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

In the Matter of the Petition For Correction of Assessment and Refund of	)	D E T E R M I N A T I O N
	)	No. 89-398
. . .	)	Registration No. . . .
	)	. . . /Audit No. . . .

[1] RULE 193C: B&O TAX -- RETAIL SALES TAX -- DEDUCTION --EXPORTS -- FOREIGN BUYERS -- DELIVERY IN WASHINGTON. The mere issuance of documentation to Canadian customers to allow them to cross the U.S. - Canadian border without duty is not sufficient under Rule 193C to establish certainty of export.

[2] RULE 118: RENTAL OF OR LICENSE TO USE REAL ESTATE -- PARKING -- TRACTORS AND TRAILERS. Because tractors and trailers are not "automobiles," service tax, and not retailing business and occupation tax and retail sales tax, is applicable if it is determined that designated parking spaces have not been rented for a continuous period of one month or more. In such a case there has been a license to use, and not the rental of real estate.

[3] RULE 229 and RCW 82.32.060: REFUNDS -- CREDITS -- NONCLAIM PERIOD -- "EXAMINATION OF RECORDS" CONSTRUED. An "examination of records," as used in RCW 82.32.060 pertains solely to the audit function, and is complete when an assessment is issued.

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: . . .

NATURE OF ACTION:

Petition concerning the taxability of hay sales to Canadian customers who accepted delivery in the state of Washington, the rental of parking space, and the nonclaim statute.

FACTS:

Bauer, A.L.J.-- The taxpayer's business records were examined for the period January 1, 1982 through December 31, 1985. As a result, the above-referenced assessment was issued on September 23, 1986 in the amount of $ . . . , including interest. The taxpayer timely appealed. A supplemental audit was completed on February 4, 1988, which allowed credits in the total amount of $ . . . for income which had been erroneously reported in the tax years 1984 and 1985. In the supplemental, the auditor disallowed any similar credits for tax years 1982 and 1983.

The taxpayer is a wholesaler and retailer of agricultural products - principally hay - and owns and operates thirteen truck/trailer sets. It not only deals in hay, but also arranges for backhauls (trucking) and rents space to generate additional revenue.

ISSUES AND TAXPAYER'S EXCEPTIONS:

1. Whether interstate and foreign sales deductions were properly disallowed when Canadian buyers took delivery in the State of Washington and then transported the goods to Canada on their own vehicles.

In addition to its commercial resale activity, the taxpayer operates a retail barn where farmers and individuals may buy smaller quantities of hay. The retail barn is located within two miles of the Canadian border, and makes many sales to Canadians. The auditor disallowed deductions for those sales wherein hay had been loaded onto foreign purchasers' vehicles at the retail barn, claiming that this was not sufficient evidence to indicate that the hay had entered the export stream.

The taxpayer argues that it gives these purchasers documentation to allow them cross the U.S. - Canadian border without duty (certain agricultural products are not normally allowed to cross the border without duty unless certain sales documentation is provided by the U.S. seller). The taxpayer claims that the auditor recognized that exportation probably occurred.

2. Whether the rental of space to park trucks and trailers is the nontaxable rental of real estate, or the taxable transfer of a license to use.

The taxpayer owns several acres of land on which its trucks and hay are stored. There is additional space, which the taxpayer has graded and covered with rock. The area is not enclosed by fence, but is surrounded by potato fields. This space is rented out to other trucking companies for the storage of their trucks and trailers. The auditor reasoned that payments received for the use of this space are not for the nontaxable rental of real estate, but income from the granting of a license to use the real estate (taxable under the service classification of the business and occupation tax).

The taxpayer claims that lessees are granted the right of control of certain designated areas for continuous periods under the terms of their leases. The lessees have specifically assigned areas, and pay rent on specific square footages. Each area is marked with a concrete marker; the tongues of trailers are apparently placed on the markers. The taxpayer claims that if a truck or trailer is incorrectly parked, then the taxpayer requires it be moved.

There are no written or signed leases for parking, and the taxpayer has supplied us with no invoices or other records of payment. Despite this lack of written documentation, the taxpayer claims that the rental periods are for thirty days or longer.

The taxpayer believes this is more than a mere license to use the real estate, and is therefore not taxable.

3. Whether RCW 82.32.060 precluded a refund for taxes erroneously paid in 1982 and 1983 in a supplemental audit during the year 1988, when the original audit completed in 1986 was still under appeal with the Department.

While waiting for a determination regarding its original appeal on the above issues, the taxpayer realized that it had incorrectly over-reported certain revenues. The taxpayer has claimed that the mistake was discovered and verified by its own personnel by December 28, 1987, and that the auditor was notified by telephone before the end of the calendar year. The auditor performed additional auditing procedures which resulted in substantial refunds to the taxpayer. However, he

did not go back to 1982 and 1983, even though those years had been examined in the original audit, because it was his judgement that the period for refunds and credits set forth in RCW 82.32.060, the nonclaim statute, had passed for those years.

4. Whether tax was properly imposed on an unreported interstate/foreign sale which was improperly entered on the taxpayer's books.

The taxpayer argues that one transaction reflected on Schedule II of the audit report was actually a foreign/interstate sale, in that the taxpayer drove to Vancouver, B.C., loaded clay targets (used for skeet shooting), and delivered them to Lewiston, Idaho. Errors were then made in both the sales journal and ledger. The taxpayer contends it has the documentation to establish the haul as foreign/interstate.

DISCUSSION:

The first issue in this appeal involves the assessment of tax on sales made to Canadian residents.

