

Cite as Det. No. 05-0115, 25 WTD 102 (2006)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
)	No. 05-0115
)	
...)	
)	Registration No. . . .
)	Document No. . . .
)	Docket No. . . .
)	

- [1] RULE 241; RCW 82.04.280(6): SERVICE VS. RADIO AND TELEVISION BROADCASTING B&O TAX -- SATELLITE UPLINK SERVICES. Mobile satellite uplink service, performed for broadcast and cable networks and other customers for a charge, does not fall within the radio and television broadcasting B&O classification.

- [2] RCW 82.08.0315, RCW 82.12.0315: USE TAX – EXEMPTION -- PRODUCTION EQUIPMENT ACQUIRED AND USED BY A MOTION PICTURE OR VIDEO PRODUCTION BUSINESS – SATELLITE UPLINK SERVICE. The sales and use tax exemption for production equipment acquired by a motion picture or video production business does not apply to equipment acquired and used by a company that provides satellite uplink of live programming. Neither the fact that the service performs some editing and engineering of the signal before uplink, nor the fact that the service makes a video tape of the signal for its customer for the customer’s possible later use, requires that the business be characterized as a video production business.

- [3] RULE 178; RCW 82.12.010: USE TAX – VALUE OF ARTICLE USED -- ACQUIRED OUT OF STATE -- FAIR MARKET VALUE. When equipment is acquired and used outside the state for an extended period before being brought into Washington, the fair market value at the time and location of first use in the state generally is the appropriate measure of the use tax, rather than purchase price.

- [4] RULE 178; RCW 82.12.010: USE TAX – VALUE OF ARTICLE USED – ARTICLES OWNED BY OUT-OF-STATE BUSINESS TEMPORARILY USED IN WASHINGTON FOR BUSINESS. Trucks owned by an out-of-state service provider that are temporarily in Washington for business purposes are

subject to use tax for the entire period they are in the state, not just for the period they are used in providing the service activity.

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.

Prusia, A.L.J. – An out-of-state company that provides mobile satellite uplink services and some production services for live events appeals an assessment of B&O tax on its revenues and use tax on its trucks. The taxpayer contends its Washington revenues should be taxed under the radio and television broadcasting Business and Occupation (B&O) tax classification, rather than the other business or service classification, its use of its trucks was exempt from use tax under the exemption for motion picture and video production businesses in RCW 82.12.0315, and, if its use of the trucks was not exempt, the values used for purposes of the assessment are incorrect. We conclude that the taxpayer is taxable under the service classification, its use of the trucks was not exempt, but value was incorrectly calculated. We deny the petition on the classification and exemption issues, and remand on the valuation issue.¹

ISSUES

1. Did the taxpayer's payment of the B&O tax portion of an estimated assessment preclude the Department of Revenue (DOR) from assessing additional tax when the taxpayer discovered and disclosed that it had additional revenues it had not reported prior to the estimated assessment?
2. Which B&O tax classification applies to the taxpayer's gross revenues from its satellite uplink and production services, the radio and television broadcasting classification, or the other business or service ("Service and Other Activities") classification?
3. If a truck was first used in Washington the year before the period under investigation, is its use not subject to tax?
4. Was the taxpayer's use of its mobile satellite uplink and production trucks exempt from use tax under the exemption granted to "motion picture or video production businesses," RCW 82.12.0315?
5. If use of the trucks is subject to use tax, did the assessment establish an appropriate value on which to assess the tax?

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

FINDINGS OF FACT

[Taxpayer] is a [State A] corporation that provides mobile satellite uplink and production services for live events Its customers include broadcast and cable networks, corporations, and concert promoters.

[Taxpayer] owns and operates [a large fleet] of mobile production and satellite uplink trucks A satellite uplink is the link from a fixed or mobile earth station to a satellite. All trucks are equipped with video and audio processing equipment to modify, mix, and amplify incoming audio and video signals, and with recording equipment and signal uplink equipment. The trucks are equipped for the production of video programming, including pre-production of opening sequences and program inserts on video tape, managing signals coming from several cameras and audio sources (switching between signals, patching and routing signals), inserting ads, and post-production of videotapes. Most of the equipment on the trucks is for processing incoming video and audio signals and for pre-production activity.

