BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	E X E C U T I V E D E T E R M I N A T I O N
	)	No. 98-172E
. . .	)	Registration No. . . .
	)	FY . . ./Audit No. . . .

[1] & [2] RULE 108; RCW 82.04.080: B&O TAX -- GROSS INCOME -- GROCERY -- SLOTTING -- ALLOWANCE -- DISCOUNT. Slotting fees and other payments to grocers for services are subject to service B&O tax as gross income to grocers. Discounts from the selling price or rebates paid to the grocer directly from the party selling the goods to the grocer may be deducted provided the grocer does not perform any service for the payment.

[3] RULE 108; RCW 82.04.080; RCW 82.04.4286: B&O TAX -- EQUAL PROTECTION CLAUSE. Businesses that structure their transactions differently may be taxed differently. The Department will not disregard the form of the transaction structured by the taxpayer.

[4] RULE 108; RCW 82.04.080: B&O TAX -- OPPRESSIVE. B&O Tax based on a difference in the method of operation is not oppressive.

[5] RCW 82.04.080: GROSS INCOME – CO-OP ADVERTISING. A retailer who receives payments from manufacturers of products which it sells for co-op advertising done by a third party may exclude such payments from service B&O tax provided: 1) The payments are expended for advertising and sales promotion only; 2) The advertising mentions the name of the manufacturer (vendor) or the trade names of the products; and 3) As a condition for payment, the manufacturer requires proof of actual advertising and its cost.

[6] ESTOPPEL -- PROSPECTIVE. Failure by the department to advise specific taxpayers of their tax obligations does not estop the Department from assessing tax in an audit.

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:

A grocer protests the assessment of business and occupation tax upon payments from manufacturers.[1]

FACTS:

M. Pree, A.L.J. -- . . . . (taxpayer) operates . . . retail grocery stores, [several] of which are located in Washington. The Department of Revenue (Department) reviewed the taxpayer's books and records for the period January 1, 1991 through June 30, 1995. The Department's Audit Division issued Assessment No. FY . . . on August 7, 1996. The assessment imposed business and occupation (B&O) tax on various allowances, also referred to as rebates and bill-backs, the manufacturers paid the taxpayer for goods it purchased from distributors. The taxpayer objected.

According to the taxpayer, as a retailer, it purchased 26,000 - 30,000 different products (15,000 products in its grocery division alone). It purchased most of the products through a distributor. Some products, particularly perishable food items, were purchased directly from manufacturers. In both cases, the manufacturers, through brokers, offered the taxpayer some sort of incentive to purchase its products, -- whether purchased directly or through the distributor. The incentives took the following forms:

1. Off-Invoice Purchase Allowance. The manufacturer reduced the price of the goods by allowing a discount off the invoice price.

2. Scan-Down Purchase Allowance. The manufacturer agreed to pay the taxpayer an allowance based upon the volume of product sold during a specified time period. During this allowance period, the taxpayer temporarily reduced the price of the item (referred to as a temporary price reduction or T.P.R.). The manufacturer based the allowance on the number of items run across the taxpayer's scanner (a "scan-down"). At the end of the allowance period, the taxpayer determined the allowance and billed the manufacturer (a "bill-back"). According to the taxpayer, these transactions were generally documented by "deal sheets," "item proposals," or some other form of written agreement.

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410

3. Volume Discount Allowance. These are similar to Scan-Down Purchase Allowances, except they are not generally associated with temporary price reductions. The manufacturer and the taxpayer agreed in advance to an allowance on a per case/item basis. At the end of the period, the taxpayer invoiced the manufacturer for the allowance.

4. Placement (Slotting) Allowance. A manufacturer paid the taxpayer to introduce a product or product line in the store, or to place the product at certain locations or in certain displays in the store. They paid the taxpayer in advance or on a bill-back basis.

