Cite as 2 WTD 331 (1987)

BEFORE THE INTERPRETATION AND APPEALS SECTION
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. 87-67
)	
)	Registration No. . . .
. . .)	Tax Assessment No. . . .
)	
)	

[1] **RULE 177 and RCW 82.08.0264:** RETAIL SALES TAX -- EXEMPTION -- AUTO SALES -- OUT-OF-STATE RESIDENCY -- DATE ESTABLISHED. Sales by auto dealers to out-of-state residents are exempt of sales tax even if delivered in Washington if certain requirements are met. Exemption not allowed for sale to person apparently moving to Alaska because at time of sale buyer had not proved he had abandoned his Washington residence. Exemption denied person allegedly moving to New York for same reason. This sales tax exemption is only available to non-residents.

[2] **RULES 102, 106 and 178; RCW 82.04.050:** RETAIL SALES/USE TAX -- WHOLESALE/RESALE EXEMPTION -- CASUAL OR ISOLATED SALE -- REGULAR COURSE OF BUSINESS -- INTENT. Generally, tangible personal property acquired for resale is not subject to sales tax. Not so, however, where the property acquired and resold is not of the kind usually sold by a taxpayer and where the intent to resell was formed after acquisition.

[3] **RULES 102 and 178; RCWs 82.04.040 and .050:** RETAIL SALES/USE TAX -- CALENDARS -- RESALE. Gifts of tangible personal property to consumers constitute taxable use of that property by the donor. Calendars given to automobile purchasers are not resold so their acquisition by an auto dealer is subject to sales 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: . . .
. . .

DATE OF HEARING: February 5, 1986

NATURE OF ACTION:

Claim for sales/use tax relief based on allegations that auto sales were to out-of-state residents and that calendars and hydroplane parts were purchased for resale.

FACTS AND ISSUES:

Dressel, A.L.J.-- . . . , Inc. dba . . . (taxpayer) is an automobile dealer. Its books and records were audited by the Department of Revenue (Department) for the period Aprilá1, 1981 through Decemberá31, 1984. As a result, Tax Assessment No. . . . for excise tax and interest totaling $ . . . was issued on Novemberá21, 1985. Subsequently, an amended assessment was issued on Decemberá26, 1985 reducing the total owed to $ . . . . The taxpayer has timely petitioned for a correction of that assessment.

On Schedule IV of the original assessment certain retail sales tax deductions claimed by the taxpayer were disallowed by the auditor. The taxpayer has obtained additional documentation, not available at the time of the audit, in support of sales tax deductions on two specific transactions in which it is asserted that vehicles were sold to out-of-state residents.

Another point of contention in the audit centers around an unlimited hydroplane. This racing boat, named " . . . ," was sold by the taxpayer in May 1985 to . . . , a Washington corporation. This corporation has as its stockholders and officers the same . . . family members who are the stockholders and officers of the taxpayer corporation. Prior to this sale the taxpayer had acquired a large inventory of parts to be used for the maintenance and operation of the hydroplane. Included were engines, bearings, exhaust stacks, pistons, tachometers, paint, fuel injectors, gear boxes, turbochargers, fuel pumps, etc. In addition, amounts were spent by the taxpayer for labor relative to installation of the parts and maintaining the mechanical condition of the

boat. Sales tax was not paid by the taxpayer on either parts or labor. The taxpayer contends that was as it should have been because it has always intended to resell the boat, so that its acquisition of the various parts and the labor performed should be considered as wholesale transactions.

That the boat was purchased for resale is an allegation disputed by the auditor. He says that it was not originally intended that the hydroplane be resold. It was purchased for advertising purposes. It was not until one year later, when the taxpayer's attorney pointed out the potential liability the [auto] dealer could face in the event of a serious accident, that the taxpayer decided to transfer ownership of the hydroplane to the other closely-held corporation.

Finally, some calendars given away by the taxpayer to automobile purchasers are a subject of disagreement. The taxpayer took photographs of its customers in front of the dealership with their newly-acquired vehicles. Those photos would then be attached to the calendars and given to the customers. Only people who bought cars got calendars. This practice was also considered by the taxpayer as a means of advertising. It claims, however, that the calendars were resold to the customers in that the price each paid for a car included the cost of the calendar as well. It acknowledged that the customers did not bargain for the calendars and that there were no invoices or sales agreements given to the customers which separately itemized or, as a matter of fact, even mentioned the calendars.

On these calendars the Department implicitly takes the position that, as in the case of the hydroplane parts, there was no resale, that the calendars were instead given away to auto buyers and that, therefore, they were consumed or used by the taxpayer rather than the customer. That being the case, the calendars were subject to the payment of sales tax when acquired by the auto dealer. Because none was paid, the taxpayer is now liable for deferred sales tax or the complement of sales tax which is use tax.

