

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

In the Matter of the Request )	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u> <u>N</u>
For Ruling of Tax Liability of)	
)	No. 87-36
)	
. . . )	Registration No. . . .
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[1] **RULE 193C AND RCW 82.04.4286:** B&O TAX -- DEDUCTION -- EXPORT SALE --VEHICLE OF TRANSPORTATION. Though rule allowing B&O tax deduction for export sales was drafted in contemplation of the more typical sale in which exported goods are shipped via some vehicle of transportation, a sale of a vehicle of transportation itself may qualify as a deductible export sale so long as it can be established at the time of sale that there is (a) certainty of export, and (b) actual entrance into the export stream.

[2] **RULE 211 AND RCW 82.04.4286:** B&O TAX -- DEDUCTION -- LEASE -- OUT OF STATE. Washington chooses not to assert B&O tax on amounts derived from leases of tangible personal property where leased property is used exclusively outside this state.

[3] **RULE 102 AND RCW 82.04.050:** RETAIL SALES TAX -- EXCLUSION -- RESALE -- REGULAR COURSE OF BUSINESS. Purchase of property for resale as part of a planned business transaction qualifies as a purchase for resale "in the regular course of business" even though the buyer/seller is not regularly engaged in the business of dealing in such property.

[4] **RULE 211 AND RCW 82.08.0254:** RETAIL SALES TAX -- EXEMPTION -- LEASE OUT OF STATE. Washington chooses not to assert retail sales tax on amounts derived from leases of tangible personal property where leased property is used exclusively outside this state.

TAXPAYER REPRESENTED BY: . . .  
 . . .

#### NATURE OF ACTION:

Foreign air carrier requests a ruling of tax liability in respect to proposed transaction in which the air carrier will purchase an airplane manufactured in Washington for resale to a foreign company, who will lease the airplane to a second foreign company, who will sublease the airplane back to the air carrier for exclusive use in domestic transportation in a foreign country.

#### FACTS:

Rosenbloom, A.L.J.--The taxpayer is a foreign air carrier (hereinafter referred to as either the "Airline" or the "Taxpayer"). The taxpayer has requested a written opinion and ruling of tax liability in respect to a contemplated business transaction described in the taxpayer's letter of December 5, 1986. The Airline proposes to purchase a B-767 aircraft from [a Washington] Company. The Airline will sell the aircraft to Company-A, residing and doing business in a foreign country. Company-A will lease the aircraft to Company-B, also residing and doing business in a foreign country. Company-B will sublease the aircraft to the Airline for exclusive use in domestic transportation in a foreign country.

All of the deliveries from [the Washington company] to the Airline, from the Airline to Company-A, from Company-A to Company-B, and from Company-B to the Airline will be simultaneously completed in Seattle, Washington. Immediately upon delivery the aircraft will depart the State of Washington en route to a foreign country, wherein it will be used by the Airline exclusively in domestic transportation.

The Airline will provide [the Washington Company] with a resale certificate, Company-A will provide the Airline with a resale certificate, and Company-B will provide Company-A with a resale certificate.

The purchase and sale agreement between [the Washington Company] and the Airline will be executed in the State of Washington. However, the purchase and sale agreement between the Airline and Company-A, the lease agreement between Company-A and Company-B, and the lease agreement between

Company-B and the Airline will be executed outside of the State of Washington.

Neither Company-A nor Company-B is registered to do business in the State of Washington, nor do either of these entities undertake any activities in Washington other than those in connection with this transaction.

The Airline has a branch office in Seattle. However, such office is exclusively engaged in the air transport business such as issuing tickets and making reservations. The subject transaction will be conducted by the Airline's head office, which is located in a foreign country.

The period of the lease between Company-B and the Airline will be 15 years. The Airline will have the option to purchase the aircraft 8 years after delivery.

#### RULING REQUEST:

The taxpayer requests a ruling that neither the Airline, Company-A, nor Company-B will incur any Washington State tax liability as a result of the proposed transaction.

