Cite as 3 WTD 295 (1987)

BEFORE THE DIRECTOR OF THE
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessments of	F I N A L D E T E R M I N A T I O N
	No. 87-218
. . .	Registration No. . . . Tax Assessment Nos. . . .

[1] **RULE 114, RCW 82.04.140 and RCW 82.04.150:** BUSINESS -- ENGAGING IN BUSINESS -- OWNERSHIP OF BUSINESS -- PROPRIETARY INTEREST -- DUES PAYING MEMBERS -- BENEFITS TO MEMBERS -- RETAIL SALES. Organizations which received dues from members who have a proprietary interest in the organization, in return for services and benefits defined by law as "retail sales" are engaged in business separate and apart from their members and are taxable upon such dues income under Rule 114. Payment of such dues is not merely a cost sharing arrangement between owners of the business.

[2] **RULE 114 and RCW 82.32.300:** VALIDITY -- AUTHORITY FOR ADMINISTRATIVE RULE. The Department will not entertain general challenges to its authority to adopt rules in accord with the Administrative Procedure Act; such rules, including Rule 114, duly adopted, have the force and effect of law unless overturned by a court of record not appealed.

[3] **RULE 114 and RCW 82.04.4282:** DUES -- BONA FIDE DUES DEDUCTION -- GRADUATED DUES -- DUES PAID FOR SERVICES. Dues which are graduated or paid in return for goods and services are not "bona fide" by nature and are not entitled to the statutory deduction for bona fide dues under the express provisions of Rule 114.

[4] **RULE 114 and RCW 82.04.4282:** DUES -- STATUTORY AMENDMENT -- CLARIFICATION -- INCONSISTENT ADMINISTRATION. Confusion

caused by inconsistent tax rulings or instructions prior to statutory amendment to clarify the distinction between deductible and nondeductible dues income does not serve to invalidate rule provisions consistently applied after the statutory amendment and until an administrative rule was promulgated.

[5] **RCW 82.04.050:** RETAIL SALES -- GOLF -- DUES. Charges for playing golf, whether designated as "dues" or by any other designation were statutorily defined as retail sales before and after 1979 amendments to a b&o tax deduction statute which distinguished between tax deductible dues and charges for goods and services. There is no retail sales tax deduction for any income derived from dues. The portion of "dues" income derived from providing golf to members was and is subject to retail sales tax before and after 1979.

[6] SALE -- SELLING PRICE -- BUYER -- SELLER -- DUES -- DESIGNATION OF CHARGES. The statutory definitions of "sale," "selling price," "buyer," and "seller," as well as the taxing scheme of the Revenue Act cannot be subverted by designating such things by different names such as "owner/members" or "dues." The amendment of administrative rules to clarify such matters does not constitute a new or different position from that intended and resulting from statutory law.

[7] **RULE 114:** DUES -- AMENDMENT -- RETROACTIVE EFFECT -- CLARIFICATION. The amendment to an administrative regulation (Rule 114) to clarify existing statutory law and to provide reasonable guidelines for its application in many varied factual situations does not constitute the retroactive application of that law.

[8] STATUTES -- PROPOSED LEGISLATION -- EFFECT -- DUES -- RETAIL SALES TAX. Proposed legislation to clarify statutory intent does not have the effect of changing statutory applications; thus, a proposed bill which would expressly include the word "dues" as being included as charges, however designated, for activities already defined as "retail sales" does not effect a change of law.

[9] **RULE 114:** AMENDMENT -- RETROACTIVITY -- REMEDIAL EFFECT -- ESTOPPEL. Amendment of an existing administrative rule to clarify and explain the application of existing statutory tax provisions is remedial in nature and such amendments may be applied retrospectively when they pertain to practice, procedure, or remedies and do not affect substantive rights. The doctrine of estoppel to apply the remedial rule measures

will not apply where the Department has made no explicit representation to the claimant contrary to the rule's remedial provisions.

[10] **RULE 114:** DUES -- SCOPE OF RULE -- AUTHORITY. Rule 114, governing the proper tax reporting procedures and valuation methods for the tax reporting of dues income is the proper implementation of statutory law in a clear and enforceable manner; the scope of the rule's guidelines and formulary valuation methods is authorized by, and properly expresses statutory law.

[11] **RULE 114:** DUES -- TAX COMPUTATION -- VALUATION METHOD -- RECORDS -- COST OF PRODUCTION. A dues receiving organization, which does not retain actual records of usage of its facilities, correctly computes its taxable dues income under the cost-of-production method in Rule 114; the rule makes no provision for estimating the actual usage of facilities.

[12] **RULE 228 and RCW 82.32.105:** INTEREST -- WAIVER -- CONVENIENCE OF DEPARTMENT. Extension interest upon all tax assessments which were reissued under remedial guidelines of Rule 114 was waived because the delay was caused for the sole convenience of the Department. No such waiver applies, nor was it within the Department's discretion, for any periods after the reissuance of such assessments.

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: . . .
. . .
. . .
. . .

HEARING CONDUCTED BY DIRECTOR'S DESIGNEES:

Sandi Swarthout, Assistant Director
Garry G. Fujita, Chief of Interpretation and Appeals
Edward L. Faker, Senior Administrative Law Judge

DATE OF HEARING: December 18, 1986

NATURE OF ACTION:

These matters arise on direct appeal to the Director of the Department of Revenue from the results of two separate tax assessments for

consecutive audit periods. Tax and interest have been assessed under both tax assessments upon amounts derived from "dues" income received from "owner/members" of the taxpayer club. Business and occupation (B&O) tax was assessed under the Service and the Retailing classifications and retail sales tax was assessed upon amounts calculated to represent charges for golf (primarily), swimming, and tennis facilities. Tax deductions were allowed for amounts calculated to represent "bona fide dues" under RCW 82.04.4282 and WAC 458-20-114 (Rule 114). The taxpayer appeals from the taxing concepts and methods applied, the tax measures derived, and the limitation of the deduction sought.

FACTS AND ISSUES:

Faker, Sr. A.L.J.

Audit History

The taxpayer's records were audited for the period from January 1, 1979 through December 31, 1982, resulting in Tax Assessment No. . . . in the original amount of $70,211. It was originally issued on December 27, 1983. That assessment was held in abeyance pending the Department's consideration of uniform and consistent methods and formulas for application in cases of "dues" receiving entities. It was adjusted because of the adoption and retroactive application of such methods and formulas in 1984 (amendment to WAC 458-20-114, adopted March 27, 1984). The taxpayer's records were subsequently audited for the period from Januaryá1, 1983 through March 31, 1986, in conjunction with which the prior audit was also adjusted. The prior (original) audit and tax assessment had been predicated upon a 60-30-10 percent breakdown which attributed 60ápercent of gross dues receipts to retailing activities, 30ápercent to service activities and ten percent to bona fide, tax deductible dues. Retail sales tax was assessed, as well as B&O tax, upon the 60ápercent retailing portion.

