Cite as 11 WTD 219 (1991).

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. 91-177
. . .	)	Registration No. . . .
	)	. . . & . . .
	)	Audit Nos. . . . & . . .

[1] RULE 241: RULE 138 -- RULE 224 -- SALES TAX -- USE TAX -- CUSTOM FILMS OR VIDEOS. The production of a customized training film or video is a service activity as opposed to a retail sale.

[2] RULE 155 AND RULE 141: SALES TAX -- USE TAX -- B&O TAX -- INFORMATION SERVICES -- COMPUTERS --MAILING LISTS . The computer retrieval and transfer to a mailing bureau of name and address information on magnetic tape for the purpose of printing mailing lists is not a sale of tangible personal property subject to the retail sales tax or use tax. It is an information service, exempt from such taxes.

[3] RULE 116: RETAIL SALES TAX -- USE TAX -- PREMIUMS. A "premium" is something offered free or at a reduced price as an inducement to buy. Premiums given away free of charge to potential customers for this purpose without the concomitant sale of something else are subject to sales/use tax. Accord: ETB 341.08.116.

[4] RULE 194 & RULE 109: B&O TAX -- INSTALLMENT SALES -- INTEREST INCOME FROM -- APPORTIONMENT. That portion of income derived from interest on installment sales which is attributable to business activities within the state other than the sale itself is subject to Service B&O tax. Where no credit activities take place at taxpayer's out-of-state locations, credit interest derived from installment sales made to out-of-state buyers or at

out-of-state locations need not be apportioned. Accord: Rena-Ware v. State, 77 Wn.2d 514 (1970) & ETB 270.04.194.

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: September 29, 1988

NATURE OF ACTION:

Appeal by camping club of five different issues.

FACTS AND ISSUES:

Dressel, A.L.J.[1] -- . . . (taxpayer) is a camping club. Its books and records were examined by the Department of Revenue (Department) for the period January 1, 1980 through June 30, 1984. As a result a tax assessment, identified by the above-captioned numbers was issued. The taxpayer's original appeal raised six issues. The membership fees and dues issue was answered in Determination 81-104A, 8 WTD 19 (1989), issued [June of 1989]. This Determination will address the five remaining issues. All of the issues addressed herein appear to have been raised by the assessment issued [December of 1986].

As a tool to be used in the training of its salespeople, the taxpayer commissioned a business . . . to design and develop a sales training program. Ultimately, the project was to yield video tapes and written "activity guides". The cost of the project was $ . . . . The taxpayer was not billed for and did not pay sales tax on this amount. The Department's auditor assessed deferred sales/use tax in the subject audit(s).

The auditor characterizes this item as a "kit consisting of a film and reading material (guides and/or manuals)". He takes the position that this "training kit" is retail merchandise and, thus, subject to retail sales tax.

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[1] This case was reassigned from former Administrative Law Judge Greg Potegal upon his transfer from the Interpretation and Appeals Division.

The taxpayer, on the other hand, believes that these materials are "custom produced special programs" and excluded from use tax under WAC 458-20-241 (Rule 241). As evidence that the video tapes are of the custom-produced variety, the taxpayer points out that individuals appearing in the video are wearing the jackets of [taxpayer] employees. Additionally, the taxpayer states that the project took six months to complete. Five or six taxpayer employees appeared in the tape(s).

The first issue is whether the design, development, and production of sales training video tapes is a retail sale.

Second on the list of five issues is mailing lists. The taxpayer purchased such lists from several different vendors (mailing list vendors). The auditor assessed use tax on the lists. The mailing lists were purchased on magnetic tapes. It appears that the taxpayer requested names of members of particular classes, the idea being that the individuals in such groups would be more likely to invest in the taxpayer's camping and recreational services. . . . . From its data base, the vendor would isolate such groups and send to the taxpayer a mailing list containing the members of whatever group. The lists were also tailored geographically, as by zip code. The lists were sent by the vendors to a direct marketing firm (mailing bureau) in [Washington] which printed the names on advertising material which was then mailed to the potential customers.

