BEFORE THE 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. 97-165
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

RCW 82.04.050 and ETB 542: RESALE OF A RETAIL SERVICE -- RETAIL SALE TAX -- TOW CHARGES. Retail services are not capable of being purchased for resale. Charges for retail services are "retail sales", without regard to whether they are performed for "consumers". The purchaser of automobile towing is responsible for paying retail sales tax on the charge.

NATURE OF ACTION:

Taxpayer protests the tax arising from: (1) the disallowance of retail sales tax exemptions taken on the sale of automobiles to nonresidents and to a Native American; (2) the reclassification from wholesale to retail of payments received for automobile towing; and (3) use tax assessed on purchases of personalized calendars given to new automobile buyers.[1]

FACTS:

Lewis, A.L.J. -- Taxpayer operates a new and used car dealership. Its books and records were audited by the Department of Revenue (Department) for the period January 1, 1991 through June 30, 1994. In May 1995, the Department issued an assessment. In July 1995, Taxpayer filed a petition protesting the tax arising from: (1) the disallowance of retail sales tax exemptions taken on the sale of automobiles to nonresidents and a Native American; (2) the reclassification from wholesale to retail of payments received for automobile towing; and (3) use tax assessed on purchases of personalized calendars given to new automobile buyers.

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

The Department disallowed the retail sales tax exemption taken on the following eight sales of automobiles to nonresidents:

(1) Buyer 1. The automobile's sale documentation included a completed nonresident affidavit, documentation of the customer's Hawaiian residency, and a photo-copy of a trip permit. The retail sales tax exemption was denied because the Department reasoned the trip permit was insufficient to document that the automobile left Washington, since the automobile could not have been driven to Hawaii. Taxpayer maintained that it fulfilled the documentation requirements for the nonresident exemption and that it need not produce a shipping document.

(2) Buyer 2. The Department denied the retail sale tax exemption because the documentation was incomplete at the time of audit. Subsequently, Taxpayer acquired a completed nonresident affidavit, a photocopy of the customer's Alaska driver's license, the Alaska license plate number, and a letter from the customer stating that at the time of delivery Taxpayer affixed Alaska plates to the automobile. Taxpayer maintained the after-acquired documentation fulfills the exemption's documentation requirements.

(3) Buyer 3. The Department denied the exemption because the documentation necessary to substantiate an exempt sale to a military person was incomplete at the time of audit. Taxpayer maintained it had documentation to support granting a nonresident retail sales tax exemption. The customer was not charged retail sales tax because of her nonresidency status, not because of her military affiliation. Taxpayer maintained its customer purchased the automobile while in Washington on vacation. The sale documentation included a completed nonresident affidavit, photocopy of a trip permit, and documentation of Buyer 3's Pennsylvania residency.

(4) Buyer 4. The Department denied the retail sales tax exemption because Buyer 4's Nevada driver's license listed a Washington address. The sale's documentation included a completed nonresident affidavit, trip permit, and documentation of Nevada residency. Taxpayer maintained that Buyer 4 used his parents' Washington address on his driver's license for convenience because he was in the military and his address frequently changed.

(5) Buyer 5. The Department denied the retail sales tax exemption because the documentation did not support an exempt sale to a military person. The documentation contained a photocopy of the customer's driver's license, and an incomplete nonresident affidavit. The affidavit did not indicate whether the automobile traveled from Washington on a trip permit or out-of-state license plate. Taxpayer contended the documentation substantially complied with the requirements and should be allowed.

(6) Buyer 6. The Department denied the retail sales tax exemption because the documentation did not support an exempt sale to a nonresident. The nonresident affidavit was not complete and there was no evidence provided to show whether the automobile

traveled from Washington on a trip permit or out-of-state license plate. Taxpayer contended the exemption should be allowed because the documentation substantially complied with the requirements.

(7) Buyer 7. The Department denied the retail sales tax exemption because the documentation did not support an exempt sale to a nonresident. The nonresident affidavit was not complete and there was no evidence provided to show whether the automobile traveled from Washington on a trip permit or out-of-state license plate. Taxpayer contended the exemption should be allowed because the documentation substantially complied with the requirements.