Then, after the amendment to Rule 114, which provided alternative methods and formulas for determining tax classifications and measures for the taxable portions of income designated as "dues," the original audit/assessment was redone to conform with the later audit approach, purportedly consistent with the amended rule provisions which were given retroactive application. The result was a reduction of the original tax assessment from $70,211 to $49,302. Concurrently, Tax Assessment No. . . . was issued for the later audit period (Januaryá1, 1983 through March 31, 1986) in the amount of $74,137.

The reaudit and assessments were based upon an estimate of members' rounds of golf played, measured by a $13.71 per round valuation arrived

at by the auditor's purported use of a study of statewide average golf charges by courses said to be similar to that of the taxpayer club.

Operative Facts

The taxpayer is a private nonprofit golf and country club, in corporate form, which is owned by its approximately 390 members. They purchased the golf course and other recreational business amenities (tennis and swimming facilities) through their nonprofit corporate vehicle in 1978 from the developer, . . . Corporation. The members have a proprietary interest in the golf course and facilities and do not pay for their use of the facilities on a pay-as-you-play basis. Rather, their membership fees and "dues" payments entitle them to unlimited use of the golf course as a right of membership. These dues, together with special assessments which are made, as authorized by the club's bylaws, are calculated to cover all costs of actual operation of the facilities. Dues are not set with particular reference to a member's frequency of use of the facilities. Each year the ensuing year's costs of operation are projected and dues are adjusted based upon those costs and anticipated capital expenditures. No profit element is considered. Special assessments are made if there are cost overruns.

The taxpayer's petition includes a statement of fact, confirmed by reference to the club's bylaws submitted for our examination, as follows:

> Article II, Section 2 of the Bylaws in fact defines, "owner memb member shall be any member who has participated in purchase of t course, equipment and related facilities and assets. . . ." In add is entitled to "full use of the clubhouse and related facilities" (2(a) and has an equal voice of any other owner member (ArticleáII, interest of owner members may be "sold or transferred" (Articl (Bylaws are marked as Exhibit 14).[1]

When nonmembers use the club's facilities they pay greens fees and other user fees on a routine basis, upon which tax is reported and paid.

There are approximately 390 members of the taxpayer club. The dues structure ranges from $117 per month for a full, proprietary membership to $20.86 per month for social membership. Only the proprietary members have charge-free golfing privileges. The posting of golf scores indicates that there are approximately 18,000 rounds of golf per year played by members and approximately 2,000 "guest" rounds played per year. Guests are charged greens fees of $20 per round during the week

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[1]Exhibits are not attached to this Determination unless expressly so stated.

and $25 on weekends. Guest play is discouraged, intentionally limited, and sales tax is collected and reported on guests' greens fees.

Issues

1. Does an owner operated, private golf club incur B&O tax liability upon its income from "dues" paid by owner/members who use its facilities?

2. Are all or any portion of amounts designated as "dues" received by owner operated nonprofit recreational clubs entitled to tax exemption under RCW 82.04.4282 and WAC 458-20-114?

3. Are charges designated as "dues" and "special assessments," which entitle the payers to use recreational facilities owned and operated by a nonprofit club, subject to retail sales tax?

4. When amounts designated as "dues" are not charged with specific regard to the actual value of recreational facilities made available, what is the appropriate retail sales tax measure, if any?

5. May the Department of Revenue retroactively apply duly adopted Administrative Code regulations which purportedly clarify existing statutory law?

6. Does WAC 458-20-114 properly implement statutory law in a clear and legally enforceable manner such that persons of common understanding may determine their correct and true tax liabilities?

7. What is the appropriate alternative tax reporting method under WAC 458-20-114 for dues receiving entities which do not maintain records of the actual usage of facilities which derive dues income?

8. Is it appropriate to assess extension interest upon any taxes found to be due, in view of the Department's written advice that interest would be waived?

TAXPAYER'S EXCEPTIONS:

The taxpayer's arguments and contentions are set forth in several lengthy but well ordered petitions and support briefs submitted before, during and subsequent to the appeal hearing. The oral testimony at the hearing related to and further elucidated these positions. On February 19, 1987, after the appeal hearing, the taxpayer submitted an abbreviated and itemized listing of its contentions regarding most of the issues identified earlier herein. So as to clearly display the Department's thorough review of these arguments, that itemization has been attached to this Determination as Exhibit A, pages 1 through 6.

The pages have been reordered to comport with the order in which the arguments were presented in the taxpayer's appeal petition.

Issue #1.

The taxpayer argues that it merely represents a community of ownership by member/owners who simply engage in a cost sharing arrangement through the payment of dues. According to the taxpayer there is no expression of legislative intent anywhere to tax such arrangements which do not amount to "sales" of anything, nor do they amount to doing "business" in any statutory sense. The appeal petition contains the following pertinent statement:

> This situation is quite different than a retail sale where sta require the existence of a "seller", "buyer", "selling price", and The Department in Rule 114 attempts to establish a fictitious pric to use their own golf course. The fact is that owners obtain becoming members. They do not buy the right to use their golf co paying dues.

At the December 18, 1986 hearing the taxpayer stressed that the golf course was merely an amenity or complement of the entire community development by . . . Corporation. It was not constructed to be operated as a commercial business venture. The course was quite restricted and was less than a standard, full quality golf course facility. The concept at the time it was constructed was that the adjacent property owners would be members of the club on a nonproprietary basis. It was not to be a retail athletic or recreational facility. In 1976 these ideas changed and, because of economics, in 1978 the club and course were purchased by the members through a not-for-profit corporate vehicle, to be operated by and for the members on a proprietary basis. Though membership in the club is not related to residential property ownership in any way, nonetheless, the equity ownership and proprietary control of the club clearly shows that it is not a commercial, retail undertaking. The members are simply enjoying the use of their own property and sharing the costs of its operation and maintenance.

The taxpayer cited several federal tax cases for our reference which support the position that dues charged by clubs for general membership could not be imputed as income from "admissions" to club functions and subjected to federal "admissions" tax. The corollary, according to the taxpayer, is that general membership "dues" should not be imputed as golfing income.

Issue #2.

The taxpayer's petition generally challenges the application of business and occupation tax to income designated as "dues" and "special

assessments" to members to cover operating cost overruns. This argument is twofold:

1. That RCW 82.04.4282 provides a plenary deduction for "dues" and the Department has no authority to tax "dues" by rule fiat; and

2. That the Department's audit and appeal rulings history reflects that dues were untaxed until the Department suddenly changed its position with the amendment of Rule 114 in 1984.