Again, the taxpayer makes the argument that this is a customized undertaking which ought not be subject to sales/use tax. It sees itself as purchasing custom computer programs which under WAC 458-20-155 (Rule 155) are a professional service as opposed to a retail sale of tangible personal property. The taxpayer believes that the "ultimate computer tapes" are only tangible evidence of what is really a professional service. It further states that the mailing lists created by the list vendors are unique and tailored to its specific requirements.

According to the Department's auditor, retail sales tax is due on the purchase of mailing lists under the authority of WAC 458-20-141 (Rule 141).

Second of the five issues is whether the purchase of mailing lists on magnetic tape, which lists have been tailored for the buyer, is a retail sale.

Use tax on premiums is the third item of appeal. The taxpayer purchased gift items to be given away free of charge to those potential customers who submitted themselves to a sales presentation at a [taxpayer] campsite. No purchase of a membership or anything else was required to receive a gift. Hereafter, these gifts will be referred to as premiums. The taxpayer suggests that the premiums are not subject to the use tax assessed by the auditor under the authority of WAC 458-20-116 (Rule 116). It also cites Excise Tax Bulletin (ETB) 341.08.116 as on point in its favor. In the ETB "premiums" given away with purchases of gasoline were determined to be purchased for resale and, thus, exempt of retail sales tax.

The auditor simply states that these premiums were given away for promotional purposes so are subject to use tax because sales tax was not paid upon their acquisition.

Issue number three is whether sales/use applies to items given away with no purchase required to prospective customers in return for the attendance of such customers at a taxpayer sales presentation.

The fourth issue is Service B&O tax on interest income from the installment sale of camping memberships. This tax was assessed on all such installment contracts, irrespective of the location of the sale or the residence of the member. The taxpayer has reported its interest income for B&O tax purposes on the basis of sales made from its Washington campsites or "preserves", as the taxpayer's attorney calls them. It has not reported interest income from installment sales made at its out-of-state locations. The taxpayer believes that this practice achieves a proper apportionment of its total interest income in that only that interest generated from contracts entered in Washington is subjected to Washington's B&O tax. It argues that such apportionment is proper under WAC 458-20-194 (Rule 194) because it maintains places of business in those foreign states.

Although the taxpayer believes that the method of apportionment described above is the best one, it acknowledges two alternative possibilities in lieu of no apportionment at all, the position taken by the Department's Audit Division. Number one, B&O tax could be asserted only on those contracts sold to Washington residents. Number two, interest could be apportioned based on a cost of doing business approach. That is to say, the taxpayer's cost of doing business in Washington could be divided by its total cost of doing business everywhere and the resulting percentage applied to total

interest income to arrive at the amount of such income to be taxed by Washington.

Another point made by the taxpayer is that the installment payments made by most, if not all, out-of-state taxpayer members are sent to lock boxes at out-of-state locations . . . . This is as opposed to taxpayer corporate headquarters in [Washington] where the accounting functions for all installment sales are accomplished.

The Department's Audit Division believes that interest income from all installment membership contracts is subject to B&O tax, not from just those made in Washington. It states that all billings, collections, credit approval, and related accounting activities are conducted at the taxpayer's Washington headquarters. It takes the position that notwithstanding the fact that the taxpayer has places of business outside this state, interest income from contracts made in those states may not be apportioned because those places of business do not contribute to the production of the interest income. The Department's auditor further states that the only out-of-state business locations are the preserve offices, where salespeople conduct the campground tours and where contracts are signed, then forwarded to the Washington headquarters. He says no accounting functions or collections are conducted anywhere other than Washington.

Fifth of the items appealed is use tax assessed on a . . . jet airplane. This plane was purchased for $ . . . in 1981, but use tax was paid based on a value of only $ . . . . The Department's auditor has assessed use tax on the full purchase price of $ . . . . The aircraft, was purchased out-of-state and then brought to Washington.

The taxpayer, however, thinks tax on a lesser amount is appropriate because the plane was not worth $ . . . when it was purchased in 1981. In support of its position it has supplied a statement from an aircraft appraiser who says, based on the Summer 1981 Edition of the "Aircraft Bluebook Price Digest", Volume 81-2, the plane's retail or market value was $ . . . . The taxpayer's attorney cites WAC 458-20-178 (Rule 178) for the proposition that in cases where the purchase price does not represent true value, use tax should be based on the average retail selling price of similar products. He adds that the aircraft was purchased at a time of "rising fortunes" for the taxpayer, the consequence of which was that the taxpayer was not as careful as it should

have been in negotiating the price of the jet. The taxpayer simply paid too much for the used airplane.

