Cite as 6 WTD 65 (1988)

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

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| 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. 88-234 |
| . . . ) | Registration No. . . . |

[1] **RULE 107 AND MISCELLANEOUS:** RETAIL SALES TAX -- EXTENDED WARRANTIES -- AUTO DEALER -- SELLER -- AMENDMENT OF RULE. After its amendment effective February 6, 1986, Rule 107 provided that an automobile dealer who sells extended warranty coverage at the same time it sells the auto to which the warranty applies is taxable under Retailing B&O and retail sales tax on gross income from the warranty. The dealer is the seller of the warranty if contractually bound to make the warranty repairs.

[2] **RULE 107 AND MISCELLANEOUS:** RETAIL SALES TAX -- EXTENDED WARRANTIES -- AUTO DEALER -- AMENDMENT OF RULE. Where an agent of the Department gave incorrect advice to another auto dealer after the amendment to Rule 107, and the taxpayer did not show it relied on that advice or had any right to rely, the Department is not estopped from assessing tax on warranty sales after the date of the rule amendment.

[3] **RULE 228:** INTEREST -- WAIVER -- RELIANCE ON PREVIOUS AUDIT INSTRUCTIONS. Interest waived where taxpayer was reporting taxes due as advised in a previous audit.

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: May 18, 1988

NATURE OF ACTION:

The taxpayer seeks a correction of the assessment of sales tax on Extended Warranty sales.

FACTS AND ISSUES:

Frankel, A.L.J. -- The taxpayer's records were examined for the period January 1, 1984 through June 15, 1987. The audit disclosed taxes and interest owing in the amount of $ . . . . Assessment No. . . . in that amount was issued on July 16, 1987.

The taxpayer operated a car dealership which closed in October of 1986. At that time the taxpayer's dealership merged with another dealer. The taxpayer was not aware that effective February 6, 1986, extended warranty sales for which the taxpayer was the warrantor were to be reported under the Retailing and retail sales classification. The taxpayer had reported the commissions received from sales of the extended warranties under the Insurance-Agents/Brokers Commission classification.[1] The taxpayer was assessed $ . . . in

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[1] In a previous audit of the taxpayer's records for the period 1980 through 1983, the taxpayer was advised to report warranty commissions under the Insurance Agents rate. The instructions stated:

> Schedule VI - Reclassification of Service Income
>
> Credit has been allowed for Service and Other Activities business tax reported on extended warranty commissions reported by you since July 1, 1983. Effective July 1, 1983, commissions and other income received from . . . Company, or others, for selling extended service warranties would be taxable upon the gross amount of such income received under the Insurance Agents/Brokers Commission classification of the business tax. This new classification taxes such income received at a slightly lower rate than the former classification, Service and Other Activities.

retailing b&o tax and retail sales tax and credited with $ . . . in tax paid, resulting in a difference of $ . . . owing. The taxpayer received an additional use tax credit for tax over-reported on demonstrator vehicles. The taxpayer had reported tax on demonstrators on 100% of average cost of new vehicles sold in prior years.

The taxpayer seeks a correction of the sales tax assessment on the basis there was a substantial amount of confusion as to whether sales tax was applicable. Specifically, the taxpayer refers to a letter dated February 21, 1986 from the Taxpayer Information Division to an auto dealer which concluded sales tax was not applicable to warranty agreements of the type offered by . . . . That letter was retracted and the dealer was informed the warranty agreements were subject to retail sales tax effective May 16, 1986. (Letter of May 13, 1986.) The taxpayer stated the contract supplied by . . . is substantially identical to the one it used which was supplied by . . . Insurance. The taxpayer seeks a deletion of sales tax assessed on its Extended Warranty Sales from February 6, 1986 through May 15, 1986.

DISCUSSION:

[1] WAC 458-20-107 was amended effective February 6, 1986 to provide that a charge for a warranty "sold by the retail seller of the property protected by the warranty and concomitant with the sale of that property" is subject to Retailing B&O and retail sales tax. The Department has not reclassified extended warranty income for periods prior to the amendment date.

In this case, the taxpayer was reporting as advised in the previous audit. The Department's position is, however, that the amendment to Rule 107 provided clear notice that the sale of extended warranties made concomitant with the sale of an automobile is regarded as a retail sale. The dealer is the "seller" of the warranty if contractually bound to the customer to make the repairs (Det. 88-151 to be published in 1988 Washington Tax Decisions).

[2] Ordinarily, the state may not be estopped from collecting taxes due it because of a mistake or oversight by one of its employees. Kitsap-Mason Dairymen Assoc. v. Tax Commission, 77 Wn.2d 812, 818 (1970). Determination 88-151 involved petitions by two auto dealers protesting the reclassification of income from the sales of similar extended warranties. As in the present case, the Department had reclassified the sales

finding the income was taxable under Retailing B&O and retail sales tax.

In that case, the taxpayers relied on an earlier letter from the Department which had stated the income from such warranty sales was subject to Service B&O. The ruling was that the amendment to Rule 107 clarified the advice and that the Department was not bound by the incorrect advice after the effective date of the amendment. The position of the Department is that Determination 88-151 is controlling in the present case. Accordingly, the assessment of Retailing and retail sales tax on the warranty sales after February 6, 1986 is affirmed.

Three elements must be present to create an estoppel: (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. Harbor Air Service, Inc. v. Board of Tax Appeals, 88 Wn.2d 359, 366-67 (1977).

As the letter from the Taxpayer Information Section was not sent to the taxpayer, and the taxpayer has not shown it relied on the letter by reporting its extended warranty sales as subject to retail sales tax after the May 15, 1986 date stated in the letter, the elements of estoppel are not present.

[3] Because the taxpayer was reporting as previously advised, however, we will agree to waive the interest assessed. The taxpayer's failure to report the sales as subject to retail sales tax was due to the previous instructions. WAC 458-20-228 states interest may be waived in such a case.

DECISION AND DISPOSITION:

The taxpayer's petition is denied, except for the cancellation of interest as provided herein. A new assessment will be issued and due on the date provided thereon.

DATED this 15th day of June 1988.