(8) Buyer 8. The Department denied the retail sales tax exemption because the documentation did not support an exempt sale to a nonresident. The nonresident affidavit was not complete and there was no evidence provided to show whether the automobile traveled from Washington on a trip permit or out-of-state license plate. Taxpayer contended that the retail sales tax exemption should be allowed because the documentation substantially complied with the requirements.

The Department also disallowed a retail sales tax exemption taken on the sale of an automobile to Buyer 9, a member of the Chippewa Indian tribe. The Department maintained that the exemption required that the automobile be delivered onto the reservation where the buyer's tribe resides. In this case, the buyer was a Chippewa Native American and the automobile was delivered to him on the Tulalip Indian reservation.

Taxpayer maintained that the Department should be estopped from collecting the tax on this latter transaction, even if lawfully due, because of incomplete tax reporting information given by the Department. Taxpayer alleged that, before making the sale, its president telephoned the Department and was told by an employee that the only requirement for the Native American exemption was "to make sure we deliver the vehicle on to a reservation." Taxpayer maintained it was not told that the exemption was only applicable when the automobile was delivered onto the reservation where the customer was an enrolled member.

Taxpayer also protested the Department's reclassification from wholesale to retail the payments it received for towing automobiles, covered by an automobile company (Company) warranty, to its service department for repair. The Department maintained that the tow charges were not resold and that Taxpayer, as a consumer, must pay the retail sales tax. Taxpayer disagreed, maintaining that the tow charges were part of the warranty repair, which was a wholesale sale to Company.

Finally, the Department assessed use tax on personalized calendars given to new automobile purchasers. The calendars were personalized with a picture of the buyer and the new automobile. The Department determined that Taxpayer was the consumer of the promotional give-a-way calendars because the customer did not bargain for them and that they were not listed on the invoices or sales agreements.

Taxpayer disagreed. It maintained that the calendars were purchased for resale and not given away as a promotion. Taxpayer maintained that for accounting purposes the calendars were treated as an inventory cost and not as a promotional expense. Taxpayer explained that only new automobile buyers received the calendars.

ISSUES:

1. Does Taxpayer's documentation of automobile sales to nonresidents support the retail sales tax exemptions it seeks?

2. Will the Department be estopped from collecting legally due taxes based on alleged incomplete tax reporting information given over the telephone?

3. Are payments received for automobile towing related to repair work done under warranty, and, thereby subject to the retailing B&O and retail sales tax classifications?

4. Are personalized calendars given to purchasers of new automobiles subject to use tax?

DISCUSSION:

The purchase of vehicles by nonresidents for use outside the state are exempt from retail sales tax if the requirements of RCW 82.08.0264 are met. The statute provides:

> The tax levied by RCW 82.08.020 shall not apply to sales of motor vehicles, trailers, or campers to nonresidents of this state for use outside of this state, even though delivery be made within this state, but only when (1) the vehicles, trailers, or campers will be taken from the point of delivery in this state directly to a point outside this state under the authority of a one-transit permit issued by the director of licensing pursuant to the provisions of RCW 41.16.160, or (2) said motor vehicles, trailers, or campers will be registered and licensed immediately under the laws of the state of the purchaser's residence, will not be used in this state more than three months, and will not be required and licensed under the laws of this state.

The statutory law is implemented by WAC 458-20-177 (Rule 177). Rule 177 explains the documentation required for the exemption.