On most jobs, [Taxpayer's] services are limited to video uplink services that connect its customers with broadcast-quality video and audio signals of live events. Its video uplink services consist of processing or engineering video and audio signals that are fed into the truck, uplinking the processed signal to a satellite, and recording the outgoing signal for possible reuse by the customer. Virtually all video and audio signals fed into a truck for satellite uplift must be modified and amplified to meet broadcast quality standards, before uplift to the satellite. The operators of the trucks are broadcast engineers, and perform audio and video engineering, switching, and mixing on virtually all uplinks. Pre-recorded sequences and commercials often are also inserted into the programming prior to uplift, and sometimes are prepared by [Taxpayer] technicians on the truck. On all jobs, [Taxpayer] also records a video of the final signal for possible reuse by its customer.

In addition to video uplink service, [Taxpayer] offers a wide range of video production services. Its production offerings include scheduling, providing a set-up crew, providing a public address system, providing audio and video equipment, providing equipment operators and program directors, and distributing the programming. The amount of such production services [Taxpayer] provides varies from job to job, and from zero to substantial. Usually, camera and audio crews, producers, and directors are provided by [Taxpayer's] customer or by third parties. On some jobs, [Taxpayer's] charge for uplink with engineering includes producing opening sequences and inserts on video tape for insertion in the program. On some jobs, [Taxpayer] provides the program director, who directs the switching and mixing of signals and insertion of pre-recorded material, usually from a script the customer has provided.² On some major live events . . . , the customer contracts with [Taxpayer] to provide supplemental camera and audio work. On many jobs, [Taxpayer] provides cellular phones for the customer's personnel to use. When [Taxpayer]

² On other jobs the customer provides the director, who directs [Taxpayer's] engineering and technical personnel, on [Taxpayer's] truck.

contracts to provide services beyond uplink with engineering, it usually hires third party subcontractors or temporary employees to perform those production functions.

While [Taxpayer] always records a videotape of the signal that is uplifted, for possible future use by the customer, the customer usually does not use the videotape. Most customers make their own videotape, on their own equipment, when they receive the signal.

[Taxpayer] has provided satellite uplink/engineering and event production services in Washington since at least 1997. [Taxpayer] has a full-time, permanent broadcast engineer located in Washington. The engineer has a [Taxpayer] truck at his residence for his use on [Taxpayer] jobs in Washington.

[Taxpayer] did not register with DOR or report Washington excise taxes before 2002. In June 2002, a DOR Tax Discovery Agent observed a truck parked in [Washington Location] bearing [Taxpayer's] name and [State A] license plates. DOR's Compliance Division began an investigation into whether [Taxpayer] was engaging in business in Washington. In response to an inquiry letter from the Compliance Division, [Taxpayer] registered with DOR and submitted gross total revenue figures of \$. . . , and use tax estimates for three trucks. . . . The Compliance Division issued an estimated B&O tax/use tax assessment . . . based on the estimates [Taxpayer] had provided. The B&O tax was assessed under the Service and Other Activities classification. The B&O portion of the assessment, including related interest, was \$. . . .

[Taxpayer] did not dispute the B&O portion of the assessment, but disputed the balance. The Compliance Division requested that [Taxpayer] pay the undisputed portion. . . . [Taxpayer] paid \$. . . , and requested more time to submit documentation relating to use tax on vehicles. The Compliance Division applied the payment to interest on the estimated assessment.

The Compliance Division's investigation continued During the investigation, [Taxpayer] identified seventeen additional trucks used in Washington at one time or another in the [audit] period. It provided fuel apportionment and transmission logs showing when the twenty trucks were in Washington, IRS depreciation schedules showing their purchase date and original cost, and an independent appraisal of their orderly liquidation value and distress value.³ [Taxpayer] had recently . . . obtained the appraisal for purposes of refinancing. The logs showed that three trucks . . . had spent more than 90 days in Washington during one or more periods of 365-consecutive days, and one [Truck A] had spent more than 180 days in Washington in such a period The other seventeen trucks had been in Washington only for short periods. Nineteen of the twenty trucks were first used in Washington in 1998 or later. [Truck A], which [Taxpayer] purchased in 1995, was placed in service in Washington in December 1997.

