Cite as 8 WTD 309 (1989)

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

In the Matter of the Petition) D E T E R M I N A T I O N
For Correction of Assessment)
and refund of) No. 89-493
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[1] RULE 107: ETB 101.08.107 -- GROSS RECEIPTS -- CASH OVER & SHORT -- CASH RECEIPTS METHOD -- DEDUCTION. A taxpayer reporting on the cash receipts basis must add cash overages and may not deduct cash shortages from receipts unless it can show that the error was due to recordkeeping errors.

[2] MISCELLANEOUS: COOPERATIVE ADVERTISING -- RECEIPTS FROM VENDORS -- CIRCULAR. A retailer who receives payments from manufacturers of products which it sells for co-op advertising done by a third party may exclude such payments from service B&O tax

provided: 1) The payments are expended for advertising and sales promotion only; 2) The advertising mentions the name of the manufacturer (vendor) or the trade names of the products; and 3) As a condition for payment, the manufacturer requires proof of actual advertising and its cost.

[3] RULE 231: RCW 82.04.270 -- INTERNAL DISTRIBUTION TAX --PURCHASE PRICE -- TAX IMPOSED BEFORE DISTRIBUTION. The purchase price method under Rule 231 imposing the internal distribution tax on products when purchased rather than when distributed, meets the intent and the purpose of the statute imposing the tax.

[4] MISCELLANEOUS: USE TAX -- RETAIL SALES TAX -- UNREGISTERED VENDORS -- BUYER LIABILITY. A buyer who pays sales tax to an unregistered vendor is not liable to the department if the vendor fails to pay the tax to the state.

[5] RULE 178 -- USE TAX. Use tax is imposed when an article is first used in the State of Washington.

[6] MISCELLANEOUS: RCW 82.32.070 -- RECORDS AVAILABLE FOR EXAMINATION. A taxpayer is required to make relevant records available to the auditor. Failure to do so may limit appeal.

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: September 27, 1989

NATURE OF ACTION:

The taxpayers petition for correction of assessment during the audit period and refund preceding the audit period. Similar issues of law are addressed in this determination. The taxpayers have indicated that factual issues can be resolved with the auditor. If those factual issues are not resolved, a subsequent determination will address those issues.

FACTS AND ISSUES:

Pree, A.L.J. -- The taxpayers are a group of affiliated corporations involved in the retailing business within and without Washington. The audit section has issued assessments with similar issues in five areas pertaining to one or more of the corporations and which will be addressed in this determination. They will be referred to as:

1) Cash over and short;
2) Co-op advertising;
3) Internal distributions;
4) Unregistered vendors;
5) Computer Software.

The first adjustment made by the auditor pertained to the taxpayers' treatment of the cash over and short accounts. The taxpayers computed retailing business and occupation tax by adding the cash over to sales and deducting the cash short from sales. Retail sales tax was computed from the cash receipts with an adjustment for exempt sales. Relying on ETB 101, the auditor added back the cash short to the measure of business and occupation tax as well as retail sales tax. In addition, the auditor computed retail sales tax on the cash overages based on the percent of retail sales to total sales including exempt receipts while the taxpayers added overages to receipts and subtracted the exempt receipts. The auditor sampled two consecutive one-month periods from which the taxpayers' adjustment was computed during the audit period. The taxpayers argue that they use the cash basis method of accounting and no deduction is being taken since there is nothing to include in receipts (the books don't reflect what its receipts are based on under Rule 197).

The second disputed adjustment concerns the taxpayers' treatment of cooperative advertising. The taxpayers would negotiate agreements with their product vendors whereby the product vendors would agree to pay the taxpayers for advertising the vendors' products through third parties. The taxpayers prepared layouts for newsprint advertising supplements or circulars that they distributed as well as coupon books. The auditor, relying on a Department of Revenue policy, assessed business and occupation tax on the payments received for the circular and coupon books that the taxpayers produced and distributed. Although they contracted out the printing work and distribution (in the samples that they brought to the hearing), the taxpayers did the layout and planning regarding the advertising. The auditor allowed the taxpayers to exclude those payments for television and radio broadcast advertising.