> Thus, in determining whether or not this particular exemption from the retail sales tax is applicable the dealer must establish the facts, first, that the purchaser is a bona fide nonresident of Washington and that the vehicle is for use outside this state and, second, that the vehicle is to be driven from his premises under the authority of either (a) a trip permit, or (b) valid license plates issued to that vehicle by the state of the purchaser's residence, with such plates actually affixed to the vehicle at the time of final delivery.
> As evidence of the exempt nature of the sales transaction the seller, at the time of sale, is required to take an affidavit from the buyer giving his name, the state of his residence, his

> address in that state, the name, year and motor or serial number of the vehicle purchased, the date of sale, his declaration that the described vehicle is being purchased for use outside this state and, finally, that the vehicle will be driven from the premises of the dealer under the authority of a trip permit (giving the number) or that the vehicle has been registered and licensed by the state of his residence and will be driven from the premises of with valid Washington plates and the nonresident purchaser wishes to qualify for exemption by transporting the vehicle out of state under authority of a trip permit, the dealer is required to remove the Washington plates prior to delivery of the vehicle and retain evidence of such removal to avoid liability for collection and payment of the retail sales tax. The seller must himself certify by appending a certification to the affidavit, to the fact that the vehicle left his premises under the authority of a trip permit or with a valid license parties issued by the state of the buyer's residence affixed thereto. The buyer's affidavit and the dealer's certificate must be in the following form:

The retail sales tax exemption provided by Rule 177 requires that: (1) the purchaser be a nonresident of Washington and the vehicle acquired for use outside Washington; and (2) the vehicle is driven from the dealership under the authority of either: (a) a trip permit; or (b) a valid license plate issued by the state of the purchaser's residence.

We find that Taxpayer has provided sufficient documentation to substantiate the retail sales tax exemption taken on sales made to Buyer 1, Buyer 2, Buyer 3, Buyer 4 and Buyer 5. Accordingly, Taxpayer's petition is granted as it relates to those sales.

The retail sales tax exemption requires documentation of how the automobile traveled out of Washington. Taxpayer has failed to provide such documentation for the sales made to Buyer 6, Buyer 7, and Buyer 8. We have no indication how the automobiles traveled out of Washington. We do not know whether the automobile traveled out of Washington on an out-of-state license plate issued by the state of the purchaser's residence or a Washington state trip permit. A person claiming a tax exemption has the burden of proving he or she qualifies for the exemption. Group Health Co-op. v. Tax Comm'n., 72 Wn.2d 422, 433 P.2d 201 (1967); Det. No. 89-268, 7 WTD 359 (1989). Because Taxpayer has not provided the necessary documentation, the retail sales tax exemptions requested cannot be allowed.

The Department disallowed a retail sales tax exemption for an automobile sold to Buyer 9, a member of the Chippewa Indian tribe. In disallowing the exemption, the Department relied on WAC 458-20-192 (Rule 192), which provides in pertinent part:

> Indians and Indian tribes are not taxable to the sales tax upon sales to them of tangible personal property made, or otherwise taxable services rendered, within an Indian reservation.
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> * * *
>
> The term "Indian," as used herein, means a person duly registered on the tribal roles of the Indian tribe occupying an Indian reservation.

> Note: For purposes of this rule, with respect to determining tax liability regarding any economic transaction or activity, the term "Indian tribe" includes only an Indian tribe upon and within whose Indian reservation such transaction or activity occurs, and the term "Indian" includes only a person duly registered on the tribal roles of the Indian tribe upon and within whose Indian reservation such transaction or activity occurs.

Thus, according to Rule 192, the tax exemption applies only when an automobile is delivered to an Native American buyer on the reservation that his tribe occupies. In this case, we find that the exemption was correctly disallowed because the automobile was delivered to the Native American buyer on a reservation that he was not a member.

Taxpayer argued that even if the tax is legally due it should not be collected because of the incomplete information given by an employee of the Department. Excise Tax Bulletin 419.32.99, 2 ETB 187 (ETB 419) states that the Department "cannot give consideration to claimed misinformation resulting from telephone conversations or personal consultations with a Department employee." The reason for this is that there is no record of the facts given to the employee; and there is no evidence that the taxpayer completely understood what the employee told him.

ETB 419 was affirmed by the Board of Tax Appeals in Professional Promotion Servs., Inc. v. Department of Rev., BTA Docket No. 36912 (1990) where the Department argued that to prove estoppel, a taxpayer must show a statement "inconsistent with a claim later asserted" by "evidence greater than testimony of the alleged wronged taxpayer as to his recollection of a conversation with a Department employee." PPS at 7.