[Taxpayer] also provided 164 invoices for services provided in Washington during the period. 153 of the 164 invoices billed for satellite uplink service or uplink service with engineering, without detailing what that involved. The remaining 11 invoices billed for satellite uplink/engineering service in conjunction with other activities. The invoices showed \$. . . more

³ These appraisal values are potentially relevant with respect to three trucks. . . .

in gross income during the period covered by the estimated assessment than [Taxpayer] had earlier reported to the Compliance Division for that period

While the investigation continued, [Taxpayer] asserted that its use of the trucks was exempt from use tax under RCW 82.12.0315, which exempts certain production equipment acquired and used by a motion picture or video production business. Beginning in 2003, with its Q4/2002 return, [Taxpayer] reported its Washington revenues under the radio and television broadcasting B&O classification, and asserted that was the correct classification, rather than the Service and Other Activities classification used in the estimated assessment.

. . . The Compliance Division issued a “final” excise tax assessment against [Taxpayer] for the period 1998 through Q2/2002

The assessment stated it assessed use tax on all trucks on a “reasonable rental value.” For [Truck A], the Compliance Division capped taxable value at [Taxpayer’s] original purchase price. The Compliance Division calculated the “reasonable rental value” for the trucks by multiplying the number of days the truck was in Washington during the year, times a “service rate,” “based on average charges for this truck during this time period.”⁴ The Compliance Division did not detail further how it calculated the service rate.

[Taxpayer] has appealed the assessment. . . .

ANALYSIS

Washington imposes a B&O tax “for the act or privilege of engaging in business” in the State of Washington. RCW 82.04.220. The B&O tax rate is determined by the type of business activity in which a person is engaged.

The use tax is imposed “for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail.” RCW 82.12.020. The tax is levied on the “value of the article used” multiplied by the rate.

[Taxpayer] engaged in business in Washington, and is subject to B&O tax. Likewise, [Taxpayer] used tangible personal property, its trucks, in Washington, and would be subject to use tax unless an exemption applies.

[Taxpayer] raises several issues on appeal. [Taxpayer] contends its B&O tax liability for the period was settled and fully satisfied by its payment of \$. . . in . . . 2002. [Taxpayer] contends that if it is liable for additional B&O tax, the correct B&O classification is RCW 82.04.280(6), radio and television broadcasting, rather than RCW 82.04.290(2), Service and Other Activities. [Taxpayer] contends that its use of the twenty trucks is exempt from use tax under RCW 82.12.0315, an exemption granted out-of-state “motion picture or video production businesses.” [Taxpayer] contends that use of one of the trucks, [Truck A], is not subject to tax, because any

⁴ Spreadsheet prepared by the Compliance Division and given to [Taxpayer].

use tax liability arose before 1998. Finally, [Taxpayer] contends that if its use of the trucks is not exempt, the valuation method the Compliance Division used was not correct under the applicable DOR rule, and was blatantly unfair. We will address the issues in the above order.

Effect of . . . 2002 payment

We find no merit in [Taxpayer's] assertion that its payment of \$. . . on . . . , 2002, fully satisfied [Taxpayer's] B&O tax liability for the period 1998 through Q2/2002. . . . The August 2002. . . assessment notice stated that the assessment was based on returns [Taxpayer] had filed, and the period was still subject to audit verification. A cover letter stated that the amount due was based on estimated figures. [Taxpayer's] . . . cover letter stated the payment was in payment of the B&O assessments for 1998 through 2002. The only assessments at that time were the estimated assessments that remained subject to audit verification. The communication cannot reasonably be read as an agreement that payment of the estimated B&O tax would foreclose further examination of B&O liability for the period under review. Also, the only means to finally settle a disputed tax liability is a written closing agreement, executed by both DOR and the taxpayer, as prescribed by RCW 82.32.350,.360. *See Town of North Bonneville v. Bencor Corp.*, 32 Wn.App. 144, 646 P.2d 161 (1982).⁵

Correct B&O classification

[1] The Compliance Division assessed B&O tax under the Service and Other Activities classification, RCW 82.04.290(2), which applies when a person engages in any business activity other than those enumerated in other statutes. [Taxpayer] initially did not dispute that classification, but subsequently asserted that its activity fell within a specifically-enumerated classification, "radio and television broadcasting," found at RCW 82.04.280(6). The rate applicable to "radio and television broadcasting" is less than one-third the rate applicable to Service and Other.

