Cite as Det. No. 91-313, 12 WTD 29 (1993).

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

In The Matter of the Petition	)	D E T E R M I N A T I O N
For Correction of Assessment of	)	
	)	No. 91-313
	)	
. . .	)	Registration No. . . .
	)	. . ./Audit No. . . .
	)	

[1] RULE 211: LEASE OF EQUIPMENT WITH OPERATOR -- TRUE LEASE. When an out-of-state taxpayer agrees to provide equipment with a crew to a customer, that agreement will only be considered a true lease when the agreement meets the criteria listed in Rule 211. Where the "lessor" retains control over the repair, maintenance, insurance, and risk of loss and shares responsibility for the safety of the equipment, it has not relinquished sufficient control for the agreement to constitute a true lease. Det. No. 88-352, 7 WTD 001 (1988) cited.

[2] RULE 193B: NEXUS -- LEASED PROPERTY -- TAXABILITY -- CREWS PROVIDED BY LESSOR. When property is leased to a lessee who brings the property into this state, the out-of-state lessor is taxable with regard to the property when it was contemplated by both parties that the property would eventually be used in Washington. In addition, when the property is leased with a crew provided by the lessor, the presence of the crew in Washington provides a sufficient connection with the state for it to impose tax. Accord: Det. No. 87-171A, 5 WTD 283 (1988); Hayssen Manufacturing Company v. Department of Rev., Docket No. 29569 (Board of Tax Appeals, 1985).

[3] RULE 193B: NEXUS -- REPAIRS TO REAL PROPERTY -- CONSTRUCTION ACTIVITIES -- OUT-OF-STATE PROVIDER. When an out-of-state taxpayer agrees to provide equipment and crews to perform repairs to real property in this state, the repairs are inherently local activities and

subject to the taxing jurisdiction of the state of Washington. Chicago Bridge and Iron v. Department of Rev., 98 Wn.2d 814 (1983).

[4] RULE 170, RULE 178: RETAILING B&O TAX -- USE TAX -- REPAIRS OF REAL PROPERTY FOR CONSUMERS. The repair of real property for consumers is an activity taxable as a retail sale. The use of property by the contractor in performing that function is subject to use tax, despite the fact that the repairs are a retail sale and subject to the retail sales tax.

[5] RULE 178: USE TAX -- PROPERTY IN TRANSIT -- TRANSPORTATION FINALLY ENDED -- BUSINESS USE. The provision in RCW 82.12.020 regarding the exemption from taxation of property in which the transportation has not finally ended refers to the taxation of property that is in transit from one location to another and is not stopped and used in this state. Property brought to Washington for use in conducting a business activity is properly subject to the use tax in Washington. Minnesota v. Blasius, 290 U.S. 1 (1933).

NOTE: A PORTION OF THIS DETERMINATION, REGARDING WAC 458-20-175 (Rule 175), IS OVERRULED BY DET. NO. 91-313R, 12 WTD ___ (1993).

PORTIONS OF THIS DETERMINATION WERE NOT PRECEDENTIAL AND HAVE NOT BEEN PUBLISHED.

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: . . .

NATURE OF ACTION:

The taxpayer protests the assessment of retailing business and occupation tax, retail sales tax, and use tax on equipment leased by it and used in Washington.

FACTS AND ISSUES:

Hesselholt, Chief A.L.J. -- The Department of Revenue (Department) issued assessments against taxpayer for the periods January 1, 1982 through August 31, 1989. Later, the Department issued Notices of Balance Due against the taxpayer for the fourth quarter of 1989 and the first quarter of 1990. All have been protested. The taxpayer paid the retailing B&O tax assessed but now requests a refund of that as well.

The taxpayer manufactures maintenance equipment outside Washington and either sells or leases the equipment.

During the audit period, the taxpayer leased certain equipment to companies operating in Washington. The bulk of the leases were with [C]. The taxpayer leased four kinds of equipment to C.

The leases between the taxpayer and C were either for specific periods or for open-ended periods. The lease payments were based on a formula. When the leases were for fixed terms, C was required to use the equipment for a minimum number of days per year. The leases allowed C to use the equipment wherever it needed to do maintenance. C operates in several states.