In this case, without a writing there is nothing to indicate what information Taxpayer gave to the Department. We do not know if the facts presented were accurate; we do not know if the information was understood; and we do not know whether Taxpayer understood the Department's instructions or, if understood, whether they were followed.

Excise Tax Bulletin 310.32.101.320, 2 ETB 33, (ETB 310) states:

> employees of the Tax Commission are specially trained in administering the provisions of the Revenue Act and, in the absence of documentary proof to the contrary, the Commission must presume that information given by them to the taxpayer is correct according to the statute.

Having found the tax was proper, as an administrative agency we do not have the authority to cancel the tax assessment based on the Taxpayer's allegation that a Department employee provided incomplete instructions regarding its tax liability.

The Department reclassified from wholesale to retail Taxpayer's billings to Company for automobile towing, reasoning that the automobile tow charges were not resold and that Taxpayer was the consumer. The definition of "retail sale" in RCW 82.04.050 includes:

> (2)(e) The sale of or charge made for labor and services rendered in respect to automobile towing and similar automotive transportation services....

Excise Tax Bulletin 542.08.129, 2 ETB 383, (ETB 542) addresses the application of retail sales tax on charges for towing. ETB 542 states:

> RCW 82.04.050 includes specific business services within the definition of "retail sale". Generally, these retail services are not capable of being purchased by anyone for resale. The statute includes "charges" for such services as being "retail sales", without regard to whether they are performed for "consumers".
>
> It has been the consistent position of the Department of Revenue that retail services are not sold at wholesale and therefore resale certificates may not be provided to persons who render retail services. Such service providers may not report their income from these kinds of services under wholesaling B&O tax and avoid sales tax collection.
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> With respect to certain special situations....
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> In these special cases the towing may be paid by the service station or repair shop as a simple matter of convenience, before they are billed by the shops to the vehicle owner or other person (e.g. insurance company) for whom the repairs are done. The service station or shop does not itself benefit from the towing and does not include the towing as a component of any further repair work performed for the vehicle owner. Rather towing charges of this kind are simply billed again by the station or shop to their customers, the vehicle owners or others, who ultimately pay for the towing and repairs on a straight through charge or marked up basis. The total charge made by the repair shop or service station to the vehicle owner or customer will then be subject to retail sales tax, including the towing portion.

The Department's Audit Division reasoned that Taxpayer was the buyer of the towing service and that the fact that the cost of the tow service was recovered in billings to Company did not transform it into a purchase for resale. In addition, ETB 542 makes clear that towing charges are a retail service not capable of being purchased by anyone for resale.

Under RCW 82.04.050, retail sales tax must be paid on repairs to tangible personal property of or for consumers. See also WAC 458-20-273 (Rule 273). If the taxpayer was the consumer of the repair service, it must pay retail sales tax.

Under Rule 257, a manufacturer that provides a warranty included in the purchase price is not considered the consumer of the repair work done pursuant to the warranty agreement. Accordingly, it does not have to pay retail sales tax when it has outside repair work done. In relevant part, Rule 257 provides:

> When a manufacturer's warranty is included in the retail selling price of the property sold and no additional charge is made, the value of the warranty is a part of the selling price. The value of the warranty is included in the "gross proceeds of sale" of the article sold and reported under the appropriate classification, e.g. retailing, wholesaling, etc.
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> (ii) When a repair is made by the manufacturer-warrantor under the warranty, the value of the labor and or parts provided are not subject to B&O tax.
>
> (iii) When a person other than the manufacturer-warrantor makes a repair for the manufacturer-warrantor, the person making the repair is making a wholesale sale of the repair service to the manufacturer-warrantor. The person doing the repair is B&O taxable under the wholesaling classification on the value of the parts and labor provided.

(Emphasis added.)

The rationale behind this rule is that a purchaser, in effect, pays retail sales tax for the warranty work as part of the purchase price, and it does not have to pay retail sales tax when the repair work is done. The manufacturer-warrantor does not have to pay retail sales tax because it is not the consumer of the repair services.