[Taxpayer] has not asserted or argued the B&O classification issue on appeal. However, because we have resolved the first issue (effect of 2002 payment) against [Taxpayer], the issue of the correct classification of additional audit-period revenues . . . is before us.

The Revenue Act does not define the term "radio and television broadcasting." WAC 458-20-241, which explains the taxation of radio and television broadcasting, states: "'Broadcast' or

⁵ The Court of Appeals held that a municipality has no power to compromise tax disputes absent express statutory authorization. DOR's only specific statutory authority to compromise, or settle, tax disputes is set out in RCW 82.32.350,.360. That authority is carefully prescribed. The closing agreement must be in writing, and to be final and conclusive, must be "approved" and the approval must be "evidenced by execution thereon by both the department of revenue and the person so agreeing." RCW 82.32.360. Also, even when the amount due has been finally determined (which it had not been in this case), the courts have held that acceptance of checks by DOR for less than the amount actually owed does not satisfy a taxpayer's obligation. *See Town of North Bonneville, supra*, and *Monroe Logging Co. v. Department of Labor & Indus.*, 21 Wn.2d 800, 153 P.2d 511 (1944).

‘broadcasting’ includes both radio and television commercial stations unless it clearly appears from the context to refer only to radio or television.”

In Det. No. 92-363, 12 WTD 519 (1992), DOR interpreted RCW 82.04.280(6) as applicable only to commercial broadcasting stations, which meet the following description:

Commercial stations broadcast their signals over the public airways of a specified region and are intended for reception by an unrestricted number of receivers. In this regard, they perform a public service by disseminating . . . programming to all available [receivers] without charge or fees. Virtually all revenue is derived from the sale of advertising which is included in the freely disseminated programming. In addition, the FCC requires each commercial station to perform certain public service functions such as providing airtime for public service announcements, equal time for opposing political views, and several other requirements and restrictions.

[Taxpayer] does not perform a business activity like that described in Det. No. 92-363. [Taxpayer] does not broadcast the signal over the public airways for reception by an unlimited number of receivers. Any such broadcasting of the signal is done by [Taxpayer’s] customer. [Taxpayer] does not perform a public service of disseminating programming without charge or fees. It performs services for a single customer for a charge. [Taxpayer’s] revenue is not derived from its sale of advertising included in free programming. [Taxpayer] is not required to perform public service functions such as airing public service announcements.

[Taxpayer] performs satellite uplink service, with audio and video engineering, and sometimes other services in producing live events. Such services do not fall within any specifically-enumerated B&O classification. Therefore, [Taxpayer’s] revenues are subject to B&O tax under RCW 82.04.290(2).

Use Tax Exemption

[2] [Taxpayer] contends its use of its trucks in Washington is exempt under RCW 82.12.0315, which states, in pertinent part:

(1) The provisions of this chapter [Use Tax] shall not apply in respect to the use of:

...

(b) Production equipment acquired and used by a motion picture or video production business in another state, if the acquisition and use occurred more than ninety days before the time the motion picture or video production business entered this state.

(2) As used in this section, “production equipment” and “motion picture or video production business” have the meanings given in RCW 82.08.0315.

RCW 82.08.0315 defines “production equipment” as including trucks and other vehicles specifically equipped for motion picture or video production. RCW 82.08.0315 (1)(c) defines “motion picture or video production business” as follows:

“‘Motion picture or video production business’ means a person engaged in the production of motion pictures and video tapes for exhibition, sale, or for broadcast by a person other than the person producing the motion picture or video tape.

The Compliance Division argues that [Taxpayer] “is not a video production business but rather a mobile satellite uplink service business.” It argues that video tape production is not the primary function of [Taxpayer’s] business activity in Washington; rather satellite uplink service is its primary function, as evidenced by the fact that only 11 of the 164 invoices [Taxpayer] provided involved charges in addition to the satellite uplink services. It argues that video production was not the real object of any of [Taxpayer’s] activities or transactions in Washington, and any video production was minimal and usually in conjunction with satellite services.

