

Cite as 3 WTD 231 (1987)

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

In the Matter of the Petition ) D E T E R M I N A T I O N  
For Correction of Assessment)

) No. 87-192  
)  
)  
. . . ) Registration No. . . .  
)  
)

[1] **RULE 211:** RCW 82.08.050 -- RETAIL SALES TAX --  
LEASE -- LESSORS -- LIABILITY FOR FAILURE TO  
COLLECT. Persons who rent or lease tangible  
personal property to consumers are required to  
collect retail sales tax from their lessees on the  
gross income from the rentals. A lessor who fails  
to collect the tax is personally liable to the state  
for the amount of tax.

[2] MISCELLANEOUS -- ESTOPPEL -- PRIOR AUDITS. In most  
cases, the state is not estoppel from collecting  
taxes due because of prior audits in which the same  
tax liability was overlooked.

[3] MISCELLANEOUS -- Rule 217 -- RCW 60.28.050 --  
RETAIL SALES TAX --áLEASE -- PUBLIC WORKS CONTRACTS  
-- CERTIFICATION BY DEPARTMENT. The state is not  
estopped from collecting retail sales taxes from a  
lessor who failed to collect the tax from a lessee  
who used the leased property in performing a public  
works contract. The fact that the state had  
previously certified that all taxes relating to the  
contract had been paid was not controlling.

[4] **RCW 82.08.0254:** DUE PROCESS -- EQUAL PROTECTION. A  
tax assessment does not violate constitutional  
provisions relating to "due process" and "equal  
protection" where the assessment was not arbitrary  
or made on some prohibited ground.

[5] **RULE 228 AND RCW 82.32.105:** INTEREST -- PRIOR AUDITS -- RELIANCE ON. Interest waived where taxpayer reasonably relied on previous audits in which tax was not assessed on similar transactions.

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: December 8, 1986

#### NATURE OF ACTION:

The taxpayer protests the assessment of retail sales tax and interest on amounts received as lease payments for the use of its equipment by commonly controlled corporations.

#### FACTS AND ISSUES:

Frankel, A.L.J. -- The taxpayer's records were examined for the period January 1, 1981 through December 31, 1984. The audit disclosed taxes and interest owing in the amount of \$ . . . . Assessment No. . . . in that amount was issued on August 20, 1985.

The taxpayer protests the assessment of \$ . . . in retail sales and use tax, plus interest, on the amounts received for the use of its equipment by commonly controlled corporations. Primarily, the taxpayer argues the state should be estopped from assessing the tax, contending the Department had full knowledge of the taxpayer's conduct during the audit period and had directly and indirectly approved that conduct. The taxpayer contends "[f]or the Department of Revenue to now make an assessment of tax after full knowledge and approval of the procedures and actions of the taxpayer is to violate the due process and equal protection clauses of the Federal and State Constitutions." ( . . . )

The ["B"] family has been in the construction business in Washington for many years. During the hearing [Mr. "B"] outlined the history of their business as follows:

1. 1930 - 1955: . . . Construction was operated by his father.

2. 1955 - 1978: [Mr. "B"] and his father operated . . . Construction Engineering. During this period, the company entered into a series of joint ventures. The ["B"]'s both owned equipment which was used by the joint venturers in performing contracts. They each received compensation as joint venture owners and as equipment owners.

3. 1978: [The "B" brothers] bought out their father's business and formed [the taxpayer corporation]. They operated the corporation the same way their father had.

At issue in this appeal is the assessment of retail sales tax/use tax on amounts received by the taxpayer corporation for the use of equipment owned by one of the owners or by the corporation.

Some of the payments at issue were from . . . , Corporation [hereinafter Corp. J. V.]. That corporation was formed by the taxpayer and employees of another corporation with which the taxpayer was a joint venturer. The payments were for the use of equipment owned by the taxpayer or one of the owners on [Corp. J. V.]'s construction projects.

The taxpayer stated that most of the [Corp. J. V.] contracts were state highway contracts for bridge construction and road grading. The taxpayer argues the Department should be estopped from assessing any further taxes on payments received for the use of equipment on those contracts because the Department has already reviewed the contracts and found no taxes were owing. The taxpayer contends it relied on the state's certification that all taxes were paid on the public works contracts, and on previous audits of its own books and records in which the auditors never found it should be collecting and remitting sales tax on amounts received for the use of its equipment.

The taxpayer also contended that the payments for the use of its equipment were not true lease payments. It stated it had no written lease agreements. The company using the equipment would pay for the upkeep and repairs for the equipment it was using. That company would pay all labor, bills, and office overhead out of the proceeds from the contract and then pay the owner of the equipment from what was left over.

The auditor assessed tax on the payments because the taxpayer's records indicated they were for the lease of equipment. If any tax is found due on the lease payments, the

taxpayer contends the state should seek the tax from the "lessee" rather than itself.

#### DISCUSSION:

[1] Each separately organized corporation is a "person" within the meaning of the Revenue Act. RCW 82.04.030 and WAC 458-20-203. Transactions between separately organized businesses are subject to tax.