The leases were negotiated with C at the taxpayer's office. Contract negotiations with C began and were conducted in the home state of C and the taxpayer's home state, neither of which are Washington. The leases allow C to use the equipment throughout its operating system in such places and at such times that C in its sole discretion determines. The leases require the taxpayer to deliver the equipment to a delivery point in C's operating area. The equipment was usually delivered to C in a different region of the country; no delivery ever occurred in Washington. After the equipment was delivered to C, the taxpayer argues that C took absolute control of the equipment as well as sole responsibility for its transportation and supplied a project leader for that purpose. The taxpayer did not know where C would choose to use the equipment.

C brought the equipment into Washington for short periods of time, before and after it used the equipment in other states. Repairs to the equipment are done at service centers in other states. Other than the crews that travel with the equipment to operate it, the taxpayer does not have any salesmen or agents residing in or working in Washington. It does not have a Washington office and does not have any support staff in Washington.

The taxpayer supplies the crews to operate the leased equipment. They were supplied because the equipment is sophisticated and requires crews specifically trained to operate it. The equipment also requires special maintenance procedures that C personnel were not trained to perform. The leased crews operated under the supervision of C project leaders. When maintenance equipment leased by C has been in damaged, C has always accepted responsibility because C's project leaders controlled the equipment.

The assessments imposed retailing B&O tax and retail sales tax on the lease payments received from the companies for the repairs performed in Washington. The assessments also imposed use tax on the equipment brought into Washington.

DISCUSSION:

The taxpayer makes a variety of arguments. First, it argues that Washington has insufficient nexus to tax it. Second, the taxpayer argues that if Washington does have nexus to tax the transactions, the use tax on the equipment is unfairly apportioned and contrary to constitutional requirements. Thirdly, the taxpayer argues that there are a number of factual errors in the assessments, including the value of the equipment on which use tax was assessed. Finally, it argues that C was assessed and paid use tax on the lease payments and that it should not have to pay the tax again.

I. Business Activities

The taxpayer asserts that it is leasing property, with a crew, to the companies. The Audit Division, in making the assessments, decided that taxpayer was repairing real property of the companies and was therefore taxable as a contractor. In order to resolve the taxpayer's contentions, it is necessary to first resolve the nature of its activities.

RCW 82.04.220 imposes a business and occupation tax "for the act or privilege of engaging in business activities." Retailing B&O is assessed on persons "engaging within this state in the business of making sales at retail." RCW 82.04.250. The taxpayer argues that it is leasing property to the companies in this state. The Audit Division asserts that the taxpayer is performing construction activities in Washington. The leasing of tangible personal property constitutes a retail sale. RCW 82.04.040 and RCW 82.04.050. See also WAC 458-20-211. Likewise, the repairing of real property for consumers is a retail activity (construction). RCW 82.04.050 and WAC 458-20-170 (Rule 170).

After July 1, 1987, the amendments to Rule 211 were in effect. These amendments were made as a result of Duncan Crane Service, Inc. v. Department of Rev., 44 Wn. App. 684 (1986). Rule 211 provides as follows:

> (3) A true lease, rental, or bailment of personal property does not arise unless the lessee or bailee, or employees or independent operators hired by the lessee

or bailee actually takes possession of the property and exercises dominion and control over it. Where the owner of the equipment or the owner's employees or agents maintain dominion and control over the personal property and actually operate it, the owner has not generally relinquished sufficient control over the property to give rise to a true lease, rental, or bailment of the property.

(4) RCW 82.04.050 excludes from the definition "retail sale" any purchases for the purpose of resale, "as tangible personal property." Also, under this statutory definition, the term "retail sale" includes the renting or leasing of tangible personal property to consumers. However, equipment which is operated by the owner or an employee of the owner is considered to be resold, rented, or leased only under the following, precise circumstances:
(a) The property consists of construction equipment;
(b) The agreement between the parties is designated as an outright lease or rental, without reservations; and,
(c) The customer acquires the right of possession, dominion, and control of the equipment, even to the exclusion of the lessor.