[Taxpayer] argues that the Compliance Division mischaracterizes [Taxpayer’s] business practice and misstates the content of the invoices. It argues that while [Taxpayer] is engaged in the business of providing uplink services that connect its customers with video and audio signals of live events, [Taxpayer] is simultaneously in the business of video production. It argues there is a video production component of virtually all the services it performs. A key component of every job is editing, mixing, and recording professional-level video production material, and “[b]ecause of such activity, [Taxpayer] is clearly in the business of video production to the extent that its contracts with its customers require such videos to be recorded, edited and otherwise produced.” [Taxpayer] argues that an invoice for satellite uplink services includes the video production component, and the Compliance Division ignored the fact that [Taxpayer] often bills its customers for “Uplink Services w/Engineering.” It argues that many of the invoices also listed other charges to customers that clearly are related to video production activity, such as beta record decks and charges for the generator to power such equipment. [Taxpayer] further argues that there is no requirement in RCW 82.08.0315 or RCW 82.12.0315 that a majority of services be video production, or that the primary purpose of jobs be video production, in order for production equipment to qualify for the exemption.

We agree that it would be a mischaracterization of [Taxpayer’s] activity to describe it as the mere satellite uplinking of video and audio signals. Even [Taxpayer’s] basic uplink service includes sound and video engineering and other technical work that is part of the production of the live programming. On the other hand, to the extent it is significant, it is fair to say that the primary function of [Taxpayer’s] business activity in Washington is mobile satellite uplink service with associated engineering and technical services, rather than event production. However, the issue before us is not whether [Taxpayer’s] uplink service involves more than a bare uplink, but whether [Taxpayer] is a “motion picture or video production business” for purposes of the exemption.

In interpreting the exemption in RCW 82.12.0315, we are guided by general rules of statutory construction. Taxation is the rule; exemption is the exception. *Spokane County v. City of*

Spokane, 169 Wash. 355, 13 P.2d 1084 (1932). Exemptions from a taxing statute are to be narrowly construed. *Budget Rent-A-Car, Inc. v. Department of Rev.*, 81 Wn.2d 171, 500 P.2d 764 (1972). Exemptions are not to be extended by judicial construction. *Pacific Northwest Conference of the Free Methodist Church v. Barlow*, 77 Wn.2d 487, 463 P.2d 626 (1969).

Reading the statutory language literally and narrowly, one must be able to reasonably characterize the taxpayer's business as being the production of motion pictures or video tapes for exhibition, sale, or for broadcast by another person. In other words, one must be able to reasonably characterize the taxpayer as being in the business of making movies on film or video tape. [Taxpayer's] business cannot be reasonably characterized as being the production of motion pictures or video tapes. Customers hire [Taxpayer] to provide the satellite uplink of live programming including the remote-studio engineering and technical activities required to produce the broadcast signal, and occasionally to perform live event production services. [Taxpayer's] customers do not engage [Taxpayer's] services because they want [Taxpayer] to make a video tape of an event for them to broadcast. [Taxpayer] personnel make a video tape of the program signal, as a backup for possible use by their customer, but that is a very minor aspect of what [Taxpayer] is hired to do. By [Taxpayer's] own admission, most of its customers do not even use the backup video tape. In the few instances where [Taxpayer] is hired to perform additional production services, the product is not a motion picture or a tape, either; [Taxpayer] is producing live broadcast content.

Narrowly read, the exemption does not apply to persons producing live programming. It applies to persons whose business is producing motion pictures on film or tape, which film or tape is later exhibited or sold, or broadcast by someone else. [Taxpayer] argues that its customers may later re-broadcast the program, and because [Taxpayer] makes a tape of the program, [Taxpayer] is making a tape for broadcast. Several flaws in that argument are that [Taxpayer's] activities are focused on a live broadcast, the initial broadcast is not from a tape of the program, and the tape [Taxpayer] makes is usually only a backup that is never used.