The second prong of this argument raises an estoppel question. The taxpayer asserts its reliance and its right to rely upon previous rulings to other clubs to the effect that dues income was not taxable. Pertinent portions of the taxpayer's petition and written submissions respecting these arguments contain the following:

> Audit History Demonstrates Even the Department Does Not Know How Subject to Tax
>
> This audit history is typical. . . . Golf Club, for example, w during roughly the same period and assessed or advised that it wo amounts ranging from a low of $14,000.00 to a high of $119,000.00 Club, whose case has been heard by this panel, described a similar Given this proven record that even the Department's trained Audit how to calculate the portion of dues representing taxable reve claimed at this point that taxpayers should have known how to make In the case of sales tax, the irony extends even further. How much club have collected from the alleged purchasers, (i.e. members) du even at the present?
>
> IV. DEPARTMENT OF REVENUE RECOMMENDS COST METHOD
>
> Throughout the years the Department has considered the bona fide not to be subject to excise taxes (see Mercer Island Country Club 7990). In 1976 for example, in its Excise Tax Information, the De green fees as being taxable but no mention was made of dues. This in Exhibit 28 in this hearing.
>
> . . .
>
> The subject assessment raises many legal issues which have be numerous communications between the Department and various taxpa approximately 1976 with the Mercer Island Country Club case Deter In that case, and in the Kitsap Country Club case Determination 80 withheld that bona fide dues were not subject to excise taxes.
>
> Subsequently, in July of 1979, the Legislature clarified the busi tax deduction relating to bona fide dues effective July 1979. Sub

> of 1984, the Department adopted the current form of W.A.C. 458-2
> rule which the Department apparently seeks to enforce against the
> commencing in 1979 for the purposes of this assessment.
>
> The legal principles concerning the application of the subject taxe
> are as set forth in legal memorandum filed with the Department by
> course of the rule making proceeding on the current Rule 114, date
> Exhibit 34 and the Taxpayer's petition filed herein which is in
> hearing as Exhibit 35.
>
> The Taxpayer asserts that its bona fide dues are not subject eith
> occupation tax or sales tax for the reasons set forth herein and in

The memorandum last referred to above consists of a 39-page historical account of the Department's tax treatment of dues and a broad, general objection to the Department's attempted taxation of any dues income, especially retroactively.

As late as April 6, 1987 the taxpayer, through its legal counsel, submitted a follow-up letter reemphasizing its position that no sales tax should be assessed for any period before April 1984. This letter also again touched upon the interest assessment question identified as issue no. 8. The letter contains the following pertinent statements:

> First, until April of 1984, the Department had no rule reg
> Departmental auditors were applying many different formulas, and
> authorized into the rule. During this period, Club managers sim
> knowing how to calculate and collect sales taxes from members.
> would be fair to relieve taxpayers from the burden of calculating
> could not calculate, at least until April of 1984 when Rule 114
> confusion was uniform within and without the Department and the de
> should thus apply.
>
> Secondly, under the circumstances described above, it is unfair
> until the Department publishes a coherent system of formulas, and p
> happen with the decisions of the three-judge panel. This is part
> to . . . who actually made offers to pay under both the facilitie
> cost method, which were refused by the Department (See Exhibits 15 a

Issues #3 and #4.

The taxpayer reiterated many of the foregoing arguments to support its position that no part of "dues" income could be subjected to retail sales tax liability under the law. At the December 18, 1986 hearing the taxpayer stressed that the application of retail sales tax to income from any transaction or activity requires that a "sale at retail" must occur. When there is no "sale," as propounded in this case, then there is no sales taxable incident and, thus, no sales tax may be assessed.

The taxpayer challenges the imputation of any of its "dues" income to actual charges for golf or any other retail sale of goods or services. The taxpayer reiterates that throughout the first audit period (Januaryá1, 1979 through Decemberá31, 1982) and until Rule 114 was amended in 1984, no one knew whether sales tax applied to any part of dues income attributable to any sale at retail, or knew how to calculate sales tax if it did apply. Even after the rule's amendment the Department's agents did not know how to determine the sales taxable parts of "dues." The taxpayer asserts that under its cost sharing arrangement covering mutually owned membership facilities there is no "sale," no "seller," no "buyer," and no "selling price" for golf, which are all statutory requirements for the retail sales tax to apply.

On February 19, 1987 the taxpayer submitted a post hearing letter seeking our consideration of a latent legislative development. It contains the following pertinent statements:

> Senate Bill 5360, which is the new proposed Sale Tax Act, contai purports to impose sales tax on club dues. That section is Se imposes sales tax on "all labor and services rendered in respec retail' . . . as well as all other services (of any kind c designated) rendered to or for any persons, ..."
>
> Section 19 of Section 22 creates a deduction for bona fide du excluding dues received "in exchange for any specific amount of services provided to individual members without additional charge, dues are graduated upon the amount of goods or services provided."
>
> None of this language exists in the existing applicable sales tax language is quite different from the existing statute. This ne language its drafters think is necessary to impose sales tax on clu
>
> We can only speculate at this point that SB5360 was drafted or at the Department. Whether it was or not, the above cited language w the language of the existing statute, clearly supports our co legislature by passing the existing statute did not intend to impos dues.

Issue #5.

The taxpayer generally challenges the retroactive application of business tax and retail sales tax in view of the historical absence of uniformity and consistency in tax applications before Rule 114 was amended in 1984. Its arguments are synopsized on page A-4 of the attached Exhibit A. In addition, the taxpayer's appeal petition contains the following:

> . . . it is well known that, although the Department has stated pub
> deal with the issue of retroactive application of the taxes to reve
> the effective date of Rule 114 would be determine on a case by cas
> Department has nonetheless applied the tax in full and allowed no r
> of which this Taxpayer is aware. The Department presumes that
> auditors did not know how to complete an audit under the new
> nonetheless should have known how to calculate the amount of tax du
> "purchaser", prepare a return and report the same to the Depar
> unfairness of this position is clear on its face.
>
> The issue of retroactivity which is closely linked with estoppel i
> legal memorandum (Exhibit 31 [sic] at Page 28, et seq.) and will
> any further extent here, except to point out one additional i
> import: the retroactivity issue with respect to business and occup
> tax is substantially different.
>
> As stated above, the Department has had the long standing interpret
> neither subject to business or sales tax. The Department asse
> statutory change justifies its new interpretation that dues ar
> arguable that this applies to business and occupation tax. The
> however, has no impact on sales tax.
>
> This begs the question of when the Department changed its interpre
> tax and how and when that interpretation was communicated to the
> is that this change of interpretation was first incorporated int
> adoption of the new Rule 114 in April of 1984. Prior to that
> excise tax bulletin or, to our knowledge, any other document issue
> other than letters to clubs and other organizations. Those lette
> the then existing Rule 114 was in effect and unchanged. This was
> when the Mercer Island and Kitsap decisions were rendered. Le
> position different than that contained in the then existing Rule 11
> as they obviously would constitute an attempt at unauthorized rulem
>
> Thus, the Department has no legal basis upon which to contend that,
> binding and legal interpretation had been made by the Department ef
> prior to April of 1984.

The "legal memorandum" to which the taxpayer's petition refers above is the 39-page document identified earlier herein. It contains five pages of general references to the doctrine of estoppel and case law authority in support of that doctrine. The taxpayer's petition concludes,

> If the tax is to apply, the Department must nonetheless deal wi
> application. Placing the burden on a club to calculate business
> when the Department's auditors are incapable of developing a c
> formula is simply unfair. The unfairness is magnified in the case
> must be collected from the individual member, particularly calcula
> basis which wrongfully assumes that all members play the same numb

members have departed the club and the opportunity to recapture pa
no longer exists.

Issues #6 and #7.