Before us, then, are these three issues: (1) whether two vehicle sales to buyers alleged to be out-of-state residents are exempt of retail sales tax, (2)áwhether the hydroplane parts were purchased for resale, and (3)áwhether the calendars were purchased for resale.

DISCUSSION:

The issues will be discussed in the numerical order in which they are listed in the previous paragraph.

RCW 82.08.0264 states:

> **Exemptions---Sales of motor vehicles, trailers, or campers to nonresidents for use outside the state.** 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)áthe 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 46.16.160, or (2)ásaid 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 to be registered and licensed under the laws of this state.

[1] WAC 458-20-177 (Rule 177) is the Department's administrative rule which implements the above-quoted statute. To verify requirements (1) and (2) of the statute are met, Rule 177 imposes the additional burden of an affidavit on which either the trip permit number or the foreign license plate must be listed in addition to the buyer's out-of-state address. In the case of [John] and [Mary Smythe], such an affidavit has been produced. Although the Alaska plate number is omitted from the main portion of the affidavit, it is listed on the dealer certification portion and on the Alaska registration application with each document dated Aprilá26, 1984, the day of delivery. Additionally, the taxpayer provided a freight bill dated Aprilá28, 1984 indicating the Volvo was shipped to Alaska.

Although the affidavit requirements appear to have been met, there is a larger hurdle the [Smythes] must negotiate. The referenced exemption is available only to non-residents. In spite of the fact that an Alaska address is listed on the affidavit, a Washington address was shown on the vehicle buyer's order and credit application. The Department's auditor discovered that the [Smythes] had lived at the Seattle address for l-1/2 years and that before that they had been in Kirkland for 4 years. The wife was employed by King County

[Insurance Co.]. The couple was listed in the 1984 Seattle telephone directory.

While it is entirely possible that the [Smythes] were in the process of moving to Alaska when they purchased the automobile, that is not known for certain. From the facts listed in the previous paragraph one gets the impression, however, that they had not yet completely abandoned their Washington residence. If that is ture, they were not non-residents of Washington at the time of the automobile sale. If they were not non-residents, they are also not eligible for the exemption at issue. It is also possible that one spouse was living in Alaska and the other in Washington on a temporary basis. That circumstance would negate the exemption as well in that the couple would be deemed as dual residents and as such would not be considered non-residents. We will not engage in any further speculation about what the facts actually were. The burden is on the taxpayer to insure that one claiming the sales tax exemption based on non-residency is actually a non-resident. Here, too much doubt exists in that regard. The burden has not been met and we find that the [Smythes] were still residents of Washington. Rule 177 discusses further the burden of the taxpayer (seller):

. . .

> The foregoing affidavit will be prima facie evidence that sales of vehicles to nonresidents have qualified for the sales tax exemption provided in RCW 82.08.0264 when there are no contrary facts which would negate the presumption that the seller relied thereon in complete good faith. The burden rests upon the seller to exercise a reasonable degree of prudence in accepting statements relative to the nonresidence of buyers. Lack of good faith on the part of the seller or lack of the exercise of the degree of care required would be indicated, for example, if the seller has knowledge that the buyer is living or is employed in Washington, if for the purpose of financing the purchase of the vehicle the buyer gives a local address, if at the time of sale arrangements are made for future servicing of the vehicle in the seller's shop and a local address is shown for the shop customer, or if the seller has ready access to any other information which discloses that the buyer may not be in fact a resident of the state which he claims. A nonresident permit issued by the department of

> revenue may be accepted as prima facie evidence of the out of state residence of the buyer, but does not relieve the seller from obtaining the affidavit and completing the certificate required by this rule.
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> In all other cases where delivery of the vehicle is made to the buyer in this state, the retail sales tax applies and must be collected at the time of sale. The mere fact that the buyer may be or claims to be a nonresident or that he intends to, and actually does, use the vehicle in some other state are not in themselves sufficient to entitle him to the benefit of this exemption. In every instance where the vehicle is licensed or titled in Washington by the purchaser the retail sales tax is applicable.
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> . . .

The various indicia of the Washington residency of the [Smythes] as listed previously should have alerted the taxpayer as to their questionable eligibility for the exemption. In allowing them to take it by not collecting sales tax, the taxpayer acted at its own risk. The exemption on the [Smythe] sale is disallowed.[1]

The second questionable out-of-state sale involved Richard [Burton]. He filled out an affidavit listing a New York address and license number. The retail sales tax exemption on his transaction was rejected, however, apparently because he listed a Washington address on his vehicle buyer's order and because he had a Washington driver's license. The additional evidence supplied at the hearing of this matter consisted of a receipt for payment of sales tax to New York State.

