Cite as 11 WTD 155 (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. 91-107
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .

[1] RULE 193D: STEVEDORING TAX -- IMPORTS -- INTERVENING STORING AND HANDLING CHARGES -- ULTIMATE CONSIGNEE. Intervening automobile storage and handling charges incurred after waterborne imports have arrived at the U.S. port of entry and prior to delivery to the ultimate consignee are taxable under the Stevedoring and associated activities tax classification.

[2] RULE 132: USE TAX -- AUTOMOBILES -- EXECUTIVE CARS -- FROM STOCK. Capitalized company cars used by employees which were not "from stock" of the company, or of the type which the company normally sold, do not qualify as "executive cars" for purposes of Rule 132.

[3] RULE 132 -- USE TAX -- AUTOMOBILES -- DEMONSTRATOR USAGE -- MANUFACTURER OR DISTRIBUTOR -- ONE PER ONE HUNDRED RULE. The "one per one hundred" rule for computing demonstrator usage applies only to retail automobile dealerships. Manufacturers or distributors who primarily make wholesale automobile sales are governed by ETB 37.12.132. Their demonstrator usage is based on the first complement of cars for each model year and on any increases above the number of cars in the first complement. Accord: ETB 37.12.132.

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.

NATURE OF ACTION:

A taxpayer protests additional taxes and interest assessed in an audit report.

DATE OF ORIGINAL HEARING: September 29, 1987
(Conducted by Potegal, A.L.J.)

TAXPAYER REPRESENTED BY: . . .
. . .
. . .

DATE OF SUPPLEMENTAL HEARING: October 26, 1990
(Conducted by Okimoto, A.L.J.)

TAXPAYER REPRESENTED BY: . . .

FACTS:

Okimoto, A.L.J. -- . . . (taxpayer) receives, inspects, stores, processes, and distributes newly imported automobiles on behalf of a northwest automobile distributor at . . . . The taxpayer also purchases imported vans and converts them into recreational vehicles by installing campers. The taxpayer then sells these converted vans at wholesale and retail. A Department of Revenue (Department) auditor examined the taxpayer's books and records for the period April 1, 1981 through June 30, 1985 and issued Tax Assessment No. . . . . This was later revised and Doc. No. . . . was issued for additional taxes and interest of $ . . . [in March of 1987]. The taxpayer protests a portion of the audit assessment and it remains due.

The taxpayer described its primary business activity at the hearing as follows:

1) A foreign manufacturer loads its automobiles onto a ship destined for . . . . The foreign bill of lading designates the foreign manufacturer as the shipper and both the local car dealership and the distributor as the consignees.

2) Distributor contracts with the taxpayer to off-load the automobiles, inspect and evaluate the condition of the cars,

and temporarily store the vehicles pending actual shipment to the local dealership.

3) Taxpayer then arranges delivery to the local dealership consignee.

TAXPAYER'S EXCEPTIONS:

Schedule II: Reconciliation of Retail Sales

In this schedule, the auditor reclassified amounts charged by the taxpayer to the distributor when it temporarily stores the automobiles in an open air lot pending delivery to the dealership[1] from the Service and Other Activities tax classification, to Retailing and retail sales tax classification. The auditor considered this activity to be "automobile parking and storage garage business" within the meaning of RCW 82.04.050. Although the auditor recognized that temporary storage of goods during the importation process would be subject to the Stevedoring rate, he nevertheless disallowed the lower rate on the following analysis.
RCW 82.04.260(12) includes within the Stevedoring tax classification, "... imported automobile handling prior to delivery to consignee." The auditor reasoned that since both the distributor and the local dealership were listed as consignees on the bill of lading, and that the taxpayer billed the distributor, and not the foreign manufacturer for its services, then these services were performed after delivery to the consignee.

In its petition, the taxpayer counter-argued that:

> The auditor,... relied exclusively upon the phrase "imported automobile handling prior to delivery to consignee" to negate application of Rule 193D and the stevedoring classification (emphasis his). His correct concern is, rather, which consignee? We hold that the term "consignee" as intended herein refers to that person to whom those goods are destined to as they are removed or transported from port property (storage). The intent of the stevedoring statute is to capture all port related activities including, in the case of imports or

[1]The taxpayer's representative has testified that he believes that no accessory installation is performed on these imported vehicles. This fact will be verified by the Audit Division.

> interstate goods, the unloading, movement to a convenient place of storage and various other services associated with the temporary custody prior to the goods committed to off-premises transport. It is this consignee to which the rule refers and which, in the case of these automobiles, is likely to be a northwest area automobile dealer.

III: Reconciliation of Service Income

In this schedule, the auditor reconciled income that he determined to be taxable under the Service and Other Activities tax classification. The taxpayer states that the following G/L accounts have been incorrectly included in this reconciliation and should have been taxed under the lower Stevedoring rate:

G/L #4105: Dock Pick Ups -- This is a charge that the taxpayer makes to expedite delivery to the local dealerships. Normally, this involves diverting an individual car from the regular processing and inspection procedure in order to allow the dealership to pick-up the car immediately after it arrives.

