

Cite as Det. No. 93-100, 12 WTD 615 (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. 93-100
)	
. . .)	Registration No. . . .
)	. . ./Audit No. . . .
)	

[1] RULE 211 AND RULE 178: USE TAX -- BAILMENT -- WHEN TAX LIABILITY ARISES -- TAX PAID BY PREVIOUS BAILEE. The tax liability of a bailee first arises when the person/bailee himself first uses the property even though an other person or previous bailee has used the property. However, if the property has been used by a previous bailee who has paid use tax upon the full original value of the article used, the present user/bailee is exempt from use tax.

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:

Petition protesting the assessment of use tax against a bailee of equipment owned by the U.S. Government.

FACTS AND ISSUES:

Krebs, A.L.J. -- . . . (taxpayer) is engaged in the business of maintaining and repairing helicopters owned by the United States Air Force (Government) [in Washington].

The Department of Revenue (Department) examined the taxpayer's business records for the period from July 1, 1989 through September 30, 1991. As a result of this audit, the Department issued the above captioned tax assessment [in March 1992]

asserting excise tax liability and interest due . . . which remains due.

The taxpayer's protest involves Schedule III of the audit report where use tax liability was asserted on the taxpayer's use as a bailee, at fair market rental value, of tangible personal property (property) and equipment owned by the government. The taxpayer had a contract with the U.S. Government which provided for it to have custodial authority and use of Government owned property in maintaining and repairing helicopters. The Government gave the taxpayer a list of the property/inventory bailed to the taxpayer and the value thereof. If the property was lost or damaged beyond normal wear and tear, then the taxpayer was liable to replace same.

The taxpayer asserts that it is not the contractor who purchased the property for the Government and does not claim any ownership of the subject property. The taxpayer further asserts:

- (1) According to WAC 458-20-17001 (6), the contractor who initially purchases the subject property and equipment is liable for the retail sales tax.
- (2) WAC 458-20-17001 (7) and (9) state that the use tax applies only if retail sales tax has not been paid and once paid no further use tax is due upon such property by any other contractor.

Per WAC 458-20-17001, the taxpayer contends that the retail sales tax and/or use tax has been previously paid to the state of Washington and that it, under contract to the federal government, is not liable for same for this previously used equipment.

The taxpayer further asserts that under WAC 458-20-178 (3) use tax arises at the time the property is first put to use in the state of Washington, and WAC 459-20-178 (7)(d) grants an exemption when the tax has been paid by a previous bailee. The taxpayer contends that because it is not the first user or the first bailee of the equipment, any use tax due would have been paid by the previous bailees.

The taxpayer cites WAC 458-20-211 (3) as support for its assertion that "there is no bailment if the owner has not generally relinquished sufficient control over the property to give rise to a bailment of the property." The taxpayer points also to WAC 458-20-211 (5) as holding that "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." Thus, the taxpayer contends that a bailment in fact does not exist.

The issue is whether the taxpayer as bailee is liable for use tax if sales tax and/or use tax has been previously paid to the state of Washington by the original purchaser of the equipment or by prior bailees.

DISCUSSION:

The taxpayer's reliance on WAC 458-20-17001 (Rule 17001) is misplaced. Rule 17001 addresses special B&O tax applications and special sales/use tax applications pertaining to "prime and subcontractors who perform certain construction, installation, and improvements to real property of or for the United States" and other governmental entities. The taxpayer's business activity did not involve real property; rather, it involved repair and maintenance of personal property, specifically, helicopters. Thus, the taxpayer's reference to Rule 17001 and its applicable tax consequences are irrelevant to the taxpayer's situation.

With respect to the Government's equipment provided to the taxpayer for use in the taxpayer's business activity of maintaining and repairing helicopters owned by and for the U. S. Government, the relevant regulation is WAC 458-20-211 (Rule 211) which in pertinent part provides:

(1) DEFINITIONS.

...

(2) The term "bailment" refers to the act of granting to another the temporary right of possession to and use of tangible personal property for a stated purpose without consideration to the grantor.

(3) A true lease, rental, or bailment of personal property does not arise unless the lessee or bailee, or employees or independent contractor 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.

...

(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 of the customer.

...

(13) USE TAX.

...

(15) The value of tangible personal property held or used under bailment is subject to [use] tax if the property was purchased or acquired under conditions whereby the retail sales tax was not paid by the bailor [Government]. Tax liability is that of the bailor, or of the bailee [taxpayer] if the bailor has not paid the tax...No further use tax is due upon property acquired by bailment after the tax has been paid by the bailee or any previous bailee upon the full original value of the article.

(Bracketed words and underlining added.)

In this case, the taxpayer was granted the "temporary right of possession to and use" of Government owned equipment "for a stated purpose" of repair and maintenance of helicopters "without consideration to the grantor"/Government. Accordingly, a bailment by definition occurred. Rule 211 (2). Furthermore, a true bailment occurred because the owner/Government or its employees/agents did not actually operate the equipment. Thus, the owner/Government generally relinquished sufficient control. Rule 211 (3).

The taxpayer's reference to Rule 211 (5) is inappropriate and irrelevant because it discusses the burden of proof as to "degree of control" in a "lessor-lessee relationship" which is not the case here where a bailor-bailee relationship exists.

WAC 458-20-178 (3) and (7)(d), cited by the taxpayer, in pertinent part provide:

(3) When tax liability arises. Tax liability imposed under the use tax arises at the time the property...acquired by bailment,...by the person using the same is first put to use in this state...Tax liability arises as to that use only which first occurs within the state and no additional liability with respect to any subsequent use of the same article by the same person.

(7) Exemptions.

(d) The use of any article of tangible personal property ...acquired...by bailment...if the use thereof by the present user or its bailor...has already been subjected to...use tax and such tax has been paid by the present user or by its bailor...; or in respect to the use of property acquired by bailment when tax has been paid by the bailee or any previous bailee,...

(Underlining added.)

[1] Thus, the tax liability of a bailee first arises when the person himself uses the property, even though another person including a previous bailee has used the property. WAC 458-20-178 (3). However, if the property has been used by a previous bailee who has paid use tax "upon the full original value of the article," the present user/bailee is exempt from use tax. WAC 458-20-178 (7)(d) and Rule 211 (15).

In this case, while the taxpayer has alleged that the sales tax and/or use tax could have been paid by the original purchaser of the equipment or by a previous bailee, the taxpayer did not submit documentation to the auditor or in connection with its appeal to show that such occurred as to the entire value or any portion of the value of the equipment. The law places the burden upon the taxpayer to support its claim for exemption with credible documentation. If the taxpayer has such documentation, it should submit same to the auditor for adjustment of the tax assessment prior to the new due date of the tax assessment. Alternatively, after the tax assessment has been paid, the taxpayer may submit the documentation to the auditor and seek a refund.

For the facts, reasons and applicable law stated, we conclude that the use tax was properly assessed upon the taxpayer's use of the property under bailment.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

Failure to make payment of the tax assessment by the due date will incur a 10% delinquent penalty plus additional interest. RCW 82.32.090 (2).

DATED this 26th day of March 1993.