5. Advertising Allowance. For a specified allowance, the taxpayer featured a manufacturer's product in a newspaper, coupon book, or some other form of advertisement. The taxpayer generally provided the design and layout of the ad, then contracted with a third party to print the ad. Afterwards, the taxpayer invoiced the manufacturer on a bill-back basis, and provided proof it ran the ad.

6. Exclusivity Allowance. A manufacturer paid the taxpayer to ensure the taxpayer carried only the manufacturer's product line. Generally, the manufacturer obligated the taxpayer to buy a certain volume, or to refund a pro-rata share of the allowance advanced, if the taxpayer did not meet the volume requirement within a specified period of time.

7. Free Product. Instead of cash, a manufacturer sometimes gave the taxpayer free cases of the product as part of the purchase deal. According to the taxpayer, free product is especially prevalent as a placement/slotting allowance.

The taxpayer did not report the allowances as income. The Audit Division assessed B&O tax on the allowances[2] if someone other than the seller paid the taxpayer. That is, where the distributor sold the goods to the taxpayer and the manufacturer of those goods gave the taxpayer an allowance on that transaction. Thus, if a manufacturer paid the taxpayer to purchase its products from the taxpayer's distributor, the tax was assessed. However, the Audit Division did not tax allowances from distributors who both sold the products to the taxpayer and gave the allowance to the taxpayer unless unless the taxpayer performed a service in addition to purchasing products for the allowance.

Thus, the Audit Division did not assess B&O tax on "off-invoice purchase allowances" from goods purchased directly from manufacturers because these amounts are considered discounts not income. The Audit Division only included Scan-Down Purchase Allowances and Volume Discount Allowances in the assessment if the manufacturer paid the taxpayer for products

[2] We will also refer to these payments as "bill-backs" or "rebates".

purchased from a distributor, not from the manufacturer. In all cases, the Audit Division taxed the placement or slotting allowances and the exclusivity allowances because it considered these allowances to be consideration for services. In taxing the allowances, the Audit Division did not differentiate between cash, credits, or free products. The Audit Division taxed Washington receipts only. [3]

The taxpayer contends that none of the allowances received were for activities subject to tax. The taxpayer states it only purchased goods for resale and did not provide any services for the manufacturers. The taxpayer submitted two sample documents containing specific "contract requirements" which include the activities described in "2 – 6", above. The sample documents include provisions entitled "performance requirements" wherein the taxpayer agreed to perform certain activities for a stated value. For example, the taxpayer would agree to run a feature advertisement for $200.00. The taxpayer argues that this amount is merely an allowance to reduce its costs of goods sold.

The taxpayer stresses its primary concern in negotiating the allowances was to reduce the cost of groceries to its customers. The taxpayer states that unless it offered products at low prices, its customers would purchase from its competitors. The taxpayer argues if it lost its customers, it would cease to exist. According to the taxpayer, the allowances enabled the taxpayer to offer its products at low prices and to remain competitive with national chains, which negotiated lower prices directly with manufacturers. Therefore, the taxpayer contends that by taxing allowances, independent grocers, such as the taxpayer, would pay more in B&O tax than the national chains for engaging in the same activity. Thus, the taxpayer argues, upholding the tax would end its existence.

To help further explain the taxpayer's position, an official from a grocers' association testified that for the grocery industry, grocers' net profits are very low, about 0.89% of gross receipts after taxes and all expenses. The official did not provide any statistics to establish the difference in allowances between national chains and independent grocers. However, the official stated national chains tended to deal directly with manufacturers. In such dealings, they could negotiate direct price discounts, rather than an allowance scheme for goods purchased through a distributor. The official noted the national trend shows a decline in the use of allowances as incentives. The official also stated that the trend in the grocery business shows an increased market share for the national chains while independents, such as the taxpayer, are going out of business or being bought by the national chains.

