Cite as Det. No. 93-144, 13 WTD 291 (1994).

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

In the Matter of the Petition For Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 93-144
. . .	)	Registration No. . . .
	)	Use Tax/MVET Assessments

1] RULE 102, RULE 178; RCW 82.04.050: PURCHASE FOR RESALE -- INTERVENING USE. Use tax is owed on the purchase of two new cars ostensibly held for resale, where no sales tax was paid at the time of purchase, and where the purchaser made substantial intervening use of the cars by driving the cars.

[2] RCW 82.44.020: MOTOR VEHICLE EXCISE TAX -- USE WITHIN THIS STATE. Motor vehicle excise tax is due for exercising the privilege of operating motor vehicles within the state of Washington. A taxpayer may not rely on the exemption from tax where the vehicles are operated with dealer license plates where the taxpayer has improperly used the dealer license plates.

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.

. . .

NATURE OF ACTION:

A sole proprietor, formerly in the used auto sales business, appeals the assessment of use tax and motor vehicle excise tax on two cars purchased and used by him and his wife.

FACTS AND ISSUES:

Gray, A.L.J. -- The taxpayer is a sole proprietor who formerly was in the business of selling used cars from a location in Yakima, Washington, using the name [Sales]. [Sales] was a partnership licensed to sell used cars, and the partners were the

taxpayer and his brother. This appeal arose after the Department of Licensing (DOL) conducted an investigation of the taxpayer and the two 1989 Honda Civics (at issue here) for reasons of its own. DOL concluded, and the taxpayer agreed, that his DOL dealer license could not be renewed in Yakima because he did not meet the "established place of business" requirements. Later, a different DOL investigator found that the taxpayer's new place of business, located [in Olympia, Washington], only received mail at that address and had no office space or inventory. The report made other findings, some of which are stated below. DOL sent a copy of its investigative reports to the Department of Revenue (Department) because payment of state taxes were also an issue.

After receipt of the DOL investigative report, the Department of Revenue (Department) made its own investigation of the tax issues and subsequently issued motor vehicle excise tax (MVET) assessments and a use tax assessment to the taxpayer. The motor vehicle tax assessments totalled $ . . . and the use tax assessment totalled
$ . . . .

[In July 1989], [the taxpayer and his wife], purchased two 1989 Honda Civics . . . in Olympia, Washington. The purchase orders for each car showed [the taxpayer and his wife] as the purchasers. The warranty information documents showed the purchasers as [the taxpayer and his wife]. The dealer provided certificates of origin for each car; photocopies of what is apparently the reverse side show the purchaser as [Sales, Yakima, WA]. The vehicle Certificates of Title showed the registered owners as [the taxpayer and his wife], d/b/a [Sales, Tumwater, WA] (his home address at the time). In Declarations of Use Tax, dated [June 1990], and signed by [the taxpayer and his wife], the [taxpayers] said no sales or use tax was due because the cars were "purchased for resale only under dealer number . . . ;" no taxes were paid. They presented a motor vehicle dealer license # . . . along with their Department registration number . . . to obtain the tax exemption.

The Department of Licensing issued dealer license # . . . solely to [Sales], in Yakima, Washington. This dealership was licensed to sell only used vehicles. That partnership could not sell new cars because it did not have a current service agreement with the manufacturer, as is required by chapter 46.70 RCW. The taxpayer said he bought the cars using the Yakima address because it was a "dealer to dealer" transaction and he planned to sell the cars as used cars.

[The taxpayer] applied for parking permits from the Department of General Administration for both Hondas. Both Hondas were later seen and photographed by a Department of Licensing investigator parked in the east campus underground garage. Honda Civic . . .

, with dealer plate . . . attached, had over 183,000 miles on the odometer when it was observed parked in the garage [in July, 1992]; at the time of purchase [July, 1989], it had 94 miles on the odometer. Honda Civic . . . , with dealer plate . . . attached, had over 88,000 miles on the odometer when it was observed parked in the garage [in July 1992]; at the time of purchase [July 1989), it had 75 miles on the odometer.
[The taxpayer] said he later changed his mind about simply reselling the Hondas and hoped to sell them at wholesale. He said that he and his wife moved to Olympia because he wanted to change his career. He said he believed he did everything that was required of him by law and that at most, the tax should be assessed on the value of the cars at the time he transferred title to himself and his wife shortly after the use tax assessments were issued [in September 1992]. The Department did not assess an evasion penalty.

DISCUSSION:

[1] We do not believe that the taxpayer purchased either car for resale; however, even if he did, the taxpayer made substantial intervening use of both cars. RCW 82.04.050 defines "retail sale" to mean, in part:

> . . . every sale of tangible personal property . . . to all persons irrespective of the nature of their business . . . other than a sale to a person who (a) purchases for the purpose of resale as tangible personal property <u>in the regular course of business without intervening use</u> by such person, ...