Whether use tax is due on the airplane based on its purchase price or its appraised value is the fifth and last issue.

DISCUSSION:

[1] With regard to the video tapes produced for training purposes, Rule 241 provides that the following types of income are taxable under the Service and Other Activities tax classification:

> ...gross from personal or professional services, including income from producing and making custom commercials or special programs, fees for providing writers, directors, artists and technicians, charges for the granting of a license to use facilities ... (Emphasis ours.)

Rule 241 further provides that the following types of income are taxable under the Retailing or Wholesaling tax classifications:

> ...sales of tangible personal property, including gross proceeds from sales of films and tape produced for general distribution and from sales of copies of commercials, films, etc., even though the original was not subjected to sales tax. (Emphasis ours.)

From the taxpayer's explanation and the description of the video tape vendor's service on the invoices presented, we are convinced that the taxpayer paid for more than just a "sales training kit" in the transaction at issue. For one thing, [about $91,000] is a considerable amount of money to pay for a simple "kit" unless it was produced in massive quantities. We have been given no indication of that. For another, the descriptions on the invoices are clearly that of a professional service. The descriptions include: "Development of [taxpayer] Sales Training Programs, Delivery of Final Drafts Video Scripts, Per Contract Additional $15,000.00 for 3 Additional Days of Writers Research, Design Development of [taxpayer] Training Program, and Draft of Leader's & Manager's Activity Guides". That sounds to us like "producing and making custom commercials or special programs" which, under the cited regulation, is a professional or personal service. We so find. That this is a custom or special film or video

program is a finding buttressed by the appearance in the video of [taxpayer's] employees wearing [taxpayer's] uniforms.

Having found that the taxpayer engaged professional or personal services, we observe that, "The retail sales tax does not apply to the amount charged or received for the rendition of personal services to others, even though some tangible personal property in the form of materials and supplies is furnished or used in connection with such services". WAC 458-20-138. Sales of copies of the original tape(s), however, are at retail per Rule 241.

As to appeal item number one, sales tax on video tapes, the taxpayer's petition is granted. The Audit Division will determine, however, if copies were sold & tax such sales accordingly.

[2] Appeal item number two is mailing lists. In assessing deferred sales tax/use tax on the mailing lists, the Department's auditor relied on Rule 141 which reads in part:

RETAIL SALES TAX

> Sales by duplicators and mailing bureaus of tangible personal property (for example, photostats, blueprints, copies, mailing lists, "Dick" strips, etc.) and/or services rendered to tangible personal property of or for consumers are subject to the retail sales tax.

Emphasis ours.

During the audit period, Rule 155, upon which the taxpayer relies
for its position that it is purchasing a professional service, read in part: "Persons rendering accounting, data processing or computer services are taxable upon gross income under the service and other business activities classification". (Emphasis ours.)

The mailing lists at issue here are, likely, are not those contemplated by the drafters of Rule 141. They are not page after page of names and addresses typed in neat little rows and columns. They are, in fact, stored in computer data bases, edited via computer programs for a particular type and location of potential customer, and the resulting names and addresses are transmitted to a mailing bureau, utilizing the medium of magnetic tape. These differences bring into play

the question of computer and information services which, under Rule 155, are not taxed as retail sales.

Recently, we faced a similar dilemma in Determination 90-5, 9 WTD 51 (1990), wherein we said, in part: ". . . we believe that charges for the retrieval of information from that data base for the production and sale of an imprinted product are essentially charges for the sale of tangible personal property".

As an inevitable consequence of the age of computers, other jurisdictions have also wrestled with the question of whether "modern" mailing lists are tangible personal property or a service. In Haroldsen, Inc. v. State Tax Comm'n., Utah S.Ct. No. 870468 (Nov. 27, 1990), the court concluded that the "real object" of the transaction was receipt of the mailing lists and that personal services rendered were incidental. It rejected the taxpayer's theory that the primary purpose of the transaction was to acquire information rather than tangible personal property.

