Cite as Det. No. 92-186, 12 WTD 221 (1993).

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

In the Matter of the Petition For Correction of Ruling of	)	D E T E R M I N A T I O N
	)	No. 92-186
. . .	)	Registration No. . . .

[1] RULE 211: RETAIL SALES TAX -- LEASE -- SCAFFOLDING -- CUSTODY AND CONTROL. Where a company charged a single lump sum fee for assembling and dismantling scaffolding at the job site and rental during the term of the lease, the entire charge was found to be a retail sale where the owner conveyed sole possession, custody and control of the scaffolding during the term of the lease to the contractor.

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 TELEPHONE CONFERENCES: . . .

NATURE OF ACTION:

A taxpayer protests audit instructions advising that charges for the installation, rental and dismantling of scaffolding are retail sales.

FACTS:

Okimoto, A.L.J. -- . . . (taxpayer) books and records were examined by a Department of Revenue (Department) auditor. As a result of the examination, a subsequent tax assessment was issued and has been paid in full by the taxpayer. The taxpayer does not dispute the additional taxes assessed, but only certain future reporting instructions given in the audit report.

The taxpayer explained during the teleconference that it is in the business of renting scaffolding. In smaller contracts, the contractor will pick up the scaffolding and assemble and install it at the job site itself. The taxpayer has considered these to be retail sales and is charging retail sales tax on these rentals.

In other larger jobs, because of the specialized knowledge required to assemble the scaffolding, the contractor will require the taxpayer to erect and dismantle the scaffolding at the job site. On these jobs, the taxpayer's bid for the job will include a specified length of time for using the scaffolding (normally 4 weeks), delivery and erection, and the subsequent dismantling and retrieval of the scaffolding by the taxpayer. If the contractor's specified use of the scaffolding exceeds the expected duration, the taxpayer will charge a weekly rental charge upon which it collects and remits retail sales tax. Normally, once the taxpayer erects the scaffolding, it stays at that location and if the contractor wants it moved to another place, the contractor separately negotiates for that movement and installation. However, the taxpayer acknowledges that under the terms of the rental agreement, the contractor is entitled to move and reassemble the scaffolding if it so desires. The taxpayer considered rentals where it installed and dismantled the scaffolding to be of a service nature and reported income received under the Service and Other Activities tax classification.

The auditor disagreed with this classification and instructed the taxpayer to report these transactions as retail sales. The auditor relied primarily on the fact that once the scaffolding has been erected and the taxpayer leaves the job site, the contract conveys sole "custody and control" of the scaffolding to the contractor.

TAXPAYER'S EXCEPTIONS:

The taxpayer does not dispute that sole possession, custody, and control of the scaffolding during the term of the lease is in the contractor, but argues that this provision is included in the contract only to avoid liability in case of accident. The taxpayer explains in its petition:

> ...The reason we "force" custody on the contractor once we leave the site is liability. We can't be held liable for any alterations or movement of the scaffold that the customer might effect in our absence, and of course, we can't run around checking every job site daily to be sure this type of activity does not occur.

The taxpayer further cites the Washington Department of Revenue Contractor's Tax Manual in support of its position.

> Your current Contractor's Manual states that, "Some rental agreements may require the owner of scaffolding to furnish, install, and dismantle scaffolding. . .Contracts falling in these categories constitute more than the mere rental of equipment. . .These contracts are reported by the owner of the scaffolding under the service classification of the B&O tax."

The taxpayer further contends that this method of reporting has been sanctioned for many years by the Department of Revenue, and that all of its competitors report in this exact same manner. The taxpayer states that to require it to charge retail sales tax on installed scaffolding while not requiring its competitors to do so will put it at a severe competitive disadvantage.

ISSUE:

Where a company charges a single lump sum fee for assembling scaffolding at the job site, rental for use during the specified term of the lease, and dismantling when the job is done, are such charges subject to retail sales tax?

DISCUSSION:

[1] RCW 82.04.050(4) includes within the definition of a retail sale:

> ... the renting or leasing of tangible personal property to consumers.

WAC 458-20-211 (Rule 211) is the lawfully promulgated regulation implementing the above statute and states in part:

> (1) DEFINITIONS. The terms "leasing" and "renting" are used interchangeably and refer generally to the act of granting to another the right of possession to and use of tangible personal property for a consideration....
>
> (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.
>
> (7) BUSINESS AND OCCUPATION TAX. Outright rentals of bare (unoperated) equipment or other tangible personal property as well as "true" leases or rentals of operated equipment or property are generally subject to the retailing classification of the business and occupation tax. ...
>
> (9) RETAIL SALES TAX. Persons who rent or lease tangible personal property to users or consumers are required to collect from their lessees the retail sales tax measured by gross income from rentals as of the time the rental payments fall due.

