

Cite as Det. No. 92-141, 12 WTD 369 (1992).

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. 92-141
)	
. . . )	Registration No. . . .
)	. . ./Audit No. . . .
)	

[1] RULE 178 -- USE TAX -- CATALOGS -- WASHINGTON CUSTOMERS -- OUT-OF-STATE PRINTERS. Taxpayer is not liable for use tax on catalogs which its printer sends from out-of-state directly to customers in Washington. There is no use by the taxpayer in Washington. Sears v. Dept. of Revenue, 97 Wn.2d 260, 643 P.2d 884 (1982).

[2] RULE 140 -- SALES TAX -- USE TAX -- CATALOGS -- PHOTOGRAPHERS. The production of negatives and transparencies by a photographer for use in a retailer's catalog is a retail sale. Sales or use tax applies.

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:

Protest of use tax assessed on catalogs distributed in Washington.

FACTS AND ISSUES:

Dressel, A.L.J. -- [Taxpayer] sells electronic equipment, watches, jewelry, personal care products, small kitchen appliances, and other items through catalogs. Its books and records were examined by the Department of Revenue (Department)

for the period January 1, 1985 through December 31, 1988. As a result a tax assessment, identified by the above-captioned numbers, was issued for \$ . . . . The taxpayer appeals portions of the assessment.

The taxpayer has catalogs printed for it. The actual printing of these catalogs is preceded by a number of preliminary steps. Photographs are taken of the items displayed in the catalogs. Negatives and transparencies are produced by the photographer which are sent to the taxpayer. The taxpayer, in turn, takes the negatives and transparencies to another party who performs a process known as color separation. The taxpayer then sends the product of this process to out-of-state printers. Those printers produce the catalogs and mail them directly to taxpayer customers located in and out of Washington.

The Department's auditor assessed use tax on those catalogs which were distributed to Washington customers. She also assessed use tax on some of the steps preliminary to printing, such as photography, which took place inside this state. She takes the position that the taxpayer is a consumer and, thus, a user of the catalogs in this state because it caused them to be distributed in this state.

The taxpayer presents a twofold argument. First, it maintains that the assertion of use tax on catalogs shipped directly to customers from out-of-state is contrary to the D.H. Holmes case<sup>1</sup> decided several years ago by the U.S. Supreme Court. Secondly, with regard to its photographs, it suggests that it is purchasing the right to publish same as opposed to the photographs per se. The purchase of the right to publish photographs is not sales taxable as per WAC 458-20-140 (Rule 140).

There are two issues here. 1) Is a Washington taxpayer subject to use tax on catalogs sent directly to Washington customers by an out-of-state printer? 2) Is the same Washington taxpayer subject to use tax on negatives and transparencies purchased from Washington photographers which negatives and transparencies are used in the production of the catalogs?

#### DISCUSSION:

[1] In Determination 88-144, 5 WTD 137 (1988), we addressed the issue of catalogs sent directly to in-state customers from out-of-state printers. We said, in part, at page 140:

---

<sup>1</sup> D.H. Holmes Co. Ltd. v. McNamara, 108 S.Ct. 1619 (1988).

The auditor assessed use tax on promotional materials such as catalogs, price sheets, and displays which were sent into Washington from out of state. The taxpayer shipped the majority of items directly to customers at no charge. A small amount was given to the taxpayer's representatives in Washington who then personally delivered the items to customers.

The taxpayer agrees that use tax was properly assessed on those materials which its representatives had possession of in this state. With respect to the materials sent directly from out of state to its customers the taxpayer contends that it is not liable for use tax because it has not used those materials in Washington.

[3] We agree with the taxpayer. The taxpayer's position is consistent with the current posture of the Department on this issue. See Sears & Roebuck v. Dept. of Revenue, 97 Wn.2d 260, 643 P.2d 884 (1982). In Sears the court does not really discuss this question other than to state that the Department did not appeal from a lower court ruling against it. The Department may in the future wish to pursue its prior position. Any such change in position by the Department would only have prospective effect.

The taxpayer stated that over 90 percent of the materials upon which use tax was assessed were sent directly to customers in Washington. If the Audit Section finds this to be consistent with the records and documents it examined in connection with this issue it will reduce the amount of use tax liability by 90 percent.

We reach the same conclusion.<sup>2</sup> Use tax will not be imposed on catalogs sent directly from out-of-state printers to Washington

---

<sup>2</sup> This result is consistent with WAC 458-20-178 (5), which states, in part:

Also liable for [use] tax is any person who distributes or displays or causes to be distributed or displayed any article of tangible personal property, the primary purpose of which is to promote the sale of products and services except newspapers and except printed materials over which the person has taken no direct dominion and control. (See RCW 82.12.010(5).)

customers. The Audit Division will amend the assessment accordingly. As in the other case, though, use tax is sustained on any catalogs sent directly to the taxpayer for distribution.

As to the first issue, use tax on catalogs sent directly to Washington customers, the taxpayer's petition is granted.

[2] As to the second issue, use tax on photographer products used in the production of the printed catalogs, we do not agree with the taxpayer that it is merely purchasing the right to publish photographs. From the document presented as evidence, it is true that the taxpayer is given permission to reproduce the photos taken. It is also clear from that document, though, that the photographer is paid primarily to take the many photographs that will be used in the taxpayer's catalogs. The mention of reproduction rights appears almost as an afterthought on the last page of the document. The document lists prices for "Box Shots", "Outline Shots", "Special Effects Shots", "Still Life Cover Shot", "Complex Cover Shot", and "Misc. Expenses." Plainly, the arrangement is for much more than reproduction rights.

In fact, the items produced by the photographers and utilized by the taxpayer for the printing of its catalogs, are items of tangible personal property. The negatives and transparencies are delivered to the taxpayer in Washington. Inasmuch as they are not resold to anyone and do not become a component part of the finished catalog, this is a retail sale, by a Washington photographer. RCW 82.04.050. The taxpayer, as the buyer, owes sales tax on these transactions. RCW 82.08.050.

Moreover, we observe that Rule 140 states, in part, "Photographers who make negatives on special order and sell photographs to customers (other than dealers for resale) must collect [from the buyer] the retail sales tax upon such sales". (Bracketed inclusion ours.)

On the second issue, use tax on photographer charges, the taxpayer's petition is denied.

#### DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part. The Audit Section will issue an amended assessment, with a new due date, consistent with this Determination.

---

(Bracketed inclusion and underlining ours.)

As to the catalogs shipped directly to Washington customers from the out-of-state printer, the taxpayer has taken no direct dominion and control.

DATED this 29th day of May, 1992.