(5) The third requirement above [c] is a factual question and the burden of proof is upon the owner/operator of the equipment to establish that the degree of control has been relinquished necessary to constitute a lessor-lessee relationship. Weight will be given to such factors as who has physical, operating control of the equipment; who is responsible for its maintenance, fueling, repair, storage, insurance (risk of loss or damage), safety and security of operation, and whether the operator is a loaned servant. If control of these factors is left with the owner/operator, then as a matter of fact, there has not been a relinquishing of control of the equipment to the degree necessary to create a lessor-lessee relationship. This is true, even though the customer exercises some constructive control over such matters as when and where the equipment is used in connection with the construction work being performed, i.e., the contractor controls the job site.

(6) Thus, the terms leasing, rental, or bailment do not include any arrangements pursuant to which the owner of the equipment reserves dominion and control of the equipment and either operates the equipment or property or provides an employee operator, whether or

> not such employee operator works under the general supervision or control of the customer.

The taxpayer argues that the leases with the companies were leases within the definition of Gandy v. State, 57 Wn.2d 690 (1961), because the agreements gave them the right to use and possess the equipment for a specified period and for fixed payments. When Rule 211 was amended after the Duncan Crane decision, the Department defined what constituted a "true" lease or rental using the idea of the right to use and possess the equipment articulated in Grady.

[1] To determine if the taxpayer's leases are true leases under the rule, we must examine the factors listed in the rule. Because the equipment is used to perform repairs on real property, it is considered construction equipment. The agreement between the parties is designated as a lease without reservations. The issue of possession, dominion and control of the equipment is a more difficult one.
The lease agreement between the parties has the following relevant provisions:

> WHEREAS, the [COMPANY] desires to lease certain equipment . . . ("EQUIPMENT") and specially trained personnel from [taxpayer] for use by the COMPANY in carrying out a portion of its current . . . Program; and
>
> WHEREAS, [taxpayer] agrees to lease the EQUIPMENT, including specially trained personnel to the [COMPANY] on the terms and conditions stated. . .
>
> Article I
>
> . . . [taxpayer] further agrees that in performing these services that [taxpayer] shall:
>
> A. Furnish all personnel, including all supervisory personnel, equipment, materials, and supplies necessary to transport the equipment and to perform the service. . .
>
> B. Designate said [taxpayer] personnel to operate and maintain the equipment.
>
> C. Warrant the EQUIPMENT to be in good working order at the time of delivery to the COMPANY, and that it will maintain the EQUIPMENT in good working order and repair and use the EQUIPMENT to [perform the services] at such points the COMPANY may designate . . .

D. See that the EQUIPMENT, when not in operation, shall conform to the requirements of the COMPANY and guard and protect the EQUIPMENT when not in use.

* * *

<u>All personnel so furnished by [taxpayer] in the performance of its . . . service under this agreement shall be deemed to remain employees solely of [taxpayer] and shall be subject to its exclusive supervision, direction, and control</u>, and for all purposes, [taxpayer] shall remain and be deemed to be an independent contractor, it being the intention of the parties that nothing herein contained shall be construed as inconsistent with that status.

The COMPANY agrees to provide . . . the following personnel, services, and supplies incidental to the [services]:

A. Transportation of the EQUIPMENT, including a project leader:

ii) During the daily operations;

iii) While in transit from one jobsite to the next . . .;

* * *

F. Adequate personnel and equipment for fire prevention.

G. Direction and control of the . . . Program, provided always that the COMPANY conform to the instructions and the directions of the operator designated by [taxpayer] to the extent that the instructions and the directions relate only to the mechanical and maintenance of the EQUIPMENT.

All crews and other personnel so furnished by the COMPANY in connection with the performance by [taxpayer] of the . . . services under this agreement shall be deemed to remain employees solely of the COMPANY and shall be subject to its exclusive supervision, direction, and control.

(Emphasis and brackets supplied.)