The taxpayer makes general, critical allegations that, even currently, neither dues receiving taxpayers nor the Department's auditors understand how to apply Rule 114, as amended, in any uniform or consistent manner. The taxpayer states that the auditor in this case developed several different tax reporting methods with different results, before and after the amendatory rule was adopted. Moreover, the auditor refused to allow the taxpayer to report taxable dues income under the very formulas contained in the rule. The taxpayer initially sought to report under a "cost method" approved for other clubs by the former Chief of the Audit Section. This method differed from the "cost of production" method, 2(a) of Rule 114. Also, the taxpayer had performed a study of comparable golf course charges in its commercial area which reflected an average comparable charge of $7 per round. The auditor also rejected this method, though it is expressly authorized by Rule 114. Instead, the auditor finally settled upon an average comparable charge of $13.71 per round, supposedly based upon the Department's own survey.

The taxpayer asserts, arguendo, that if it is taxable for providing golf to members, the measure of tax should be determined by the "cost method" originally approved. Its petition includes the following:

> By a letter dated December 5, 1979, the Federation of Clubs, which composed of clubs in the state of Washington, requested an ex Department as to how excise taxes would apply to dues (Exhibit 30) 1979, . . .[2] Chief of Audit, wrote back to the Federation (E hearing), and advised that "a method" for determining the amount of sales tax and B & O tax was the "cost" method and further set f determine the appropriate amount. The Federation forwarded copies . letter to its members, and published an article in its newslett (Exhibit 32) explaining the cost method and stating that this Department is using.
>
> Exhibits 21, 28, 29 and 30 represent the Department's expres direction to club taxpayers. The Department is bound by those estopped from denying their application.
>
> . . .

[2]Names of specific Department agents have been omitted.

The Taxpayer contends that its dues are simply a cost sharing arr
members who have a common interest in club property. Notwithstandi
indicated to the departmental auditors its intention and desire to
for calculating excise taxes on its dues to the extent that it is li

The taxpayer has prepared the calculation of its taxes for the ye
the . . . [approved] . . . method and the cost method contained in
33). If indeed it is required to pay excise taxes on club dues, it
to use the . . . [first] . . . method as set forth in . . . [the]
Federation of Clubs (Exhibit 30). It more accurately alloca
situation than the cost method contained in Rule 114 itself. The R
required a fraction which makes no reference to dues but instead
times total club revenue which has no relation to dues.

. . .

Taxpayer believes that it is entitled to use the cost method
reasons:

1. Dues are set based upon costs, and members' dues pay no more t
words, there is no profit element included in dues and to use any
costs taxes the club on revenue it does not receive.

2. The Department advised the Federation of Clubs in 1979 to us
The Federation subsequently advised its members that the Departme
method to be used. Prior to the adoption of new Rule 114 in Apri
method was the only method recommended by the Department in writ
Taxpayer's knowledge.

3. Taxpayer is entitled to use the cost method under subparagraph
The Taxpayer has calculated its tax liability under the cost me
offered in this hearing.

. . .

The issue of sales tax is most problematic for the Department and
law, including the Department's past interpretations lead clearly
that it does not apply. The strongest position that the Departmen
the circumstances is that dues were subject to the service tax and
the date of the statutory change in the B&O deduction tax statute
July of 1979.

. . .

If that were the Department's decision, it must then decide h
calculated. This poses a dilemma because until April of 1984 the
the change to Rule 114, the Department's rules including excise tax
that bona fide dues are entirely deductible from B&O tax if the du

> entitled to a voice in the control of the club. The only poss
> Department to assert that a viable formula is the . . . [first "c
> formula. There do not appear to be alternatives for the Departm
> April of 1984.
>
> Use of the per round method during that period was not communicate
> to the taxpayer, nor was any public communication of this alternat
> this alternative. It is not plausible to hold the taxpayer respo
> tax under a rule that the Department has yet to decide. The
> assessments, workpapers, etc. produced by the Department in audit
> anything, the vagueness of applicable statute.
>
> The . . . [first] . . . cost method has faults, but it would appea
> what happens in the unique proprietary golf club situation and
> entitled to elect that method or the market method, whichever prod
> This is consistent with the Department's public explanation of R
> adopted. (Bracketed inclusions provided.)

Issue #8.

The taxpayer asserts that it was expressly advised in writing that all interest would be waived, on any tax found to be due, for all periods after the issuance date of the original tax assessment. The appeal petition includes the following:

> By letter dated March 30, 1984, (Exhibit No. 23) the acting Dire
> that its assessment would be reexamined with an anticipated substa
> accordance with the Marchá1, 1984 letter. It also states "all inte
> assessed for periods after issuance of the original tax assessme
> pursuant to RCW 82.32.105."
>
> . . .
>
> Apparently the Club had no further contact with the Department unt
> which time an entrance conference took place to reaudit the secon
> The auditors stated over the Club's protest that the per round cha
> used in the audit would be $13.71 based upon a survey done by the
> several years ago of greens fees and guest charges at public and pr
> He stated that he had his "marching orders" which were to restate
> of 1979 through March of 1986 based upon this per round amount. T
> the Department's prior written waiver of interest and the fact that
> do its own survey (see page 19 of public hearing transcript) (Exhi
> surveys done by the Seattle Times in May of 1982 (Exhibit No.
> (Exhibit No. 26), and May of 1986 (Exhibit No. 27) which were publi
> the Times. No heed was paid to either of these items.

The auditor's comments on this question were contained in a letter to the taxpayer's CPA of July 22, 1986, as follows:

> During our meeting, you asked if . . .[3] letter of March 30, 1
> waiving of interest was still in effect. I said I believed it was.
> . letter, I note he refers to the issuance of an amended tax ass
> prepared and submitted to Olympia by . . . on June 13, 1986. The
> for the 1979 - 1982 time period should be issued shortly. As I rea
> interest would be waived from the original assessment date (approxi
> the amended date (approximately 7/31/86). Since you have expres
> appeal the assessment of any taxes based on dues, I believe the is
> waiver of interest would properly fall in the province of the
> Appeals division. I would suggest that you include this issue i
> them under WAC 458-20-100.

DISCUSSION:

The issues raised in this case, as addressed by the taxpayer's petition, memoranda of authorities, and oral testimony, constitute issues of mixed fact and law. Several of them are somewhat redundant in that the arguments apply equally to business tax application, sales tax application, and the availability of statutory tax deduction. We have extensively included the taxpayer's arguments and contentions earlier herein, though we do not perceive all of them to be pertinent to the actual questions before us here. Rather, our attempt has been to isolate the issues of merit which directly bear upon the actual tax assessments in question.

Issue #1.

The taxpayer's arguments imply that it is not engaged in business in any taxable way because it consists of a fellowship of owner/operators who merely share the expenses of commonly owned property. We disagree.

We find as a matter of fact and law that the members of the taxpayer's club do not own the golf course and facilities the operation of which derives dues income. Rather, by the taxpayer's own testimony, the club is a separate, nonprofit corporate entity. It is clearly engaged in the business of providing golf and other recreational facilities for a charge, designated as "dues," with periodic "special assessments" when the dues income does not cover the costs of operation and maintenance. The statutory definitions of "business" at RCW 82.04.140 and "engaging in business" at RCW 82.04.150 are broad and clearly comprehensive enough to contemplate the taxpayer's activity. Moreover, RCW 82.04.040 defines the term "sale" to include, ". . . any activity classified as a 'sale at retail' or 'retail sale' under RCW 82.04.050." The latter statute includes the following statement:

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[3]Agents' names deleted.