We note that although the rule is not expressed in terms of a seller-warrantor, the rationale applies equally to such cases. Accordingly, a seller does not have to pay sales tax on outside repair work done pursuant to a seller's express or implied warranty that was included as part of the selling price.

A different result would have occurred had the tow charges been under an extended warranty that was not part of the vehicle's selling price. When an extended warranty is provided by a manufacturer or nonmanufacturer for a separate charge, sales tax is owed on the purchase of the outside warranty work by the warrantor. In this regard, Rule 257 provides:

> Nonmanufacturer's warranties and manufacturer's warranties not included in the retail selling price of the article being sold.
>
> (i) When a warranty is sold for a charge separate from the charge of the product, e.g., a warranty extending the manufacturer's warranty, the charge is reported in the service and other activities classification of the B&O tax.
>
> (ii) When a repair is made by the warrantor under a separately stated warranty, the value of the labor and or parts provided are not subject to B&O tax.
>
> (iii) When a person other than the warrantor makes a repair for the warrantor, the person making the repair is making a retail sale of the repair service to the warrantor. The person making the repair is B&O taxable under the retailing classification.

The rationale behind treating extended warranties in this manner is that they are in the nature of an insurance contract not subject to use tax.[2] Like an insurance policy, an extended warranty's value is

[2]In Sound Hyundai, Inc. v. State of Washington, Thurston County Superior Court case no. 88-2-02100-4 (1988), the court invalidated a portion of former WAC 458-20-107 that interpreted the statutory definition of retail sale to include the

rooted in its intangible element, namely, the service that will be rendered to its purchaser in the event of mechanical failure. That is not the case here. Further, the taxpayer's customers did not pay a separate charge as is generally the case for extended warranties. Taxpayer's petition is granted in regards to this issue.

Finally, Taxpayer protested the Department's assessment of use tax on its purchase of personalized calendars. The Department found that taxpayer did not purchase the calendars for resale, but rather they were purchased as an advertising give-a-way. In assessing the tax, the Department relied on the ruling of a published determination with very similar facts. In Det. No. 87-67, 2 WTD 331 (1987) the automobile dealer took photos of its customers in front of the dealership with their newly-purchased automobile. The photos were attached to calendars and given to the customers. The taxpayer claimed the calendars were resold because the price paid for a car included the cost of the calendar. However, the taxpayer acknowledged its customers did not bargain for the calendars and that the invoices or sales agreements did not itemize or even mention the calendars.

The determination found that the calendars were given away for their advertising and good-will value and not purchased for resale. The determination found Taxpayer liable for the use tax reasoning:

> The resale exemption applies to resales. "Resale" means that more than one sale has taken place. "Sale" means "any transfer of the ownership of, title to, or possession of property for a valuable consideration..." RCW 82.04.040. In this instance, no valuable consideration is exchanged for the calendar. It is a gift. There is no resale so the resale exemption may not be utilized. The taxpayer is therefore, deemed the user of the calendars and is liable for use or deferred sales tax. WAC 458-20-178 (Rule 178).

We are persuaded that the calendars in this case were similarly purchased for their advertising and good-will value and not for resale. Accordingly, consistent with Det. No. 87-67, we find that use tax was correctly assessed on the purchase of calendars.

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sale of "extended warranties". The Department did not appeal that decision but amended Rule 107 and issued a new Rule 257, in accordance with the decision.

DECISION AND DISPOSITION:

Taxpayer's petition is granted as it relates to the disallowed retail sales tax exemptions taken on automobile sales made to Buyer 1, Buyer 2, Buyer 3, Buyer 4, and Buyer 5. Taxpayer's appeal is denied as it relates to the retail sales tax exemption taken on sales made to Buyer 6, Buyer 7, Buyer 8, and Buyer 9.

Taxpayer's petition is granted as it relates to the reclassification of automobile tow charges from wholesale to retail.

Taxpayer's petition is denied as it relates to the use tax assessed on the purchase of personalized calendars.

Dated this 26th day of August 1997.