Under Rule 211, taxpayer has not relinquished sufficient control of the equipment for the agreement to constitute a true lease of equipment with operator. Taxpayer is responsible for maintenance and repair of the equipment. The lessees are responsible for providing fuel and fire protection equipment during the time the equipment is in use. Both parties are responsible for the safety and security of the equipment. Generally, taxpayer bears the risk of loss or damage to the equipment, except when caused by the fault or negligence of the lessee. The taxpayer insures the equipment. The bulk of the factors listed in Rule 211 to determine control of the equipment show that the equipment remains within the control of the taxpayer. Thus, the use of the equipment, though designated a lease, is not considered a lease under Rule 211, and the property is not considered held for resale.

Because one piece of the protested equipment is leased without a crew, its lease is a true lease under the rule.

II. Nexus

The taxpayer argues that Washington has insufficient nexus to tax it on its rental To C of equipment that is used in Washington. It argues that the physical presence of the equipment is insufficient for there to be nexus; in order for Washington to have nexus to tax the transactions, the taxpayer must have knowingly and purposefully approached the economic marketplace in Washington. The taxpayer made all its arguments as to nexus under the lease theory. It did not address the arguments under any other theory.

The taxpayer reasons as follows:

> This issue has been decided by the Department in Final Determination No. 87-171A, 5 WTD 281 (1988). The determination concerned an Oregon based marine equipment company (the "Lessor") that leased pulp barges to a company with a pulp and paper mill in Oregon and a plant in Washington (the "Lessee"). The Lessor constructed the barges in Oregon and possession to the barges passed from the Lessor to the Lessee in Oregon. The Lessee based the barges in Oregon and used them to transport pulp from the Oregon mill to the Washington plant. The Lessor had no control over the use to which the barges were put.
>
> The Department found that the Lessor did not have sufficient nexus with Washington to allow Washington to collect business and occupation tax from the Lessor.

> The Department stated that "in order for the B&O tax and retail sales tax to apply to any gross receipts derived by an out-of-state business, it must be found that the business has, itself, knowingly and purposefully approached the economic marketplace in this state." 5 WTD at 287. The determination focused on the fact that the lease permitted the Lessee to take the property any place it chose. Thus, even though it was likely that the barges would be used to transport pulp from Oregon to Washington the lease did not state that that was the case and did not prohibit the Lessee from using the barges for any other purpose. The Department, therefore, stated that:
>
> > If the leased property delivered to the lessee outside this state does not contemplate or provide for the use of the property in this state by the lessee, then the movement and presence of the leased property here, at the sole discretion of the lessee, cannot attribute any purposeful entry into this state by the lessor for the purpose of doing any business here. Such a situation is totally independent from the transaction. It would place the tax liability of the lessor completely at the whim of its lessee and would force the conclusion that the lessor can approach the marketplace in this state unknowingly and even if they did not want such exposure. 5 WTD at 288.

The taxpayer argues that although it was likely that the equipment and crew would eventually operate in Washington, it was never certain, and it did not itself knowingly approach Washington.

A. Nexus as a lessor.

A lease is not a single "sale" but a contract for a series of transactions or sales. Gandy v. State, 57 Wn.2d 690 (1961). For excise tax purposes, the sales take place in this state when the property is used in this state by the lessee. WAC 458-20-103.

WAC 458-20-193B (Rule 193B) was the administrative rule in effect during the audit period defining the constitutional limits upon this state's ability to impose its excise tax upon sales of goods originating in other states to persons in Washington. The rule provided that the B&O tax is assessed on persons outside this state who rent or lease tangible personal property for use in this state upon the gross proceeds from such rentals, "irrespective of the fact that possession to the property leased may have passed to the lessee outside the state or that the lease agreement may have been consummated outside the state."

ETB 447.04.211, issued in 1972, discusses the application of the B&O and retail sales tax on the proceeds from leases or rentals of tangible personal property put to use by the lessee both inside and outside of this state. That bulletin provides:

> . . . The controlling factor which determines whether Washington State possesses taxing jurisdiction over such lease or rental income is the physical location of the property in this state during the term of the lease. The taxable incident takes place in this state when the property is "used" in this state by the lessee. Conversely, when leased tangible personal property is used by the lessee outside Washington State, this state does not impose its jurisdiction with respect to that use. (See Longview Tugboat Company v. State, 64 Wn.2d 323 (1964), and Stone v. Stapling Machines Co., 71 S. 2d 205 (Miss., 1954).
>
> Thus, persons who lease or rent tangible personal property for use both within and without Washington are taxable upon that portion of gross income derived from its use by the lessee in Washington, providing accurate records are maintained to substantiate the amount of "use" claimed outside this state.