The use tax is imposed by RCW 82.12.020 "for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail." RCW 82.12.010(2) defines "use":

> "Use," "used," "using," or "put to use" shall have their ordinary meaning, and shall mean the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within this state; . . . .

RCW 82.04.190 defines "consumer" to mean:

> Any person who purchases, acquires, owns, holds, or uses any article of tangible personal property irrespective of the nature of the person's business . . . other than for the purpose (a) of resale as tangible personal property in the regular course of business . . . .

WAC 458-20-178(3) explains in more detail how use tax liability arises:

> Tax liability imposed under the use tax arises at the time the property purchased, received as a gift, acquired by bailment, or extracted or produced or manufactured by the person using the same is first put to use in this state. The terms "use," "used," "using," or "put to use" include any act by which a person takes or assumes dominion or control over the article and shall include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within the state. Tax liability arises as to that use only which first occurs within the state and no additional liability arises with respect to any subsequent use of the same article by the same person.

The taxpayer and his wife were consumers under the statute. There is no evidence that they treated either car as inventory for resale, or made any attempt to sell either car, and there is evidence that they used both cars as would any other person who buys a car in a retail transaction. The taxpayer and his wife exercised exclusive dominion and control over the two Hondas as consumers. They were identified on the sale documents as the purchasers, they acknowledge they were the purchasers and they made actual and substantial use of the cars.

A car dealer who buys cars for resale does not put 183,000 and 88,000 miles on those cars. It is also difficult to imagine why a used car dealer would buy new cars from a new car dealer and turn around and sell them as used cars at used car prices without losing substantial amounts of money. Even if the dealer tried to sell the car at his purchase price, it is hard to imagine why anyone would buy what amounts to a new car from a used car dealer when the used car dealer would be unable to provide the new car warranty. Additionally, there is no evidence that the taxpayer was engaged in selling cars at all at the time of purchase. The taxpayer was not actively selling cars from the Yakima location and did not have any cars for sale at the location identified in the Olympia area . . . (the taxpayer only received mail at that address). It is also significant that the taxpayer acquired the two cars in the community to which he and his wife were relocating from Yakima and where he was beginning a new job in state government as part of his plans for a career change.

[2] The MVET is imposed on the privilege of using within this state any motor vehicle except those operated under dealer's licenses (and other nonapplicable exemptions). RCW 82.44.020. RCW 46.70.090(3) authorizes the use of dealer plates under certain conditions:

(3) Motor vehicle dealer license plates may be used:
(a) To demonstrate motor vehicles held for sale when operated by an individual holding a valid operator's license, if a dated demonstration permit, valid for no more than seventy-two hours, is carried in the vehicle at all times it is operated by any such individual.
(b) On motor vehicles owned, held for sale, and which are in fact available for sale by the firm when operated by an officer of the corporation, partnership, or proprietorship or by their spouses, or by a bona fide full-time employee of the firm, if a card so identifying any such individual is carried in the vehicle at all times it is operated by such individual. Any such vehicle so operated may be used to transport the dealer's own tools, parts, and equipment of a total weight not to exceed five hundred pounds.
(c) On motor vehicles being tested for repair.
(d) On motor vehicles being moved to or from a motor vehicle dealer's place of business for sale.
(e) On motor vehicles being moved to or from motor vehicle service and repair facilities before sale.
(f) On motor vehicles being moved to or from motor vehicle exhibitions within the state of Washington, if any such exhibition does not exceed a period of twenty days.

WAC 308-66-160 is DOL's administrative rule pertaining to dealer's license plates. That rule prohibits the use of dealer's license plates on any vehicle belonging to a member of the dealer's family
and on any vehicle owned by the dealer if that vehicle is used exclusively by members of the dealer's family.

As we read the licensing statute and rule, the taxpayer improperly used the dealer license plates. Neither the investigative reports nor the taxpayer disclosed any facts that would bring into play subsections (a) and (c-f) of RCW 46.70.090(3). Subsection (b) contemplates a sale by a licensed dealer in compliance with other DOL requirements, and the first DOL investigator concluded (and the taxpayer himself admitted) that he had not been in compliance with DOL's license requirements at the time of purchase of the cars. The evidence suggests that at the time of purchase, the taxpayer had abandoned his car sale business. There is no evidence the taxpayer or his wife complied with the other requirements of subsection (b). The taxpayer plainly violated the prohibitions in WAC 308-66-160 in placing the dealer plates on the two cars owned by himself and his wife.

We conclude that the MVET is due because the taxpayers exercised the privilege of operating the two Hondas in this state. There was improper use of the dealer license plates, which negates taxpayer reliance on the exemption from tax in RCW 82.44.020(1). We also conclude that the taxpayer acquired the two Hondas in a retail sale and that use tax is due because no retail sales tax was paid at the time of the sale.

DECISION AND DISPOSITION:

The taxpayer's petition is denied. No refunds shall be granted. The file will be remanded to the Compliance Division for further action, if necessary.

DATED this 25th day of May, 1993.