

Cite as 11 WTD 9 (1983).

BEFORE THE INTERPRETATION AND
APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	<u>D E T E R M I N A T I O</u>
<u>N</u>		
For Correction of Assessment of)	
)	No. 83-283
)	
. . .)	Registration No. . . .
)	Tax Assessment No. . .
.)	

[1] **RULE 175:** USE TAX -- TANGIBLE PERSONAL PROPERTY -- INTERSTATE COMMERCE -- PROMOTIONAL BROCHURES. Sales brochures constitute tangible personal property. If used in connection with operating as a carrier in interstate and foreign commerce, their purchase and delivery here is tax exempt under RCW 82.08.0261. The proviso in the statutory exemption of RCW 82.08.0261 which makes interstate carrier property taxable under use tax when it is put to actual use here, means that the use tax applies if the property is used here for its ultimate intended purpose. Mere storage here, or acts of delivering the property to persons outside this state, is not "actual use" as a consumer within this state.

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 AND PLACE OF CONFERENCE: . . .

FACTS:

Faker, A.L.J. -- The taxpayer's business records were audited for the period from January 1, 1978 through December 31, 1981 revealing a total tax and interest deficiency in the amount of

\$ Tax Assessment No. . . . in that amount was issued .
 the taxpayer paid the unprotested portion . . .
 . The balance remains unpaid.

TAXPAYER'S EXCEPTIONS:

The protested portion of the assessment consists of deferred retail sales tax (assessed as use tax) and interest measured by the value of cruise brochures.

The taxpayer conducts interstate and international boat excursions as a common carrier of persons for hire. During the audit period the taxpayer through its branch, ". . .," operated the boat ". . ." in regularly conducting two kinds of cruises referred to as the ". . ." trip and the ". . ." tour. On both excursions the boat traveled through interstate or international waters.

The taxpayer purchased its cruise brochures from . . . , a Washington printer, under an arrangement whereby the printer delivered the brochures to designated mailing bureaus (principally . . .) in this state for direct mailing to persons both within and outside Washington State.

The auditor concluded that the printer's deliveries to mailing bureau agents constituted constructive delivery to the taxpayer. Therefore, pursuant to WAC 458-20-193A, deferred sales tax was assessed notwithstanding that the brochures were immediately distributed to points outside this state.

The taxpayer asserts that it has paid use tax upon the value of brochures distributed to persons in this state and this tax is not protested. However, with regard to brochures distributed outside Washington State, the taxpayer asserts that the auditor's reference to Rule 193A is not appropriate because of the express statutory exemptions of RCW 82.08.0261. This statute provides for a sales tax exemption for tangible personal property used in connection with the business of operating as a private or common carrier in interstate or foreign commerce. The statute contains a proviso that any "actual use of such property in this state" shall be subject to use tax liability under Chapter 82.12 RCW.

The taxpayer asserts that the sales tax exemption pertains to all kinds of tangible personal property, which would include brochures which advertise interstate and international cruises. Moreover, it asserts, the mere act of distribution to points outside this state does not constitute "actual use"

in this state so as to trigger use tax liability under the proviso. The taxpayer argues that the actual use of promotional brochures is the act of providing them to potential customers as a promotional item. This use, it is argued, only occurs outside this state after the brochures are mailed.

Also protested is the auditor's use of a test period formula to determine actual brochure use. The taxpayer asserts that assuming arguendo, that use tax is due on brochures, it now has actual records available which overcome the need for any test period auditing technique.

DISCUSSION:

RCW 82.08.0261 provides, in full, as follows:

The tax levied by RCW 82.08.202 shall not apply to sales of tangible personal property (other than the type referred to in RCW 82.08.0262) for use by the purchaser in connection with the business of operating as a private or common carrier by air, rail, or water in interstate or foreign commerce: Provided, That any actual use of such property in this state shall, at the time of such actual use, be subject to the tax imposed by chapter 82.12 RCW. (Emphasis supplied.)

There is no question that the brochures purchased by the taxpayer from [printer] and delivered in this state to [mailing bureau] and other mailing bureaus constituted tangible personal property used in connection with waterborne interstate commerce. We have examined the sample brochures which are clearly created for the purpose of promoting the interstate cruises. The statute is clear and unambiguous on its face. Thus, the sales of the brochures to the taxpayer were sales tax exempt.

The provisions of RCW 82.08.0261, being specific in nature, take precedence over the general provisions of RCW 82.08.0254 which is the statute which exempts state sales taxation where it is prohibited by the State and Federal Constitutions. It is this latter statute (the general exemption) which is implemented in part by WAC 458-20-193A, dealing with interstate sales delivered outside this state. In the instant case the taxpayer has not claimed entitlement to this general exemption, nor is it applicable. Moreover, we find the auditor's reference to Rule 193A provisions to be inapposite. The truly applicable statute, RCW 82.08.0261, provides for the

tax exemption sought and it is immaterial for this exemption that the tangible personal property is delivered here to the buyer or the buyer's agent.

Also, having determined that the sales in question were exempt of sales tax, it is not appropriate to assess "deferred sales tax." This term refers to tax which would be due because the sales transactions were taxable, but sales tax was not actually paid at the time the sales were transacted. It is clearly inappropriate for application in the case at hand.

We find the statutory term "actual use" contained in the proviso of the statute to refer to the ultimate intended promotional use of the brochures in this case. The terms "use," "used," "using," and "put to use" are defined by RCW 82.12.010(2) to have their ordinary meaning, and shall mean,

. . . the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within this state. (Emphasis ours.)

Clearly the acts which are preparatory to actual use are not taxable acts unless there occurs a later "actual" use. Thus, mere entrance of goods into storage here, withdrawal from such storage, or the putting in motion of those delivery methods by which the goods are delivered outside this state for actual use there, are not, themselves, taxable uses.

Judicial support for the forgoing position is found in Sears Roebuck & Co. v State of Washington, 97 Wn.2d 260, 643 P.2d 884 (1982). In that case the Court ruled that though delivery agents of Sears physically handled catalogs which were being delivered to ultimate users, Sears itself had no dominion or control sufficient to incur use tax liability.

Even aside from the foregoing case law, the Department has uniformly ruled that mere delivery of tangible personal property to persons outside this state for actual use there does not constitute a use taxable incident.

Having found for the taxpayer on the merits, it is unnecessary to discuss the audit test period question.

DECISION AND DISPOSITION:

The taxpayer's petition is sustained.

DATED this 26th day of October, 1983.