Cite as 2 WTD 293 (1986)

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

In the Matter of the Petition For Correction of Assessments of)		D E T E R M I N A T I O N
	)	No. 87-65
	)	
ABC	)	Registration No. . . .
	)	Tax Assessment No. . . .
	)	Warrant No. . . .
	)	
Q	)	Registration No. . . .
	)	Tax Assessment No. . . .
	)	Warrant No. . . .
	)	
Z	)	Registration No. . . .
	)	Tax Assessment No. . . .
	)	Warrant No. . . .
	)	
JOE AND FLO DOE	)	Registration No. . . .
	)	Tax Assessment No. . . .
	)	Warrant No. . . .
	)	

[1] RULE 228 and RCW 82.08.050: SALES/USE TAX -- PENALTIES and INTEREST. The Department may proceed against either the seller or buyer to collect unpaid retail sales/use tax. It may not, however, collect twice the tax, interest, or penalties owed.

[2] RULE 178 and RCW 82.12.0251: USE TAX -- NONRESIDENT EXEMPTION -- SECONDARY RESIDENCE. A user of tangible personal property in this state may be exempt if he or she is a bona fide nonresident. A yacht owner with a secondary residence here is not a bona fide nonresident.

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:

Petition to halt the duplication of sales/use tax assessments against related corporations and to delete use tax against a yacht allegedly held for the purpose of chartered cruises.

FACTS AND ISSUES:

Dressel, A.L.J.-- . . . (Taxpayer [ABC]) is an incorporated general contractor. . . . (Taxpayer [Q]) is a company which owns and operates several Washington motels and which also derives income through the investment in and management of commercial real estate. . . . (Taxpayer [Z]) is the predecessor corporation to [Q]. [Joe and Flo Doe] (Taxpayer [Doe]) dba [Kookaburra] Sales & Charters ([Kookaburra]) formerly maintained a yacht allegedly used for the chartering of scenic cruises. The [Doe]s are officers and sole stockholders in the three closely-held corporate entities and are alleged to be the proprietors of the charter business as well.

Audit examinations of the books and records of all four taxpayers were conducted for varying periods beginning on January 1, 1981 and ending on January 31, 1985. As a result, Tax Assessment No. . . . was issued on October 11, 1985 against [ABC] for excise tax and interest totaling $ . . . ; Tax Assessment No. . . . was issued on October 22, 1985 against [Q] for tax and interest totaling $ . . . ; Tax Assessment No. . . . was issued on Octoberá25,á1985 against [Z] for tax, interest, and penalties totaling $ . . . ; and Tax Assessment No. . . . was issued on October 22, 1985 against the [Doe]s' dba [Kookaburra] for tax, interest, and penalties totaling $ . . . . All assessments are unpaid pending this Determination.

[ABC] performed remodeling and construction work during the audit period for its two sister companies, [Q] and [Z]. [ABC]

did not charge sales tax. This fact was unearthed during the combined audit. To help ensure that the tax would be paid, the Department issued double assessments. On the work done for [Q], [ABC] was assessed retail sales tax and [Q] was assessed deferred sales/use tax on the charges made. Similarly, on the work done for [Z], [ABC] was assessed sales tax and [Z] was assessed use tax on those charges. The three taxpayers involved do not dispute that retail sales tax should have been paid. They aver, however, that tax is owed only one time each on the charges made to [Q] and [Z] and that, concomitantly, any interest or penalty assessed should be levied only one time each against the tax owed on the charges made to [Q] and [Z]. In other words, either [ABC] should pay sales tax, interest, and penalties on its charges to [Q], or [Q] should pay deferred sales/use tax, interest, and penalties on the fees charged by [ABC]. The same is true regarding the relationship between [ABC] and [Z]. Each item should be paid only once including interest and penalties. Whether that is so is issue number one.

The assessment against [Kookaburra] is somewhat more complicated. In the course of auditing the three incorporated taxpayers, two checks were discovered which were made out to [Kookaburra] Sales & Charters. Investigation by the auditor revealed that these checks were payments for use of the [Doe]s' yacht, [Kookaburra] III. On several occasions in 1980 and 1981, the yacht was used to take employees of [Z] and [ABC] on pleasure cruises. Mr. [Doe] skippered the boat on each occasion. Apparently, these several cruises were his idea to foster good will within the two corporations of which he was the primary functionary. For its use of the boat, [Z] was billed $2,100 for three days use. [ABC] was billed $3,700 for six days' use.