#### DISCUSSION AND RULING:

This legal opinion may be relied upon for reporting purposes and as support the reporting method in the event of an audit. This ruling is issued pursuant to WAC 458-20-100(18) and is based upon only the facts that were disclosed by the taxpayer. In this regard, the Department has no obligation to ascertain whether the taxpayer has revealed all of the relevant facts or whether the facts disclosed are actually true. This legal opinion shall bind this taxpayer and the Department upon these facts. However, it shall not be binding if there are relevant facts which are in existence but have not been disclosed at the time this opinion was issued; if, subsequently, the disclosed facts are ultimately determined to be false; or if the facts as disclosed subsequently change and no new opinion has been issued which takes into consideration those changes. This opinion may be rescinded or revoked in the future, however, any such rescission or revocation shall not affect prior liability and shall have prospective application only.

1. Business and Occupation Tax. The sale of the aircraft by the Airline to Company-A will be exempt from business and occupation tax as an export sale as described in WAC 458-20-193C. That rule provides in pertinent part as follows:

EXPORTS. A deduction is allowed with respect to export sales when as a necessary incident to the contract of sale the seller agrees to, and does deliver the goods (1) to the buyer at a foreign destination; or (2) to a carrier consigned to and for transportation to a foreign destination; or (3) to the buyer at shipside or aboard the buyer's vessel or other vehicle of transportation under circumstances where it is clear that the process of exportation of the goods has begun, and such exportation will not necessarily be deemed to have begun if the goods are merely in storage awaiting shipment, even though there is reasonable certainty that the goods will be exported. The intention to export, as evidenced for example, by financial and contractual relationships does not indicate "certainty of export" if the goods have not commenced their journey abroad; there must be an actual entrance of the goods into the export stream.

In all circumstances there must be (a) a certainty of export and (b) the process of export must have started.

It is of no importance that title and/or possession of the goods pass in this state so long as delivery is made directly into the export channel. To be tax exempt upon export sales, the seller must document the fact that he placed the goods into the export process. That may be shown by the seller obtaining and keeping in his files any one of the following documentary evidence:

(1) A bona fide bill of lading in which the seller is shipper/consignor and by which the carrier agrees to transport the goods sold to the foreign buyer/consignee at a foreign destination; or

(2) A copy of the shipper's export declaration, showing that the seller was the exporter of the goods sold; or

(3) Documents consisting of:

(a) Purchase orders or contracts of sale which show that the seller is required to get the goods into the export stream, e.g., "f.a.s. vessel;" and

(b) Local delivery receipts, tripsheets, waybills, warehouse releases, etc., reflecting how and when the goods were delivered into the export stream; and

(c) When available, United States export or customs clearance documents showing that the goods were actually exported; and

(d) When available, records showing that the goods were packaged, numbered, or otherwise handled in a way which is exclusively attributable to goods for export.

Thus, where the seller actually delivers the goods into the export stream and retains such records as above set forth, the tax does not apply. It is not sufficient to show that the goods ultimately reached a foreign destination; but rather, the seller must show that he was required to, and did put the goods into the export process.

[1] The Rule was obviously drafted in contemplation of the more typical sale in which exported goods are shipped via some vehicle of international transportation. However, the mere fact that the vehicle of transportation itself is the subject of the sale is no basis for denying the exemption. The transaction will nevertheless qualify as an export sale so long as it can be established that at the time of sale there is a) certainty of export, and b) actual entrance into the export stream.

Title to the goods will pass in this state, once from [the Washington Company] to the Airline and again from the Airline to Company-A. The rule provides, however, that this is of no importance so long as delivery is made directly into the export channel. The seller may establish this by obtaining and keeping in its files "(a) copy of the shipper's export declaration, showing that the seller was the exporter of the goods sold. . . ." WAC 458-20-193C(2). The taxpayer represents in its petition that [the Washington Company] will obtain and keep in its files a copy of a shipper's export declaration showing [the Washington Company] as the exporter of the aircraft. Thus, the sale by [the Washington Company] to the Airline will qualify as an export sale beyond the taxing jurisdiction of this state. Consequently, the state has no authority to impose a tax on the subsequent sale of the aircraft by the Airline to Company-A.

Furthermore, the Department has recognized that there may be two exempt sellers of the same exported goods. ETB 448.04.193C describes a "direct seller arrangement" in which a parent corporation first sells property to its domestic international sales corporation (DISC) at a discounted price. The DISC then sells the property to a foreign purchaser. The ETB rules that the entire transaction may qualify as an exempt export sale notwithstanding the intervention of the DISC, provided that both the parent corporation and the DISC must retain the appropriate proofs of export.

