Cite as 10 WTD 413 (1990).

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

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. 91-059 Registration No. . . . . . ./Audit No. . . .

[1] RULE 193A: B&O TAX -- INTERSTATE EXEMPTION -- GOODS -- TRANSPORTATION OF -- BUYER'S OBLIGATION. Where an Alaskan buyer pays for lumber shipped by a Washington seller, a delivery bill of lading must show the seller as consignor and the buyer as consignee in order for the seller to be exempt of B&O tax.

[2] MISCELLANEOUS: B&O TAX -- ESTOPPEL -- PRIOR AUDIT. The Department is estopped from assessing B&O tax on interstate sales when it specifically ruled in a prior audit that such sales were deductible/exempt. Partial Accord: 1 WTD 093, Det. 86-232.

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 25, 1990

NATURE OF ACTION:

Petition urging application of the interstate sales exemption.

FACTS AND ISSUES:

Dressel, A.L.J. -- [Taxpayer] is a wholesaler of lumber. Its books and records were examined by the Department of Revenue

(Department) for the period January 1, 1985 through June 30, 1989. As a result, a tax assessment, identified by the above-captioned numbers, was issued for $ . . . . The taxpayer appeals.

At issue are lumber sales the taxpayer makes to Alaskan buyers. On such sales the taxpayer transports the lumber from its [local] facility to a dock in Tacoma or Seattle. There the lumber is loaded aboard ships and transported to Alaska by shipping companies . . . . The taxpayer's Alaskan buyers pay the shipping charges on delivery there. The taxpayer pays for the short journey from its . . . facility to the local docks. Invoices and bills of lading created by the taxpayer show the Alaskan buyer as the party billed and the shipping company as the person to whom the taxpayer ships the lumber. Presumably, the shipping company creates bills of lading to cover transportation from the Washington dock to Alaska. The taxpayer, however, reported that it never sees those.

The taxpayer's first argument is that because its lumber is sold and shipped out-of-state to an Alaskan buyer, such transactions should be exempt of the B&O tax as interstate sales.

Secondly, the taxpayer claims estoppel. It says it was audited previously by the Department in 1985. The auditor at that time looked at the same transactions and approved them for the interstate exemption. The taxpayer asserts that the Department should now be estopped from denying that exemption in the present audit. The taxpayer relied on the prior audit in reporting its sales in the current audit period. It thinks it is inappropriate for the Department to change its position without notice. In support of its estoppel argument, the taxpayer cites *Kitsap-Mason Dairymen's Assoc. v. Tax Commission*, 77 Wash.2d 812 (1970) and *Harbor Air Service, Inc. v. Board of Tax Appeals*, 88 Wash.2d 359 (1977).

The issues are: 1) are sales of lumber by a Washington taxpayer to an Alaskan buyer exempt of B&O tax as interstate sales; and 2) should the Department be estopped from denying the interstate sales exemption when it allowed it in a previous audit.

DISCUSSION:

[1] The taxpayer has oversimplified the interstate sales issue. More than eventual delivery to and use in an out-of-state locale is required for a Washington seller to avail

him(her)self of the interstate sales exemption. WAC 458-20-193A (Rule 193A) is directly applicable. This regulation reads in part:

> SALES OF GOODS ORIGINATING IN WASHINGTON TO PERSONS IN OTHER STATES.
>
> . . .
>
> BUSINESS AND OCCUPATION TAX
>
> RETAILING AND WHOLESALING. Where tangible personal property in Washington is delivered to the purchaser in this state, the sale is subject to tax under the retailing or wholesaling classification, even though the purchaser intends to and thereafter does transport or send the property out of state for use or resale there, or for use in conducting interstate or foreign commerce. It is immaterial that the contract of sale or contract to sell is negotiated and executed outside the state, that the purchaser resides outside the state, or that the purchaser is a carrier.
>
> Where the seller agrees to and does deliver the goods to the purchaser at a point outside the state, neither retailing nor wholesaling business tax is applicable. Such delivery may be by the seller's own transportation equipment or by a carrier for hire. In either case for proof of entitlement to exemption the seller is required to retain in his records documentary proof (1) that there was such an agreement and (2) that delivery was in fact made outside the state. Acceptable proof will be:
> (a) The contract or agreement AND
> (b) If shipped by a for hire carrier, a waybill, bill of lading or other contract of carriage by which the carrier agrees to transport the goods sold, at the risk and expense of the seller, to the buyer at a point outside the state;

The taxpayer runs afoul of (b) above in that it has not produced and, indeed, does not have access to a waybill, bill of lading or other contract of carriage by which it agrees to transport the lumber to the buyer at a point outside this state. Even if the taxpayer was able to produce such a document, it would not demonstrate that transportation was at

the risk and expense of the seller. The taxpayer has indicated that the buyer pays the freight charges to Alaska.

The exemption requirement discussed in the previous paragraph has been relaxed somewhat in Revenue Policy Memorandum (RPM) 89-2, ... Considering the evidence available to us, however, even the lesser requirement of the RPM is not met in that the *delivery* (to Alaska) bill of lading is missing.

As to the first issue, whether the taxpayer's sales qualify as interstate, the taxpayer's petition is denied.

Estoppel is the second issue. We have examined the prior audit. It appears the taxpayer was taking no deduction for interstate sales until that audit. The auditor said they were eligible to do so and gave them a substantial B&O tax credit for the audit period then under consideration. In his report there was no discussion of technical requirements such as bills of lading or which party bears the risk and expense of shipment. The exemption was simply allowed.

The taxpayer claims that its operation vis-a-vis Alaska sales was no different in the present audit period than in the prior audit period. There was mention made at an audit supervisor's conference in this matter that the taxpayer formerly acted as shipper on Alaska shipments but was no longer doing so. When queried about this at the telephone hearing, the taxpayer's president said he thought that had something to do with an Alaskan subsidiary company the taxpayer had a long time ago, apparently even before the first audit period.

[2] Ordinarily, where the Department, in a previous audit, has overlooked an aspect of a taxpayer's business which should have been taxed but wasn't, it will not be estopped from assessing the correct tax in a subsequent audit. *Kitsap-Mason Dairymen v. Tax Commission*, supra, at 818. This, however, is not a case of overlooking something. The previous auditor looked directly at the very kind of sales at issue in the present appeal and pronounced, in writing, that they qualified for deduction as out-of-state sales.

Estoppel requires a statement which is inconsistent with a party's later claim, another party's action in reliance thereon, and resulting injury to such other party if the first party is allowed to repudiate his or her earlier statement. *Harbor Air Service, Inc. v. Board of Tax Appeals, supra*, at 366 and 367. Here, the inconsistent statement is the first audit report. By its testimony and by the fact that it did

not include the out-of-state sales at issue on its state excise tax returns, it is clear that the taxpayer relied on the inconsistent statement. Lastly, the taxpayer has sustained financial injury in that it has, suddenly, been assessed substantial and unexpected taxes. Had it received reasonable notice of such liability, it could have planned for same and much more easily assimilated the expense into its operating budget.

We rule that the Department is estopped from assessing B&O tax on Alaska sales for the audit period. It has notice, however, as of [October 1989] when the audit report was released, that compliance with Rule 193A is necessary. Allowance of the interstate B&O deduction after that date will be conditioned on the requirements of Rule 193A, tempered by the more liberal provisions of RPM 89-2.

As to the second issue, estoppel, the taxpayer's petition is granted.

DECISION AND DISPOSITION:

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

DATED this 28th day of February 1991.