The taxpayer also noted that it used the same contract form and negotiated similar allowances with manufacturers as with distributors. In fact, during the hearing, it was difficult for the taxpayer to determine whether it purchased the products directly from the manufacturer or from

[3] The taxpayer's controller acknowledged the tax was only imposed upon allowances for its stores in Washington. Together with the Audit Division, based upon the best information available, the taxpayer agreed the amount of allowances allocated to the Washington stores was fair.

a distributor.[4] The taxpayer states it was the same "deal" regardless of the party from whom the product was purchased. Its goal was to reduce unit costs.

The taxpayer's President stated the allowances reduced its cost of goods sold for federal income tax purposes. A decision to uphold the assessment would bankrupt the taxpayer. A prospective ruling would cause them to move out-of-state.

The taxpayer also contends the Audit Division's treatment of these allowances has been inconsistent. According to the taxpayer, some taxpayers have been taxed only on slotting fees, while others have been taxed only on allowances. The taxpayer contends stores account for the allowances differently, and the accounting method or label should not determine the taxability. [5]

TAXPAYER'S EXCEPTIONS AND ISSUES:

The taxpayer's post-hearing brief poses six arguments why the allowances fall outside the B&O tax statutes:

1. Transactions for the purchase of goods, which include procurement of allowances, are not taxable activities within contemplation of the tax statues. According to the taxpayer, virtually every form of allowance at issue was negotiated as an integral part of purchasing goods for resale. Stating that it does not matter what form the transaction takes, the taxpayer contends its purchasing activity was not contemplated within the tax statutes per Time Oil Co. v. State, 79 Wn.2d 143, 483 P.2d 628 (1971). The taxpayer treated these allowances as a reduction of cost of goods sold for federal income tax purposes. Furthermore, the taxpayer argues, even if the allowances were determined to be gross income, there must be some taxable activity, separate and distinct from the retailing activity, for the B&O tax on gross income to apply. Fisher Flouring Mills Co. v. State, 35 Wn.2d 482, 213 P.2d 938 (1950).

2. Allowances tied to the purchase of goods are not included in the gross proceeds of the business and/or are deductible under WAC 458-20-108 (Rule 108). The taxpayer considers the allowances the same as discounts. Under Rule 108, if the sale is made subject to a cash or trade discount, the gross proceeds actually derived from the contract and the selling price are determined by the transaction as finally completed. The taxpayer asserts that in the grocery industry, purchase allowances are the mechanism by which manufacturers give trade discounts. Manufacturers use bill-backs to ensure performance -- the grocers must move the goods before the manufacturer pays the

[4] The taxpayer provided sample documents at the hearing, which the taxpayer stated were a representative sample of the transactions at issue.

[5] Over the years, the taxpayer's records have become less specific regarding the type of allowance given. From the Audit Report, it is evident that in the early years, the taxpayer's records identified space slotting and advertising, while later in the audit period, the schedules refer only to manufacturer's sales discount credit.

allowance. The bill-backs allow the manufacturers to influence price adjustments of goods sold through wholesalers.

3. Allowances received from manufacturers who do not sell directly to grocers should not be treated differently than discounts given off invoices to grocers who have a direct purchasing relationship with the manufacturer.

4. Cash allowances tied to the purchase of goods are substantially the same as off-invoice purchase allowances, and should not be taxable. In the alternative, cooperative advertising allowances are not considered taxable.[6] Det. No. 89-493, 8 WTD 309 (1989).

5. The taxing scheme violates the taxpayer's right to equal protection. Stores purchasing only on a direct basis would not be taxed on allowances even though they received allowances from an identical source for an identical purpose. See Associated Grocers, Inc. v. State, 114 Wn.2d 182, 787 P.2d 22 (1990). All entities of a class must be treated equally. H & B Communications Corp. v. Richland, 79 Wn.2d 312, 316, 484 P2d 1141 (1970).

6. The B&O Tax levied on trade allowances is oppressive and, therefore, invalid and should be reversed. Oppressive or confiscatory taxes will not be sustained. Pacific Tel. & Tel Co. v. Seattle, 172 Wash. 649, 21 Pac. 721 (1933).

