

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

In the Matter of the Petition )	<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 Refund of )	
)	No. 89-160
)	
)	Registration No. . . .
. . . )	
)	
and )	
)	
)	Registration No. . . .
. . . )	
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[1] **RULE 174:** RCW 82.08.0263 -- RCW 82.12.0254 -- SALES TAX -- USE TAX -- EXEMPTION -- MOTOR VEHICLES -- INTERSTATE COMMERCE -- FOR HIRE CARRIER -- TITLE TO GOODS CARRIED -- CONTRACT FOR CARRIAGE. A seller/carrier transporting its own goods is not a "for hire" carrier. A seller/carrier transporting goods titled in the name of the purchaser with whom the seller/carrier has contracted for carriage is a "for hire" carrier. Where taxpayer, holder of an ICC permit, transports boats it has manufactured across this state's boundaries and title to the boats passes to the purchaser when the boats leave the taxpayer's factory, the taxpayer is held not to be a "for hire" carrier where there is no contract of carriage between taxpayer/seller/carrier and the purchaser. Use of motor vehicle by a "for hire" carrier is a requisite for sales/use tax exemption on purchase/use of the motor vehicle. Weyerhaeuser Co. v. Dept. of Revenue, 106 Wn.2d 557 (1986).

[2] **RULE 174:** RCW 82.12.0254 -- USE TAX -- EXEMPTION -- MOTOR VEHICLES -- INTERSTATE COMMERCE -- USED IN SUBSTANTIAL PART. To be entitled to the use tax exemption for motor vehicles transporting property

for hire across the state's boundaries, a taxpayer must show that the vehicles cross the state's borders at least 25 percent of its total trips in each year. UPS v. Dept. of Revenue, 102 Wn.2d 355 (1984).

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 4, 1988

#### NATURE OF ACTION:

Taxpayer/buyer seeks refund of sales taxes paid on purchase of trucks and use taxes paid on registration of trucks on the basis that there are statutory exemptions for purchasers/users who are holders of carrier permits issued by the Interstate Commerce Commission. Taxpayer/seller seeks refund of sales taxes which were collected from the taxpayer/buyer and remitted to the Department of Revenue.

#### FACTS AND ISSUES:

Krebs, A.L.J. -- . . . (taxpayer) is a Delaware corporation doing business in the state of Washington and elsewhere in the United States. The taxpayer manufactures boats at a number of plants across the country. The taxpayer generally builds boats to order at the request of dealers to which it sells.

The taxpayer maintains a fleet of trucks which are used to haul boats which it has manufactured as well as boats manufactured by other companies. The taxpayer is the holder of a carrier permit, No. MC . . . , issued by the Interstate Commerce Commission to engage in interstate transportation as a common carrier by motor vehicle. The taxpayer has had such authority since at least 1982.

The taxpayer has submitted a list, by dates, of trucks acquired during the period of May 31, 1983 through November 7, 1985, and the amount of sales tax paid to the seller, use tax paid to the Department of Revenue (Department) per Tax Assessment No. . . . issued April 9, 1985 for the audit period January 1, 1981 through March 31, 1984, or use tax paid to the Washington Department of Licensing upon registration of the

trucks. The total refund sought for the period of May 31, 1983 through November 7, 1985 per the taxpayer's calculations is \$ . . . . The taxpayer seeks refund also of all similar taxes paid after November 7, 1985 until the present time plus statutory interest.

[The truck seller], based in . . . , Washington, the other petitioner for refund in this matter, sold trucks to the taxpayer beginning February 1, 1985. Such sales continued at least until March 29, 1988. For this period of time, [the truck seller] reports that it collected \$ . . . in sales tax from the taxpayer and remitted that amount to the Department with its monthly tax returns. [Seller] believes upon its review of the facts and applicable law that it collected and remitted the taxes in error. Therefore, [seller] seeks refund of the full amount of such taxes plus statutory interest and, in turn, will refund same to the taxpayer/purchaser.

The taxpayer contends that its purchases of trucks are exempt from sales tax under the provisions of RCW 82.08.0263 because the trucks were purchased "to be used for the purpose of transporting therein persons or property for hire in interstate or foreign commerce... by the owner," that as purchaser and user it held "a carrier permit issued by the Interstate Commerce Commission," and that the purchased trucks did "first move upon the highways of this state from the point of delivery in this state to a point outside of 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."