We conclude that [Taxpayer] is not a "motion picture or video production business," and therefore does not qualify for the use tax exemption in RCW 82.08.0315.⁶

⁶ While we do not find the language of the statute ambiguous or unclear, as a check on whether we might be reading the exemption more narrowly than the Legislature intended, we examined the legislative history of the exemption. The sponsor's description describes the purpose of House Bill 1913 as encouraging out-of-state companies to choose Washington as the location to produce their projects. That purpose usually would not apply to persons involved in the production, filming, or broadcasting of live events, because usually it is not their decision where the event occurs. A Fiscal Note in the file, prepared by DOR, expressly assumes that sales and equipment rentals to film and video production businesses are primarily made by those businesses classified in SIC 7819, and assumes "film and video production businesses" are those classified in SIC code 7812 ("SIC" is the acronym for Standard Industrial Classification, the system for classifying businesses generally used in the United States in 1995. It is now being replaced by the North American Industry Classification System (NAICS), a system jointly developed by the U.S. Canada, and Mexico.) The file includes a page from a SIC manual that describes the businesses falling under those sections. The SIC code 7812 description is as follows, in relevant part (emphasis added):

Whether Use Tax Can Be Assessed On [Truck A]

[Taxpayer] contends its [Truck A] is not subject to use tax at all, because use tax liability attached only to the first use in Washington, which occurred in 1997, one year before the period for which [Taxpayer] has been assessed tax.

The mere fact that first use occurred prior to the period for which B&O tax is assessed is not determinative for use tax. How long before the assessment first use occurred is what determines taxability. DOR can assess use tax on any tangible asset a person has used in the state on which it has not paid retail sales tax or use tax, unless more than four years have passed since the close of the tax year in which the tax was incurred (in the case of a registered taxpayer) or more than seven years have passed (in the case of an unregistered taxpayer). WAC 458-20-230 (Rule 230). In this case, [Taxpayer] was unregistered in 1997, and the assessment was issued within seven years after 1997. We conclude that [Taxpayer's] use of [Truck A] is taxable.

Valuation issues

[3] Use tax is levied and collected in an amount equal to “the value of the article used by the taxpayer.” RCW 82.12.022. RCW 82.12.010(2) defines the term “value of the article used.” Subsection (2)(c) applies under the fact of this case. It states:

In the case of articles owned by a user engaged in business outside the state which are brought into the state for no more than one hundred eighty days in any period of three

Establishments primarily engaged in the production of theatrical and nontheatrical motion pictures and video tapes for exhibition or sale, including educational, industrial, and religious films. Included in the industry are establishments engaged in both production and distribution. Producers of live radio and television programs are classified in Industry 7922.

SIC Code 7819 is titled “Services Allied to Motion Picture Production,” and describes establishments that perform services independent of motion picture production, but allied thereto. The SIC manual also characterizes the group into which classifications 7812 and 7819 fall, as follows:

This major group includes establishments producing and distributing motion pictures, exhibiting motion pictures in commercially-operated theaters, and furnishing services to the motion picture industry. The term motion pictures, as used in this major group, includes similar productions for television or other media using film, tape, or other means.

The file does not include information about classifications falling within group 79, but we note that group is for “Amusement and Recreation Services.” Industry 7922 is “Theatrical Producers and Services.”

These legislative materials evidence that the Legislature intended that the exemptions now codified in RCW 82.08.0315 and RCW 82.12.0315 apply to businesses falling within SIC codes 7819 and 7812. [Taxpayer] does not fall within either of those SIC codes. [Taxpayer] is not primarily engaged in the production of theatrical or nontheatrical motion pictures and video tapes.

We find that the legislative history supports our above interpretation of RCW 82.08.0315 and RCW 82.12.0315, and our conclusion that [Taxpayer] is not a “motion picture or video production business” for purposes of RCW 82.08.0315.

hundred sixty-five consecutive days and which are temporarily used for business purposes by the person in this state, the value of the article used shall be an amount representing a reasonable rental for the use of the articles, unless the person has paid tax under this chapter or chapter 82.08 RCW upon the full value of the article used, as defined in (a) of this subsection.