G/L #4101, Dockside Service -- Manifest verification through locating of vehicle identification numbers and other dockside services.

G/L #4102, Load & Unload -- This involved loading and unloading vehicles at the . . . railhead whose port of entry was [the local port].

G/L #4103, Final Inspection . . . -- Inspection and evaluation of the condition of the cars at the time they came off the ship.

G/L #4402, Load & Unload -- This involved loading and unloading European and Brazilian vehicles at the . . . railhead whose port of entry was Houston.

G/L #4403, Final Inspection . . . -- Inspection and evaluation of the condition of the cars after being unloaded at . . . railhead whose port of entry was Houston.

Reimbursement of Insurance coverage required by the Port and manufacturer.

Schedule VIII: Use Tax on Company Autos

In this schedule the auditor assessed use tax on company cars used by company employees based on the full purchase price of the cars. The auditor did not apply WAC 458-20-132 (Rule 132) because he did not believe that the taxpayer was a true "automobile dealer" within the meaning of rule 132. The auditor stated in his report that the taxpayer has no retail lot, and does not hold itself out to the public as selling the types of cars (Porsche, Audi, Rabbit, etc.) carried in the general ledger company car account. Therefore, the auditor did not believe that these cars could be considered as "from stock" as required by Rule 132.

Although the taxpayer concedes that its primary business is not the sale of these types of cars, it nevertheless contends that its status as a licensed automobile dealer, allows it to utilize the rule 132 valuation. The taxpayer also stated that it does occasionally purchase and sell these types of new cars to individuals per their request. In addition, although the cars were listed in an asset account, the taxpayer stated that they were not depreciated. For this reason, it believes that the special use tax valuation under Rule 132 should be applied.

In addition, the auditor assessed use tax on the full value of van conversion units used by company salespersons to promote the taxpayer's van conversion process to retail dealers. The taxpayer explained that these vans were used by taxpayer's salespersons to attend RV shows, visit retail dealerships, and for other demonstration purposes. The taxpayer contends that these demos should be valued under the "one per one hundred" method under Rule 132. Although the taxpayer concedes that most vans are sold at wholesale, it nevertheless points out that over $700,000 in retail camper sales were made during the audit period.

ISSUES:

1. What is the correct tax classification for intervening automobile storage and handling charges incurred after waterborne imports have arrived at the U.S. port of entry but prior to delivery to the final consignee?

2. Do capitalized company cars which were not "from stock" of the company, or of the type which the company normally sells, qualify as "executive cars" for purposes of Rule 132?

3. Does the "one per one hundred" rule for computing demonstrator usage apply to manufacturers or distributors of van conversion units, if they have a licensed dealership?

DISCUSSION:

[1] When the legislature enacted RCW 82.04.260(12) it enlarged upon such time-honored concepts that exportation begins and ends at water's edge, and that for purposes of excise taxation, the activity of stevedoring was limited to those involving cargo movement occurring from the end of ship's tackle to a waiting railway car or truck.

RCW 82.04.260(12) states:

> (12) Upon every person engaging within this state in the business of stevedoring and associated activities pertinent to the movement of goods and commodities in waterborne interstate or foreign commerce; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds derived from such activities multiplied by the rate of thirty-three one hundredths of one percent. Persons subject to taxation under this subsection shall be exempt from payment of taxes imposed by chapter 82.16 RCW for that portion of their business subject to taxation under this subsection. Stevedoring and associated activities pertinent to the conduct of goods and commodities in waterborne interstate or foreign commerce are defined as all activities of a labor, service or transportation nature whereby cargo may be loaded or unloaded to or from vessels or barges, passing over, onto or under a wharf, pier, or similar structure; cargo may be moved to a warehouse or similar holding or storage yard or area to await further movement in import or export or may move to a consolidation freight station and be stuffed, unstuffed, containerized, separated or otherwise segregated or aggregated for delivery or loaded on any mode of transportation for delivery to its consignee. Specific activities included in this definition are: Wharfage, handling, loading, unloading, moving of cargo to a convenient place of delivery to the consignee or a convenient place for further movement to export mode; documentation services in connection with the receipt, delivery, checking, care, custody and control of cargo required in the transfer of

> cargo; imported automobile handling prior to delivery to consignee; terminal stevedoring and incidental vessel services, including but not limited to plugging and unplugging refrigerator service to containers, trailers, and other refrigerated cargo receptacles, and securing ship hatch covers.

We interpret RCW 82.04.260(12) to mean that a person does not have to be exclusively engaged in the business of stevedoring to qualify for the lower tax rate established in the statute. In our opinion, it is also clear from the implication of the specific language of the statute and from reading the statute in its entirety that the lower business tax rate for "stevedoring and associated activities" applies generally to gross proceeds from movement activities which occur after goods have been consigned to interstate or foreign waterborne carriage and before delivery to the consignee. In essence, if the goods being handled or stored are still in the process of importation, than charges for handling or storing those goods are taxable under the lower stevedoring rate[2].