To be exempt as an export, goods must have entered the export stream with certainty of a foreign destination. Neither the intent to export, nor the fact the article ultimately reaches a foreign destination, is sufficient to invoke the immunity. Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69 (1946); Carrington Co. v. Dep't. of Revenue, 84 Wn.2d 444, 445 (1974). The test applied to determine whether goods have entered foreign commerce is one of "reasonable facility and certainty." Tacoma v. General Metals, 84 Wn.2d 560, 563 (1974).

WAC 458-20-193C (Rule 193C) is the administrative rule dealing with sales of goods from or to persons in foreign countries. The rule provides a deduction with respect to export sales 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] Rule 193C thus lists three types of documentary evidence which a seller may use to document that he placed the goods into the export process. The taxpayer itself neither placed the goods into the export process, nor retained the necessary documents. The mere issuance of documentation to Canadian customers to allow them to cross the U.S. - Canadian border without duty is not sufficient under Rule 193C to establish certainty of export. The taxpayer's petition is denied as to this issue.

The second issue involves whether the rental of space for the parking of tractors and trailers is the nontaxable rental of real estate, or the taxable license to use.

Generally, automobile parking and storage garage businesses are subject to retailing business and occupation tax and retail sales tax unless designated parking spaces are rented for the exclusive use of each customer for a rental period of thirty days or more. RCW 82.04.050 and ETB 232.08.118.

[2] Because tractors and trailers are not "automobiles," however, service tax, and not retailing business and occupation tax and retail sales tax[1], is applicable if it is determined that designated parking spaces have not been rented for a continuous period of one month or more. In such a case there has been a license to use, and not the rental of real estate.

Here, although the taxpayer has claimed that certain parking areas are delineated, and that tenants are charged by the square footage delineated for those areas for periods of one month or more, no evidence supporting this claim has been submitted other than the arguments of the taxpayer's representative.

The auditor, when on site, was unable to discern individual parking areas or even the concrete blocks described by the taxpayer. Office personnel, when asked by the auditor, indicated that "tenants" were instructed where to park only in general terms. Further, the taxpayer executes no lease

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[1] Only "automobile parking and storage garage businesses" are taxable as retail sales. RCW 82.04.050.

agreements setting forth specific areas, and no invoices or billings have been submitted documenting either specified spaces/square footages or greater than thirty day occupancies of these areas.

Accordingly, we must deny the taxpayer's petition as to this issue, and hold the rental of parking areas to be in the nature of a license to use and not the rental of real estate taxable under the service classification of the business and occupation tax.

We must similarly deny the taxpayer's petition for refund for taxes overpaid in 1982 and 1983. RCW 82.32.060, the nonclaim statute, reads in pertinent part as follows:

No refund or credit shall be made for taxes paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed.

WAC 458-20-229 (Rule 229) similarly provides:

If upon written application for a refund or an audit of his records, or upon examination of the returns or records of any taxpayer, it is determined by the department of revenue that within the four calendar years immediately preceding the completion by the department of such an examination, a tax has been paid in excess of that properly due, the excess amount paid within said period will be credited to the taxpayer's account or will be refunded to him.
No refund or credit may be made for taxes paid more than four years prior to the beginning of the calendar year in which refund application is made or examination of records by the department is completed.

Thus, the Department is without authority to grant a credit or refund attributable to time prior to the four calendar years preceding the year in which the taxpayer either requests a refund, or an examination of records by the department is completed.

Although the taxpayer claims it telephonically contacted the auditor before the end of calendar year 1987, the auditor's records indicate he was called no earlier than January 21, 1988. Because the taxpayer failed to make written application during calendar year 1987, we are constrained to accept the auditor's records as to the date of contact.

Four years prior to the beginning of 1988 includes calendar years 1987, 1986, 1985, and 1984. Calendar years 1983 and 1982 are outside of the four year window.

Further, calculating the refund from the date "the examination of records is completed" does not further the taxpayer's cause.

[3] An "examination of records," as used in RCW 82.32.060 pertains to the audit function. An "examination of records" is complete when an assessment is issued. Once an assessment is appealed under RCW 82.32.170, such latter review becomes an "examination of assessment."

The original "examination of records" was completed on September 23, 1986 the date the first assessment was issued. The overpayment had not been detected. The second "examination of records," which did address the overpayments, was completed on March 10, 1988. By virtue of RCW 82.32.060, refunds as a result of that examination could only be made for the prior four years - 1987, 1986, 1985, and 1984.

Generally, then, a request for refund or credit regarding an issue unrelated to those in a pending petition for correction of assessment or refund is subject to the four year nonclaim period set forth in RCW 82.32.060, even though other issues from the same audit period may still be pending with the Department in an appeal status.

Although this may at first blush seem a harsh result, it must be remembered that, had the auditor on his second examination detected additional underpayments for tax years 1982 and 1983, he would have been barred from issuing an another assessment by RCW 82.32.050, which provides in pertinent part:

No assessment or correction of an assessment for additional taxes due may be made by the department more than four years after the close of the tax year ....

The taxpayer's petition regarding this issue is denied.

The last issue involving the interstate/foreign sale which was improperly entered on the taxpayer's books is a factual matter which will be referred to the Audit Section.

DECISION AND DISPOSITION:

The taxpayer's petition for correction of assessment and refund is denied, except that the file will be referred to the Audit Division for possible adjustment in accordance with this Determination. An amended assessment will then be issued, payment of which will be due on the date indicated thereon.

DATED this 28th day of July 1989.