Rather than addressing each argument in the sequence offered by the taxpayer, we will examine the statutes imposing the tax, determine the nature of the allowances, and analyze whether the assessment properly taxed the allowances. Then, we will address the taxpayer's arguments.

ISSUE:

Are allowances, bill-backs, payments, or rebates from manufacturers to retailers that purchase the manufacturer's products from a third-party distributor gross income subject to B&O tax?

DISCUSSION:

[1] B&O tax is imposed upon receipts from business activities. See RCW 82.04.220. RCW 82.04.140 defines "business" as:

> "Business" includes all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly.

[6] The Audit Division is not aware of any receipts from cooperative advertising included in the assessment. If the taxpayer can identify cooperative advertising payments in the assessment, the Audit Division will review them, and adjust the assessment accordingly.

The taxpayer's purchase of groceries for resale with the object of obtaining allowances constituted a business activity.

RCW 82.04.220 imposes B&O tax on business activities at stated rates for various activities. If the activity is not otherwise defined, the proper classification is service and other activities. RCW 82.04.290.[7] B&O Tax under that classification is measured by the gross income of the business. RCW 82.04.080 defines "Gross income of the business" as:

> . . . the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

The taxpayer receives cash payments or credits for purchasing products. The purchase of products is clearly a transaction of business. Therefore, receipts from the manufacturer to induce the taxpayer to purchase products from the distributor are income to the taxpayer unless otherwise deductible or excludable.

We will now address the taxpayer's argument that purchasing is not a business activity, then consider when allowances may be treated as discounts.

The taxpayer alleges the purchase of goods, which includes procurement of allowances, is not a taxable activity within contemplation of the tax statutes. We disagree. In Time Oil Co. v. State, supra, the Washington Supreme Court (Court) held that exchanges of goods between affiliates were subject to tax, even without the transfer of possession of the goods. Analyzing the statutory scheme of Chapter 82.04 RCW, the Court did not limit the activities upon which the tax could be imposed:

> RCW 82.04.140 defines "business" as:
>
> "Business" includes all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly.
>
> For purposes of applying and measuring the tax, the statute then proceeds to classify various business activities, i.e., Extracting, RCW 82.04.230; Manufacturing, RCW

[7] Effective July 1, 1993, this provision was recodified as RCW 82.04.290(4) and effective July 1, 1998 again recodified as RCW 82.04.290(2).

> 82.04.240; Retailing, RCW 82.04.250; Wholesaling grains, RCW 82.04.260; Wholesaling, RCW 82.04.270; Other business or service activities, RCW 82.04.290.
>
> Viewing these broad provisions, and RCW 82.04 in its entirety, it is obvious that the legislature intended to impose the business and occupation tax upon virtually all business activities carried on within the state. Reynolds Metals Co. v. State, 65 Wn.2d 882, 400 P.2d 310 (1965).

Time Oil, at 146. The taxpayer's purchase of goods clearly was a business activity. The rebates were clearly intended to be taxed.

The taxpayer's post-hearing brief discusses Fisher Flouring Mills Co. v. State, 35 Wn.2d 482, 213 P.2d 938 (1950). In that case, a flour mill sold flour subject to World War II price regulations. The sales price did not cover the costs to manufacture the flour. The United States paid the miller a subsidy to cover excess costs. The case involved the measure of manufacturing B&O tax. Specifically, was the subsidy part of the value of the products manufactured? The Court held the subsidy payments were not "the proceeds of bona fide sales," and therefore, not "gross proceeds derived from the sale thereof." Id., at 486. The "value of products" definition now includes subsidies. RCW 82.04.450.

The taxpayer states grocers and other retailers are taxed on "gross proceeds of sales," not on gross income. Persons making sales at retail are taxed on "gross proceeds of sales." RCW 82.04.250. The taxpayer also argues that even if the allowances were determined to be gross income, there must be some taxable activity, separate and distinct from the retailing activity for the B&O tax to apply.