> The term "sale at retail" or "retail sale" shall include the sale for personal business or professional services including amounts c fees . . . and other service emoluments however designated, r engaged in the following business activities: (a) Amusement and re including but not limited to golf, pool, billiards, skating, bowl tows and others; . . . (Emphasis supplied.)

[1] In this case the individual club members do not own the golf course but merely have a proprietary voice in its operation. They pay for using the facilities offered by the club, regardless of how these payments or emoluments may be designated, as "dues" or otherwise. Clearly, persons would not purchase such interests, called memberships, or pay any dues or special assessments if they did not enjoy, use, and realize the entitlement to play golf, tennis, and swim for no additional charge. To argue that this method of payment is merely a nonbusiness, "cost sharing" arrangement is simply to assert moot distinctions without any real differences in fact or law. All persons who purchase retail services or benefits are, to a great extent, sharing the costs of such services and benefits. To charge for something "at cost" does not make that transaction any less a "sale" or "sale at retail." The taxpayer's argument is tantamount to saying, "We aren't buying golf privileges; we're sharing the costs of golf provided to us by our club." Within the purview of the statutory definitions referenced earlier, such a position is specious and unsupportable under the law. The taxpayer is a corporation which represents itself to the public as offering golfing and other recreational activities for a charge designated as "dues." Such activity is both "business" and "retail sale" under the statutes.

The federal case law referenced by the taxpayer is inapposite here. No tax has been assessed upon "admissions" of any kind. Neither has the Department imputed the dues income to golf. Only the dues income from golf playing members has been taxed; it is not necessary to impute this income. It is clearly derived from no other privilege or benefit than that of golf and recreation business. The decisions of the Thurston County Superior Court in Drayton Beverages, Inc. and Crossroads Enterprises, Inc. v. Department of Revenue, Nos. 44319 and 44320 (1971), are eminently more applicable than the case relied upon by the taxpayer. In those "dance hall" cases the Court held that amounts designated as "cover charges" were actually charges for dancing and taxable as retail sales. Here, amounts designated as "dues" are actually charges for golfing and are taxable as such.

The Department's position on this issue is inherent in WAC 458-20-114 and WAC 458-20-183, and is one to which the Department is presently committed in litigation, as the taxpayer is aware.

Issue #2.

[2] We will not entertain here a general challenge to the authority for and administration of WAC 458-20-114 (Rule 114). This rule has been duly adopted after public hearing and in accord with the provisions of the Administrative Procedures Act, chapter 34.04 RCW. By virtue of the provisions of RCW 82.32.300 this rule has the force and effect of the Revenue Act itself unless overturned by the decision of a court of record not appealed. Rule 114, in part, implements the business tax deduction for "bona fide dues" provided by RCW 82.04.4282. The rule provides in pertinent parts,

> The law does not contemplate that the deduction should be granted payments required to be made by members or customers are designa fees" or "dues." The statutory deduction is not available for tangible personal property or for providing facilities or servic charge. Neither is it available ". . . if dues are in exchange amounts of goods or services rendered by the recipient thereof to additional charge to the member, or if the dues are graduated upon or services rendered . . ." (RCW 82.04.4282). Thus, it is only th and dues which are paid for the express privilege of belonging as organization, or society, which are deductible. (Emphasis supplied

[3] In the instant case the taxpayer's dues structure is admittedly graduated. "Social members" pay lower dues and do not enjoy golf privileges without paying greens fees. So-called "proprietary members" pay higher dues and enjoy golf privileges without paying greens fees. Any person of common intelligence can understand the purpose of this dues differential. Rule 114 provides,

> Also, the statute does not distinguish between the kinds of clu associations, or other entities which may be eligible for this dedu operated for profit or nonprofit. They may be owned by the member operating as a partnership, joint venture, sole proprietorship, or They may be of a charitable, fraternal, social, political, benevol other nature. However, none of these characteristics determines tax deduction. The availability of the deduction is determined so of the activity or charge which generates the "amounts derived" rule.
>
> . . .
>
> "Dues" are those amounts paid solely for the privilege or r membership in a club or similar organization. "Bona fide dues" wi this rule shall include only those amounts periodically paid genuinely entitle those persons to continued membership in th organization. It shall not include any amounts paid for goods or s the member by the club or similar organization. (Emphasis supplied

Under the clear provisions of this rule the dues in question in this case are not entitled to the deduction of RCW 82.04.4282.

[4] As to the second prong of the taxpayer's argument on this issue, we must stress that no business tax or sales tax has been assessed upon any "dues" income for any periods before July 1, 1979. That was the effective date of the legislative amendment to RCW 82.04.4282 which distinguished between tax deductible, bona fide dues and other amounts designated as "dues" which are graduated upon or paid for services rendered. At least from the effective date of that amendment, it is clear that the business tax deduction did not apply to all amounts merely because they were designated as dues. The Department's auditing history or even the existence of inconsistent assessments or appeal rulings prior to the statutory amendment have absolutely no bearing upon the tax liability attendant to activities which produced dues income after the statutory amendment. Even the prior Determinations cited by the taxpayer as support for the position that "dues" were not subject to business tax at all, ruled differently for periods after July 1, 1979. See Determination 79-90, Mercer Island Country Club and Determination 80-77, Kitsap Country Club, cited by the taxpayer. Whatever confusion or inconsistency of tax administration which may have prevailed earlier was clearly resolved by the statutory amendment. Also, contrary to the taxpayer's assertions on this issue, the Department did not only begin to tax dues income or attempt to limit the dues deduction after April 1984 when Rule 114 was amended. Conversely, the Department's position, under the law, has been uniform and consistent, at least since the statutory amendment in 1979, that not all so-called "dues" were entitled to the deduction. There are a virtual plethora of audit assessments and appeal Determination, most of which the taxpayer is aware, which levy and sustain tax upon different organizations' dues for periods after July 1979. Moreover, the question of the legal validity of that position of the Department is presently being litigated, again as the taxpayer is well aware. In short, the propriety of Rule 114 and its administrative application, retroactively since 1979, is presently before the courts and will not be further discussed here. The Department as well as dues receiving clubs and organizations know very well how to calculate the portion of dues subject to tax and tax deductible "bona fide" dues for all periods after 1979. Rule 114 expressly provides the method and formulas to achieve that result.

Issues #3 and #4.

