

Cite as Det. No. 93-069, 12 WTD 589 (1993).

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 N</u>
For Correction of Assessment of	)	
	)	No. 93-069
	)	
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .

[1] RULE 108 -- RETAIL SALES TAX -- DISCOUNTS. The measure of retail sales tax will not be imputed based on vendor price reductions for cellular phones improperly labeled as "rebates" when the retail vendor receives a bona fide commission from the cellular phone company for enrolling the phone purchaser for retail cellular phone service.

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: . . .

NATURE OF ACTION:

A cellular phone retailer protests the assessment of retail sales tax on the value of phones sold to its customers.

FACTS AND ISSUES:

Pree, A.L.J.-- . . . (hereinafter referred to as the taxpayer) sold cellular phones in Washington. The taxpayer also enrolled its customers for cellular service with one of the cellular phone companies. For every customer who signed a service agreement, the cellular company would pay the taxpayer a . . . sum which was designated [as] a commission in its retail dealer agreement. The taxpayer would allow the customers who signed service agreements to reduce either the cost of the phone or the service received later by an amount designated as a "rebate" by the taxpayer.

The taxpayer's records were examined for the period January 1, 1987 through June 30, 1991 disclosing . . . taxes and interest owing. Assessment . . . in that amount was issued [in January 1992]. The auditor contended that the "commission" from the cellular company was passed through to the customer as a rebate or cash gift. The customer could select one of three options regarding how the "rebate" was applied. The auditor considered the "rebate" a cash gift. If it was used against the purchase price of the phone, the auditor assessed retail sales tax on the transaction measured by the phone's price before the "rebate" discounted the price to the customer.

In its petition, the taxpayer protested the assessment of retail sales tax on the "rebate" amount used to reduce the price of the cellular phones sold to its customers. The taxpayer argues that the "rebates" were not rebates issued by the manufacturer or the service provider, but only a discount offered by it to encourage its customers to sign up for the cellular service. Often, the net price paid by the customer for the phone was less than the taxpayer's cost of the phone. In effect, the phones were used as loss leaders, enabling the taxpayer to earn the commission income. No "rebate" checks were ever issued which customers could cash or turn over either to the taxpayer or the cellular phone company. Customers were not entitled to this "rebate" or discount unless they signed up for the cellular service. In reality, the taxpayer discounted the phone's price because the loss on the phone was more than offset by the commission received from the cellular phone company.

The issue is, what is the proper measure of retail sales tax that the taxpayer was required to collect on the purchase the phones.

#### DISCUSSION:

[1] RCW 82.08.050 requires sellers such as the taxpayer to collect the proper amount of retail sales tax from buyers. It also provides that if sellers fail to collect the tax, they are personally liable. The measure upon which retail sales tax is imposed is the selling price under RCW 82.08.020. RCW 82.08.010(1) defines "Selling price" as:

. . . the consideration, whether money, credits, rights, or other property except trade-in property of like kind, expressed in the terms of money paid or delivered by a buyer to a seller without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes other than taxes imposed under this chapter if the seller advertises the price as including the tax or that the seller is paying

the tax, or any other expenses whatsoever paid or accrued and without any deduction on account of losses; but shall not include the amount of cash discount actually taken by a buyer; and shall be subject to modification to the extent modification is provided for in RCW 82.08.080.

We have reviewed many of the taxpayer's advertisements as well as the advertisements of its competitors selling similar phones with cellular service. Nearly all the advertisements show a low selling price on the phones with the condition that the purchaser sign a cellular service agreement. If purchasers do not sign the agreement, they are required to pay a higher price.

We must decide whether or not the selling price includes the price before the reductions from the "rebates." Sales tax was collected on the sales price reduced for the "rebate." The taxpayer only required the customer to pay the reduced price at the time of the phone purchase provided the customer enrolled for cellular service. There is no indication that the charge for cellular service was more than that charged to other cellular customers. Therefore, there is no evidence that the cellular charge was not fair market value.

The commission agreement between the taxpayer and the cellular phone company did not require the taxpayer to sell a phone, only to enroll the customer for service. The cellular phone company had no right to the phone and could in no way be considered to be buying the phone.

The AUDITOR'S DETAIL OF DIFFERENCES AND INSTRUCTIONS TO TAXPAYERS states on page 2 that the commission is passed through to the customer as a rebate by the taxpayer. The instructions conclude that the taxpayer is a conduit for the customer's rebate from the cellular company.

There is no such thing as a rebate check in this situation. The customer never receives a rebate check from anyone. Rather, if the customer enrolls for cellular service, the customer receives a [price reduction] from the taxpayer, not the cellular phone company. This transaction is distinguishable from manufacturer's rebates where the customer receives a check from the manufacturer or other third parties, not the vendor selling the tangible personal property. See Det. No. 89-107, 7 WTD 189 (1989).

The phone manufacturer did not offer the customer a rebate, nor did the cellular phone company. The taxpayer, as a retail vendor merely offered the customer a [price reduction] on the purchase price of the phone for enrolling for the cellular service. In

fact, no rebate was received by the customer from anyone upon which tax could be imposed.

We also note that there is no tax avoidance motive in this case. The cellular phone company collects retail sales tax from the customer for its service. Providing telephone service is a retail sale. See RCW 82.04.050(5) and RCW 82.04.065. Had a non-retail service been marked up in lieu of a reduced retail sale price of tangible personal property, the measure of the retail sale would be scrutinized closer. In this case however, the customer pays retail sales tax either on the cellular service or on the phone. The form of the transaction provides no tax benefit to the customer upon whom the retail sales tax is imposed.

Under the following circumstances, unique to the cellular phone industry, we will accept the taxpayer's designated sales price as the proper measure of retail sales tax:

1. The customer does not receive a rebate check or credit from the manufacturer or the service provider;
2. The service provider pays the commission to the vendor for enrolling customers and does not condition the commission on the sale of phones or other personal property;
3. The charge for the service provided is designated as a retail sale and sales tax is collected on amounts received by the vendor for that service; and
4. There is no evidence provided that the customer charge for the service is greater than fair market value.

Having met all of these requirements, we find that the taxpayer properly collected retail sales tax on the reduced sales price of the cellular phone.

#### DECISION AND DISPOSITION:

The taxpayer's petition is granted. The file will be returned to the Audit Division to delete the retail sales tax assessment due to the increased value of the phones. The service business and occupation tax will be restored on the payments received from the cellular phone company.

DATED this 25th day of February, 1993.