The taxpayer contends that its use of the trucks is exempt from use tax under the provisions of RCW 82.12.0254 when used under the "one-transit permit" conditions in RCW 82.08.0263, or when used by it as an owner and as "holder of a carrier permit issued by the Interstate Commerce Commission" and "used in substantial part in the normal and ordinary course of the user's business for transporting therein persons or property for hire across the boundaries of this state if the first use of which within this state is actual use in conducting interstate or foreign commerce."

With respect to the "for hire" condition in RCW 82.08.0263 and in RCW 82.12.0254, the taxpayer cites Weyerhaeuser Co. v. Dept. of Revenue, 106 Wn.2d 557 (1986) as holding that Weyerhaeuser was engaged in the business of transporting "for hire" where it sold property and transported the property only after title passed to the purchaser.

The taxpayer asserts that it meets the "for hire" condition because it transports boats manufactured by other companies and also boats manufactured by it which it has sold to dealers. As to the latter boats, they are shipped FOB taxpayer's factory. The taxpayer points to its standard agreement with dealers, used in 1985 and 1986, as specifically providing for passing of title to the dealers at the taxpayer's factory.

The taxpayer asserts that it took delivery of the purchased trucks at its plant in . . . , Washington, and the trucks were then driven outside the state of Washington under the authority of a one-transit permit per RCW 46.16.160. The trucks carried boats on their first trip out of Washington.

Accordingly, the taxpayer believes that its trucks qualify for the sales tax exemption under RCW 82.08.0263 and the use tax exemptions under RCW 82.12.0254.

#### DISCUSSION:

The pertinent statutes are summarized below. There are two sections of the law involved. The first is the sales tax exemption of RCW 82.08.0263 which makes the sales tax inapplicable to:

1. sales of motor vehicles and trailers
2. for use in interstate or foreign commerce
3. to transport persons or property
4. for hire by an ICC licensed carrier
5. if the first movement is from the point of delivery in Washington to a point outside the state pursuant to a one-transit permit.

The second section is RCW 82.12.0254 which provides that the use tax does not apply to:

1. use of motor vehicles and trailers
2. by an ICC permit holder

3. if used in substantial part transporting persons or property for hire across the state boundaries

4. and if the first use of the property was in interstate or foreign commerce.

Thus, a vehicle initially meeting the conditions for sales tax exemption can later become subject to the use tax if it does not continue to be used "in substantial part" as stated in number 3 above.

Pursuant to the authorization of RCW 82.32.300, the Department of Revenue promulgated WAC 458-20-174 (Rule 174), which implements the above exemption statutes and has the same force and effect as the law itself. Rule 174 in pertinent part provides:

#### RETAIL SALES TAX

1. SALES OF MOTOR VEHICLES AND TRAILERS. Under RCW 82.08.0263 of the law, sales of motor vehicles and trailers to be used for the purpose of transporting therein persons or property for hire in interstate or foreign commerce...are not subject to the retail sales tax when delivery is made to the purchaser in this state: Provided, both of the following requirements are met:

a. The purchaser or user is the holder of a carrier permit issued by the Interstate Commerce Commission, and

b. Said vehicle will move upon the highways of this state from the point of delivery in this state to a point outside the state under the authority of a trip permit issued by the director of motor vehicles pursuant to the provisions of RCW 46.16.160.

In order to qualify for this exemption from the retail sales tax such buyers must furnish to their vendors the number of the permit issued to the carrier by the Interstate Commerce Commission and must have affixed to the vehicle before it leaves the premises of the dealer the necessary trip permit. In addition, and as evidence of the exempt nature of such sales, the seller is required to obtain from the buyer an exemption certificate, to

which he must append his own certification, all  
reading substantially to the following effect:

EXEMPTION CERTIFICATE

The undersigned hereby certifies that he is the holder of carrier permit No. .... issued by the Interstate Commission, that the vehicle this date purchased from you being a \_\_\_\_\_ (specify truck or trailer and make) \_\_\_\_\_, Motor No. ...., Serial No. ...., will move on the highways of this state from \_\_\_\_\_ (point of origin in state) \_\_\_\_\_ to \_\_\_\_\_ (out of state destination) \_\_\_\_\_, under the authority of a trip permit dated \_\_\_\_\_, issued by the director of motor vehicles through the agency of the Washington State Patrol Office located at \_\_\_\_\_, and that the sale of this vehicle is entitled to exemption from the Retail Sales Tax under the provision of RCW 82.08.0263.

Dated.....