[5] Throughout the audit periods in question here, and long before the amendment of the bona fide dues deduction of RCW 82.04.4282, other statutory law expressly provided that the charge made for amusement and recreation, including "golf," was a "sale at retail." See RCW 82.04.050. Before the 1979 statutory amendment, however, some confusion prevailed when the charges for golf were exacted from members of country clubs or golf clubs and were designated as "dues." Until that time the

law made no provision for any portion of dues being nondeductible because they were paid in return for significant goods or services rendered. Regardless of confusion about the full extent of the B&O tax deduction for dues, however, charges for golf, "however designated," were retail sales. Moreover, under RCW 82.08.020, both before and after 1979, retail sales were subject to collection and payment of retail sales tax. Thus, with or without a specific WAC rule providing formulas for determining tax measures, charges for golf which were designated as "dues" or otherwise were properly subject to retail sales tax. Neither before nor after 1979 was there any retail sales tax deduction or exemption for any golf charges, whatever they may have been called. The legislature has never expressed the slightest intent or purpose that private country clubs or golf clubs, nonprofit or otherwise, should not be required to collect and remit sales tax from dues paying members who received golf privileges in return. To argue otherwise is strictly specious. The Department did not need express authority to adopt or amend any rule which applied sales tax to golf dues. The statutory law already did that, even before 1979. We conclude that golf dues were subject to retail sales tax both before and after 1979.

Absent a rule to assist golf clubs, or any dues receiving organization, in determining the part of their dues income subject to retail sales tax, the duty or burden to do so rested exclusively with such clubs. This was precisely one of the issues treated by the Superior Court in the Drayton Beverages and Crossroads cases, supra. The Court ruled in its memorandum opinion that if the cover charges were segregable into sales taxable charges for dancing and other non-sales taxable charges, the taxpayers had failed to do so. Thus, the entire cover charge was subject to sales tax. Likewise, in the . . . case before us here and other similar "dues" cases, the burden to segregate or allocate between sales taxable and non-sales taxable dues rested with the taxpayer. The taxpayer arranged its own fees structure. It decided to charge its proprietary members higher dues because they received golf privileges. It thus had the burden to determine which part of its income was charges for "golf" and to collect and report tax accordingly.

[6] In view of the foregoing statutory analysis and conclusions, we must reject the taxpayer's arguments that there was no "sale," "selling price," "buyer," or "seller" of golf in this case. The statutory law, as construed by case law in similar cases, is clear. The taxpayer cannot subvert the clear effect of the statutory definitions and tax imposing sections merely by calling its golf selling price by the name of "dues" or by calling its golf buyers "proprietary members."

[7] About 1973 the Department recognized that there was some inconsistency and lack of uniformity with regard to the many kinds of dues receiving organizations who provided sales taxable goods or services. They were neither reporting sales tax in a uniform manner nor

were they being assessed for tax uniformly upon audit. This was caused, for the most part, by the broad diversification of clubs, associations, and organizations which began to establish themselves as for-profit or not-for-profit "dues" charging "membership" entities. Camping clubs, travel clubs, family exercise and fitness clubs, and similar leisure time enterprises, in addition to golf clubs, began to proliferate. Their dues structures were essentially different, based upon the marketability of the services and benefits they provided. Many such organizations, like camping clubs, heavily front loaded their charges, designating them as "initiation fees" or membership charges, with relatively lesser periodic "dues." Others amortized the costs of producing the goods or services offered to members and established sliding scales of "dues" proportionate to the varying amounts of goods or services offered to different classes of members. The Department was confronted with a wide spectrum of general "dues" structures by different organizations. Some parts of the so-called dues entitled members to services defined by law as retail sales; some parts were for services not defined as retail sales; still other parts entitled members only to belong to an organization without receiving any significant goods or services other than mere social or fraternal association. This was not a condition caused by the Department or by the workings of statutory law. The strictly administrative problem confronted was to find some way to allocate the pool of "dues" income between the respective services provided. For a number of years various methods were employed, without much uniformity, to achieve the consistent result of assessing tax properly upon all such organizations. Amendments to Rule 114 were proposed, not for purposes of imposing tax liability (which the Department is without authority to do), but for the purpose of providing workable guidelines for dues charging organizations to consistently and uniformly report the tax liability already imposed by statutory law. The organizations themselves demanded a set of alternative methods or formulas for reporting, geared to their particular kind of activity, so that a "reasonableness" judgment would not be left to the Department's many field personnel. Some such organizations persisted in their arguments that, simply because their income was "dues," it could not be taxed, especially for retail sales tax. However, since the 1979 amendment of RCW 82.04.4282 the Department has uniformly ruled that if the activity being engaged in, or the service being provided was a "sale at retail" by statutory definition, then sales tax was due. The retroactive application of the guidelines in Rule 114, amended in 1984, back to 1979 was simply a policy recognition by the Department that the uniform guidelines were beneficial to all dues charging organizations. In all known cases the retroactive application of these guidelines reduced the assessed tax liability of these organizations by recognizing that some "dues" income was, in fact, "bona fide." This part was business tax deductible under RCW 82.04.4282 and it did not constitute the "selling price" for significant goods or services. Thus, neither was that part of dues

subject to retail sales tax. See Determination No. 86-55A, page 8 (March 20, 1987), to which the taxpayer has access. In short, the Department and taxpayers alike know that the law made certain charges for named amusement and recreation activities subject to sales tax. Until Rule 114 was amended the taxpayers providing such services for a charge had the duty to collect and report sales tax on the "retail sale" activities. They knew or should have known of this burden under then prevailing statutory law. Now, under Rule 114, it is simply easier to make the allocation decisions, assuming the taxpayer is cooperative. The Department doesn't have to impute income to anything. Any confusion which has existed resulted from the resistance to the rule's prescriptions by taxpayers who sought plenary tax exclusion. The Department has no authority or discretion to excuse tax liability because of such confusion.

[8] Finally on these issues, the taxpayer's letter of February 19, 1987 speculates that specific language in a legislative bill under consideration in the current legislative session should guide us to the conclusion that, absent such explicit language in the law, sales tax could not apply to club dues. We disagree. The language in the proposed bill was drafted because virtually all personal and professional services were being proposed for inclusion within the sales tax base. To be candidly frank, the explicit language about "fees or dues" was incorporated at the recommendation of the Department precisely so that such organizations as the taxpayer in this case would discontinue raising distinctions without any real differences at law. It was an attempt to say, very clearly and unarguably, what the statutory law already provided in general terms. Accordingly, the taxpayer's speculations are without merit.

Issue #5.

RCW 82.32.300 generally provides as follows:

> The administration of this and chapters 82.04 through 82.28 RCW vested in the department of revenue which shall prescribe forms and for the determination of the taxable status of any person, for the and for the ascertainment, assessment and collection of taxes and thereunder.
>
> The department of revenue shall make and publish rules and inconsistent therewith, necessary to enforce their provisions, wh same force and effect as if specifically included therein, unless the judgment of a court of record not appealed from. (Emphasis sup

[9] There is no prescription of statutory law requiring the Department to issue separate rules governing every phase or aspect of business activities to which tax may apply. Neither is there any legislative

mandate that the Department should amend rules every time tax law changes or is clarified. The taxpayer has cited no authority whatever for its gratuitous position that Rule 114 cannot be given retroactive application from the date that the statute it administers was amended. This is an especially disconcerting argument in view of the fact that the retroactive rule application results in a significantly lower tax liability than would exist if 100 percent of dues charged by golf clubs were deemed taxable. That result, of course, would prevail if the ruling in Drayton Beverages and Crossroads, supra, was stridently applied.