Both cited cases are pertinent, but there is a fact in the instant case which, we believe, distinguishes it from the other two. Unlike Determination 90-5, the party here doing the computer retrieval of the name and address information, is not the same party who created the label, flyer, letter or other piece of tangible personal property which is the "real object" of the taxpayer's purchases. The taxpayer buys that tangible personal property from the mailing bureau. From the mailing list vendor, it purchases only information, which is sent on the medium of magnetic tape to the mailing bureau. Arguably, the magnetic tape is tangible personal property, but it is certainly not the "real object" of the taxpayer's purchase(s). It is but the tangible representation of professional information services provided, to which sales tax does not apply. WAC 458-20-138.

Inasmuch as the taxpayer is purchasing information only from the mailing list vendor, as opposed to tangible personal property, the vendor is regarded as rendering "information services" to the taxpayer. Per Rule 155[2], those who charge

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[2] Rule 155 was amended September, 1985. Although the amendment postdates the audit period in this case, it was a memorialization of previous Department policy and authority as reflected in ETBs 151.04.155 and 388.04.155, as well as the original version of Rule 155.

for such services are taxable under the Service and Other Activities classification of the B&O tax. Only charges B&O classified as Retailing are subject to retail sales tax. Rule 155. The taxpayer, therefore, does not owe sales tax on the subject purchases of mailing list information. Had the taxpayer purchased the paper on which the names and addresses were printed, the result here, likely, would have been otherwise. As it was, however, the taxpayer purchased no tangible personal property from the mailing list vendor, so it owes no sales tax or, for that matter, use tax. See RCW 82.12.020.

On appeal item number two, mailing lists, the taxpayer's petition is granted.

[3] Number three is use tax on premiums. Rule 116 does not define "premiums". Somewhat curiously, it refers to them as "so-called premiums". To the best of our knowledge, premiums are also not defined in RCW 82. When a term is used but not defined in a statute, it must be given its usual and ordinary meaning, usually ascertained from dictionaries. Marino Property v. Port of Seattle, 88 Wn.2d 822, 567 P.2d 1125 (1977). According to the American Heritage Dictionary, Second College Edition, the second definition of "premium" is "Something offered free or at a reduced price as an inducement to buy". That fits what we have here. The taxpayer gives away "prizes" to people who show up to hear one of its sales presentations for a camping membership. No purchase is required.

Having established that it is, in fact, a premium that is at issue here, we look further into Rule 116 to the following paragraph:

> Sales of so-called premiums to persons who do not pass title thereto with other articles which are sold by them, but which are given as an inducement to perform a service, such as the soliciting of subscriptions, or are given upon the returning of coupons or other evidence of prior purchases of similar articles, are sales for consumption, and the retail sales tax applies thereto.

This paragraph fits the facts in this case as well. The premiums are given as an inducement to prospective members. They are, therefore, retail sales taxable to the party who gives them away. The taxpayer is that party.

The taxpayer's attorney has cited ETB 341.08.116 as authority for the proposition that the premiums are resold, that the taxpayer's acquisition of same is at wholesale, and that, therefore, sales tax should not apply. It is true that was the result of the actual case which inspired the ETB, however, the instant case is distinguishable from that one. In that case gifts were given away with gasoline purchases. The gift was considered resold along with the gasoline. Here, however, nothing is resold.[3] Further, the ETB specifically buttresses our conclusion of taxability where it says in part, "Sales tax is due upon articles purchased to be given away . . . " The taxpayer owes deferred sales tax or its complement, use tax. See RCW 82.12.020 and RCW 82.12.0252.

On the third item appealed, use tax on premiums, the taxpayer's petition is denied.

Interest from the installment sale of membership contracts is the fourth item. The taxpayer implicitly concedes that B&O taxation of some such interest is taxable by suggesting two apportionment formulae which would tax those contracts sold in Washington or those sold to Washington residents. We first must decide whether apportionment of any kind is required.

In Rena-Ware Distributors, Inc. v. State, 77 Wn.2d 514 (1970), the Department made an assessment upon the receipts from a service charge (interest) to out-of-state customers on installment sales. The Department did not attempt to collect a business and occupation tax on the receipts from sales made to customers outside the state, conceding that those were immune under the commerce clause of the U.S. constitution. Its theory in taxing the service charge was that the servicing of accounts is a business handled entirely within the state and that a tax upon it is not a burden on interstate commerce. Rena-Ware at 515.

