Cite as 10 WTD 65

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. 90-268
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .

[1] RULE 190: SALES TAX -- EXEMPTION -- CAR RENTALS -- FEDERAL GOVERNMENT. The rental of automobiles directly to the federal government is not sales taxable. The rental of automobiles to employees of the federal government is sales taxable. ETB 248.04.159.190.

[2] MISCELLANEOUS AND RULE 190: SALES TAX -- ESTOPPEL -- REPRESENTATION BY AUDITOR. The written statement by a previous auditor that rentals to the federal government are not subject to sales tax misled taxpayer in that it did not distinguish between the government per se and government employees. Estoppel found. Relief granted. ACCORD: Det 89-77, 7 WTD 171 (1989).

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: May 4, 1988

NATURE OF ACTION:

Protest of retail sales tax assessed on car rentals to government employees.

FACTS AND ISSUES:

Dressel, A.L.J. -- . . . (taxpayer) rents automobiles. Its books and records were examined by the Department of Revenue (Department)

for the period . . . through . . . . As a result a tax assessment, identified by the above-captioned numbers, was issued for $ . . . . The taxpayer appeals a portion of said assessment.

The taxpayer does at least part of its business as . . . Rent a Car in downtown . . . and at . . . International Airport. In 1983 it entered into a contract with the General Services Administration (GSA) of the United States of America (USA) to rent cars to the federal government. It did make such rentals during most of the audit period. The taxpayer did not collect sales tax on these car rentals. There were at least three reasons for this. The contract stated that federal employees who rented the cars were not required to pay sales tax. Secondly, GSA auditors told the taxpayer it should not be charging sales tax to federal employees. Lastly, in a 1978 audit by the Department, its auditor wrote in part in his report to the taxpayer:

> Leases of automobiles to instrumentalities of the U.S. Government, in your case GSA, are not subject to retail sales tax . . . In the future, leases to the U.S. Government should be reported under the retailing and retail sales tax classification and the appropriate deduction taken on the reverse side of the excise tax return under retail sales tax.

The Department's auditor in the more recent assessment, however, charged the taxpayer for sales tax on the majority of its government rentals. This was done in those instances where the federal employee paid for the rental with cash, traveler's check, or his or her own personal check or credit card. Where the federal government was charged directly as by the use of a credit card in the name of the federal agency whose employee was using the car, sales tax was not assessed. In explaining his action, the auditor cited WAC 458-20-190 (Rule 190) and said, in effect, that in those situations where personal funds or credit cards were used, the rental was actually made to the individual employee and not to the United States. Only sales to the United States per se are exempt of retail sales tax, therefore, those to individual employees are not exempt.

In opposition the taxpayer argues numerous theories including the contract and the Supremacy Clause of the U.S. Constitution. It also argues estoppel, saying that it relied on the advice of the first auditor in 1978 when he said the taxpayer's GSA rentals[1] were not subject to sales tax.

---

[1]GSA negotiated the subject contract with the taxpayer for the benefit of other federal agencies as well as for GSA itself.

The issue is whether the Department is correct in charging sales tax on the car rentals made to government employees.

DISCUSSION:

Rule 190, as presently written, states in part:

> Sales to federal employees or representatives of the federal government are subject to sales tax, even though the federal government may reimburse them for all or a part of such expenses. Direct purchases by the federal government are sales tax exempt, but purchases by others whether with federal funds or through a reimbursement arrangement are fully subject to the retail sales tax.

[1] The reimbursement arrangement mentioned in the rule is what exists in the instant case. Car rentals under this arrangement are considered direct to the individual employee and indirect to the federal government. Contrary to the authority cited by the taxpayer, the indirect taxation of the USA is not unconstitutional. See Washington v. U.S., 75 L.Ed.2d 264 (1983). The Department is within the rule in requiring a direct purchase and payment by the government agency per se.

Estoppel, however, is another matter. Under this theory of the law, a party who makes a statement upon which another justifiably relies is held to that statement. In Determination 89-77, 7 WTD 171 (1989) estoppel was invoked against the Department in a case involving the collection of garbage. The Department issued a letter as to how income from the collection of garbage was to be reported for excise tax purposes. It later altered those instructions retroactively in an excise tax bulletin. The taxpayer had relied on the letter and was unable to recover from its customers the additional tax amounts called for in the excise tax bulletin. The administrative law judge, in estopping the Department from collecting the additional taxes, quoted the elements of that legal theory as follows:

> 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 359, 366-67 (1977). Because the taxpayers have shown that they relied on the earlier instructions from the Department as to the proper reporting of their income, and that this reliance was to their detriment as they were required by the WUTC to lower their rates to reflect the change in tax liability,

> we find the Department is estopped from retroactively reclassifying the income at issue.

[2] So, too, has this taxpayer relied to its financial detriment on the instructions of the Department's first auditor. That auditor made the flat statement that U.S. government rentals were not subject to sales tax. In the strictest sense that is true. If rentals are made in the name of an agency of the government and paid for by that agency per se rather than by an employee of that agency, they are not sales taxable. The auditor, however, did not distinguish the "strict" sense from the "liberal" sense. He did not caution the taxpayer that if payments were made with the funds of agency employees, the rentals were sales taxable.

Further, the taxpayer avers that its billing and payment procedures during the earlier audit period were the same as in the later period. In fact, the taxpayer produced a rental agreement and charge card receipt from the earlier period which reflected payment by a government employee's personal American Express card. Sales tax was not charged. The first auditor did not assess sales tax on this or any similar transaction, nor did he otherwise mention the transaction.

Had he overlooked government rentals altogether, the auditor's omission would not be sufficient to excuse the taxpayer from sales tax liability in the later audit period. See Kitsap-Mason Dairymen's Association v. Tax Commission, 77 Wash.2d 812 (1970). The auditor, however, made a specific, affirmative representation to the taxpayer which the second auditor is effectively attempting to recant. The taxpayer reasonably relied on the first auditor's statement. The above-mentioned elements of estoppel have been satisfied.

Finally, we observe that the language of Rule 190 did change slightly between the two audits. The earlier version stated in part that "Sales to persons in the Army or Navy service of the United States, including civilian employees in such service, are not exempt from the retail sales tax . . ." That language shows, just as the present language does, that the federal government's sales tax exemption is limited in that it does not apply to individual employees. The expansion of that statement in the amended rule to include "federal employees" and "reimbursement", in our judgment, is not adequate to cause the taxpayer to question the first auditor's statement that government rentals are not subject to sales tax. In other words the estoppel situation was not interrupted by the amendment of the rule. Further, the amendment simply put in the rule a policy the Department has followed since at least 1966 which policy is also expressed in ETB 248.04.159.190.

Estoppel applies, incidentally, only to the date the taxpayer was notified by the most recent auditor of its error of not charging

sales tax on rentals to individual employees. Thereafter, the taxpayer is accountable for sales tax on such rentals.

DECISION AND DISPOSITION:

The taxpayer's petition is granted. The Audit Division will issue an amended assessment with this determination.

DATED this 28th day of June 1990.