Subsection (2)(a), referenced in the above quote, states that the value shall be the purchase price for the article of tangible personal property, but if the article used “is sold under conditions wherein the purchase price does not represent the true value thereof, the value shall be determined as nearly as possible according to the retail selling price at place of use of similar products of like quality and character.” DOR has consistently interpreted this as meaning the fair market value of the article at the time and location of first use within the state. Det. No. 90-298, 11 WTD 67 (1990). When equipment is acquired and used outside the state for an extended period of time before being brought into and used in Washington, DOR generally does not use purchase price as the measure of tax, but rather the fair market price alternative. *Ibid.*

[4] WAC 458-20-178 (Rule 178) is the DOR rule that explains the use tax. Rule 178 generally tracks 82.12.010(2) in explaining how “value of the article used” is determined, at subsections 13-15. However, in one respect Rule 178 deviates from the statute. Rule 178(15), which explains subsection (2)(c) of the statute, states that reasonable rental value shall be used if the articles are brought into the state for more than 90 days (rather than 180 days) in any 365-day period. The reason for the discrepancy is that section (15) of Rule 178 is out-of-date. The rule section tracks statutory language that was effective for the period 1985-1994. RCW 82.12.010(2)(c) was amended in 1994, and since then the applicable number of days has been 180.

The Compliance Division and [Taxpayer] disagree on what is the appropriate measure of tax on the three trucks that were used the most in Washington, whether [Taxpayer’s] evidence of retail selling price was sufficient, and how to determine “reasonable rental value” of trucks when that is the appropriate measure of the tax.

The Compliance Division, relying on Rule 178(15), asserts that the three trucks that were in Washington for more than 90 days in a 365-day period . . . should be valued at fair market value (although it does not actually value them in that manner, explaining that the values [Taxpayer] provided were not fair market values, a fair market value was difficult to determine due to the unique nature of [Taxpayer’s] business, and the Compliance Division therefore used a reasonable rental value capped at original purchase price). [Taxpayer] also cites Rule 178(15) in its argument, and contends those three trucks should be valued at retail selling price. Both the Compliance Division and [Taxpayer] agree that the measure of tax for the other seventeen trucks should be “reasonable rental value.”

Both the Compliance Division and [Taxpayer] err in relying on the 90-day figure in Rule 178(15). Reasonable rental value is the appropriate measure until the property has been in Washington for more than 180 days in any period of 365 consecutive days. The measure of value for all the trucks except [Truck A] should be reasonable rental value. The appropriate

measure of value for [Truck A] should be determined in accordance with RCW 82.12.010(2)(a). RCW 82.12.010(2)(c).⁷

a. Reasonable Rental Value Calculation

In calculating reasonable rental value, the Compliance Division multiplied the number of days a truck was in Washington during the year times a “service rate,” which the Compliance Division describes as “based on average charges for this truck during this time period.” [Taxpayer] argues it was improper to use the average daily charge for the service, because the charge is for much more than just use of the truck. The charge for the truck includes labor charges for the driver/engineer, per diem expenses, generator usage, and professional video tapes. [Taxpayer] also argues that the Compliance Division’s method makes no consideration for the fact that the amount of days a truck spends in Washington includes days before and after job assignments traveling from location to location, and the customer is not charged for those days; fails to take into account that the rental charge for a day is generally higher than rental charges for longer periods; fails to take into account that charges are for services performed over a number of days, and that the rental amount applicable to each day of rental should be the total rental charge divided by the number of days needed to complete the job; and arbitrarily applies service rate amounts without any justification in the record.

We agree that it is improper, in calculating reasonable rental value of the trucks, to use a truck charge or job charge that includes a charge for the driver/engineer or per diem expenses. This is not a situation involving rental of equipment with operator. Use tax is due on the reasonable rental value of the truck, not the reasonable rental value of the truck with operator. We also agree that the calculation of reasonable rental value should take into account, if that is possible in this situation, the fact that generally the rental value of property varies with the length of the rental term. We do not agree with [Taxpayer] that use tax is due only for days the trucks are actually being used for performing production and uplink services. Trucks that are temporarily in Washington for business purposes are subject to use tax for the entire period they are in the state, on the reasonable rental value for that period. Travel time, parking time, and preparation time are all usage of the trucks in relation to the job they have entered the state to perform. If a truck is not temporarily in the state for business purposes, but rather is stationed in Washington, then RCW 82.12.010(2)(c) would not even apply, and use tax would be due on the full value.