The auditor determined that [Joe and Flo Doe] dba [Kookaburra] Sales & Charters were not registered with the Department of Revenue. Inasmuch as the above checks made it appear that [Kookaburra] was doing business in the state of Washington, the auditor caused [Kookaburra] to become registered and then issued Tax Assessment No. . . . . Business and occupation (B&O) tax was not assessed because [Kookaburra] earned less than the $12,000 annual minimum. WACá458-20-104. Because the [Doe]s had not paid sales tax when they purchased the [Kookaburra] III, use tax was levied on the value of the boat. The auditor reasoned that this was a charter business and, as such, was subject to the Service classification of the B&O tax. Among persons liable for use tax, according to WAC 458-20-178 (Rule 178), are those engaged in a business taxable

under the Service and Other Activities classification. The use tax is due with respect to the purchase of tangible personal property for use in the business when purchased without paying the retail sales tax.

In its petition for correction taxpayer [Kookaburra] argues that it was not in the charter business. Mr. [Doe] pointed out that he had formed the idea at one time that he would use his yacht for that purpose, but the idea never got off the ground. The only charters ever made of the boat while it was in the possession of him and his wife were the two mentioned previously to his own corporations. Although he made some efforts to promote the boat for charters, he didn't have any takers. He did establish a bank account, however, in the name of [Kookaburra] Sales & Charters. This was done primarily to create a fund to pay for improvements and repairs on the boat including electrical work.

The [Kookaburra] III yacht was purchased by the [Doe]s in August of 1978 for approximately $175,000. In that same year they purchased a secondary residence in Port Townsend. Their primary residence at the time was in [Antelope], Oregon where they conducted another business which was apparently their prime producer of income. Between 1978 and 1982 the [Doe]s spent two to four months each year at their residence in the Port Townsend area. The remainder of those years they lived in Oregon. In October of 1982, they sold their business interests in Oregon and moved to Washington to live on a full-time basis. Their boat during these years was over 50 percent of the time in Washington. The rest of the time it was in British Columbia which is also where they purchased the yacht. While in Washington, the boat was moored most frequently at Admiralty Marina on Lake Union. When in Seattle on business the [Doe]s would stay on the yacht when it was there. When it wasn't it was usually at PortáLudlow, near their residence in Port Townsend. After they moved permanently to Washington in October of 1982, they did not use the [Kookaburra] III until it was sold in May of 1983 for $285,000.

It is claimed by the [Doe]s that their boat was never used in a taxable charter business and that the Department erred in assessing use tax on the boat on the basis that it was so used. Secondly, it is claimed that there was no personal use of the boat after the [Doe]s officially established residency in Washington in October 1982 so, therefore, there was no taxable use in this state against which the use tax may be applied. Whether use tax is appropriate under either theory is issue number two.

DISCUSSION:

[1] The first issue really isn't an issue. In his reports the auditor has stated in both the [Q] and [Z] audits that if the sales/deferred sales/use tax is paid by [ABC] within the statutory period specified in RCW 82.32.060, the taxes assessed against [Q] and [Z] for improvements, maintenance, and repairs to motels purchased without payment of sales tax will be deleted. The doubled assessments were levied only to protect the Department so that if the tax owed cannot be obtained from one party for bankruptcy or whatever reasons, it may be collected from the other party. There was never an intent to collect tax twice on the same transactions.

The same is true of interest and penalties. Assessments for same may be collected only once. They go with the tax, not with the number of potential taxpayers. Against a single tax, a single interest charge and a single penalty charge only may be levied.[1] Just because the Department is empowered by RCWá82.08.050 to proceed against either the buyer or the seller for unpaid sales tax does not mean that it can actually collect interest, penalties, and tax, for that matter, from both parties. The only equitable construction to be given the situation is that because the Department is entitled to the tax only once, it is also entitled only once to interest and penalties that accrue as a result of nonpayment of the tax.

As to issue number one, the taxpayers' petition is granted. It has been requested that the interest and penalties for these duplicated assessments be levied against [Q] and [Z] rather than against the contractor, [ABC]. No problem is seen with such a disposition.

Upon payment of the subject tax, interest and penalties by those two entities, the assessment against [ABC] will be amended to eliminate any duplicated amounts including penalties and interest.

[2] Regarding issue number two, use tax on the yacht, a partial citation of WACá458-20-178 (Rule 178) is appropriate:

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[1] Single penalty and interest amounts can expand according to the length of time they remain unpaid, of course. See RCWs 82.32.090 and 82.32.050.

> **Use tax.** NATURE OF THE TAX. The use tax supplements the retail sales tax by imposing a tax of like amount upon the use within this state as a consumer of any article of tangible personal property purchased at retail or acquired by lease, gift, or bailment, or extracted, produced or manufactured by the person so using the same, where the user, donor or bailor has not paid retail sales tax under chapter 82.08 RCW with respect to the sale to him of the property used.
>
> In general, the use tax applies upon the use of any tangible personal property, the sale or acquisition of which has not been subjected to the Washington retail sales tax. Conversely, it does not apply upon the use of any property if the sale to the user or to his donor or bailor has been subjected to the Washington retail sales tax, and such tax paid thereon. Thus, these two methods of taxation stand as complements to each other in the state revenue plan, and taken together, provide a uniform tax upon the sale or use of all tangible personal property, irrespective of where it may have been purchased or how acquired. (Emphasis added.)

