

Cite as 9 WTD 077 (1990)

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

In the Matter of the Petition) D E T E R M I N A T I O
N
For Correction of Assessment of)
) No. 90-42
. . .)
) Registration No. . . .
) Document No. . . .
)

- [1] MISCELLANEOUS: USE TAX - PRIVATE INDIVIDUALS - LAXITY OF ENFORCEMENT. Laxity in enforcement as to some is not of itself a defense to enforcement against others. State v. Lee, 87 Wn.2d 932, 936, 558 P.2d 236 (1976).
- [2] **MISCELLANEOUS:** PRIOR AUDIT -- VERBAL INSTRUCTIONS - FAILURE TO TAX -- EFFECT OF -- ESTOPPEL. The Department is not bound by verbal instructions, even if given in the course of an audit. The Department is not estopped from assessing tax, based on its failure to do so because of oversight in a previous audit. ETB 419 and Kitsap-Mason Dairymen v. Tax Commission 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: March 3, 1987

NATURE OF ACTION:

Petition concerning use tax on subscriptions and publications,
and the use of a test year.

FACTS:

Bauer, A.L.J.-- The taxpayer's business records were examined for the period January 1, 1983 through March 31, 1986. As a result, the above-referenced assessment was issued on December 30, 1986 in the total amount of \$. . . , including interest.

The taxpayer is a construction company.
The audit assessed use tax on the company's subscriptions and publications and used a test year for the imposition of use tax.

TAXPAYER'S EXCEPTIONS:

The taxpayer objects to the use tax assessment on its subscriptions and publications, thinking it unfair because private citizens do not have to pay sales tax. The taxpayer wonders why a company has to pay, and points out that, in years past, this tax was not assessed, and in the last audit (1983), it was agreed that they wouldn't be assessed.

The taxpayer claims that the auditor used a test year based on the contract volume of a low year, and then applied it to a high volume year (1984).

The taxpayer also objects to the imposition of penalties and interest.

ISSUES:

The following issues are before us for resolution:

1. Whether subscriptions and publications of a business are subject to use tax, when private citizens often pay neither retail sales tax nor use tax and are never audited, and when the taxpayer has never been assessed in prior audits.
2. Whether the use of the test year was correct.
3. Whether penalties and interest should be excused.

DISCUSSION:

Under the law, subscriptions and publications are subject to use tax if retail sales tax has not been paid on their purchase. This is so, whether or not the subscriber is a private individual or a business entity. Because business entities are regularly audited by the Department, use tax is

assessed when an auditor discovers it to be due and owing. Because it is not generally cost efficient to audit private individuals¹, many such persons escape enforcement action.

[1] However, laxity in enforcement as to some is not of itself a defense to enforcement against others. State v. Lee, 87 Wn.2d 932, 936, 558 P.2d 236 (1976). Neither does the fact that the taxpayer has never been assessed for these items warrant relief. We have reviewed the last audit (January 1, 1979 through December 31, 1982), and there were no written instructions granting relief on this issue.

[2] The Department is not bound by verbal instructions, even if given in the course of an audit. Excise Tax Bulletin 419.32.99 (ETB 419). Neither is the Department estopped from assessing tax, based on its failure to do so because of oversight in previous audits. Kitsap-Mason Dairymen v. Tax Commission, 77 Wn.2d 812 (1970).

The taxpayer's petition as to the first issue is denied.

As to the test year issue, we have reviewed the list of consumables and note that many are overhead items which would not change with the volume of business conducted. For this audit period, then, we will apply the test period consumables for all years without regard to contract volume. This decision will not be binding for future audit periods.

The taxpayer's petition as to the second issue is granted.

The last issue concerns penalties and interest. No penalties were assessed. Interest is excusable only under the circumstances provided for in WAC 458-20-228 (Rule 228), which circumstances include only the following:

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.

¹ Individuals are assessed use tax when large items on which the tax has not been paid are brought to the Department's attention.

Neither of the above circumstances apply in this case. Therefore, the taxpayer's petition as to this issue is denied, except as that interest attributable to the adjustment which will be made as a result of relief granted on the second issue.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part. After making adjustments in accordance with this determination, the Audit Section will issue a new assessment, payment of which will be due on the date thereon.

DATED this 29th day of January 1990.