

Cite as Det No. 13-0059, 32 WTD 232 (2013)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

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| In the Matter of the Petition for Correction of) | <u>D E T E R M I N A T I O N</u> |
| Assessment of) | |
|) | No. 13-0059 |
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| ...) | |
|) | Registration No. . . . |
|) | Document No. . . . |
|) | Docket No. . . . |
|) | |

- [1] RULE 119, RULE 118; RCW 82.04.040: RETAIL SALES TAX – B&O TAX – CATERERS – LICENSE TO USE REAL PROPERTY. Taxpayer’s income from wedding packages that include catering and a license to use real property is subject to retail sales tax and retailing B&O tax.
- [2] RCW 82.32A.020; ETA 3065.2009: ESTOPPEL – TAX WAIVER – ORAL INSTRUCTIONS. Washington law does not allow for waiver of tax based on alleged oral advice.

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.

Margolis, A.L.J. – A provider of catering and a venue for weddings (Taxpayer) appeals the assessment of retail sales tax and business and occupation (B&O) tax on grounds that its income includes rent, which it asserts is exempt from tax, and in the alternative, that the Department of Revenue (Department) is estopped from assessing the taxes because Taxpayer relied on incorrect oral advice from the Department. We deny the petition.¹

ISSUES

1. Whether Taxpayer’s income from wedding packages that include catering under WAC 458-20-119 and a license to use real property under WAC 458-20-118 is subject to retail sales tax and retailing B&O tax or service and other activities B&O tax.

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

2. Should Taxpayer be relieved from its responsibility to collect and remit taxes because it claims to have received incorrect oral advice from the Department?

FINDINGS OF FACT

Taxpayer sells wedding packages that include catering and the use of a [building] in . . . Washington. . . .

Taxpayer's basic wedding package includes a dinner buffet, services provided for the ceremony and services provided for the reception. The services provided for the ceremony [and reception] include: facility rental, [furnishings, decorations, linens, use of various rooms in the building, and staff services] . Basic wedding package pricing is between \$. . . and \$. . . .

The Department's Audit Division (Audit) examined Taxpayer's records for the period of January 1, 2008, through June 30, 2011, and, on January 30, 2012, assessed Taxpayer \$. . . . The assessment was comprised of \$. . . in retail sales tax, \$. . . in retailing B&O tax, \$. . . in service and other activities B&O tax, \$. . . in use/deferred sales tax, \$. . . in interest, and \$. . . in a five percent assessment penalty.

Audit discovered substantial discrepancies between income recorded on Taxpayer's profit and loss statement and income reported on Taxpayer's excise tax returns, including underreported retail sales. Taxpayer explained that in 2008 or 2009 its accountant was told by a Department employee that rental of the venue, including chairs and linens, was not subject to retail sales tax, and thus Taxpayer only collected and remitted retail sales tax on catering.

Audit determined that when catering was included in the wedding package, the entire sale was subject to retail sales tax and retailing B&O tax, and on the rare occasion where Taxpayer only sold a license to use the venue, Taxpayer was liable for service and other activities B&O tax, and assessed taxes accordingly. Taxpayer argues that the assessment is incorrect because it includes tax on rent income that is not subject to excise tax, and, in the alternative, it reported in reliance on oral advice from the Department.

Taxpayer provided a [contract] showing that Taxpayer charged different amounts based on the goods and services purchased. The contract includes [a rental information] section [which includes] basic facilities & services . . . and [an additional section]. The rental information section . . . shows no price for these facilities and services. The [additional] section lists a series of products with pricing information (such as [cost for] additional guests [and catering]).

Taxpayer also provided a declaration by its accountant, certified as true and correct under penalty of perjury. The declaration states that the accountant telephoned the Department in 2009 to determine how Taxpayer should collect taxes, and was told that Taxpayer "should pay taxes on catering, beverages, and the rental of items not included in the base venue rental such as tablecloths" and "the fees paid for the venue itself would be untaxed because rental properties are untaxed."

ANALYSIS

[1] Washington imposes a B&O tax “for the act or privilege of engaging in business” in the State of Washington. RCW 82.04.220. The B&O tax measure and rate are determined by the type or nature of the business activity in which a person is engaged. Ch. 82.04.RCW. Washington also levies a retail sales tax on each retail sale in this state. RCW 82.08.020 and 82.04.050. Under RCW 82.32.050, persons making retail sales are liable for retail sales tax when they fail to charge, collect, and remit the retail sales tax to the Department.

