Cite as 3 WTD 455 (1987)

BEFORE THE DIRECTOR
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment/Refund of)	D E T E R M I N A T I O N	
	)	No. 86-301A
	)	
. . .	)	Unregistered
	)	
	)	
	)	

[1] **RULE 105 AND RCW 82.04.360:** B&O TAX -- EMPLOYEES -- VIS-A-VIS INDEPENDENT Contractors -- SERVICES -- JOCKEYS. Free lance jockeys who ride horses on a contracted basis and who are not considered employees for purposes of the State Employment Security Act or Federal Social Security Act are not employees for purposes of b&o tax exemption under RCW 82.04.360.

[2] ESTOPPEL -- DETRIMENTAL STATEMENT -- RELIANCE. The necessary element of estoppel which requires that a statement be made or action be taken which is relied upon by another is missing when the Department has had no occasion to expressly rule or refrain from ruling upon a person's taxable status.

[3] **RCW 82.32.160:** PROSPECTIVE TAX LIABILITY -- ADMINISTRATIVE AGENCY --DISCRETION. To achieve industry wide uniformity and consistency in the application of excise taxation the Department of Revenue has discretion to establish dates certain for prospective tax liability when the question of such liability or exemption is one of first impression, and the prospective ruling does not result in the refund of any taxes properly due and collected.

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, Sr. Administrative Law Judge

DATE OF HEARING: March 18, 1987; Olympia, Washington

NATURE OF ACTION:

This is an appeal to the Director of the Department of Revenue from the findings and conclusion of Determination No. 86-301, which was issued on November 21, 1986. Appellants requested a written ruling as to the tax liability of jockeys who derive income from riding racehorses in this state. Pursuant to Washington Administrative Code (WAC) 458-20-100, and after a hearing conducted on October 28, 1986, the Department ruled that jockeys were independent contractors with respect to the income derived; were subject to business and occupation tax under the Service classification; were not entitled to the tax exemption for "employees" under Revised Code of Washington (RCW) 82.04.360; and that the state is not estopped from asserting the tax liability at issue. In a cover letter accompanying the Determination the Department advised the appellants that compliance with the ruling would be required on and after January 1, 1986, and that no penalties or interest would be assessed for taxes due in 1986 if they were paid on or before the due date for filing 1986 annual returns. Appellants have appealed all aspects of the ruling and advisory letter.

FACTS AND ISSUES:

Faker, Sr. A.L.J. -- The facts of this case are not in dispute. They are fully and properly reported in Determination No. 86-301 and are not restated here.

The single issue for our resolution is whether jockeys at Washington racetracks are independent contractors rather than employees and are thus subject to the business and occupation tax upon their gross receipts from riding. As a corollary, if tax liability exists, what is the appropriate date for compliance?

TAXPAYER'S EXCEPTIONS:

In their petition to the Director and oral testimony at the March 18, 1987 hearing, the appellants reiterated the arguments placed before the administrative law judge and treated in Determination No. 86-301. Specifically, appellants insist that the question of "employee" status must be controlled by common law and that the provisions of WAC 458-20-105 (Rule 105) regarding "employee" status conflict with the statutory intent implicit in RCW 82.04.360. Appellants assert that prevailing case law, notably Hollingberry v. Dunn, 68 Wn.2d 75 (1966) supports the proposition that the "right to control" the physical conduct of a person in the performance of services is the test for distinguishing employees from independent contractors. Horse owners, who are the jockeys' employers, retain the right to control their physical conduct in riding races.

Appellants assert that even under the provisions of Rule 105, they meet the guidelines for treatment as employees. Moreover, they have been ruled to be "workers" for purposes of Workmen's Compensation in this state. Also, to the extent that Rule 105 requires persons to be employees for purposes of the State Employment Security Act or the Federal Social Security Act in order to be considered employees under the Revenue Act (for taxation purposes), the rule is inconsistent with statutory intent.

Finally, if tax liability exists, the appellants assert that the Department is estopped to enforce compliance retrospectively to January 1, 1986 or for any period before the ruling of the Department through Determination No. 86-301, that is, November 21, 1986. Appellants cite Conversions v. Dep't of Rev., 11 Wn. App. 127 (1974) for this estoppel position.

DISCUSSION:

We have thoroughly reviewed the findings and conclusions of Determination No. 86-301, with special regard for the exceptions and arguments raised by the appellants. We find that it fully and properly responds to the appellants contentions and represents the uniform and consistent position of the Department, under the law. We recognize that case law propositions may prevail distinguishing "employee" status from "independent contractor" status for the express purposes of applying chapters of the statutory law unrelated to taxation, and which may be contrary to the conclusions of the Determination in respect to Revenue Act applications. However, no case law has been cited in support of appellant's contentions which controls that question for tax purposes, explicitly or impliedly. Conversely, as Determination No. 86-301 explains, the provisions of Rule 105 do expressly announce the guidelines and tests for determining "employee" status, specifically for Revenue Act purposes. Moreover, under the provisions of RCW 82.32.300, this rule has the same force and effect as the Revenue Act itself unless overturned by the decision of a court of record not appealed.