We conclude that [the Washington Company] and the Airline may both qualify as exempt sellers of the aircraft even though only [the Washington Company] is shown as the exporter. We suggest that the Airline also retain appropriate proofs of export in its own files so that, in the event of an audit, the exempt nature of the sale can be established by reference to the Airline's own records without having to resort to those of [the Washington Company].

[2] The lease between Company-A and Company-B and the lease between Company-B and the Airline will not be subject to business and occupation tax. If the aircraft were leased for use both within and without Washington State, the state would assert tax only upon that portion of the lease income attributable to use within this state. ETB 447.04.211. Since the aircraft will be leased and subleased for exclusive use in domestic transportation in a foreign country, Washington State chooses not to assert tax on any portion of income from either lease.

We conclude that neither the Airline, Company-A, nor Company-B will incur any Washington State business and occupation tax liability as a result of the proposed transaction.

2. Retail Sales Tax. The retail sales tax will not apply to either the sale of the aircraft by [the Washington Company] to the Airline, the subsequent sale by the Airline to Company-A, the lease between Company-A and Company-B, or the lease between Company-B and the Airline.

[3] Excluded from the definition of "sale at retail" are sales of tangible personal property to a person who purchases for the purpose of reselling such property in the regular course of business without intervening use by such person. RCW 82.04.050. Where property is purchased for resale as part of a planned business transaction, it is purchased for resale

"in the regular course of business." It is not necessary that the buyer/seller be a person regularly engaged in the business of dealing in such property. Thus, the sale by [the Washington Company] to the Airline will qualify as a sale for resale in the regular course of business without intervening use.

Since Company-A will purchase the aircraft solely for the purpose of leasing it to Company-B, the sale by the Airline to Company-A will not be subject to retail sales tax. WAC 458-20-211. Similarly, since Company-B will lease the aircraft from Company-A solely for the purpose of subleasing it to the Airline, the retail sales tax will not apply upon the lease agreement between Company-A and Company-B.

[4] Finally, amounts derived by Company-B from subleasing the aircraft to the Airline are not subject to retail sales tax. As noted in our discussion under the heading business and occupation tax, Washington State chooses to tax lease income only when the leased property is located here. ETB 447.04.211. This applies equally in the context of the retail sales tax. Since the aircraft will be subleased to the Airline to be used exclusively in domestic transportation in a foreign country, lease payments will not be subject to retail sales tax.

We conclude that neither the Airline, Company-A, nor Company-B will incur any Washington State retail sales tax liability as a result of the proposed transaction.

3. Use Tax. The use tax is imposed upon ". . . the privilege of using within this state as a consumer any article of tangible personal property . . ." RCW 82.12.020. (Emphasis supplied.) The term "consumer" does not include a person who purchases or uses tangible personal property solely for the purpose of reselling such property in the regular course of business. RCW 82.04.190. The Airline will purchase the aircraft for immediate resale to Company-A. Company-A in turn will purchase the aircraft for immediate resale to Company-B. Furthermore, since "sale" includes renting or leasing of tangible personal property, Company-B will also purchase the aircraft for resale to the airline.

Because all of these purchases and resales are part of a planned business transaction they qualify as purchases for resale "in the regular course of business" within the meaning of RCW 82.04.190. Thus, neither the Airline (as purchaser of the aircraft from Boeing as distinguished from lessee of the

aircraft from Company-B), Company-A, nor Company-B will be consumers.

The Airline, in its capacity as lessee of the aircraft from Company-B, will be a consumer. However the aircraft will depart for a foreign destination immediately upon delivery, and will be only momentarily present in this state. We find that any use of the aircraft in this state by the Airline as lessee will be de minimus.

We conclude that neither the Airline, Company-A, nor Company-B will incur any use tax liability as a result of the proposed transaction.

4. Property Tax, Public Utility Tax and Other Washington State Excise Taxes. The Department's Property Tax Division has confirmed that neither the Airline, Company-A, nor Company-B will incur any Washington State Property tax liability with respect to the aircraft as a result of the proposed transaction. Nor will any of the parties incur Public Utility tax or other Washington State excise tax liability as a result of the proposed transaction.

DATED this 4th day of February 1987.