There is no question that the [Kookaburra] III has been used within this state. This fact coupled with the admission by taxpayer [Doe] that Washington retail sales tax was never paid on the boat, would seem to justify the imposition of use tax here. There are, however, numerous use tax exemptions available. Those are also listed in Rule 178:

> EXEMPTIONS. Persons who purchase, produce, manufacture, or acquire by lease or gift tangible personal property for their own use or consumption in this state, are liable for the payment of the use tax, except as to the following uses which are exempt under RCW 82.12.030[2] of the law:
>
> 1. Any of the following uses:
>
> a. The use of tangible personal property brought into the state of Washington by a

[2] Now codified as RCWs 82.12.0251 - .0279.

> nonresident thereof for his use or enjoyment while temporarily within the state, unless such property is used in conducting a nontransitory business activity within the state; or . . .

Taxpayer [Doe] has said that he was a nonresident temporarily enjoying his boat while in the state of Washington. The auditor has said in effect that that may be true but that the charter business in which the boat was allegedly utilized is a nontransitory business activity so the taxpayer may not avail himself of the nonresident exemption as quoted above.

Actually, both parties may be wrong. Taxpayer [Doe]s' business use of the boat appears to be de minimus. It is not necessary to analyze the auditor's contention, however, because, clearly, taxpayer [Doe] was not a nonresident. The [Doe]s had one home or other in the Port Townsend area continuously from 1978 to October of 1982 which is when they say they "officially" moved to Washington. They resided in their Port Townsend home for two to four months each year during this period. They were, therefore, residents of Washington during that time. They were also residents of Oregon in those years because that is where they lived during the eight to ten months a year that they didn't reside in Washington. "Dual residency" is an apt phrase to describe their status.

It is argued by taxpayer [Doe] that its domicile until October of 1982 was Oregon so that it is entitled to the nonresident exemption of Rule 178, which exemption is statutorily inscribed at RCWá82.12.0251. In support of its position, it has cited In re Mullins, 26 Wn.2d 419, 174 P.2d 790 (1946). This case is distinguishable from the case sub judice because it construed the term "domicile," it also construed the term "residence" when what was actually meant was domicile, and the issue being decided had to do with domestic relations. The subject here is state excise taxation and in this arena "residence" and "domicile" are not synonomous.

There is no indication in the Revenue Act or in the rules that implement it that a definitional distinction between "residence" and "domicile" will not be recognized. There are no Washington cases holding that one term is the equivalent of the other when construing Chapter 82 RCW. Indeed, in administering that title of the code, the Department of Revenue has observed a distinction between the two. For purposes of the Revenue Act, "residence" can mean a secondary

residence. "Domicile," in effect, means legal residence as must be established for voting purposes. "Residence," as used in the Revenue Act, is a broader term which can include one's domicile but which may also include one's secondary place of abode. Although there are no appellate court level Washington cases construing "residence" as used in the Revenue Act, the Department's construction of the term finds support in McGrath v. Stevenson, 194 Wa. 160 (1938). While this was not a state tax case either, the court recognized therein the distinction between "residence" and "domicile" when it said:

> Each of the terms "reside," "residing," "resident," and "residence" is elastic. To interpret the sense in which such term is used, we should look to the object or purpose of the statute in which the term is employed. A man can have only one place of residence [i.e., domicile] for voting purposes and certain other purposes, but there is no reason why, within the meaning of [a statute allowing freeholders "residing" in the vicinity of a county road considered useless to petition for vacation of the same], he may not have more than one place of residence. (Bracketed inclusions added.)

Consequently, while taxpayer [Doe] may or may not have been engaged in a nontransitory business activity, vis a vis the alleged boat charters, he is subject to the payment of use tax on his former yacht because he used it for pleasure in this state and because he does not qualify for exemption as a nonresident.

As to issue number two, taxpayer [Doe]'s petition is denied.

DECISION AND DISPOSITION:

The taxpayers' petition is substantially denied. All assessments are due for payment no later than March 20, 1987. If payment in full of the assessments, penalties, and interest levied against [Q] and [Z] is received by the due date and as noted in the discussion of issue number one, the taxpayers may include therewith a written request for adjustment of the [ABC] assessment. Said latter assessment will then be issued in amended form with the duplicated tax, interest, and penalties deleted. The tax warrants will be adjusted accordingly such that amounts thereof attributable to the duplicated assessments are cancelled. Because the due date on the tax assessments has been extended for the sole convenience of the Department, interest on all assessments and on warrant

amounts related to those assessments will be waived from May 5, 1986 through the new due date. The taxpayers are instructed to contact the Department's Port Angeles office, Compliance Section, to ascertain the specific amounts owed by each.

DATED this 27th day of February 1987.