

Cite as Det. No. 91-330, 11 WTD 531 (1992).

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

In the Matter of the Petition)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u> <u>N</u>
For Correction of Assessment of)	
)	No. 91-330
)	
. . .)	Registration No. . . .
)	. . ./Audit No. . . .
)	

[1] RULE 178 and RULE 112: USE TAX -- VALUE OF ARTICLES USED -- TRAINING TAPES AND MATERIALS -- RETAIL COST. Taxpayer purchasing training programs including video tapes, practice models and molds, and printed materials is subject to use tax on the full retail price paid for the programs.

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: . . .

NATURE OF ACTION:

Taxpayer petitions for correction of assessment of use tax on training programs purchased for use in its business.

FACTS AND ISSUES:

Adler, A.L.J. (successor to Heller, A.L.J.) -- Taxpayer is engaged in the business of operating a dental laboratory, at which items for use by dentists are manufactured. Its records were examined for the period from January 1, 1986, through September 20, 1989. The auditor found that taxpayer had purchased various training programs from a California company and had failed to pay use tax on them after they were delivered. The tax was assessed on the retail purchase price of \$20,000.

Taxpayer signed a Master License contract with the seller, which states the price of the Master License fee was \$2,500. Each

instruction unit is separately priced, includes accompanying materials and supplies, and covers different topic areas.

The license contract is a one-time transaction covering all subsequent purchases of programs. The seller retains title to the programs and provides instruction seminars for purchasers on correct operation of the equipment, models, and use of the programs. The purchaser is required to attend two of these seminars initially and then at least one per year.

The seller may assign the agreement, but the purchaser may not without prior written consent of the seller. The license is non-exclusive and states the programs are

for the instructional use of [purchaser] and its employees within the scope of their employment only. All designs, processes, apparatus, applications, books, tapes, samples, and similar matter relative to the system or systems shall in no way be reproduced, duplicated, sold, or communicated to any other individual, firm, or agency without the prior written consent of an officer of [seller]. Customer is hereby made aware that such a violation of copyright is a federal offense and [seller] will vigorously enforce its copyright in order to protect [seller's] and [purchaser's] investment.

The seller charges duplication and handling fees for replacement of damaged equipment. Lost or stolen materials are replaced at full retail price. If the purchaser breaches the license agreement, the seller can demand return of all materials and can charge full retail price for any unreturned items.

Taxpayer's president argues the value on which tax should be assessed should be considerably less, approximately nine percent of the purchase price. He contends the use tax applies only on

tangible personal property.... The dictionary defines tangible as "perceptible by the touch, palpable, concrete."

We leased a training program of which books, tapes and manuals have a value of \$1,800.00. The balance of the \$20,000.00 cost pays for the intangible training concept, a master license agreement and consulting by [the seller's representative].

Taxpayer supplied letters from the seller's representative and from the seller's controller. The controller states:

Pursuant to your request on the use tax application, it is our contention that the \$1,800.00 represents the product portion of the [seller's] Dental System, while the balance of the system remains the ownership of [seller].

The seller's representative comments:

To further qualify your request regarding your purchase of [our programs], as we state [sic] to you previously \$1800.00 represents the product portion...As you stated in your letter, the balance represents the educational value. In other words, the primary value of the [seller's programs] is in it's [sic] educational content not the materials that are included in it. [Brackets supplied.]

DISCUSSION:

[1] WAC 458-20-178 (Rule 178) is the administrative rule implementing the use tax statutes. It has the same force and effect as the law itself. RCW 82.32.300. It provides, in pertinent part:

The [use] tax is levied and collected on an amount equal to the value of the article used by the taxpayer. The term "value of the article used" is defined by the law as being the total of the consideration paid or given by the purchaser to the seller for the article used.... (Emphasis supplied.)

WAC 458-20-112 (Rule 112) similarly states that "value"

shall be determined by the gross proceeds of sales in every instance in which a bona fide sale of such products is made and whether sold at wholesale or retail.

In this case, taxpayer purchased training programs. In addition, it was required to purchase a non-exclusive license to use the programs.

Taxpayer contends the proper "value" for use tax purposes is only \$1,800 of the \$20,000 spent to acquire the license and programs. The seller, in response to taxpayer's requests for a delineation based on tangible property and intangible value, states the value of its products should be divided into a nontaxable "educational" portion and a taxable "product portion." We disagree. The seller is offering the purchaser copies of training programs. The license agreement is for nonexclusive use of the programs.

The programs are clearly not custom tailored for the taxpayer. As a result, no portion of the programs qualifies for sales or use tax exemptions as purchased services.

The transaction is a retail sale, and the value for use tax purposes is the "total of the consideration paid or given by the purchaser to the seller." The fact that the seller is not willing to sell the programs at their alleged value, \$1,800, directly contradicts the contention that such a figure should be used as the basis for assessing use tax. The "value" for use tax purposes is determined by the demand for the contents, which reflect the skills of the seller. That "value" certainly could not be based solely on the cost of the physical materials used to produce the training programs.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 17th day of December, 1991.