Determination 87-171, 3 WTD 153 (1987) was the underlying determination of the Department in Determination 87-171A, 5 WTD 281 (1988), on which the taxpayer relies. The underlying determination found the barges taxable.

In Det. 87-171A, the earlier determination was reversed. Det. 87-171A stated as follows:

> Washington State has jurisdiction to tax lease receipts under the B&O tax and retail sales tax where the property is leased to a consumer for use in this state during any of the lease period, on an apportioned basis as appropriate, where the lease agreement or the parties to the lease contemplate such use in this state.
>
> This is so, even though the lessee originally takes delivery of the leased property at a point outside this state. If there is no written lease agreement or the agreement is silent with respect to the lessee's place of use of the property, then the circumstances

> surrounding the lease transaction will be weighed to determine the place of use contemplated by the parties. If the lessee is a Washington located business, or billings go to a Washington location or lease payments are made from a Washington location, such circumstances among others, are supportive of this state's taxing jurisdiction. The nexus contact is clear. In such cases the lessor knows and agrees to have its lease property maintained in this state as income producing property. Neither the Commerce Clause nor the Due Process Clause requires more. Conversely, Washington does not assert taxing jurisdiction upon lease receipts where an out-of-state lessor, without other presence or activity in this state delivers the leased, mobile property, at a point outside this state, to an out-of-state lessee and where the subsequent movement of the mobile property into Washington and use of the property here is at the sole discretion of the lessee.

The Determination went on to state that, under the specific facts of that case, taxation of the leases was not supported. It reviewed all of the factors and case law cited in the earlier Determination and stated "[m]ost importantly, the record reflects no activity whatever in this state by the taxpayer respecting the leased barges." 5 WTD at 290.

[2] 5 WTD 281 is distinguishable from the case presented here. In this case, the taxpayer provides crews of its own employees to operate the equipment it leases to the various companies. When the lease is signed, it is within the contemplation of both the Lessor (taxpayer) and the Lessee (companies) that the equipment will be used on any of the lessee's property that requires repairs. The taxpayer is aware of the locations of the property owned by the companies. The crews work for several weeks, traveling with the equipment, and then get time off. The taxpayer flies the employees to their home states for their off-time. The crews spend nights in hotels near the sites at which they are working.

In Hayssen Manufacturing Company v. Department of Rev., Docket No. 29569 (Board of Tax Appeals, 1985), the Board of Tax Appeals found the sale of machinery taxable where virtually the only activity of the taxpayer in Washington was the installation of the equipment. The issue in Hayssen was whether the taxpayer performed significant services in relation to establishing or maintaining sales in Washington to create nexus with the state.

Hayssen's contacts with Washington consisted of nonresident salespersons who occasionally visited customers in the state. Additionally, nonresident service technicians came into

Washington to supervise the installation of machinery sold to Washington customers and to repair that machinery. Furthermore, Hayssen's machine sales were not conditioned upon the customers requesting installation by Hayssen. Sales and supervision of installation were contracted separately. Based on these facts, the taxpayer argued there was insufficient activity in Washington to create nexus.

The Board did not find that installation was a condition of sale. Still, after reviewing the standards of Rule 193B, the Board declared the taxpayer's arguments "spurious" and found its activities significantly associated with its sales into this state. The Board stated in affirming the assessment:

> ..., if the sale of the manufactured machinery was not conditioned upon a service contract, certainly the services and the activity surrounding the supervision and installation were generated as a result of the sale of the manufactured machinery thereby creating significant activity in the state of Washington to establish nexus and further maintain the corporation's position in the marketplace.

The reasoning of Hayssen applies to the present appeal. Although the taxpayer states that it has no employees or salesmen in Washington, other than the crews of the equipment, its crews appear to spend more time in Washington than did the installation workers in Hayssen.