Also, concerning its repeated estoppel argument, the taxpayer's audit records reflect that it was never directly or personally advised of any nonliability for sales tax collection and payment upon charges to members for golf. The first element of estoppel, an affirmation or statement upon which the taxpayer relied, is not in evidence here. Even in the administrative appeals cases referred to by the taxpayer, Mercer Island and Kitsap golf clubs, the taxpayers were required to account for retail sales tax on golf dues after the 1979 clarifying amendment to RCW 82.04.4282. In fact, never has the Department ruled, in any case, that dues attributable to retail sales taxable activities, including golf, were not subject to retail sales tax for any period after the 1979 statutory amendment. Even the Mercer Island and Kitsap cases make this clear. It can hardly be argued that the taxpayer relied upon any statement to its detriment concerning nontaxability of dues for any period after Julyá1, 1979. No such statement was ever made by the Department. Also, because the audit periods in question here do not predate the 1979 statutory clarification, there has been no tax assessed upon golf dues before that time. There is no standing by the taxpayer to raise the issue of pre-1979 contrary or confusing positions of the Department.

Again, as to retroactive application of Rule 114, the Department has not taken the position that sales tax or B&O tax may be retroactively imposed. These taxes applied to any charges, however designated, derived from engaging in the amusement and recreation business long before 1979. (See RCW 82.04.050.) Any uncertainty about that taxability was resolved by the 1979 statutory amendment. The only position taken by the Department about retroactive application was that the rule guidelines for allocating dues income between respective business activities could be applied back to July 1, 1979, the effective date of the RCW 82.04.4282 amendment. That is a retroactivity position which assisted taxpayers and, in most instances, reduced their tax burden. However, the statutory law imposed the sales tax on golf charges whether or not the Department ever promulgated a rule to assist taxpayers in ascertaining their individual tax liabilities when they make their charges for golf through a "dues" payment method. The taxpayer has cited no precedent at law or made any other persuasive

argument that the tax administering agency is prohibited from assisting taxpayers through retroactive rule guidelines. After all, the very dues receiving organizations themselves requested such guidance.

The taxpayer's contentions regarding the retroactive application of Rule 114 guidelines (see p. A-4 of Exhibit A attached) are misleading and incorrect in most respects. Rule 114 was not "first adopted in 1984." Rule 114 governing "bona fide initiation fees and dues" was first adopted effective Mayá1, 1943. It originally provided, in pertinent parts,

> Amounts derived from bona fide initiation fees, dues, contrib tuition fees and endowment funds may be deducted from the measur Business and Occupation Tax. (Sec. 12(b) of the law.) This dedu strictly and such amounts may be deducted only if:
>
> (1) They are bona fide, and
>
> (2) They have been included in the "Gross Amount" reported under with respect to which the deduction is sought, and
>
> (3) They have not been otherwise deducted through inclusion in allowable deduction taken under such classification for another rea
>
> (4) They do not exceed the limitations hereinafter set forth.
>
> Amounts which may be deducted as initiation fees are those amou actually required to be paid by a person to a club or similar or sole privilege of joining such club or similar organization.
>
> Amounts which may be deducted as dues are those amounts only which toward the support of a club or similar organization in order to therein. Amounts which are for, or graduated upon, services rende such club or organization may not be deducted.
>
> The right to deduct bona fide initiation fees, dues, contributions, fees and endowment funds does not exempt any person, association o liability upon selling tangible personal property or upon provi services for which a special charge is made to members or o supplied.)

As the taxpayer itself has correctly noted, there has never been, nor is there now, any tax deduction or exemption from retail sales tax for initiation fees or dues, bona fide or otherwise. Again, Rule 114 as amended in 1984 does not administratively provide any such sales tax deduction or exemption. It merely explains that the "bona fide" portion of income designated as "dues" does not constitute the "selling price" for anything. Thus, it is only the "selling price," the actual charge

for goods or services defined as "retail sales," including "golf," which is subject to sales tax. Clearly it is not the imposition of any tax which has been retroactively applied from 1984 back to 1979, it is only the helpful guidelines for calculating respective tax classifications and tax measures which have been allowed for retroactive use by clubs who designate their gross receipts as "dues." Clearly, when administrative regulations are merely remedial in nature, they may operate retrospectively. A rule is remedial when it pertains to practice, procedure, or remedies, and does not affect a substantive right of persons governed by the regulations. See Yellam v. Woerner, 77 Wn.2d 604 (1970). It has been, and continues to be, the position of the Department that the amendment of Rule 114 in 1984 was strictly remedial in nature. It was promulgated at the request of dues charging taxpayers simply to provide procedural guidelines for tax classifying their respective business activities and allocating respective tax measures from their gross receipts.

The taxpayer's petitions for correction on grounds of improper retroactive application of Rule 114 and based upon estoppel arguments are without merit.

Issue #6.

[10] The Department has consistently responded to challenges to the Rule 114 provisions as follows:

> Rule 114 provides alternative methods of determining the value of services for which no actual charge is made when they are used or e charge is assessed periodically in the form of dues. Such dues a privilege of engaging in amusement and recreation activities ("reta 82.04.050) among other non-retail services provided. The entire p is to provide the administrative methodology to allocate income be of sales and services, where specific pay-as-you-play charges or collected. It is an administrative rule which must provide repor the myriad of clubs, associations, and organizations which elect t charges or to periodically assess charges to members under the des "initiation fees." Such charges, by whatever name, are made in goods and services. Only a limited portion of such amounts ar within the meaning of RCW 82.04.4282 and allowed for business tax the law, there is no deduction of retail sales tax for any charges engaging in any amusement or recreation business, expressly incl 82.04.050.
>
> The alternative valuation methods provided by Rule 114 are availab of taxpayers, not at the forced election of the Department. In cas actual usage of facilities are maintained, . . . either metho available. The rule provides, in pertinent part:

> All amounts derived from initiation fees and dues must be rep
> income which then must be apportioned between taxable and dedu
> The alternative apportionment methods are mutually exclusive
> qualifying organization elects to use the standard deduction,
> other methods may be used. Organizations which cannot quali
> standard deduction, or which elect not to do so, may apportio
> based upon such actual records of facilities usage as are mai
> method is accomplished by:
>
> a) The allocation of a reasonable charge for the specific goo
> rendered: Provided, That in no case shall any allocation o
> charge for any goods or services be deemed "reasonable" if th
> such charges is insufficient to cover the costs of providing
> services; or,
>
> b) The average comparable charges for such goods or services
> commercial businesses.
>
> The actual records of facilities usage method must reflect
> goods or services and the frequency of use by the membersh
> actual tally of times used or a periodic study of the average
> facilities. Actual usage reporting may also be based upon a g
> fees and dues structure. For example, an organization ma
> initiation fees or dues rates for a social membership t
> membership. The difference between such rates is attributab
> the goods or services rendered. It constitutes the taxab
> "amounts derived" allocable to that particular activity. Be
> diversification of methods by which "amounts derived" may be
> to members, the actual records of usage method of report
> organization to organization. The following are some example
> method for several different kinds of facilities. (Emphasis pr

These rule provisions are intended as both aids and guidelines f
ranging from golf clubs to garden clubs and camping clubs to trade
various kinds of organizations which derive "dues" income run the
sports, fraternal, recreational, and commercial activities.
legislature of this state has never expressed any intent that th
activities should be somehow tax exempt, merely because they are de
Nevertheless, the allocation of gross income between taxable du
"bona fide" dues, as well as between retail sales taxable act
service taxable activities is difficult, at best. The Departmen
resolve such difficulty, at the specific request of many dues cha
providing the alternative valuation formulas in Rule 114. Properly
works. It derives, as nearly as possible, the proper amounts of t
the proper tax classifications. The rule contemplates that taxp
alike aspire to this goal.