The taxpayer sells groceries. The taxpayer also purchases products, promotes them, and sells shelf space. Those activities, although related, are separate and distinct from selling the products. Persons engaged in multiple activities within the purview of the B&O tax provisions are taxable under each section applicable to each of their activities. RCW 82.04.440. For instance, J.C. Penney paid tax at the retailing rate on sales and the service rate for its financing charges from its charge accounts. See Department of Rev. v. J. C. Penney Co., 96 Wn.2d 38, 633 P.2d 870 (1981). The decision in Impecoven v. Department of Rev., 120 Wn.2d 357, 364, 841 P.2d 752 (1992) summarizes:

> The statute, itself, allows a "person" who engages in separate but related activities to be taxed on each activity unless exempted. See RCW 82.04.440; see also Drury the Tailor v. Jenner, 12 Wn.2d 508, 510, 515, 122 P.2d 493 (1942) (prior to subsequent legislative exemption, tax properly imposed on activity of retail and on manufacture as each constitutes a separate activity).
>
> In addition, we have refused to ignore the business structure of entities engaged in separate but related activities to avoid B&O taxation. See Washington Sav-Mor Oil Co. v. State Tax Comm'n, 58 Wn.2d 518, 364 P.2d 440 (1961).

The taxpayer's purchasing activity in exchange for providing a service constitutes engaging in business. Rebates, allowances, or bill-backs received from third parties are gross income from engaging in business. Unless an exclusion or deduction applies, receipts from purchasing are subject to tax under the service and other activities classification.

Bill-back or rebate receipts from manufacturers constitute gross income of the taxpayer, unless other authority exists to exclude or deduct these amounts. Taxation is the rule and exemption is the exception. O'Leary v. Department of Revenue, 105 Wn.2d 679, 682, 717 P.2d 273 (1986), quoting Budget Rent-A-Car of Washington-Oregon, Inc. v. Department of Rev., 81 Wn.2d 171, 174, 500 P.2d 764 (1972).

[2] The Department allows deductions for bona fide discounts. Deductible discounts include cash discounts and trade discounts offered by sellers. RCW 82.04.4283 allows a deduction for cash discounts taken by purchasers. RCW 82.04.160 defines "cash discount" as:

> . . . a deduction from the invoice price of goods or charge for services which is allowed if the bill is paid on or before a specified date.

From the evidence provided by the taxpayer, the bill-backs were not dependent upon dates when the taxpayer paid the suppliers. The bill-backs were not cash discounts. Therefore, the bill-backs are not deductible under RCW 82.04.4283.

Other discounts may not be subject to tax. Rule 108 provides in part:

> (5) DISCOUNTS. The selling price of a service or of an article of tangible personal property does not include the amount of bona fide discounts actually taken by the buyer and the amount of such discount may be deducted from gross proceeds of sales providing such amount has been included in the gross amount reported.

Discounts reduce the receipts of the seller. In this case, the disputed transactions involve products purchased from distributors. The manufacturers, not the distributors, pay the taxpayer. The bill-backs or allowances do not reduce the distributors' measure of wholesaling B&O tax. In some cases, the distributors may not even know the amounts the manufacturers paid the taxpayer. The distributors' measure of tax is the consideration they receive from the taxpayer.[8]

---

[8] Wholesalers pay B&O tax on their gross proceeds of sale. RCW 82.04.270. RCW 82.04.070 defines "Gross proceeds of sales":

> "Gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property and/or for services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

Because the distributors do not pay the taxpayer the allowances in dispute, they may not reduce their measure of tax by the payments from the manufacturer to the taxpayer. The bill-backs are not discounts.

The Department has been uniform and consistent in its position that bona fide discounts never include situations where the purchaser is required to provide any service or benefit to the seller in return for the price reduction. See, e.g., Det. No 83-180, 11 WTD 5 (1983) and ETA 034.04.108[9] (copies attached). Purchasers pay tax on consideration for their services.

The manufacturer's payments may induce the taxpayer to purchase its products or price them lower for consumers. In addition, the taxpayer may be required to reduce its prices on those products to consumers. The bill-backs constitute gross income for engaging in business.