Taxpayer knows that it is possible that its equipment will be used in Washington by the companies. It provides a crew to operate the equipment. That crew stays in Washington for the time involved in performing the repairs. Even though the taxpayer asserts that C has accepted liability when the equipment has been damaged, the taxpayer's activities constitute sufficient activity to subject it generally to Washington's jurisdiction for the actions of its crews or damage caused by its equipment. See RCW 4.12.025. The taxpayer's petition is denied as to this issue under the lease theory.

B. Nexus as a contractor.

Rule 193B provided:

> CONSTRUCTION, REPAIR. Construction or repair of buildings or other structures, public road construction, repair of tangible personal property and similar contracts performed in this state are inherently local business activities subject to tax even though materials involved may have been delivered

> from outside the state or the contracts may have been negotiated outside the state and notwithstanding the fact that the work may be done by foreign vendors who performed preliminary services outside the state with respect thereto.

[3] Taxpayer's activities of repairing the real property of the companies in this state are local activities and taxable as such under the rule. Hayssen, discussed above, applies equally to this argument as to the lease theory above. See also Chicago Bridge and Iron v. Department of Rev., 98 Wn.2d 814 (1983).

The taxpayer next argues that it should not be assessed use tax on the equipment brought into Washington and leased to its customers.
It also specifically asserts that, since one of the protested pieces of equipment is leased without an operator, its rental is a true lease and not subject to use tax. We agree with the taxpayer on the issue of the use tax on this item.

III. Use Tax.

The taxpayer set forth a number of reasons why use tax should not be assessed on the equipment that was leased with crews. For rentals of equipment with operators where the rental transaction is taxable as a retail sale, the Department agrees that the use tax is not due for periods prior to the revision of WAC 458-20-211 (Rule 211), effective July 1, 1987,[1] whether or not the transaction is a true lease under the rule. See Det. 88-352, 7 WTD 001, (1988). The taxpayer's petition is granted for use tax assessed on rented equipment for periods prior to July 1, 1987. Because of this decision, it is unnecessary to discuss the taxpayer's contentions regarding the constitutionality of the unapportioned use tax.

[4] RCW 82.12.020 provides that the use tax is due upon the use of tangible personal property by a consumer when that user has not paid retail sales tax or use tax on that property. The taxpayer has argued that it does not use the property as a consumer because the leasing of property is a retail sale. The Audit Section did not assess the tax under the leasing provision of RCW 82.04.050. Instead, the Audit Section, concluding that the leasing of equipment with operators in this instance did not meet the definition of a true lease under Rule 211, assessed tax under RCW 82.04.050(2). That section defines a retail sale to include:

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[1]Rule 211 was adopted on an emergency basis effective July 1, 1987. The permanent adoption was effective August 11, 1987.

> . . . the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following:
>
> (b) the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, and shall also include the sale of services or charges made for the clearing of land and the moving of earth excepting the mere leveling of land used in commercial farming or agriculture;

RCW 82.12.010 provides, in part, that:

> In the case of articles owned by a user engaged in business outside the state which are brought into the state for no more than ninety days in any period of three hundred sixty-five consecutive days and which are temporarily used for business purposes by the person in this state, the value of the article used shall be an amount representing a reasonable rental for the use of the articles, unless the person has paid tax under this chapter or chapter 82.08 RCW upon the full value of the article used, as defined in the first paragraph of this subsection.

WAC 458-20-178(15) repeats that provision.

The taxpayer is performing its work of repairing real property for the companies, which are the consumers of the work done. However, the taxpayer is also a consumer of the equipment used by its crews in the performance of the repairs. RCW 82.04.190 defines a consumer, in part, as:

> (1) Any person who purchases, acquires, owns, holds, or uses any article of tangible personal property irrespective of the nature of the person's business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers . . . .

The taxpayer argues that the use tax was enacted to tax transactions not subject to the sales tax; that the tax does not apply to sales for resale; that the use tax only applies if the taxpayer uses the property as a consumer; and that the use tax does not apply to property in transit. The taxpayer argues that its use is not that of a consumer but instead is a sale for resale. As discussed above, the "lease" of the equipment with operators does not fit the definition of a true lease under Rule 211. Therefore, it is being used as construction equipment in performing construction work for a consumer and its use is not a sale for resale. Under the statutes cited above, its use by the taxpayer is subject to the use tax. Because the property is only in the state for limited periods of time, the taxpayer is entitled to the tax treatment provided in RCW 82.12.010, allowing it to pay use tax on the reasonable rental value of the equipment for the time it is in Washington.

The taxpayer is correct in its contention that the same transactions are not generally subject to both the use and the sales tax. However, taxpayer is being taxed for <u>its</u> use of the equipment in Washington to perform a contract. Under the statutes, that use is use as a consumer and subject to the tax. The transaction of performing the repairs is a separate retail sale made to the companies.

The taxpayer also argues that the property is still in transit and therefore not taxable:

> Under RCW 82.12.020, the use tax:
>
> > will not apply with respect to the use of any article of tangible personal property purchased, extracted, produced or manufactured outside this state until the transportation of such article has finally ended, or until such article has become commingled with the general mass of property in this state.
>
> The maintenance equipment meets all of the requirements of this provision. The equipment is tangible personal property. It is manufactured by the [taxpayer outside Washington]. The transportation of the equipment does not end in Washington because the equipment moves from Washington to other states after working in Washington for short periods of time. Furthermore, the equipment does not become commingled with the general mass of property in Washington because it moves continuously into and out of Washington.

[5] The taxpayer cites <u>Pope & Talbot, Inc. v. Department of Rev.</u>, 90 Wn.2d 191 (1976), to support its position that the equipment is still in transit. In <u>Pope & Talbot</u>, the taxpayer was an Oregon corporation that purchased an airplane in Oregon.

The plane was hangared in Oregon, but the plane was used to transport executives from Oregon to Washington on eight separate occasions. The court found that the exemption in RCW 82.12.020 applied to the use of the plane in Washington, because "the transportation of an airplane might be found to `finally end' in Washington when it is home-based here, and thereby acquires a tax situs." Pope & Talbot, at 195.

The situation presented in Pope & Talbot is clearly different from the one presented here. The airplane was used simply to transport persons from one location to another. Under the circumstances of that case, Pope & Talbot was not conducting a taxable business activity with the plane. RCW 82.12.010 provides that property temporarily used for business purposes in Washington is subject to tax on the reasonable rental value of the property. If we accept the meaning the taxpayer ascribes to the section of RCW 82.12.020, the provision in RCW 82.12.010 has no meaning.

The United States Supreme Court, In Minnesota v. Blasius, 290 U.S. 1, 10 (1933), stated that

> Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power.

We believe that RCW 82.12.020 must be interpreted in light of RCW 82.12.010 and Minnesota. Thus, we find that the provision in RCW 82.12.020 refers to the taxation of property that is in transit from one location to another and is not stopped and used in this state. The taxpayer's petition is denied as to the use tax on the equipment operated by the taxpayer's crew. Use tax is due on the reasonable rental value of the equipment for the time that it is used in Washington.

The taxpayer also objected to the imposition of retail sales tax on the payments received from C, arguing that since C had already been assessed and had paid the use tax on the payments, it should not be required to again pay the retail sales tax. With this we agree. Under WAC 458-20-175 (Rule 175), the Department allows a common carrier to directly pay sales or use tax when making purchases from a vendor. Where the taxpayer can show that C is registered in Washington and can provide proof of payment for the time period at issue, the retail sales tax will be deleted from the assessment.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part, as follows:

1. Nexus. Taxpayer's petition is denied. Taxpayer is subject to the taxing jurisdiction of the state of Washington.

2. Use tax. Taxpayer's petition is granted in part and denied in part. Use tax assessed prior to July 1, 1987, will be deleted from the assessment. Use tax after July 1, 1987, on all equipment, except the one piece of protested equipment which was leased without a crew, is sustained. The measure of the tax, for the equipment here less than 90 days, is the reasonable rental value of the equipment.

3. Retail sales tax. Taxpayer's petition is granted subject to the provisions listed above.

* * *

DATED this 15th day of November 1991.