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

In the Matter of the Petition For Refund of	)	D E T E R M I N A T I O N
	)	No. 88-352
. . .	)	Registration No. . . .
	)	

[1] **RULE 211:** RETAIL SALES TAX -- CRANE -- RENTAL OF -- WITH OPERATOR. A purchase of tangible personal property to be held exclusively for rental is exempt of sales tax. The definition of leasing and renting in the previous edition of this rule is invalid in that it excluded those rentals of cranes and similar equipment with which the lessor provided an operator. Duncan Crane Service, Inc. v. The Department of Revenue, 44 Wa. App. 684 (1986).

[2] **RULE 170, RULE 211, AND RCW 82.04.050:** RETAIL SALES TAX -- LEASE OF CRANE WITH OPERATOR -- RENTAL PAYMENTS. Inasmuch as the Court of Appeals has found that the rental of a crane or similar equipment with operator can be a lease just as is the rental of such equipment without an operator, the former situation, if established, like the latter, is a retail sale and the rental payments are 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: July 29, 1987

NATURE OF ACTION:

Petition for refund of sales tax paid on purchase of crane to be leased to others.

FACTS AND ISSUES:

Dressel, A.L.J. -- [The taxpayer] leases cranes. In this action it is petitioning for a refund of sales tax paid on the purchase of a used Grove hydraulic crane, serial no. . . . . The taxpayer has produced an invoice indicating that it was charged $ . . . for Washington State sales tax when it purchased the crane on May 28, 1982. The refund requested is in that amount.

As its basis for refund, the taxpayer cites the case of Duncan Crane Service, Inc. v. The Department of Revenue, 44 Wa. App. 684, 723 P.2d 480 (1986). The taxpayer claims that the subject crane has been held continuously since its acquisition for the sole purpose of lease with and without an operator. It argues that the Duncan case held that such leasing activity is statutorily defined as a retail sale and, therefore, its acquisition of the crane was effectively for resale and should not have been subjected to the payment of retail sales tax. Whether that is correct is the issue with which we will deal hereafter.

DISCUSSION:

[1] The taxpayer's assertion is essentially correct. In the Duncan Crane case, supra, the Court of Appeals held that the Department of Revenue (Department) had created an artificial distinction between a lease with operator and a lease without operator in its administrative rule, WAC 458-20-211 (Rule 211). The cited regulation read in part at the time this petition was submitted:[1]

> **Leases or rentals of tangible personal property, bailments.** The terms "leasing" and "renting" are used interchangeably and refer generally to the act of granting to another the right of possession to and the use of tangible personal property for consideration. The term "bailment" refers to the act of granting to another the right of possession to and use of tangible personal property without consideration. The terms do not include rental agreements pursuant to which the owner or lessor operates the equipment or supplies an employee operator, whether or not such employee operator works under the supervision or control of the lessee.
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> . . .
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> RETAIL SALES TAX

[1] Amended August 11, 1987 to reflect the court's ruling in Duncan Crane.

. . .

> The retail sales tax does not apply upon sales of tangible personal property to persons who purchase the same solely for the purpose of renting or leasing such property. However, the retail sales tax applies upon sales to persons who rent such property with operator or who intend to made (sic) some use of the property other than or in addition to renting or leasing. (Italics ours.)

The Duncan court reasoned that there was no statutory justification for exempting the purchase of tangible personal property to be held exclusively for rental without a lessor operator from the payment of retail sales tax when the purchase of such property to be leased with an operator provided by the lessor is not similarly exempt. In this case the taxpayer has convinced us that its situation is sufficiently analogous to that in the Duncan case. It makes no personal use of the 50 ton crane at issue other than leasing it. The crane was either leased with an operator or leased without an operator. In the period immediately after its acquisition, the taxpayer advises that rentals were about 50% with an operator and 50% without. In the last couple of years, however, the rentals have been exclusively without an operator. We have no evidence that the crane was subjected to intervening use, i.e., use other than rentals, by the taxpayer.

It is, therefore, our ruling that there is nothing to distinguish this case from Duncan Crane, supra, and that because the crane was acquired for resale (lease) with operator, the taxpayer's acquisition of the crane was at wholesale and should not have been subjected to the payment of retail sales tax.

It is observed that Rule 211 was amended effective August 11, 1987 to reflect the Court of Appeals' ruling in Duncan Crane, supra. The amended rule imposes various criteria on so-called "true leases" which must be met in order to qualify for exemption from sales tax on the purchase of tangible personal property which is later rented. Inasmuch as the taxpayer's acquisition of the crane predates the amendment of that rule, and inasmuch as its business activities relating to the crane, i.e., leasing, commenced prior to the rule amendment, we deem the rule's changed provisions inapplicable to the case at hand, at least up to August 11, 1987. As of that date, however, the taxpayer falls under the parameters of the amended rule and, thereafter, must demonstrate that any leases with operator satisfy the new criteria. If they do not, the taxpayer will be considered to have subjected the crane to personal use and will be liable at that time for use tax. We acknowledge the taxpayer's observation at the hearing of this matter that, as of that date and for the several years prior to that, rentals have been without operator. The criteria now imposed in amended Rule 211 for "true leases" apply only to rentals with an operator.

Our ruling in this matter creates a, perhaps, unanticipated ramification. As effectively stated in Duncan Crane, supra, a lease with a lessor-supplied operator can be a lease just like one where the operator is furnished by the lessee. The taxpayer's crane rentals are all leases or rentals. Previously, rentals with operator were taxable, for business and occupation (B&O) purposes, according to the classification of the activities performed by the equipment and operator. Rule 211, prior to amendment of August 11, 1987. That rule further stated:

> Thus, the charge made to a construction contractor for equipment with operator used in the construction of a building would be taxable under wholesaling-other and a similar charge to a contractor for use in the construction of a publicly owned road would be taxable under public road construction.

[2] Pursuant to that instruction and consistent with the WAC 458-20-170 definition of "subcontractor," the taxpayer reported all of its income from the rental of cranes with an operator under the Wholesaling B&O classification. Because of the Duncan ruling, however, that is no longer the proper way to report such income. According to Duncan, a lease with operator can be a retail sale just as is a lease without operator. See also RCW 82.04.050(4). Consequently, retailing is the proper B&O classification for both kinds of leases, and such income is also subject to retail sales tax.[2]

It is our understanding that the taxpayer did not collect retail sales tax on those rentals with an operator. If such transactions are adjudged leases for purposes of determining whether acquisition of the item leased is subject to sales tax, to be consistent they must also be adjudged leases and, thus, retail sales when determining the B&O and sales tax consequences the rentals therefrom create. Only where such rentals are made to those who re-rent the item are they first rentals subject to Wholesaling B&O rather than Retailing B&O and retail sales tax. Here, we have no information to the effect that the taxpayer's customers re-rent the crane(s). Therefore, we conclude all of the taxpayer's rental/lease transactions, heretofore, are retail sales, and retail sales tax is due on rentals with operator on which the tax was not collected previously.

DECISION AND DISPOSITION:

The taxpayer's petition is granted. Its file will be returned to the Audit Section so that it may verify the actual payment of sales tax to the vendor of the crane, and so that it may calculate the

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[2] See RCW 82.04.250 and RCW 82.08.020.

amount of retail sales tax which should have been collected on those crane rentals with operator consistent with this Determination. Assuming payment of sales tax on the purchase of the crane is verified, the amount of retail sales tax which was not collected on the rental payments will be offset against the retail sales tax refund due the taxpayer on its purchase of the crane. Depending upon which amount is greater, the Department will issue a credit or a notice of balance due to the taxpayer.

DATED this 26th day of August 1988.