FINDINGS AND DECISION

OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Appeal of

EASTSIDE CHRYSLER PRODUCTS, INC. FILE NO. B-82-001

from a B&O tax determination by the Department of Licenses and Consumer Affairs

Eastside Chrysler Products, Inc., appellant, appeals the decision of the Department of Licenses and Consumer Affairs as to B&O tax owing upon sales of certain automobiles.

The appellant exercised its right to appeal pursuant to Section 5.44.230, Seattle Municipal Code.

The matter was heard before the Hearing Examiner on December 3, 1982.

After due consideration of the evidence elicited during the public hearing, the following findings of fact and conclusions shall constitute the decision of the Hearing Examiner on this appeal.

Findings of Fact

1. Eastside Chrysler Products, Inc. (Eastside) is a Washington corporation with a place of business in Snoqualmie, Washington, which corporation is principally engaged in the business of selling automobiles. No office is maintained in the City of Seattle. Eastside pays a B&O tax to the City of Snoqualmie.

2. In 1980, Eastside sold automobiles directly to the City of Seattle. The purchase order forms used by the City did not specifically mention the imposition of the B&O tax upon sellers outside the City or the requirement of a business license. The forms did include a statement that

> (s)eller shall at all times observe and comply with all Federal and State laws, County and City ordinances and regulations in any way affecting the performance of any contract.... (Exhibit 1(b)(2))

3. On April 8, 1982, the City's purchase order form was changed to indicate that a City business license is required if bidder's contracts exceed $50,000 in a year.

4. The City claims B&O tax in the amount of $2,272.98 on the sales of automobiles by Eastside to the City in 1980.

5. The City solicited bids in April, 1981, for 60 motor vehicles. The City rejected the bids it received, including the bid of Eastside, and purchased the vehicles through an intergovernmental cooperative purchasing agreement between the State and City.

6. Eastside bid successfully to purchase vehicles to the State. The invitation to bid was issued by the Division of Purchasing (Purchasing) in Olympia. Eastside submitted its bid to Purchasing. The contract was awarded in Olympia on November 21, 1980. Eastside expressly agreed to supply political subdivisions if the bid was accepted.

7. Contract 360 A-80 (Exhibit 2(c)) for the purchase of automobiles from Eastside provides that orders for vehicles would be placed by State purchase orders and that vendors are not to accept purchase orders from political subdivisions (p. 2). The intergovernmental agreement with the City (Exhibit 2(a)) can be read to allow direct orders.

8. The City of Seattle Purchasing, as ordering agency, issued its purchase requisition April 14, 1981, on a state form to the State for 60 Plymouth Horizons (Exhibit 2(d)).

9. A purchase order was issued to Eastside on April 15, 1981, by Purchasing for the automobiles requested by the City (Exhibit 2(f)) to be shipped to Seattle.

10. The City claims B&O tax in the amount of $529.50 on the sale of automobiles purchased through the intergovernmental cooperative purchasing agreement in 1981.

11. July 26, 1981, was the effective date of RCW 46.70.300 which provides:

> PROVISIONS OF CHAPTER EXCLUSIVE - LOCAL BUSINESS AND OCCUPATION TAX NOT PREVENTED. (1) The provisions of this chapter relating tothe licensing and regulation of vehicle dealers, salesmen, and manufacturers shall be exclusive and no county, city, or other political subdivision of this state shall enact any laws, rules, or regulations licensing or regulating vehicle dealers, salesmen, or manufacturers.
>
> (2) This section shall not be construed to prevent a political subdivision of this state from levying a business and occupation tax upon vehicle dealers or manufacturers maintaining an office within that political subdivision if a business and occupation tax is levied by such a political subdivision upon other types of businesses within its boundaries.

12. The amount of B&O tax claimed by the City owing on sales after July 26, 1981, is $40.10.

13. The B&O tax is a self-assessed tax. Forms are mailed to businesses who have business licenses and returns are to be filed quarterly.

14. Early in 1981 a tax auditor for the City found that Eastside had made sales to the City in excess of $50,000 and had not filed a B&O tax return. He notified Eastside by form letter that it was liable for the tax. Telephone discussion and correspondence with David Fluke, owner of Eastside, and with Kenneth Johnson, Eastside's lawyer, followed regarding liability.

15. A letter from Regina L. Glenn, Director, Department of Licenses and Consumer Affairs, dated January 13, 1982, was sent to Mr. Johnson, with a copy to Eastside, responding to arguments by Eastside against liability (Exhibit 4). The letter states that "(A)ccording to Seattle Municipal Code 5.44.130 the tax owed the City... is $2,272.98" for 1980. It further states that the 20 percent penalty is waived because of the good faith dispute over tax liability. Finally, Mr. Johnson is requested to advise his client where to send the documents, previously sent, and the payment.

16. The tax auditor had further discussions with Mr. Johnson regarding the liability following the January 13, 1982, letter.

17. A second letter, dated July 8, 1982, (Exhibit 5) was sent with debit notes for taxes due, as requested by Mr. Johnson. The 20 percent penalty of $454.60 was added to the 1980 liability and of $150.28 to the 1981 liability. A description of the right to appeal the 1981 liability was included in the letter.