If the taxpayer is only required to purchase products, it renders a service not for the distributor selling the products, but for the manufacturer who compensates the taxpayer for the act. The taxpayer is without authority to exclude, or deduct payments from manufacturers, when the taxpayer purchases the products from distributors.

Other rebates are subject to B&O tax. For instance, car dealers must include automobile manufacturers' rebates assigned to the dealers in their measure of B&O tax as well as in the measure of retail sales tax. See ETA 494.08.108 (ETA 494, copy attached). Manufacturers pay consumers rebates on cars that they purchase from dealers.

The taxpayer attempts to distinguish ETA 494 by stating that the question is not whether the rebate is part of the selling price under RCW 82.08.010 on which tax is paid under RCW 82.08.020, but whether the rebate itself is gross income to the buyer. However, we did say in ETA 494, and the other rulings, that a manufacturer's rebate was not a discount in the buyer's purchase price. See Det. No. 89-107, 7 WTD 189 (1989) and Det. No. 87-365, 4 WTD 357 (1987). We require consumer-buyers to pay retail sales tax on the full price. Sellers must include the full price in their measure of tax. Since we do not treat manufacturers' rebates as discounts, the payments received from the manufacturers must be accounted for as income.

Other third-party payments to entice particular purchases or behavior regarding transactions between two other parties are taxable. For instance, builders who construct energy efficient structures for new homebuyers include payments from electric companies in their measure of tax. Det. No. 93-078, 12 WTD 599 (1993). In our case, the manufacturers paid the grocers with bill-backs to encourage the grocers to buy their products from the distributors.

The value proceeding or accruing to the distributors from the sale of groceries to the taxpayer was the amount the distributors received. Because the distributors did not pay the discounts, they may not reduce their measure of tax.

[9] Formerly, ETB 034.04.108. All Excise Tax Bulletins have been cancelled and reissued as Excise Tax Advisories to be consistent with RCW 34.05.230(4).

No legal authority exists in the statutory scheme permitting a deduction of the allowances at issue.[10] The bill-backs must be included in the taxpayer's measure of tax.

[3] Next, the taxpayer contends the taxing scheme violates taxpayers' right to equal protection. Citing Associated Grocers, Inc. v. State, 114 Wn.2d 182, 787 P.2d 22 (1990), the taxpayer asserts that stores purchasing only on a direct basis would not be taxed on allowances even though they were received from an identical source for an identical purpose. All entities of a class must be treated equally. H & B Communications Corp. v. Richland, 79 Wn.2d 312, 316, 484 P2d 1141 (1970).

The taxpayer implies large, national chains are not taxed on the same transactions. We need to clarify. The Department taxes third party rebates to all business recipients regardless of size. Likewise, volume discounts offered by sellers to buyers are deducible from the seller's measure of tax as trade discounts regardless of the size of the taxpayer (provided no services are required for the discount). Finally, as discussed above, even stores making direct purchases are taxable on payments made by the seller for services.

While larger, national chains may transact business differently, when they receive third party rebates based upon the activities of their Washington stores, they must include the rebates in their measure of tax. We also note the bill-backs pertaining to the taxpayer's stores located out-of-state were not included in its measure of tax. [11]

The taxpayer asks that we disregard the form and observe the substance of the transactions.[12] When asked to disregard the form of transactions structured by a taxpayer, the Court refused. See Washington Sav-Mor Oil Co. v. State Tax Comm'n, 58 Wn.2d 518, 521, 364 P.2d 440 (1961). In Sav-Mor Oil, the plaintiff challenged the assessment of B& O tax on sales to its parent corporation. Sav-Mor argued as a wholly owned subsidiary, it was actually a part of the parent company. If part of the same company, it could not make a sale to itself. The court rejected the argument. The Court will not "import an exemption into the tax statutes" where none existed. Time Oil 79 Wn. 2nd at 147.