Taxpayer sells wedding packages that include catering. A “sale” for purposes of the retail sales tax includes “the furnishing of food, drink, or meals for compensation whether consumed upon the premises or not.” RCW 82.04.040. WAC 458-20-119 (Rule 119) is the administrative rule regarding sales by caterers and food service contractors. Sales of meals and prepared foods by caterers to consumers are subject to the retailing B&O tax and retail sales tax. Rule 119(2). Thus, the wedding packages include a product subject to retail sales tax and retailing B&O tax.

The wedding packages also include the use of a facility. WAC 458-20-118 (Rule 118) is the administrative rule regarding the sale or rental of real estate and the license to use real estate. Rule 118(1) provides that income from the rental of real estate is exempt from B&O tax, but a license to use real property is subject to B&O tax under the service and other activities classification, unless it is otherwise taxed under another classification by a specific statute.² Rule 118(2) explains that the rental of real property conveys an estate or interest with an exclusive right in the lessee of continuous possession against the world, including the owner, and grants “the absolute right of control and occupancy during the term of the lease or rental agreement.” In contrast, a license “does not confer exclusive control or dominion Usually, where the grant conveys only a license to use, the owner controls such things as lighting, heating, cleaning, repairing, and opening and closing the premises.” Rule 118(3). Because Taxpayer sells the use of a facility for events, and does not grant an absolute right of control or occupancy, we conclude that the wedding packages also include a license to use real property, a product subject to the service and other activities B&O tax. Thus, when the use of a facility is sold by itself, without catering, it is subject to service and other activities B&O tax. However, it is usually sold as part of a wedding package that includes catering, so we now consider how this combined transaction is taxed.

Before July 1, 2008, when considering transactions that involved sales of products subject to both retail sales tax and service and other activities B&O tax, we looked to the true object of the transactions. In Det. No. 06-0030, 26 WTD 50 (2007), we considered the taxation of income for a catering business that rents rooms to the public in conjunction with its catering activity. We held that “the rental of the event room usually is incidental to the catering of the event, and is part of the same service and contract. In those cases, the contract should not be bifurcated, and the entire amount should be taxed under the retailing classification and retail sales tax collected.” *Id.* In this matter, Audit found that Taxpayer’s significant income comes from catering, and use

² RCW 82.04.050(2)(f) defines all services of a hotel, motel, or similar business as being a retail sale, so the rental of meeting rooms or ballrooms by such businesses are retail sales. *See also* Det. No. 06-0030, 26 WTD 50, FN 2.

of the facility is typically incidental. Taxpayer has provided no evidence indicating otherwise. Thus, in accord with 26 WTD 50, we find that the true object of the wedding package is catering, with the use of a facility as an incidental part of the service, and the entire contract price is subject to retail sales tax and retailing B&O tax.

Effective July 1, 2008, Washington enacted RCW 82.08.190 and 82.08.195 applicable to “bundled transactions.” These provisions provide guidance on how to tax transactions that involve a combination of retail sales and non-retail services and supersede use of the “true object test” discussed in previous published Department determinations for all periods after the law change. RCW 82.08.190(1)(a) defines “bundled transaction” as “the retail sales of two or more products, except real property and services to real property, where: (i) The products are otherwise distinct and identifiable; and (ii) The products are sold for one nonitemized price.”^{3]}

Taxpayer’s wedding packages include the sale of basic facilities and services. These basic facilities and services are comprised of several products, including entertainment services and furniture rental subject to tax under RCW 82.08.020. These products are distinct and identifiable,⁴ and sold for one nonitemized price.⁵ Thus, we conclude that the sale of basic facilities and services are bundled transactions. RCW 82.08.195(1) provides that “. . . a bundled transaction is subject to tax imposed by RCW 82.08.020 if the retail sale of any of its component products would be subject to the tax imposed by RCW 82.08.020.” Because some components are subject to tax under RCW 82.08.020, the entire bundle is subject to retail sales tax.^{6]} Audit reviewed Taxpayer’s invoices, and found that in addition to the basic wedding package, meal and additional beverage services were added based on the number of anticipated guests. Because the basic package is a bundled transaction subject to retail sales tax, and the meal and additional beverage services are catering services also subject to retail sale tax, we find that Audit correctly assessed retail sales tax and retailing B&O tax on these contracts.

