducted little, if any, business activity in the state of Washington. That being the case, its estimator for bidding on construction jobs phoned the Department . . . as the company was planning to bid a Washington job shortly thereafter. He states that he was told the business and occupation (B&O) tax rate was .00471. He prepared his bid accordingly. The company was successful in getting the job and began deriving income from it in the third quarter . . . . In the meantime, however, the Department had closed the company's registration, initially made in . . . , because of inactivity. The taxpayer's account was reopened, and on . . . a Department employee sent the company excise tax returns for the second and third quarters of . . . . She even filled out the one for the third quarter, apparently based on income figures provided by the taxpayer. She listed the taxpayer's income and tax amount on the Wholesaling line of the B&O section of the tax return. On that return and in an accompanying memo she advised the taxpayer that it owed \$ . . . for the third quarter (Q3) of . . . . She left the second quarter (Q2) return blank, except that she circled the number "13" which is the Wholesaling line on the form. Apparently, she didn't have the second quarter figures and was telling the taxpayer to add them and on that line.

In the audit the Department's auditor reclassified all income to the Retailing B&O category. Retail sales tax was not a consideration because the construction qualified for sales tax deferral. The auditor pointed out that such deferral has no effect on the B&O classification which should be Retailing because the taxpayer was a prime contractor on all of its Washington contracts. The taxpayer does not disagree with the new category. The matter to which it objects is the misinformation it alleges it received earlier from the Department. While its estimator was told . . . that its B&O rate was .00471, the rate actually asserted by the auditor was .00581 for . . . . This is due in part to the

reclassification from Wholesaling to Retailing, in part because both the Wholesaling and Retailing rates changed . . . , and because there were special rates implemented in this same time period for border counties such as . . . . The second piece of misinformation alleged is the correspondence from the Department employee who indicated on the tax returns that Wholesaling was the taxpayer's proper category. The taxpayer thinks that because it was misinformed, the B&O tax in excess of what it reported ought to be deleted.

The issue is whether incorrect advice by Department employees may be the basis for the abatement of excise tax.

#### DISCUSSION:

[1] With respect to the telephone conversation between the taxpayer's estimator and the Department's employee, ETB 419.32.99 controls. . . . As stated therein, the Department cannot give consideration to claimed misinformation resulting from telephone conversations or personal consultations with a Department employee (agent). That is so even, in this instance, where the taxpayer's estimator made notes of the conversation. While the notes make the recollection of the telephone talk more reliable than the type we encounter more frequently where no notes are taken, we still do not believe that the three reasons for the ETB have been overcome. For the sake of convenience we will quote them here from ETB 419.32.99:

(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.

We acknowledge that there is some evidence recorded in the estimator's notes. We do not see the writing as complete enough, though, to invoke any sort of estoppel theory for the same reasons expressed above in the ETB vis-a-vis oral misinformation. We don't know exactly what the estimator told the Department's employee about the nature of the taxpayer's business or the nature of the contemplated construction project(s). We don't know what, if anything, the Department's

employee told the estimator that the latter party didn't write down. We find it somewhat peculiar, for instance, that the Department employee would have focused on the rate of tax as opposed to the classification of tax, yet the estimator's notes reflect only the rate.

Had letters on the B&O tax question been exchanged between the parties, we would consider estoppel. Letters would have more completely and reliably recorded the exchange of information and advice. Letters would have better established who was misinformed, if anybody. From a factual point of view, we find the note insufficient as a basis against which to apply the legal theory of estoppel.

Now we examine the matter of the written information furnished by the Department. Two tax returns were marked by the Department's employee. On one it was indicated that the taxpayer should fill out the Wholesaling B&O line. On the other the Wholesaling line was already filled out by the Department for the taxpayer. The elements of equitable estoppel as restated by Washington's Court of Appeals in Schoneman v. Wilson, 56 Wash. App. 776 (1990) at pages 783 and 784 are:

. . . (1) an admission, statement or act inconsistent with a claim afterward asserted, (2) action by another in reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. Board of Regents of UW v. Seattle, 108 Wn.2d 545, 551, 741 P.2d 11 (1987). . .

[2] Here, we think the marked tax returns are sufficient evidence of "an admission, statement or act inconsistent with a claim afterward asserted". Number one, they are a writing. Number two, they lead the taxpayer to a course of behavior which resulted in its financial injury. The taxpayer could have built the additional tax into its subsequent construction bids had it been told "Retailing" instead of "Wholesaling".<sup>1</sup> We think it is fair to conclude that in filling out the forms as she did, the Department employee effectively told the taxpayer that it was supposed to report under the Wholesaling category. We have much less doubt about the taxpayer being

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<sup>1</sup>For a significant portion of the audit period, the border county Retailing B&O rate exceeded the Wholesaling rate by nearly .1%.

misinformed in this instance than in the telephone conversation because we know exactly what was conveyed by the Department to the taxpayer.

As a consequence, it is our conclusion that the Department is estopped from asserting B&O tax at a rate higher than the Wholesaling rate in effect on . . .<sup>2</sup> as to jobs bid after that date which were taxed in the subject assessment. Estoppel does not apply to jobs bid before that date. It will be the taxpayer's responsibility to supply the auditor with evidence as to which bids came after . . . .

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part.

DATED this the 13th day of April 1990.

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<sup>2</sup>. . . is the date of receipt by the taxpayer of the Department's erroneous, written correspondence.