The term "retail sale" includes the renting or leasing of tangible personal property to consumers. RCW 82.04.050(4). Persons who rent or lease tangible personal property to consumers are required to collect retail sales tax from their lessees on the gross income from rentals when the payments fall due. WAC 458-20-211. In this case, the payments were for the use of the taxpayer's equipment for a period of time and were listed in the taxpayer's records as lease payments. We agree with the auditor that the payments were subject to the retail sales tax. The fact that the taxpayer did not have formal lease agreements is not controlling.

Although the retail sales tax is imposed on the buyer/lessee, if the seller/lessor fails to collect the tax, the lessor is personally liable to the state for the amount of the tax. RCW 82.08.050. Accordingly, the Department was not required to seek payment from the lessees as the taxpayer contends it should.

[2] Estoppel: To create an estoppel, three elements must be present: (1) an admission, statement, or act inconsistent with claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act. Harbor Air Service, Inc. v. Board of Tax Appeals, 88 Wn.2d 359, 366-67 (1977).

Ordinarily, the state may not be estopped from collecting taxes due it because of a mistake or oversight by one of its employees. See Kitsap-Mason Dairymen's Assoc. v. Tax Commission, 77 Wn.2d 812, 818 (1970). Kitsap was not a case in which auditors changed their interpretation of a statute or a rule, but one in which they overlooked through "ignorance, neglect, or inadvertence," Kitsap's error in computing its tax liability. The fact that the oversight was not discovered earlier did not relieve Kitsap of its liability for the correct tax during the audit that was at issue. 77 Wn.2d at 818. In the present case, therefore, the taxpayer is not

excused from payment of the tax because the Department, in previous audits of its records, failed to assess retail sales or use tax upon similar transaction.

[3] Nor is the Department estopped from collecting the tax due on the lease payments because the lessee used the leased equipment on public works contracts which were reviewed and cleared by the Department prior to the audit at issue.

The taxpayer relied on Excise Tax Rule 458-20-217 which is the rule dealing with the lien for unpaid taxes. The rule states the duties of the disbursing officer upon final acceptance of the public improvement contract, as provided by RCW 60.28.050:

The amount of all taxes, increases and penalties due or to become due under any chapter of the Revenue Act from a contractor or his successors or assignees with respect to a public improvement contract wherein the contract price is \$20,000 or more is a lien prior to all other liens upon the amount of the retained percentage withheld by the disbursing officers, and the amount of all other taxes, increases and penalties due and owing from the contractor is a lien upon the balance of such retained percentage after all other statutory lien claims have been paid.

Any state, county or municipal officer charged with the duty of disbursing or authorizing the payment of public funds, before making final payment of the retained percentage to any person performing any such contract, or to his successors or assignees, must require the person to secure from the department a certificate that all taxes, increases and penalties due from such person, and all taxes to become due with respect to such contract have been paid in full or that they are, in the department's opinion, readily collectible without recourse to the lien and that said lien is therefore released.

When the Department issues a certificate that all taxes with respect to a public works contract have been paid, it does not do a complete audit of the contractor's books and records. The Department checks to see that the person performing the contract reported the full contract amount and paid retail sales tax on materials used in performing the contract. A disclaimer states that the contract clearance is qualified and subject to future audit. ( . . . . )

[4] The assessment does not violate constitutional provisions relating to "due process" or "equal protection" of law as prohibited by RCW 82.08.0254. The assessment was not arbitrary, but was based on the Washington statute imposing a retail sales tax on leases of tangible personal property. Also, the selection process for the assessment was not made on some prohibited ground, as race or religion, in violation of the equal protection clause. See, e.g., Frame Factory v. Department of Ecology, 21 Wn.App. 50, 57 (1978).

[5] Interest: RCW 82.32.105 provides that if a taxpayer's failure to pay any tax when due was the result of "circumstances beyond the control of the taxpayer," the Department shall waive or cancel any interest or penalties imposed with respect to such tax. WAC 458-20-228 is the administrative rule which sets forth two situations which constitute circumstances under which the Department will consider a waiver of interest. One of those situations is the failure to pay the tax was the direct result of written instructions given the taxpayer by the Department.

The Department has waived interest in situation where a taxpayer relied on a previous audit and failed to pay a tax that was due. Reliance on the previous instructions or assessment is reasonable unless the taxpayer's business activities have changed so that the prior written instructions are no longer applicable.

In the present case, the taxpayer stated that it was conducting and reporting its business during the previous audit periods the same way that it was reporting its activities during the audit period at issue. Because the taxpayer was not advised that retail sales tax was due on payments received for the use of its equipment when audited in the past, and because the taxpayer was part of the lessee corporation whose public works contracts were reviewed by the Department, we agree to waive the interest that was assessed on the unpaid taxes on the lease payments.

#### DECISION AND DISPOSITION:

The taxpayer's petition is denied except for the cancellation of the interest on the retailing and retail sales tax assessed on the lease payments. An amended assessment shall be issued and due on the date provided thereon. Because the delay in issuing this Determination was for the convenience of the

Department, extension interest shall be waived after March 8, 1987 (three months after hearing).

DATED this 5th day of June 1987.