[2] Taxpayer also argues that the Department is estopped from assessing the taxes because Taxpayer relied on oral instructions. Equitable estoppel is a doctrine in law that is based upon the principle that a person should not be permitted to deny what he or she has once solemnly

^{3]}Under the statutory definition in RCW 82.32.023, “products” include services, and not just tangible personal property.]

⁴ RCW 82.08.190 does not define what constitutes “distinct and identifiable products,” but RCW 82.08.190(2) explains that the term excludes certain packaging, free products, and items included in the definition of sales price in RCW 82.08.010. These products and services [at issue in this appeal] do not fall under these exclusions.

⁵ RCW 82.08.190(3) provides that:

“One nonitemized price” does not include a price that is separately identified by product on binding sales or other supporting sales-related documentation made available to the customer in paper or electronic form including, but not limited to, an invoice, bill of sale, receipt, contract, service agreement, lease agreement, periodic notice of rates and services, rate card, or price list.

Taxpayer’s rental contract includes some pricing information for add-ons, but shows no prices separately identified by product for basic facilities and services.

⁶ A transaction that otherwise meets the definition of “bundled transaction: Is not a bundled transaction if certain conditions are met; however, none of those circumstances applies in this case. *See* RCW 82.08.190(4)

acknowledged. *Emrich v. Connell*, 105 Wn.2d 551, 716 P.2d 863 (1985). 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. *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 599, 957 P.2d 1241 (1998). Equitable estoppel against the government is not favored. *Kramarevsky v. Dep't of Social & Health Serv.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993). For tax to be waived based on estoppel, the Department's instructions must be incorrect, a taxpayer must rely to its detriment, and a taxpayer's reliance upon them must be reasonable. Det. No. 99-6, 19 WTD 533, 540 (2000); Det. No. 89-372, 8 WTD 115 (1989). In this matter, the only evidence that the Department made a statement inconsistent with a claim later asserted is the declaration by Taxpayer's accountant. . . . Thus, we find it insufficient to establish that the Department told Taxpayer not to report the sales and income at issue. . . .

Because the Washington tax system is based largely on voluntary compliance, the Washington legislature has placed upon taxpayers the responsibility to know their tax reporting obligations, and to seek instructions from the Department when they are uncertain about those obligations. RCW 82.32.005(2) and RCW 82.32A.030(2). The Department addressed whether oral instructions are binding in Excise Tax Advisory (ETA) 3065.2009,⁷ which reads as follows:

RCW 82.32A.020 provides that the taxpayers of Washington have:

The right to rely on specific, official written advice and written tax reporting instructions from the department of revenue to that taxpayer, and to have interest, penalties, and in some instances, tax deficiency assessments waived where the taxpayer has so relied to their proven detriment

RCW 82.32A.020 does not authorize, nor does any other law permit, the Department to waive tax, interest, or penalties on the basis of a taxpayer's recollection of oral instructions by an agent of the department.

The Department 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.

⁷ Taxpayer asserts that reliance on this ETA is misplaced because it was published on February 2, 2009, prior to the part of the assessment period, reliance on oral statements is not addressed in RCW 82.32A.020(2), and, in case of doubt, taxing statutes are construed against the government. However, ETA 3065.2009 was an update to ETA 419.32.99 (1971), which also provided that the Department cannot give consideration to claimed misinformation resulting from telephone conversations, and the Department has consistently applied this principle in published determinations. See Det. No. 93-159, 13 WTD 316 (1994); Det. No. 95-093, 16 WTD 29 (1995). Further, there is no doubt regarding the correct construal of RCW 82.32A.020, which only provides taxpayers the right to rely on *written* advice. Thus, we find that reliance on this ETA is not misplaced.

There are three reasons for this ruling:

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

(Emphasis in original). As explained in this ETA, Washington law does not allow for waiver of tax when the alleged advice is oral. This is because we simply cannot confirm what facts were presented to the Department and what oral instructions the Department provided to Taxpayer. Therefore, we are unable to waive the assessment based upon the alleged oral advice that Taxpayer claims to have received.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 28th day of February 2013.