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

In the Matter of the Petition For Correction of Assessment of)	D E T E R M I N A T I O N	
	No. 87-206	
. . .	Registration No. . . .	
	Tax Assessment No. . . .	

[1] **MISCELLANEOUS AND RCW 82.32.050:** B&O TAX -- IMPOSITION -- ESTOPPEL -- ELEMENTS OF -- RETROSPECTIVE APPLICATION -- PRIOR WRITTEN INSTRUCTIONS. No estoppel found where prior Final Determination correctly stated tax liability, even though parenthetical remark contained therein, when taken out of context and viewed in isolation, might imply that the taxpayer was taxable under a different tax classification.

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: . . .

NATURE OF ACTION:

Taxpayer objects to retrospective reclassification of certain income from Retailing B&O tax to Service and Other Activities B&O tax alleging reliance upon a prior Determination of the Department.

FACTS:

Rosenbloom, A.L.J. -- The taxpayer operates a club which provides tennis, racquetball, and health club activities to its members. There are three categories of membership. Full Club Membership entitles the member to use of all club facilities. Racquetball Membership entitles the member to use

of all of the club facilities except the tennis courts. Health Club Membership entitles the member to use all of the club facilities except the tennis and racquetball courts. Members pay a joining fee and monthly dues for the privilege of using these facilities.

The taxpayer also provides lessons, instructions, classes, and health and fitness activities for a separate charge. The taxpayer collected and remitted retail sales tax on such charges, and reported the gross income derived therefrom under the Retailing B&O tax classification. In the current examination of the taxpayer's account, the auditor reclassified these amounts to the Service B&O classification.

TAXPAYER'S EXCEPTIONS:

The taxpayer alleges that these amounts were reported under the Retailing B&O classification based upon the results of a prior audit and Final Determination issued to the taxpayer, which provides in part:

> A member simply cannot participate in the club's activities (all of which are retail activities) without payment of both a joining fee and dues. (Emphasis the taxpayer's.)

Consequently, the taxpayer argues that it would be inequitable to reclassify these amounts retrospectively during the audit period here at issue.

DISCUSSION:

The issue is whether the Department is estopped from asserting Service B&O tax retrospectively. We find that it is not. "The doctrine of estoppel will not be lightly invoked against the state to deprive it of the power to collect taxes." Kitsap-Mason Dairymen's Association v. State Tax Commission, 77 Wn.2d 812, 818 (1970). Moreover, three elements must be present to create an estoppel:

> (1) An admission, statement, or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act.

Harbor Air Service, Inc. v. The Board of Tax Appeals, 88 Wn.2d 359, 366-367 (1977).

[1] Taken out of context and viewed in isolation, the parenthetical remark contained in the Final Determination might imply that all of the taxpayer's gross receipts are subject to Retailing B&O and retail sales tax. However, the Final Determination concerned the correct classification of the taxpayer's "joining fees." The taxpayer had argued on appeal that these charges were deductible under RCW 82.04.4282 (formerly RCW 82.04.430(2)) as bona fide dues. The Final Determination held that joining fees, like the monthly dues, were subject to retail sales tax because they entitled members to participate in the club's activities.

Whether or not the statement that "all of (the club's activities) are retail activities" is completely accurate, no one could reasonably infer from the Final Determination that all of the taxpayer's gross income is derived from these retail activities. In fact, the Final Determination specifically referred to income derived from providing tennis lessons to members and non-members. The Final Determination recites that this income was appropriately subject to Service B&O tax with no deduction for amounts paid over to the tennis instructors. (We note that separate charges made for tennis lessons were among the items reclassified to the Service B&O classification in the current audit.)

Accordingly, we find that the Department's Final Determination is entirely consistent with the position now taken by the Department, (i.e., that separate charges for lessons, instructions, classes, and health and fitness activities are subject to Service B&O tax). Thus, the first element of estoppel is missing.

DECISION AND DISPOSITION:

The taxpayer's petition for correction is denied.

DATED this 12th day of June 1987.