The third issue involves internal distributions. One of the taxpayers would purchase products, store them, then ship them to various stores that it owned. The taxpayer computed the tax based on the purchase price from the vendors at the time the merchandise was distributed to the stores. The taxpayer argued that it was necessary to use this method since at the time the goods were purchased, it was unable to determine whether or not the goods were going to be sold in Washington or outside of Washington. The taxpayer also argued that the method upon which the auditor based the assessment as provided in Rule 231 exceeded the statutory authority by imposing tax before the time mandated in the statute.
The auditor, relying on Rule 231, contended that the taxpayer's method was unacceptable. According to the auditor, the taxpayer could either measure the tax at the time of purchase under method one in which case the measure of tax was the purchase price, or under method two, measure the tax at the time of distribution to the stores in which case the measure of tax was taken from the amount invoiced to the store. The assessment was based on method one and the auditor used a sample period to determine the percentage of goods shipped outside of the state and deducted that estimate from the measure of tax.

The fourth issue involved taxes paid to unregistered vendors. The taxpayers purchased assets from out-of-state vendors who were not registered with the State of Washington. The taxpayers paid the vendors an additional amount for sales tax which was not separately stated on the invoices they received, but the taxpayers state that they wrote sales tax with an additional amount on the receipts when they returned them to the vendors. The auditors assessed tax on those amounts claiming that the state never received the tax and it was the taxpayers' responsibility to pay use tax on those purchases. The taxpayers contend that they followed the statutory requirements for paying the sales tax and the use tax cannot be imposed.

A fifth issue raised by a taxpayer at the hearing involved use tax on computer software which was ordered from a defunct vendor which is and has always been nonoperational according to the taxpayer. The taxpayer made two payments totalling over $85,000. The software is still carried on the books since the taxpayer hopes a third party can make it operational. The taxpayer argues that it contracted to receive functional capability which it has not yet received and consequently has been unable to use the software. In the alternative, it argues that the software is custom, not subject to retail sales tax under Rule 155.

Finally, there was an unresolved issue regarding investment income. The auditors were unable to obtain information regarding the identity of some of the investment income to determine whether or not it qualifies for exclusion from service business and occupation tax. According to the taxpayer such information has now been provided, and they expect a revised assessment. They request that their appeal rights be reserved, pending the assessment. No evidence was presented at the hearing regarding this issue and no findings are made in this determination.

DISCUSSION:

[1] RCW 82.04.070 defines "GROSS PROCEEDS OF SALES" as:

> "Gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property and/or for services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

ETB 101.08.107 states:

> RCW 82.04.070 defines "gross proceeds of sales" very broadly with no allowance for deductions.
>
> The commission has uniformly held that no deduction for cash shortages will be allowed from the gross proceeds of sales. While part of the shortage could represent uncorrected over-rings, other factors such as errors in making change and pilferage, could also contribute. The best evidence of the minimum volume of cash sales is deemed to be the cash register reading.

The taxpayer requests an adjustment to the assessment to allow an exclusion for cash shortages from business and occupation tax arguing that the amounts in question were never received under the taxpayers' accounting method. The taxpayer relies on WAC 458-20-197 which states in part, "When returns are made upon cash receipts and disbursements basis, value proceeds or accrues to a taxpayer as of the time the taxpayer receives, either actually or constructively, the consideration promised." In the alternative, the taxpayer requests it be allowed to offset cash shortages with cash overages which have been added to receipts.

The issue is whether or not the taxpayer received the amounts shown on the cash register tapes even though the money was not in the till at the end of the day when they were compared. The tape totals create a presumption that the cash was received and then somehow lost. Based on RCW 82.08.080 and ETB 101.08.107, no deduction or offset is allowed unless the taxpayer can show the error was due to record keeping errors such as uncorrected ring-ups rather than pilferage from dishonest employees or some other cause as suggested in the ETB. Since this has not been shown, no deduction is allowed.

[2] The cooperative advertising exemption is not addressed in any Department of Revenue rule. However, in 1968, the Department of Revenue Interpretations and Appeals division did publish the Automobile Dealers' Tax Manual (not necessarily current on other issues today) which stated on page 10:

> COOPERATIVE ADVERTISING ALLOWANCES
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> Cooperative advertising allowances are not subject to tax under the "Service and Other Activities" classification, provided such amounts are received by the automobile dealer in trust for the manufacturer or distributor. There must be a specific agreement between the car dealer and the one making the allowance that:
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> 1) The credits or allowances must be expended for advertising or sales promotion only; and
> 2) The advertising must mention the name of the manufacturer or the trade name of the products; and
> 3) As a condition for payment, the manufacturer must require proof of actual advertising and its cost.
>
> No exemption is allowed for amounts received as payments for advertising services performed directly by the car dealer. For example, (a) the placing of special displays in a show room, or (b) an advertising bulletin which the automobile dealer

> publishes. No exemption is allowed for commissions, or service charges retained as payment for repairing or placing advertising.