---

[10] For instance, RCW 82.04.4283 specifically permits a deduction for cash discounts. Offering rebates has been a business practice for years. No statutory deduction exists for business rebates. As discussed later, the Department has not varied its position regarding the taxability of these payments.

[11] Some of the bill-backs were for services related to the taxpayer's stores outside of Washington. Since the taxpayer performed those services outside of Washington, those bill-backs were not subject to service B&O tax. See RCW 82.04.460 and WAC 458-20-194 (Rule 194) (copy attached). Those bill-back receipts were not included in the assessment.

[12] As authority for elevating form over substance, the taxpayer's post hearing brief cites the appellate case, Rho Company v. Department of Rev., 52 Wn. App. 196, 207, 758 P.2d 553 (1988). On appeal, the supreme court noted the extent to which a taxpayer is allowed to invoke the doctrine is far from settled. Rho Company v. Department of Rev., 113 Wn.2d 561, 569, 782 P.2d 986 (1989). The case was resolved without resorting to substance/form analysis. Id at 570.

[4] Regarding the taxpayer's statement the B&O tax levied on trade allowances is oppressive, the taxpayer cited two cases. First, in Pacific Tel. & Tel. Co. v. Seattle, 172 Wash. 649, 21 P.2d 721 (1933), the Court upheld a city tax on gross income. Second, in Oil Heat Institute v. Mukilteo, 81 Wn.2d 7, 498 P.2d 864 (1972), the Court upheld a municipal tax of 2.5% of gross income on fuel oil sales, twice the rate imposed upon natural gas sales. Later, the court found the fact that the higher tax rate put a business at a "competitive disadvantage is of no moment." Sonitrol Northwest v. Seattle, 84 Wn.2d 588, 593, 528 P.2d 474 (1974). Taxpayers bear a heavy burden of proof to show taxes are oppressive. Oil Heat Institute 81 Wn. 2nd at 3, citing In re Garfinkle, 37 Wash. 650, 655, 80 P. 188 (1905); and Stull v. De Mattos, 23 Wash. 71, 62 P. 451 (1900).

For purposes of excise taxes on businesses, a classification based solely on a difference in the method of operation of a particular kind of business is permissible. Sonitrol, 84 Wn. 2nd at 591. As stated before, large, national chains are liable for tax on the same receipts as the taxpayer. The methods of operation, in this case purchasing, vary. Money received from the seller may qualify as a volume discount whether received by a large chain or the taxpayer. Payments from third parties or for services are subject to tax. We do not consider the B&O tax on rebates, allowances, or bill-backs oppressive.

In any event, the Department does not have the authority to ignore the statute, because a taxpayer finds the tax to be oppressive. This power rests solely with the courts. Bare v. Gorton, 84 Wn.2d 380, 526 P.2d 379 (1974).

[5] We recognize an exclusion for cooperative advertising allowances exists. Det. No. 89-493, 8 WTD 309, 314 (1989). That determination incorporated a portion of a Department publication:

> Automobile Dealers' Tax Manual (not necessarily current on other issues today) which stated on page 10:
>
> > COOPERATIVE ADVERTISING ALLOWANCES
> >
> > Cooperative advertising allowances are not subject to tax under the "Service and Other Activities" classification, provided such amounts are received by the automobile dealer in trust for the manufacturer or distributor. There must be a specific agreement between the car dealer and the one making the allowance that:
> >
> > 1) The credits or allowances must be expended for advertising or sales promotion only; and
> >
> > 2) The advertising must mention the name of the manufacturer or the trade name of the products; and
> >
> > 3) As a condition for payment, the manufacturer must require proof of actual advertising and its cost.

The availability of the exclusion is not limited to automobile dealers, but retailers generally. See generally Det. No. 89-493, 8 WTD 308. A retailer was allowed to exclude payments for advertising services performed by others, but receipts for advertising it produced were subject to tax.