[1] Upon careful examination of these rule provisions, we find nothing which convinces us that they are, in any respect, contrary to statutory intent as contended by the appellants. Such contentions were unsupported and no common law references were provided, nor are we aware of any, which conflict with or construe the tax regulation (Rule 105) which is challenged. The decision in Hollingberry v. Dunn relates to indemnification for wrongful death and personal injury, and is inapposite here. Again, the rule provisions have

been consistently applied for all persons engaged in business in this state, across a wide range of divergent business undertakings. Most significantly, the Department has asserted precisely the same rationale and applied the same rule provisions for other activities related to the horse-racing industry. The ruling of Determination No. 86-301 is also consistent with the prevailing case law in other jurisdictions where the "employee" status of free-lance jockeys has been determined expressly for taxation purposes. (Determination No. 86-301, page 4, paragraph 3.) We hereby sustain the findings and conclusion of that Determination.

The Department is cognizant of the seeming disparate tax treatment between persons who derive income from wages, as "employees," and persons who may perform identical functions or services as free-lance or independent contractors. That disparity is the direct result of a gross receipts tax upon all business activities with express limited exemptions, such as the Washington State business and occupation tax. The rules governing the administration of that tax are dictated by the very nature of the business privilege tax structure itself. The Department has limited discretion in that regard.

[2] Concerning the appellants estoppel arguments, we neither see the decision in Conversions v. Dep't of Rev., supra, as apposite here, nor do we find the elements necessary for estoppel to exist. The Conversions' case was one in which the former Tax Commission had known of the facts and conditions which raised the question of taxability but placed the matter in abeyance for a period of almost ten years before administratively resolving it. That affirmative inaction by the administrative agency caused the appellants in that case to rely upon the Commission's continued failure to assert tax liability in the face of known controlling facts. Then, finally, the agency asserted retroactive liability for the statutory audit period, to the clear financial detriment of the appellants.

In the case before us here, however, the Department has had no occasion to examine the business

activities of jockeys prior to their request for a tax ruling. The Department has neither affirmatively expressed any opinion, under the law, relating to the taxability of jockeys, nor has it failed to act in the face of known facts and conditions which would require its administrative action. The Department is not charged with the responsibility of knowing about every person who engages in business in this state or to divine such conclusions as whether that person is a tax exempt "employee" or an independent contractor. Contrary to the case in Conversions, supra, the Department did nothing or failed to do nothing upon which the appellant could be said to rely to their detriment.

Moreover, rather than suffering any detriment, the appellants have enjoyed a benefit or tax windfall for many years. The Department could not be estopped even from pursuing collection of business tax throughout the entire statutory period for conducting audits under RCW 82.32.100, which would go back to January 1, 1983. However, by setting a date certain for tax registration and reporting, the Department has sought to achieve consistency and uniformity with others within the horse-racing industry and to fulfill the spirit and intent of RCW 82.32.160, which provides in pertinent part as follows:

> After the conference the department may make such determinations as may appear to it to be just and lawful and shall mail a copy of its determination to the petitioner.

[3] Because this case does not involve the refunding of any tax reported by appellant or other jockeys represented in general by the . . . , the Department is not proscribed from establishing a date for compliance, registration, and payment of tax. See Council of Campfire v. Revenue, 105 Wn.2d 55 (1985) which would prohibit actual refunds in cases such as this.

We recognize that there is a very real, practical problem in this case which makes it extraordinary, if not unique. In a letter to the administrative law judge, dated December 9, 1986, appellants explained that the jockeys represented by the

appellant guild were gone from Washington tracks during the off-season. They return to the state about March of the year. Thus, the requirement in the November 21, 1986 cover letter which accompanied Determination No. 86-301, to the effect that jockeys who registered with the Department on or before December 31, 1986 would not be required to account for business tax for any periods before January 1, 1986, was impracticable. In addition, that letter advised that if 1986 taxes due were paid on or before the annual return due date for that year, no penalties or interest would be assessed. We take administrative notice of the custom of the trade and that independent contractor personnel within the horse-racing industry follow the circuit and are present and engaged in business in this state on a seasonal basis. Accordingly, the caveat contained in the cover letter is hereby withdrawn. Rather, jockeys who register with the Department before December 31, 1987, and report and pay business tax for tax years 1986 and 1987 will satisfy their liability without risk of penalty or interest. See RCW 82.32.105 which authorizes such interest and penalty waivers.

DECISION AND DISPOSITION:

Except as modified by this Final Determination in regard to the time requirements for registration and tax payment, Determination No. 86-301 is sustained and appellant's petition is denied.

DATED this 31st day of July 1987.