This position has been recognized in subsequent audit reports brought to our attention by the taxpayer. We have also ruled that where a taxpayer prepared the advertising copy and photographic layout, and third party printers then prepared the final work product (flier which were typically included in the taxpayer's monthly billings to customers as an insert), that the contributions toward expenses for cooperative advertising materials did not meet the statutory definition of "gross income of the business" at RCW 82.04.080 because the funds did not "accrue or proceed" to the taxpayer by reason of any business engaged in by the taxpayer. Rather the taxpayer is a mere conduit for such funds which are paid over directly to third party providers of services (advertising printers). We have also ruled that payments received from vendors by a taxpayer for advertising in catalogs produced by the taxpayer were includable in the measure of tax because the taxpayer was being paid for the service of producing its catalog.

Provided that they meet the three numbered requirements in the Automobile Dealers' Tax Manual (which the auditor did not contest from the limited materials he reviewed), to determine whether or not the taxpayers must include the payments received, we must determine whether the payments were in the nature of a reimbursement such as the mailing inserts discussed above, or whether the payments were for a service performed by the taxpayer such as the catalog production.

The taxpayers do not deny that they performed design and layout services in their advertising departments. They contend, however, that the payments they received were not for the advertising services performed by the taxpayers, but for third party expenses incurred to produce the advertising such as printing and postage.

At the hearing, the taxpayers provided sample co-op advertising offers or open-ended contracts from the vendors in which the vendors offered to reimburse retailers a percentage of printing and mailing costs, but not production costs. Also included were invoices from the taxpayer to two vendors which showed the computation of the amounts due from the vendors based on the printing and distribution costs and the relative size of the vendors ad to the circular or coupon book.

The taxpayer did not enter these receipts as sales or in any income account in its books, but entered the payments as a credit to third party advertising expenses. In its monthly advertising expense summary for its profit and loss statements, the taxpayer first computed its net advertising expense by offsetting its net third party billings with the vendors payments. The taxpayer then subtracted its internal costs to arrive at its advertising expense total. The taxpayer contends that this treatment is consistent with its position that the vendors payments were only for the third party costs and not the services it performed since they were subtracted only after the third party costs were offset by the vendors payments.

Payments by vendors (manufacturers of the products sold by the taxpayers) who only agree to pay for third party distribution and printing costs and not advertising services performed by the taxpayer, are not includable in the business and occupation tax measure provided that they meet the three requirements from the Automobile Dealers' Tax Manual. However, payments received from vendors which are part of an arrangement or contract requiring the taxpayer to produce a catalog or even a circular and are not limited to a portion of third party printing or distribution costs are for the service of producing advertising and taxable as such. The payments under the portions of the sample contracts reviewed meet the requirements for exclusion. The auditors should select and review other contracts for which payments were received to determine whether the taxpayers were entitled to exclusion of these payments and the extent of the exclusion.

[3] RCW 82.04.270 states:

> (1) Upon every person except persons taxable under subsections (1) or (8) of RCW 82.04.260 engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of forty-four one-hundredths of one percent.
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> (2) The tax imposed by this section is levied and shall be collected from every person engaged in the business of distributing in this state articles of tangible personal property, owned by them from their own 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: . . . The department of revenue shall prescribe uniform and equitable rules for the purpose of ascertaining such value, which value shall correspond as nearly as possible to the gross proceeds from sales at wholesale in this state of similar articles of like quality and character, and in similar quantities by other taxpayers: . . .

WAC 458-20-231 (Rule 231) in part states:

> Persons engaged in the business of distributing in this state articles of tangible personal property owned by them from their own warehouse or other central location in this state to two or more of their own retail stores or outlets, though no change in title or ownership to such property occurs, are taxable under the internal distribution classification of the business and occupation tax on the value of the articles so distributed, the intent 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. The internal distribution tax is applicable to transfers of merchandise from a central location which were preordered for a receiving retail outlet even if there is no inspection or opening of cartons or boxes at or by the central location. The tax may also be applicable to transfers by a retail outlet to two or more other retail outlets which are under the same ownership.
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> . . . . .
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> DETERMINATION OF THE VALUE OF THE ARTICLES DISTRIBUTED
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> The value of articles distributed shall correspond as nearly as possible to gross proceeds of sales at wholesale in this state by other taxpayers of similar articles of like quality and character and in similar quantities. Taxpayers may determine the value of articles distributed by one of the following methods:
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> METHOD 1. COST.