The New York receipt is attached to this Determination as Exhibit A. We are unwilling, based on the receipt alone, to overturn the auditor's judgment that out-of-state residency was not proven. One major difficulty is that the required

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[1] The [Smythes] are also not eligible for the non-contiguous state exemption of RCW 82.08.0269 and WAC 458-20-193A because it appears they as buyers, rather than the seller, delivered the auto to the transportation provider for shipment to Alaska.

affidavit is not part of the record in this case. As a consequence, it is not possible to compare the vehicle described on the receipt with the one described on the affidavit. There exists no documentary assurance that they are the same automobile.

Secondly, there is a discrepancy as far as dates are concerned. On Schedule IV of the audit, June is listed as the month of the [Burton] transaction. The receipt shows sales tax was paid to New York on Septemberá10, 1984, some three months later. Based only on this information it is possible that [Burton] did not actually move to New York until several months after he purchased the vehicle. If that were actually the case, of course, he like the [Smythes], would not have been a non-resident of Washington at the time he bought his car. Because of this possibility, the identification discrepancy discussed in the previous paragraph, the Washington address and the Washington driver's license, we find that the taxpayer has not met its burden of proving that buyer [Burton] was a non-resident at the time he purchased his car. Therefore, the exemption claimed on his deal is disallowed as well.

Our attention will now be focused on the second issue, the hydroplane. On each retail sale the retail sales tax is imposed. RCW 82.08.020. "Retail sale" is defined in part as follows:

> **RCW 82.04.050 "Sale at retail", "retail sale".** (1)á"Sale at retail" or "retail sale" means every sale of tangible personal property (including articles produced, fabricated, or imprinted) to all persons irrespective of the nature of their business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers <u>other than a sale to a person who (a) purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person</u>, or . . . (Emphasis added.)

[2] Underlined above is the resale exemption on which the taxpayer bases its claim for exemption from retail sales tax on its purchase of the hydroplane parts and labor. Two problems are readily evident with respect to that theory. First of all, to avail oneself of the resale exemption, one must resell the property "in the regular course of business."

The taxpayer here does not sell hydroplanes or hydroplane parts in the regular course of its business. It sells automobiles and other land-based vehicles including accessories and service on same. Its sale of the hydroplane and its parts was an anachronism, a one-time-only event which qualifies as a "casual or isolated sale." This phrase is defined in WAC 458-20-106 (Rule 106) which states in part:

> **Casual or isolated sales--Business reorganizations.** A casual or isolated sale is defined by RCW 82.04.040 as a sale made by a person who is not engaged in the business of selling the type of property involved. Any sales which are routine and continuous must be considered to be an integral part of the business operation and are not casual or isolated sales.
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> . . .
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> The retail sales tax applies to all casual or isolated retail sales made by a person who is engaged in the business activity; that is, a person required to be registered under WAC 458-20-101. Persons not engaged in any business activity, that is, persons not required to be registered under WAC 458-20-101, are not required to collect the retail sales tax upon casual or isolated sales.

This taxpayer is registered and is required to be registered, so its casual sale of the hydroplane with parts is retail sales taxable.

The second problem is the taxpayer's intent at the time the parts were acquired. We are not convinced that these items were purchased "for the purpose of resale" as is required by RCW 82.04.050 for the resale exemption from retail sales tax. The auditor's explanation that the boat was acquired for advertising and racing purposes and that the resale idea arose only after consultation with an attorney is, frankly, more tenable than the taxpayer's explanation that resale was intended from the outset.

Not only that, but it is clear from the record that many of the parts were installed or used in the boat prior to its sale. Such intervening use also nullifies the resale exemption. For this combination of reasons, the taxpayer's petition as respects issue number two, the unlimited hydroplane, is denied.

Last to be decided is the question of the calendars. The taxpayer claims they are resold to its customers. We disagree. We believe they are given away for their advertising and good-will value. No separate charge is made for the calendar. It is not listed on a customer's invoice or purchase order. The customer does not bargain for the calendar. In most cases, we dare say, he or she doesn't even know that he or she is getting a calendar until after the terms of the car deal are finalized. The customer buys the car. He or she does not buy a calendar. That he or she receives as a gift.

[3] 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 the instant case, 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. The taxpayer's petition is also denied as to issue number three.

DECISION AND DISPOSITION:

The taxpayer's petition is hereby denied. Because the due date has been extended for the sole convenience of the Department, interest will be waived for the period from May 5, 1986 through the new due date. The balance of Tax Assessment No. . . . in the amount of $ . . . plus unwaived statutory interest of $ . . . , for a total of $ . . . is due for payment by March 26, 1987.

DATED this 6th day of March 1987.