We remand the file to the Compliance Division to allow [Taxpayer] an opportunity to establish the reasonable rental values of the 19 trucks, which values should assume a rental value without operator, and should take into account any variations in rental value related to the length of the periods the trucks were in Washington.⁸

b. Value of [Truck A]

⁷ For part of the period that is relevant in this appeal, these provisions were codified as RCW 82.12.010(1)(a) and (c). The statute was amended in 2003, retroactive to June 1, 2002, and subsection (1)(a) reworded.

⁸ Use tax is also due on the use of other articles brought into the state. RCW 82.12.010(2)(c), and to the extent the assessment includes tax on such use, it need not be adjusted.

We next consider whether the assessment used an appropriate value for [Truck A]. The measure of value for [Truck A] should be purchase price, unless [Truck A] was “sold under conditions wherein the purchase price does not represent the true value thereof,” in which case “the value shall be determined as nearly as possible according to the retail selling price at place of use of similar products of like quality and character” (fair market value). RCW 82.12.010(2)(c).

Both the Compliance Division and [Taxpayer] assume that fair market value is the appropriate measure in the case of [Truck A], if it can be established. However, the Compliance Division concluded that fair market value had not been established, and based the value of [Truck A] on its “reasonable rental value” capped at original purchase price. [Taxpayer] contends the value should be based on the independent appraisal it provided. [Taxpayer’s] independent appraisal established an “orderly liquidation value” and a “distressed value” for each truck. The Compliance Division states it rejected [Taxpayer’s] valuation because “Taxpayer provided ‘distressed values’ on vehicles sold at an auction for failing businesses.”

The Compliance Division’s response overlooks the fact that the appraisal stated both a distressed value and an “orderly liquidation value,” or “OLV.” Depending on circumstances, OLV might be a valid measure of retail selling price.⁹ However, the OLV for [Truck A] in [Taxpayer’s] appraisal is not an appropriate value to use under the circumstances presented here. Use tax liability arises at the time the property is first put to use in this state. Rule 178(3). Value is to be determined as of that date. *Det. No. 90-298, supra*. [Taxpayer] purchased [Truck A] in 1995, and first used it in Washington in 1997. [Taxpayer’s] appraisal was done in . . . 2002. The appraisal did not provide values as of the date of first use, but rather values five years after first use; the values it states for [Truck A] are of little evidentiary value on the issue DOR must decide.

The measure the Compliance Division used, “reasonable rental value” capped at original purchase price, is not the measure prescribed by Rule 178. On the other hand, the value the Compliance Division actually used, original purchase price, is appropriate under the statute and

⁹ We found the following definitions for “orderly liquidation value” and “distress liquidation value”:

1. **Orderly liquidation value.** This assumes that the enterprise can afford to sell its assets to the highest bidder. It assumes an orderly sale process. It assumes that the seller can take a reasonable amount of time to sell each asset in its appropriate season and through channels of sale and distribution that fetch the highest price reasonably available.
2. **Distress liquidation value.** This is an ‘emergency’ price. This assumes that the enterprise must sell all its assets at or near the same time, to one or more purchasers. The assumption is that the typical purchaser for the assets is a dealer who specializes in the liquidation of the entire assets of a company. For obvious reasons, the Distress Liquidation Value will always be lower than the Orderly Liquidation Value.

rule, given the absence of evidence that purchase price did not represent the true value at the time and place of first use.

Because the case is being remanded on other valuation issues, we will allow Taxpayer an opportunity, on remand, to present additional evidence as to the fair market value of similar articles of like quality and character at time and place of first use of [Truck A] in Washington.

DECISION AND DISPOSITION

Taxpayer's petition is denied on the B&O classification and use tax exemption issues. This matter is remanded to the Compliance Division for possible adjustment to the use tax portion of the assessment based on records the taxpayer must provide

Dated this 27th day of May, 2005.

STATE OF WASHINGTON DEPARTMENT OF REVENUE