Conclusions

1. The appeal as to the tax determination for 1980 is untimely leaving the Hearing Examiner without jurisdiction over the matter. Section 5.44.220, Seattle Municipal Code, provides that the Director is to notify a taxpayer who has not made a return of the amount owed by mail. Section 5.44.250 directs that such notices are to be sent by ordinary mail to the taxpayer. It is not necessary to decide whether notice to the taxpayer's attorney complies with this requirement as the copy of the letter sent to Eastside provided the required notice. Section 5.44.230 regarding appeals requires any appeal to be filed within 20 days from the time the taxpayer was given notice, or February 2, 1982, in this case. The Notice of Appeal filed July 28, 1982, is, therefore, untimely. The later letter notification by way of debit notes was at the request of the taxpayer who cannot create a new opportunity to appeal by his own request. The penalty imposed for late payment cannot be reviewed independent of the tax assessment.

2. Appellant urges that the Director is estopped from taxing Eastside's sales prior to April 8, 1982, when the purchase order form was changed to show that the B&O tax is applicable to sales made to the City. Courts are reluctant, however, to find an estoppel where the political subdivision is acting in its taxing capacity. See, Wasem's, Inc., v. State, 63 Wn.2d 167, 385 P. 2d 530 (1963). Moreover, the City has not made an admission or statement or done any act inconsistent with its claim that the B&O tax applied, which would be a necessary element of an estoppel according to Harbor Air Service v. Board of Tax Appeals, 88 Wn.2d 359, 560 P.2d 1145 (1977). The power to tax cannot be lost by a mere failure to expressly notify the taxpayer of that power. See, Puget Sound Power and Light v. Seattle, 172 Wn. 668, 21 P.2d 727 (1933).

3. Appellant further urges that RCW 46.70.300 preempts the City's authority to levy a B&O tax on a vehicle dealership with no office within the City. The statute clearly preempts the regulation of vehicle dealerships. It also makes clear that the levying of a B&O tax on vehicle dealerships is not preempted, apparently emphasizing the difference between licensing/regulation and taxation. While paragraph (2) refers to vehicle dealers maintaining an office within the political subdivision that reference alone cannot be construed to take away the power the City has to tax, if otherwise permitted for, according to Nelson v. Seattle, 64 Wn.2d 862, 395, P.2d 82 (1964), a statute must be clear and unambiguous to take away an existing power from a first class city. Though the words used may suggest the implication urged, they are ambiguous and such a result would not further the purpose of the chapter to protect citizens of the state from deceptive practices. The preemption is solely of the authority to regulate and does not affect the City's ability to tax.

4. An administrative agency has no jurisdiction to determine the constitutionality of the ordinances which it administers. Bare v. Gordon, 84 Wn.2d 380, 526 P.2d 379 (1974). Eastside's allegation that the imposition of a B&O tax on a business located in a city where it also must pay a B&O tax is a denial of equal protection is, therefore, not considered by the Hearing Examiner.

5. The Court in Dravo v. Tacoma, 80 Wn.2d 590, 496 P.2d 504 (1972), which dealt with an ordinance nearly identical to Section 5.44.040, determined that the taxable event is the "accepting and executing" of the contract or the taxpayer's act of entering into the contract, not the performing of the contract. Since a City has no power to levy a tax on activities which occur outside its limits, Connecticut General Life Insurance Co. v. Johnson, 303 US 77, 80, 82. L.Ed 673, 58 S.Ct. 436 (1938), it must be determined where the contract was entered into from the facts of the case. In the Dravo case the Court found that the invitiation for bids was issued in Tacoma, the vendor submitted its bid by delivering it to Tacoma and the contract was on a form provided by Tacoma and signed by Tacoma's representatives in Tacoma. The facts here show that the request for bids emanated from Olympia and Eastside submitted its bid to Olympia. The bid was accepted and the contract awarded in Olympia. The Court in Dravo concluded the taxable event occurred in Tacoma. It follows that the taxable event here occurred in Olympia.

6. The Director urges that the state contract was a conduit through which the City contracted with Eastside or that the Purchasing Division in Olympia was acting as agent for Seattle when the contract was made. However, the facts show that the City solicited bids on its own in April, 1981, long after Eastside had contracted with the State to provide vehicles. The City's role was much closer to that of a third party beneficiary of the contract.

7. Since the "taxable event, accepting and executing the contract, occurred outside the City and the vendor had no contact with Seattle until the performance of the contract, the City has no power to levy the B&O tax on the value of the contract.

Decision

The appeal as to the B&O tax determination for 1980 is dismissed for lack of jurisdiction.

The determination of the Director of the Department of Licenses and Consumer Affairs is hereby modified to exclude the tax levied on Washington State Contract 360-80 ($529.59) and proportional late penalty.

Entered this 3rd day of January, 1983.

M. Margaret Klockars
Deputy Hearing Examiner

Notice of Right to Appeal

The decision of the Hearing Examiner in this case is the final administrative determination by the City. Any further appeal must be filed with the Superior Court within 14 days of the date of this decision. Vance v. Seattle, 18 Wn.App 418 (1977); JCR 73 (1981). Should an appeal be filed, instructions for preparation of a verbatim transcript are available at the Office of Hearing Examiner. The appellant must initially bear the cost of the transcript but will be reimbursed by the City if the appellant is successful in court.