Final Determination 86-55A,
___ WTD ___ (1987).

The taxpayer has access to the above referenced Final Determination. The Department is now committed, in litigation, to the position that Rule 114 properly implements and administers the statutory law in a clear and enforceable manner.

Issue #7.

[11] This is the pivotal and most dispositive issue in these appeals. It is identified by the taxpayer in its Exhibit A summary as "Formulas." The real question is, under the special facts of the taxpayer's case here, what is the appropriate method or formula for calculating the taxable portion of gross receipts designated as "dues," under the guidelines of Rule 114? The answer is the "cost of production method." The audit report reflects that the taxpayer did not maintain actual records of usage of its golf facilities. Rather, rounds of golf played by dues paying, "proprietary" members were estimated based upon some records maintenance. A post audit letter to the taxpayer's CPA from the Department's Supervising Field Auditor, dated July 22, 1986, contained the following:

> First, . . . questioned the total value attributed to golf for noting that rounds played in 1985 (the base year, used as an avera activity of approximately 400 members. Mr. . . . noted that there fewer playing members in the earlier years covered by the audit. a ratio of rounds played in 1985 divided by the number of playing ratio then applied to the number of active members in the prior ye a more accurate estimate of golf play in the earlier years. This apply to the prior audit. Since you have appealed the entire applying to dues or any part of dues, no adjustment will be writte a decision is rendered that is favorable to your position, the issu an adjustment for average rounds played will then be made. (Emphas

While we recognize that this was a reasonable and seemingly cooperative attempt to settle upon a valid tax measure, Rule 114 makes no provision for averaging or estimating actual usage of facilities. In fact, the concepts of "estimated" usage and "actual" usage are contradictory. Under the rule prescription a golf club must either keep "actual" records of the rounds of golf played by dues paying members or perform periodic studies of actual use to develop an accurate average, or it may not use the "actual records of facilities usage method." None of this was done by the taxpayer during the audit periods. Rather, the auditors attempted to derive a workable estimate of usage to be broadcast throughout both audit periods. Moreover, this method was never agreed to by the taxpayer. In fact, the taxpayer resisted any application of the Rule 114 methods of calculating taxable measures because of its persistence that it could operate a private golf facility for dues paying members without incurring any tax liability whatever.

The correct and appropriate method for calculating the taxpayer's taxable dues income attributable to golf, tennis, and swimming is the cost of production method under the formula set forth in Rule 114. This taxpayer was never advised to use any other cost method nor did it have any right to rely upon advice given to other clubs under the undisclosed facts pertaining to those clubs. Individual adjustments to reporting methods authorized by the Department for special use in some cases may be because of the unique features of the facilities in those cases. Rule 114 expressly provides,

> Under very unique circumstances and only upon advance written rec the department will consider variations of the foregoing accounting additional factors shown to be unique to certain kinds of organizati
>
> Unless income accounting and reporting are accomplished by one o methods outlined in this rule, or under a unique reporting me advance by the department, it will be presumed that all "amoun person who provides "goods or services" as defined herein, c nondeductible amounts.

The taxpayer cannot be heard to complain that it relied upon written tax reporting advice, instructions, or approval to another, nonaffiliated golf club concerning the specific appropriate reporting method for that other club. Rather, the cost of production method in Rule 114 is proper here. As the taxpayer's issues summary pleads, "(t)his method is reasonable and . . . is entitled to use it." However, the taxpayer may not adjust this method to serve its own concept of what is "more appropriate." The method, precisely as set forth in the rule, is applicable.

Because of this ruling it is unnecessary to discuss the arguments raised concerning the value of rounds played or average charges by other golf courses. Again, see Final Determination No. 86-55A, p. 6. Whereas the taxpayer does not have actual records of golf rounds played during the audit periods, it is immaterial what the average charge per round by other golf clubs may be. The taxpayer may opt for this method in the future if appropriate records are kept.

Issue #8.

[12] The wavier of post-assessment, extension interest was authorized by the Department's letter to the taxpayer dated March 30, 1984. It provided in part,

> . . . the entire matter has been referred back to the Excise reexamination of records in line with the amended Rule 114 provisi which might be assessed for periods after issuance of the origin will be waived pursuant to RCW 82.32.105.

It is clear that this waiver pertained only to extension interest, not audit interest. RCW 82.32.050 provides that interest shall be assessed upon unpaid tax deficiencies at the rate of nine percent per year from the last day of the year in which the deficiency was incurred until date of payment. RCW 82.32.105 provides for the waiver of interest by the Department when non-timely payment is due to conditions beyond a taxpayer's control. WAC 458-20-228 provides the exclusive circumstances under which the Department will waive interest assessed under RCW 82.32.050. One such circumstance is that the extension of the due date for payment was for the sole convenience of the Department. It was this circumstance to which the March 30, 1984 waiver letter pertained. Clearly, from the tenor of the letter, amended tax assessments were contemplated. The letter did not expressly provide that interest would be waived for periods after the amended assessments were issued. In fact, the sole reason for the interest waiver during the interim was that the Department recognized that in some instances the tax assessments of dues charging clubs had not been based upon consistent and uniform audit theory. All such organizations (of which there were 24) which had outstanding tax assessments were told that interest would be waived between the date of their original assessment and the adjusted assessment based on the Rule 114 guidelines. Such waiver was within the Department's discretion. It was not within the Department's discretion to waive all interest which may accrue for any reason until the amended assessment was paid. Clearly, nonpayment of the amended assessments in this case was not for the sole convenience of the Department. Rather, it was because the taxpayer continued to refuse to accept any tax liability at all and elected to avail itself of administrative appeal remedies under RCW 82.32.160. No interest waiver is appropriate or possible for periods after amended Assessment No. . . . was issued. Obviously, however, if the tax assessments are again reduced because of the calculations to be done under the "cost of production" method explained earlier, the interest assessment will also be reduced proportionately.

DECISION AND DISPOSITION:

The taxpayer's petition is sustained only with respect to the election of the appropriate tax measurement formula to be used under WAC 458-20-114. The Audit Section will adjust the respective tax assessments by applying the "cost of production" method, based upon the cost data provided in Exhibit 39 and other financial information in the file. These amended assessments, performed pursuant to the guidelines contained herein, will constitute the final position of the Department on these matters. The assessments will be due for payment in full on the dates to be shown thereon.

In all other respects, the taxpayer's petition is denied.

DATED this 30th day of June 1987.

NOTE: See hardcopy for Attachments