The underlying basis for the exclusion is that the retailer is a mere conduit. Id. at 314. The funds earmarked for advertising are paid to advertisers. The retailer retains nothing. The three requirements specified in the Automobile Dealers' Tax Manual assure the retailer's role remains as a conduit only.

The taxpayer states it meets two of the three requirements, but the first requirement is "more problematic." Manufacturers require the taxpayer send proof of advertising with the invoice. They also require the ad name their product. However, the taxpayer's item proposals do not generally state specifically the allowance will be spent of advertising. The taxpayer reasons that because advertising must occur and proof is provided to the vendor prior to payment, it follows that the allowance would be expended for that purpose. The taxpayer contends failure to include a specific provision in the agreements, which includes ad allowances, should not be fatal to the analysis.

Cooperative advertising receipts are excludible because the retailer acts as a conduit, committing to spend the money for advertising or sales promotion only. Without such an agreement, the funds accrue or proceed to the taxpayer until the taxpayer directs their expenditure. The taxpayer is not acting as a conduit, but a reseller of services.

However, the Audit Division did not consider this issue. The Audit Division will review the advertising receipts included in the assessment to determine whether the taxpayer was acting as a mere conduit.

[6] Finally, the taxpayer requests any adverse ruling, subjecting the allowances to tax, be applied on a prospective basis. The taxpayer states there has never been any guidance from the Department on these issues. Specifically, regarding advertising allowances, the taxpayer states, "Unlike the automobile industry, the Department has never issued a Grocery Industry Tax Manual or otherwise offered guidance to the industry as to the taxability of advertising or other allowances." The taxpayer does not offer a legal basis for prospective application.

We note in the Sept.-Oct. 1963 periodic publication, Tax Facts, the Department did state the cooperative advertising requirements, which were not directed to any specific industry. The article provided:

> No exemption will be allowed in respect to amounts received as compensation for advertising services performed directly by the recipient, for example, the placement of special displays in his store or the sale of advertising space on the walls of his store or in an advertising bulletin published by him. No exemption will be allowed in respect to

> commissions, service charges or other amounts retained by the wholesaler or retailer as compensation for his services in preparing or placing the advertising or for any other services.

We are not aware of an instance where the Department has varied from taxing payments for placement of special displays or similar compensation when audits uncover such payments. The taxpayer has alluded that the Department has not taxed similar payments in other audits. While we are not aware of the Department ever exempting such payments, prospective application or other relief to the taxpayer is not the remedy even if allowed in another audit. The Department has not changed its position regarding the issues raised by the taxpayer.

The doctrine of estoppel will not be lightly invoked. Kitsap-Mason Dairymen v. Tax Commission, 77 Wn.2d at 818, 467 P.2d 312 (1970). In Kitsap-Mason Dairymen, the Washington Supreme Court addressed audit inconsistencies stating:

> . . . This is not a case in which auditors changed their interpretation of a statute or rule. It is one in which they overlooked through ignorance, neglect or inadvertence Kitsap's error in computing the tax. The fact that the oversight only recently has been discovered does not relieve Kitsap of its liability for the correct tax during the audit period now under consideration.

The relief sought by the taxpayer, prospective application, is often associated with the doctrine of estoppel. The taxpayer has not provided any evidence that it received any misinformation from the Department. Further, if the taxpayer has received any misinformation from another source, we note:

> A failure to pay taxes because of misinformation received from others, including the DOL [Department of Licensing], is not a defense to a later assessment for delinquent taxes under case law or any statute. To create an estoppel, three elements must be present: (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. Board of Tax Appeals, 88 Wn.2d at 359, 366-67 (1977).

Det. No. 87-298, 4 WTD 087, 93 (1987). There is no basis to apply the rulings in this determination prospectively only.

DECISION AND DISPOSITION:

We deny the taxpayer's petition. However, the Audit Division has agreed to allow the taxpayer to verify its claims regarding cooperative advertising and allowances received from its distributor, where the taxpayer proves it did not perform any services.

Dated this 28th day of January, 1999.