In Rena-Ware as in this case, the taxpayer had out-of-state sales offices and the sales at issue were made out-of-state. The court concluded that all of the "activities" of the taxpayer which were attributable to customer payments, extended over time by the installment contract, were local,

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[3] In those cases where the taxpayer does sell something such as a membership to a prospective customer to whom a premium has been given, a resale has occurred and, consistent with both Rule 116 and ETB 341, no sales/use tax would be owed.

rendered at the taxpayer's home office in Washington state. Inasmuch as only local activities were being taxed which activities could not be taxed by other states, the tax was found not discriminatory against persons, i.e. the taxpayer, engaged in interstate commerce. Rena-Ware at 519.

In a later case on the same subject, Washington's Supreme Court said that all activities related to the extension of credit occasioned by an installment contract should be examined to determine if the apportionment of interest is appropriate. Such determination depends on the situs of those activities. Department of Rev. v. J.C. Penney Co., 96 Wn.2d 38, 43-45 (1981).

[4] In both Rena-Ware and the instant case, the pertinent sales were made outside the state. Arguably, the sales are a credit activity in that there would be no credit without the sales. On the other hand, the mainstream credit activities of accounting, credit approval, and billing have nothing to do with the sales per se. One can have a sale without credit. So, just as arguably, the out-of-state sales are not a credit activity.

In this case the only additional, out-of-state activity of the taxpayer, as compared to the activities of Rena-Ware, that might be related to credit is that payments are received at lock boxes in Boston, Los Angeles, and Dallas. If one takes a closer look at that, however, (s)he sees that it is not activity conducted by the taxpayer. The lock boxes are at out-of-state banks where the taxpayer, obviously, has no place of business. The banks simply receive the payments and put them into the taxpayer's account. No additional business activity is conducted by the taxpayer out-of-state as a result of having these payments sent to out-of-state financial institutions.

Rule 194 discusses the tax ramifications of those who do business both inside and outside this state. As to the apportionment of the income from such business, the rule[4] reads in part:

> Persons engaged in a business taxable under the service and other business activities classification

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[4] The quotation which follows from Rule 194 is actually a quotation from the statute which the rule promulgates, namely, RCW 82.04.460.

> and who maintain places of business both inside and outside this state which contribute to the performance of a service, shall apportion to this state that portion of gross income derived from services rendered by them in this state. (Emphasis ours.)

Here, the taxpayer has out-of-state business locations, its camping preserves, which contribute to its sales function, but they do not contribute to its service function of providing credit. All of that function including billings, collections, credit approval, and related accounting activities are conducted at the taxpayer's Washington headquarters. None of those activities are done by the taxpayer at a non-Washington location. Because no out-of-state, taxpayer business location exists which contributes to this interest income, all such income derived from installment sales is B&O taxable at the Service and Other Business Activities rate.[5][6]
No apportionment is required.

As to the fourth issue, apportionment of interest from the installment sale of camping memberships, the taxpayer's petition is denied.

The fifth and last issue, or item of appeal, is use tax on the taxpayer's airplane. More specifically, the issue is what should the measure of that tax be. Rule 178 reads in part:

> (13) Value of the article used. . . In case the article used was extracted or produced or manufactured by the person using the same or was acquired by gift or was sold under conditions where the purchase price did not represent the true value thereof, the value of the article used must be determined as nearly as possible according to the retail selling price, at the place of use, of similar products of like quality, quantity and character.

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[5] WAC 458-20-109 (Rule 109) provides that interest income is subject to B&O tax under the Service and Other Activities classification.

[6] See also ETB 270.04.194 which states in part: "Second, if the out-of-state business situs does not contribute to the income producing service, Washington may tax all of that income".

It is not apparent from the record that the Audit Division has seen the appraisal provided by the taxpayer to Interpretation and Appeals. This item is, therefore, remanded back to that division for consideration of the appraisal including verification that the airplane appraised is the same one assessed.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part.

DATED this 28th day of June 1991.