.....  
(name of carrier-purchaser)

By.....  
(title)

.....  
(address)

CERTIFICATE OF DEALER

I hereby certify that upon the delivery of the above described vehicle to said purchaser there was affixed thereto trip permit No. ...., and that the same authorized the transit of this vehicle between the points of origin and destination as hereinabove set forth.

.....  
(name of dealer)  
.....  
(title)

In all other cases where the purchaser takes delivery of the vehicle in this states the retail

sales tax is applicable to the sale and must be collected from the purchaser.

...

The exemption certificates referred to in this rule must be retained by the seller in his files as a part of his permanent records subject to audit by the department of revenue. As to any sales claimed to be exempt from the retail sales tax under the provisions of RCW 82.08.0262 and RCW 82.08.0263, where no exemption certificate has been secured and retained as required herein, or where the exemption certificate does not substantially comply with the essentials set out in the foregoing forms, the seller will bear the burden of proving its tax exempt status.

#### USE TAX

The use tax applies upon the actual use within this state of all articles of tangible personal property purchased at retail and upon the acquisition of which the retail sales tax has not been paid to this state, unless such use is exempt from use tax under the provisions of chapter 82.12 RCW. Pursuant to RCW 82.12.0254 the use tax does not apply to the following uses:

a. The use by the holder of a carrier permit issued by the Interstate Commerce Commission of any motor vehicle or trailer ... owned by ... the permit holder and used in substantial part in the normal and ordinary course of the user's business for transporting persons or property for hire across the boundaries of this state if the first use within this state is actual use in conducting interstate or foreign commerce.

...

c. The use of any motor vehicle or trailer while being operated under the authority of a trip permit issued by the director of motor vehicles pursuant to RCW 46.16.160 and moving upon the highways from the point of delivery within this state to a point outside this state. (Emphasis supplied.)

In this case, with respect to the sales tax exemption statute, the taxpayer purchased trucks in Washington for use in interstate commerce, that is, to haul boats which it had manufactured and sold to out-of-state dealers. The taxpayer did also interstate hauling of boats for other persons. The taxpayer paid retail sales tax to the seller of the trucks, [seller], and now seeks refund of the sales taxes paid to the seller. [Seller] seeks refund of the same taxes to pay them over to the taxpayer in order to avoid first refunding the taxes to the taxpayer and then, in turn, claiming a refund from the Department. In this way, [the seller] hopes not be faced with a loss of working capital (the amount involved is claimed to be \$ . . . ) by first making the refund to the taxpayer.

The taxpayer had an ICC carrier permit when it purchased the trucks from [seller], but obviously did not furnish the permit number to the seller because it was paying sales tax on the purchase. Also obvious is that no Exemption Certificate per Rule 174 was furnished by the taxpayer to the seller nor was any Rule 174 Certificate of Dealer completed by the seller. Furthermore, we doubt that the necessary (for tax exemption) trip permits were obtained for these trucks because, sales tax having been paid, there was no need for the trip permits. Bearing in mind that the exemption statute RCW 82.08.0263, to perfect entitlement to the exemption, requires that the trucks "first move upon the highways of this state from the point of delivery in this state to a point outside of this state under the authority of a one-transit permit", we cannot conclude that the taxpayer has met all of the necessary conditions for entitlement to the sales tax exemption.

It may well be that the taxpayer did obtain trip permits for the trucks in question or can show by its records that the trucks' first move was to a point outside this state. If such is the case, we will accept such documentation as satisfying the "first move" condition. The Department elevates substance over form in such situations and the absence of the technical proof (trip permits) will not defeat the exemption.

[1] With respect to the "for hire" condition to qualify for the sales tax exemption, a carrier transporting its own goods is not in a "for hire" status. The taxpayer has cited the Weyerhaeuser case, *supra*, as holding that Weyerhaeuser was engaged in the business of transporting "for hire" where it sold property and transported the property only after title passed to the purchaser. As part of its business, Weyerhaeuser sold timber to Asian customers. In the process, Weyerhaeuser agreed to arrange for shipping a portion of the



timber by acquiring access to vessels by means of time-chartering. As a time-charterer, Weyerhaeuser negotiated contracts with various ship owners whereby it obtained control of the vessels. Under the contract, Weyerhaeuser paid for all the fuel. The statute granting the fuel tax exemption is RCW 82.08.0261 which in pertinent part provides:

The [retail sales] tax...shall not apply to sales of tangible personal property...for use by the purchaser in connection with the business of operating as a private or common carrier by air, rail, or water in interstate or foreign commerce...(Bracketed word supplied.)

