Cite as 5 WTD 157 (1988)

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. 88-150
. . .)	Registration No. . . .

[1] **RULE 231 AND RCW 82.04.270:** INTERNAL DISTRIBUTION TAX -- OWN WAREHOUSE OR OTHER CENTRAL LOCATION -- STORAGE TANK -- RENTAL OF.
A business which rents a storage tank and distributes its own property from the central location to two or more of its own retail outlets is liable for the internal distribution tax.

[2] **RULE 118:** STORAGE TANK -- LEASE OF -- FACTORS DETERMINING. An agreement for the short term storage of oil was not found to be an agreement for the rental of the storage tanks where the owner of the oil did not receive sole continuous possession of the storage tanks. Chemical Processors v. State, Board of Tax Appeals, Docket Nos. 23223 and 23594, distinguished.

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: August 21, 1987

NATURE OF ACTION:

The taxpayer protests the assessment of Internal Distribution Tax.

FACTS AND ISSUES:

Frankel, A.L.J. -- The taxpayer's records were examined for the period August 1, 1981 through September 30, 1985. The audit disclosed taxes and interest owing in the amount $ . . . . Assessment No. . . . for that amount was issued December 10, 1985. Two post audit adjustments were made in 1987, reducing the assessment to $ . . . . The taxpayer paid $ . . . toward the assessment leaving a balance of $ . . . .

At issue is the assessment of internal distribution tax on fuel distributed to the taxpayer's retail gas stations from fuel stored in tanks owned by [O]. The taxpayer stated it entered into an agreement for short term storage of oil in the fall of 1984 and in 1985 one or two times. The taxpayer stated the agreements were made with [O], a competitor, when it had a barge load of gasoline and no place to put it.

DISCUSSION:

RCW 82.04.270 imposes the B&O tax on wholesalers and distributors. Subsection (2) provides for the internal distribution tax on:

> every person engaged in the business of distributing in this state articles of tangible personal property, owned by them from their <u>own</u> warehouse or other central location in this state to two or more of their own retail stores or outlets, where no change of title or ownership occurs, the intent hereof being to impose a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler, but not actually making sales; (Emphasis added.)

WAC 458-20-231 is the administrative rule which discusses the tax on internal distributions. The rule defines "warehouse or other central location as:

> any facility regardless of the type of activity conducted there, which is operated in this state by a person who distributed tangible personal property from that facility to two or more of his own retail stores or outlets.

> The said term includes any retail outlet irrespective of how the distributed goods may be inventoried or stored at such outlet. The term includes any facility, central distributing point, building, loading platform and adjacent areas operated by the taxpayer where articles of tangible personal property are received and from which they are distributed. Such facilities, distributing points, buildings, platforms and areas are included within the term regardless of how long such property may remain at such places and regardless of the nature of the activity performed at such places with respect to such property.
>
> The said term also includes any manufacturing or processing facility operated by the taxpayer from which such distribution is made. The term does not include facilities operated by other persons at which team track deliveries are made into trucks for distribution to retail outlets nor does it include any individual trucks owned by the taxpayer from which deliveries are made at facilities or places not owned by the taxpayer to other trucks for distribution to retail outlets.

A person who rents a warehouse or other central location, as a storage tank, and distributes its own property from the central location to two or more of its own retail stores is liable for the internal distribution tax.

The taxpayer relied on the following in support of its position that it was not renting storage tanks or operating its <u>own</u> warehouse or other central location in this state:

> 1) The dictionary definition of "own" as "belonging to oneself or itself; and
>
> 2) WAC 458-20-118 which provides that . . .
>
> > <u>A lease or rental of real property</u> conveys an estate or interest in a certain designated area of real property with an exclusive right in the lessee of continuous possession against the world, including the owner, and <u>grants to the lessee the absolute right of control and occupancy during the term of the lease or rental agreement</u>. (Emphasis added by taxpayer.)

The taxpayer stated it did not have possession and control of the storage tanks--that it did not even know where the tanks were located.

In Chemical Processors, Inc. v. State, Docket Nos. 23223 and 23594 (1983), the Board of Tax appeals reversed the Department's decision that the agreements by which Chem-Pro transferred possession and control of oil storage tanks constituted a license to use the property (. . .). The Board concluded that the agreements provided for a lease or rental or real estate. The Board stated:

> We are persuaded that the sole, continuous possession of the tanks by the sub-lessee who has the right of control and use of the tanks, and who, although requiring permission, could transfer such rights to another party is sufficient possession and control to be considered a lease of real estate. (Decision p. 6.)

The Department had relied on an earlier Determination (. . .) in which a similar contractual agreement was found to be the granting of a license to use storage tanks. The Department found that the facts indicated the agreement was for a license to use rather than a lease. In that case, Chem-Pro's employees provided the skill and labor in loading and unloading the oil, controlled the heat to the tanks, monitored the oil level in each tank, and maintained the tanks in proper repair. The Determination states that [t]he only obligation that the lessee incurred other than a monthly payment for the "rental" of the tanks was that associated with the risk of loss to its own product. The Department concluded that the agreement was not for the rental of real estate and that Chem-Pro was liable for Service B&O on the revenues received. (The issue in that case).

In the present case, we find the taxpayer's agreement with [O] is distinguishable from the agreements at issue in the Chemical Processors and did not provide for the rental of real estate. We base this decision on the following:

> 1) The agreement was not for the "rental" of a storage tank;
>
> 2) The taxpayer did not receive sole, continuous possession of storage tanks;

3) [O] bore the risk of loss; and

4) The agreements were for short term storage of oil for which the taxpayer paid a fee.

Although the agreement did provide that the taxpayer's drivers would do loading and unloading at the terminal, this fact is not controlling. Accordingly, we conclude that the taxpayer was not distributing property from its own central location and the internal distribution tax does not apply.

DECISION AND DISPOSITION:

The taxpayer's petition is granted.

DATED this 9th day of March 1988.