The taxpayer has testified that both the distributor and the local dealership are listed as consignees of the automobiles from the time they leave the foreign manufacturers plant. Assuming this fact, then we agree with the taxpayer that the "consignee" for purposes of the statute is the local dealership and not the distributor. Indeed, this clearly demonstrates that the automobile is always destined for ultimate delivery to local dealership, and that the distributor is merely an intermediary along the way to facilitate the importation process. Therefore, we conclude that so long as the taxpayer's records document that:

1. The automobiles arrived via waterborne interstate or foreign transportation and,

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[2] RCW 82.04.260(12) provides that the goods can be moved to a warehouse or similar holding or storage yard to await further movement in foreign commerce and still be entitled to the Stevedoring tax classification.

2. The automobiles are moving in a continuous journey from the foreign manufacturer to the ultimate local dealership consignee, through all modes of carriage[3];

then intervening handling and storage is taxable under the lower Stevedoring tax classification. Accordingly, the taxpayer's petition is granted on this issue subject to verification by the Audit Division.

[2] WAC 458-20-132 (Rule 132) is the lawfully promulgated rule governing automobile dealers and has the same force and effect as law unless overturned by a court of record not appealed from. RCW 82.32.300. It read during the period in question[4]:

> Where an automobile dealer purchases a passenger car or pickup truck without paying a retail sales tax in respect thereto, and uses such car or truck for personal use or demonstration purposes, the use tax is applicable irrespective of the fact that such personal car or demonstrator may later be sold by the dealer....
>
> When a dealer or a person associated with a dealer (firm executive, corporate officer or partner) does not have a recent model car registered in his own name and regularly uses either one or various new cars from stock for personal driving (whether or not such cars are also used for demonstration purposes) the use tax will be applicable to the value of one such car for each two calendar years in addition to the tax otherwise applicable to demonstrator use. ... In such cases, the measure of the use tax shall be the same as the measure herein approved for the computation of use tax on demonstrator use. (Emphasis ours)

Rule 132 clearly restricts the special use tax computation to new cars "from stock" of the automobile dealership. As the

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[3]This test applies equally to the Brazilian and European automobiles whose port of entry was Houston.

[4]Rule 132 was amended on April 17, 1986 to implement the recently enacted "trade-in" initiative and had an effective date of January 1, 1985. We will use the rule as it was written prior to January 1, 1985 unless specified otherwise.

taxpayer has conceded, it is not an Audi, Porsche, or Volkswagen dealership, but will only occasionally sell those types of cars "as a favor" for a friend. Because the taxpayer has not used cars "from stock", but purchased other cars and capitalized them as assets, these cars are not entitled to be valued as "executive cars"[5]. The taxpayer's petition is denied on this issue.

[3] The "one per one hundred" rule for demonstrator vehicles was specifically designed to be applied to retail automobile dealerships whose primary goal is to sell cars at retail. This is reflected by the relatively low use tax liability incurred. (One car for each 100 sold at retail) This computation method does not apply to a manufacturer or distributor whose primary goal is wholesale sales because the number of retail sales does not accurately reflect the actual volume of demonstrator use[6]. Instead, a manufacturer or wholesale distributor's use tax liability for demonstrators is governed by ETB 37.12.132 which states in part:

> Taxpayer, an automobile manufacturer, used many new cars for demonstration purposes within the state. The cars were used for a short time and were then resold at retail. The Retail Sales Tax applied to these sales.
>
> Where no Sales Tax is paid on a demonstrator automobile, the Use Tax is applicable irrespective of the fact that the demonstrator may later be sold. However, Rule 132 relieves retail dealers from liability for Use Tax on the full complement of cars used for demonstration purposes within a year. The same considerations are applicable to use of cars by manufacturer's representatives within the state. Therefore liability for the Use Tax was computed on the value of the first complement of cars of each model year and on increases above the number of cars

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[5]Although the cars are not entitled to be valued as "executive cars" the taxpayer may be entitled to a "trade-in" deduction during the last 6 months of the audit period.

[6]Although it is true that [over $700,000] in sales were included in the Retail Camper account, the auditor reduced that amount by [about $500,000] as being non-resident or wholesale sales. Taxpayer's wholesale camper sales exceeded [$3.5 million]. Therefore, we conclude that taxpayer's business is primarily as a manufacturer or wholesale distributor.

> in the first complement so that the tax was held due on the greatest number of cars in use at any one time during the model year. No tax was held due on the usual turnover or replacement of cars within the year.

This issue shall be remanded to the Audit Division for a recomputation of use tax under the above guidelines stated in ETB 37.

DECISION AND DISPOSITION:

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

DATED this 29th day of April 1991.