The dispute centered on whether Weyerhaeuser qualified as a private carrier for purposes of the exemption. The Court ruled that Weyerhaeuser was, in fact, acting as a private carrier and was entitled to the exemption. The Court rejected the Department's argument that Weyerhaeuser could not be a "private carrier" because it was not a carrier "for hire" when it carried logs which were still owned by it. The Court ruled that it was Weyerhaeuser's customers who held legal title to the logs being shipped and that "because the purchaser owns this timber and has contracted with Weyerhaeuser for carriage, the purchaser has effectively hired the corporation [Weyerhaeuser] as a carrier".

In this case, the taxpayer's standard agreement, article 7, with its dealers, used in 1985 and 1986, provides:

7. Passage of Title and Risk of Loss. Title to products shall pass to Dealer at the time the products leave [taxpayer's] factory. If the products are transported on [taxpayer's] trucks, risk of loss shall pass to Dealer upon delivery to Dealer's location. When shipments are by other means including common carrier, risk of loss shall pass to Dealer at the time the products leave [taxpayer's] factory.

Thus, while title to the boats passes to the dealer when they leave the taxpayer's factory, the dealer/purchaser has not contracted with the taxpayer for carriage. In the Weyerhaeuser case, the Court stated:

The substance of the shipping arrangements here is that Weyerhaeuser is hired as a carrier by

purchasers to whom title and risk of loss have passed. (Emphasis supplied.)

In this case, the taxpayer has not been hired as a carrier and when it does transport the boats, the risk of loss does not pass to the dealer/purchaser until delivery is made to the dealer's location. Furthermore, the standard contract contemplates that shipments will be made also by other carriers. We conclude that the taxpayer does not act as a "for hire" carrier under such arrangements with its dealers.

Because the taxpayer does not satisfy the "for hire" and "the first movement pursuant to a one-transit permit" conditions set forth in the sales tax exemption statute and Rule 174, it is not entitled to a refund of sales taxes paid to the seller, . . . ; nor is the seller entitled to a refund of the sales taxes remitted to the Department.

The taxpayer seeks refund of use tax paid to the Department pursuant to two tax assessments resulting from audits and use tax paid to the Washington Department of Licensing upon registration of trucks acquired without payment of sales tax.

To qualify for continuing exemption from use tax, the pertinent use tax exemption statute, RCW 82.12.0254, requires use of the trucks "in substantial part...for transporting therein...property for hire across the boundaries of this state".

Here, the taxpayer does not meet the "for hire" condition for exemption for the same reasons stated in the discussion with respect to the sales tax exemption.

[2] With respect to the "substantial part transportation across this state's boundaries" condition, historically, the Department of Revenue has chosen among several methods to determine whether a vehicle is used "in substantial part" in interstate commerce under RCW 82.32.0254. The various methods have included the number of trips across state lines, amount of interstate hauling revenue and ton-miles traveled in interstate commerce. The method used by the Department in each case has depended upon the nature of the business involved. In UPS v. Department of Revenue, 102 Wn.2d 355 (1984), the Washington State Supreme Court specifically upheld the "25 percent border crossing" test, that is, the vehicle must cross the state's borders at least 25 percent of its total trips in each year in order for the use tax exemption to be available. The Court further ruled that the Department was

not required to use any of the other methods if the border-crossing test is "far more practicable".

In this case, the audit report covering the period from January 1, 1981 through March 31, 1984 and the audit report covering the period from April 1, 1984 through June 30, 1988 state that the trucks subjected to use tax did not meet the substantial (25%) usage requirement. These conclusory statements by the auditors were based upon examinations of the taxpayer's records and interviews of the taxpayer's employees. No evidence to the contrary has been submitted by the taxpayer except a bare assertion that the trucks were used in interstate commerce "98 percent of the time". We conclude that the trucks did not meet the substantial (25%) usage requirement.

Because the taxpayer's trucks were not used in "substantial part for transporting therein property for hire across the state's boundaries", they do not meet the conditions in RCW 82.12.0254 for exemption from use tax.

Because use taxes were paid to the Department of Licensing upon registration of trucks, the two audits would generally not scrutinize their use. Thus, the taxpayer may be able to establish their entitlement to use tax exemption by meeting the requirements of RCW 82.12.0254 by submitting supporting evidence pertinent to their usage. We will consider the submission as being within the claim period allowed by the taxpayer's petition now under consideration.

DECISION AND DISPOSITION:

The taxpayer's petition for refund is denied.  
The petition of [the truck seller] for refund is denied.

DATED this 22nd day of March 1989.