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

In the Matter of the Petition For Correction of Assessment of)	D E T E R M I N A T I O N
)	No. 88-327
. . .)	Registration No. . . .
)	Document No. . . .
)	Audit No. . . .

[1] **RULE 151:** B&O TAX - SERVICES - DENTAL LABORATORIES. Dental laboratories are required to report income from their activities under the Services B&O classification. Department may issue assessment on taxes unpaid for four years plus the current year.

[2] MISCELLANEOUS - ESTOPPEL - ETB 419 - ORAL INSTRUCTIONS. Assessment of Services B&O Tax is proper. Department does not have authority to abate a correct tax assessment because taxpayer alleges that it received incorrect oral instructions regarding its tax liability.

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.

NATURE OF ACTION:

Taxpayer protests reclassification of his dental laboratory income, previously reported under the Manufacturing B&O tax classification, to the Service and Other Activities classification, and petitions for waiver or negotiation of the interest assessed in addition to the tax.

FACTS AND ISSUES:

Johnson, A.L.J. -- Taxpayer does business as a dental laboratory. Prior to the recent assessment, taxpayer had reported its gross income under the manufacturing classification of the B&O tax. An examination of the taxpayer's account resulted in reclassification of its income for the years 1984-1987, inclusive. Taxpayer contends that it thought it was reporting its income correctly and

that the independent accountant or bookkeeper, who handled its books and who is now deceased, would not have reported its income in the incorrect manner absent authorization from the Department of Revenue. Taxpayer also contends that the delay in correcting its reporting procedure has caused a hardship and that it knows of "'numerous' dental laboratories in the state which are facing the same type of correction and have been reporting incorrectly for years."

DISCUSSION:

[1] RCW 82.04 imposes Business and Occupation tax upon persons engaging in business in Washington. The amount of tax is determined by the classification applied to the taxpayer's particular activity or activities. Unless the taxpayer's activity is specifically classified by the provisions of this chapter, the taxpayer is required to report gross income from its activities under the "other business or service activities" provisions of RCW 82.04.290. The legislature has specifically designated certain activities as those which are required to report under the manufacturing, wholesaling and retailing classifications. The administrative rules promulgated by the Department of Revenue explain what activities fall into each category. These rules have the same force and effect as the law itself. RCW 82.32.300.

WAC 458-20-151 (Rule 151) specifically addresses the activities conducted by dental laboratories and clearly states that income from such activities is to be reported under the services B&O classification. The rule states that dentists, dental laboratories and physicians are subject to the tax, because they are rendering a professional service. Rule 151 has so provided since May 1, 1935, and does so because persons engaged in this type of business are rendering professional services requiring a high degree of skill and training, rather than being mere vendors of merchandise. Although the performance of professional services commonly results in the vending of tangible evidence of the work performed, such as a bridge or dentures, the intrinsic value of the tangible personal property vended is an insignificant aspect of a business activity which is primarily the rendition of a personal or professional service. Additionally, because the work of a dental laboratory was initially conducted by dentists, the decision to have both dentists and labs report under the services classification results in uniform treatment within the profession.

In a 1966 letter to the president of the Washington State Dental Laboratory Association, the chairman of the Tax Commission (predecessor to the Department of Revenue) stated that

> [t]he Tax Commission's published Rule 151 sets out the Commission's determination that dental laboratories are engaged in the business of rendering professional services. This rule has been a matter of public record

> for the entire thirty-year life of the Revenue Act of 1935. It must be presumed that the legislature was and is aware of this ruling. The fact that no question was raised as to the validity of the rule during the many sessions of the legislature since its adoption by the Tax Commission raises the strongest of presumptions that the rule correctly interprets the legislative intent.

Another letter to the same association notes that the existing tax impact on dental laboratories is that they pay services B&O on their gross receipts and sales tax on materials only. That impact is considerably less than if they paid manufacturing tax on their gross receipts plus the retail sales tax on the full selling price to the dentists, which would be required under that reporting procedure. In that 1965 letter, the Secretary of the Tax Commission stated that

> [t]he Tax Commission has no objection to reviewing its ruling that dental laboratories are taxable under the classification "Service and Other Activities." We wish to make sure, however, that your Association understands that the consequences of any change in the present Rule will be a substantial increase in the total tax burden.

A 1977 letter to the association again restated the Department's position, quoted above, that the long-unchanged status of the rule "raises a very strong presumption that the rule correctly reflects the legislative intent."

Upon discovery of the reporting error, the auditor correctly reclassified taxpayer's income for the four years preceding the current year, as required by RCW 82.32.100.

Additionally, RCW 82.32.050 requires mandatory assessment of interest when taxes are not paid in a timely manner:

> the department shall assess . . . interest at the rate of nine percent per annum. . .If payment is not received by the department by the due date . . . the department shall add a penalty of ten percent of the amount of the additional tax found due.

The use of the word "shall" in the statute makes assessment of the interest mandatory. As an administrative agency, the Department of Revenue has no discretionary authority in this case to waive or cancel interest, unless, pursuant to RCW 82.32.105, the circumstances resulting in the mistake were beyond the control of the taxpayer.

No such circumstances exist in this case. It is the obligation of taxpayers in this state to correctly inform themselves of the tax consequences of their activities. Taxpayer protests that the error should have been caught sooner and that the reason it went

unnoticed is because of "undertrained and poorly paid" Department personnel. Given the number of businesses operating in Washington and the fact that this taxpayer has not previously been audited, which would almost certainly have resulted in reclassification, the fact that its reporting error went unnoticed is not surprising.

[2] Taxpayer contends that his former bookkeeper or accountant would not have reported its activities under the incorrect classification absent some authorization from the Department of Revenue. Excise Tax Bulletin 419.32.99 (ETB 419) addresses the issue of whether the oral instructions of its employees are binding upon the Department. That bulletin states that the Department

> gives consideration, to the extent of discretion vested in it by law, where it can be shown that failure of a taxpayer to report correctly was due to written instructions from the department or any of its authorized agents. The department cannot give consideration to claimed misinformation resulting from telephone or personal consultations with a department employee.
>
> There are three reasons for this ruling:
>
> (1) There is no record of the facts which might have been presented to the agent for his consideration.
>
> (2) There is no record of instructions or information imparted by the agent, which may have been erroneous or incomplete.
>
> (3) There is no evidence that such instructions were completely understood or followed by the taxpayer.

In this case, the taxpayer merely states that its accountant must have had some reason for reporting taxpayer's income under manufacturing. ETB 419 follows the Washington Supreme Court's holding in King County Employees' Assoc. v. State Employees' Retirement Board, 54 Wn.2d 1, 11-12 (1959):

> Estoppel will never be asserted to enforce a promise which is contrary to the statute and to the policy thereof.

Although we sympathize with taxpayer's complaint that it must have obtained the information somewhere and that the failure to detect the error for several years resulted in hardship,

> the doctrine of estoppel will not be lightly invoked against the state to deprive it of the power to collect taxes. The state cannot be estopped by unauthorized action, admissions or conduct of its officers.

Kitsap-Mason Dairymen v. Tax Commission, 77 Wn.2d. 812, 818 (1970).

Finally, taxpayer's contention that "numerous Dental Laboratories in Washington are facing the same type of correction and have been reporting incorrectly for years" is not borne out by the facts. A survey of 92% of the state's registered dental labs resulted in the finding that only 5.8% of those surveyed were reporting their taxes incorrectly in some manner.

Because we find that the tax is proper, we do not have authority to abate the assessment based on taxpayer's allegation that his former accountant received erroneous instructions regarding its tax liability.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 12th day of August 1988.