(Emphasis supplied.)

Under the terms of the submitted contract the taxpayer clearly grants to the contractor "the right of possession to and use of tangible personal property for a consideration." We further note that the contractor also actually takes possession of the scaffolding and thereafter exercises sole dominion and control over it during the term of the lease. Accordingly, we conclude that this conveyance falls within the definition of a retail sale under both RCW 82.04.050 and Rule 211. Although the taxpayer attempts to rely on the Contractor's Tax Manual we believe that situation to be distinguishable and overruled by the revision of Rule 211. The full text to the quotation cited by the taxpayer reads as follows:

> Some rental agreements may require the owner of scaffolding to furnish, install, and dismantle scaffolding, or to perform additional service during the same job. The owner may be required to move, adjust, and or inspect the scaffolding while being used by the construction contractor who has rented the scaffolding. Contracts falling in these categories constitute more than the mere rental of equipment and the owner continues to exercise a degree of control over the equipment while it is in the hands of the contractor. These contracts are reported by the owner of the scaffolding under the service classification of the B&O tax.

(Emphasis supplied.)

The principle of the above excerpt from the Contractor's Tax Manual was that, because the owner of the scaffolding equipment did not relinquish total custody and control of the scaffolding

while it was in the hands of the contractor, it was not a true lease of equipment. This principle was severely eroded if not overruled by the Washington Court of Appeals in Duncan Crane v. Department of Rev., 44 Wn.App. 684 (1986). Duncan Crane involved the issue of whether a crane company that leased its crane to a construction company "with operator" was renting that equipment "for resale." Notwithstanding a clear provision in former Rule 211 stating that equipment leases "with operator" were not true rentals of equipment, the court held in favor of Duncan Crane. The court struck down the operative language in Rule 211 as being "ultra vires", or beyond the Department's legal rulemaking authority. The Department subsequently amended Rule 211 in 1987 to reflect the holding of the court in Duncan Crane. The field auditor based his ruling for the taxpayer's future reporting instructions upon this revised language in Rule 211, and we agree. Scaffolding rental agreements that convey total custody and control to the lessee during the term of the lease constitute "true leases" of equipment and are fully subject to Retailing B&O and retail sales tax.

Nor do we believe that the installation or dismantling of the scaffolding changes the tax classification of the subsequent lease of tangible personal property. RCW 82.04.050 includes within the definition of a retail sale:

> (2) The term "sale at retail" or "retail sale" shall include the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following: (a) The installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers ...

(Emphasis supplied.)

The term "to install" has not been defined in the statute and therefore it must be given its usual and ordinary meaning. Marino Property v. Port of Seattle, 88 Wn.2d 822 (1977). Webster's New Universal Unabridged Dictionary, (2d. ed. 1983) defines the term "to install" to mean:

> 1. to place (a person) in an office, rank, etc., with formality or ceremony.
> 2. to establish in a place or condition; to settle; as, we installed ourselves in the balcony.
> 3. to fix in position for use; as, we installed new light fixtures.

(Emphasis supplied.)

We believe that by assembling and/or erecting the scaffolding in place on the construction site, the taxpayer is essentially fixing that scaffolding in a position for use. It therefore must be considered "installing" tangible personal property of or for consumers and included within the definition of a retail sale.

DECISION AND DISPOSITION:

Accordingly, we rule that a contract for the rental of scaffolding which conveys total custody and control of the scaffolding equipment to the lessee during the term of the lease is a true lease and should be reported under the Retailing and retail sales tax classifications, notwithstanding that the owner may be required to install and remove the equipment. This ruling shall be effective as of August 1, 1992.

This legal opinion may be relied upon for reporting purposes and as support of the reporting method in the event of an audit. This ruling is issued pursuant to WAC 458-20-100(9) and is based upon only the facts that were disclosed by the taxpayer. In this regard, the department has no obligation to ascertain whether the taxpayer has revealed all of the relevant facts or whether the facts disclosed are actually true. This legal opinion shall bind this taxpayer and the department to these facts. However, it shall not be binding if there are relevant facts which are in existence but have not been disclosed at the time this opinion was issued; if, subsequently, the disclosed facts are ultimately determined to be false; or if the facts as disclosed subsequently change and no new opinion has been issued which takes into consideration those changes. This opinion may be rescinded or revoked in the future; however, any such rescission or revocation shall not affect prior liability and shall have a prospective application only.

DATED this 15th day of July of 1992.