(A) COST OF PRODUCTION. The value of articles distributed may be computed upon the basis of the cost of manufacturing or producing such articles. In such case there shall be included every item of cost attributable to the particular article or articles manufactured or produced, including cost of transportation to the local distribution point. In such event tax liability accrues during the period in which the articles are distributed.

(B) PURCHASE PRICE. The value of articles distributed may be computed upon the basis of purchase price including delivery costs of such articles delivered at the local distribution point. The purchase price must include the amount of state and federal excise taxes imposed upon the distributor for the sale, handling or distribution of the articles distributed, whether such taxes are paid by the distributor to his vendor, or are paid by him directly to the taxing body. In such event tax liability accrues during the period in which the articles were purchased, even though the particular articles purchased may not be distributed until a later date. (Not available to those who manufacture or produce the articles distributed.)

METHOD 2. INVOICE PRICE TO RETAIL STORE. The value of articles distributed may be computed upon the basis of charges or memorandum invoices rendered to the retail stores at the time the articles are distributed, providing the amount of such charges or invoices is not less than the cost price of such articles. . . . In such event tax liability accrues during the period in which the articles are distributed.

METHOD 3. RETAIL SELLING PRICE LESS 15%. The value of articles distributed may be computed upon the basis of the retail selling price less 15%. In such event tax liability accrues during the period in which the articles are sold at retail.

METHOD 4. CORRESPONDING WHOLESALE SALES. The value of articles distributed may be determined according to the gross proceeds of sales of similar articles of like quality, character and quantity where bona fide wholesale sales are made during the same period, either by the taxpayer or by others, and providing a general standard price is established for such articles during said period. In such event tax liability accrues during the period in which the articles are distributed.

> A taxpayer may elect to report upon the basis of any one of the four above methods, providing that the method elected shall be applied to all articles distributed, and after such election is made such taxpayer shall not be permitted to change to any other method without securing the written consent of the department of revenue. A taxpayer may use both method 1A and 1B if conditions warrant. Intricate or unusual problems concerning determination of the value of articles distributed should be submitted to the department for special ruling.

The taxpayers argue not that the rule was misapplied, but the rule is not within the parameters of the statute. The taxpayers argue that Method 1(B) in Rule 231, which imposes tax at the time the articles are purchased rather than when they are distributed, exceeds the Department's authority under the statute. We disagree. While the tax "shall be collected from every person engaged in the business of distributing", it does not specify that it must be measured or paid at the time of distribution of the articles taxed. The statute (RCW 82.04.270) goes on to authorize: "The department of revenue shall prescribe uniform and equitable rules for the purpose of ascertaining such value, which value shall correspond as nearly as possible to the gross proceeds from sales at wholesale in this state of similar articles of like quality and character, and in similar quantities by other taxpayers." The intent of subsection (2) is "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." Subsection (1), regarding the imposition of the wholesaler's tax, states the tax, "with respect to such business shall be equal to the gross proceeds of sales of such business". Under the Rule authorized in subsection (2), a taxpayer is given several options under this scheme to tax transfers where no sale occurs. The tradeoff between the options is whether the tax is imposed on a higher value (retail sales price) at a later time or a lower value (cost) at an earlier time. It is the taxpayer's option to elect which method is used and thereby select the time and valuation method regarding the imposition of tax. We believe that Rule 231 fairly and reasonably prescribes methods to determine the tax.

However, since the wholesaling business and occupation receipts of a wholesaler do not include returns, lost or damaged products, or other nonwholesaling transactions, if the internal distribution tax is intended to impose an equal tax, it must somehow take those events into consideration. The taxpayer is entitled to some consideration for the items not shipped to its retailers in this state. However, it must still pay tax equal to that of a comparable wholesaler. At the hearing, the taxpayer while raising the issue in its petition, was unaware of the extent of the problem, if any. The auditor did account for those items shipped out of the state and will review the taxpayers' records regarding items damaged, returned to vendors, or sold to other retailers and remove them from the assessment.

[4] Unregistered vendors. Some of the invoices from the taxpayers' vendors did not include charges for sales tax. The taxpayer made payment to the vendors of the invoice amount plus an additional amount which the taxpayer computed as the amount of sales tax which would be due on the items purchased normally subject to sales tax. The taxpayers stated that they typed the designation, "sales tax" next to the additional amounts on the invoices they returned to the vendors with the additional amounts. The auditors checked the state's records regarding the vendors, and found that they had not registered with the Department of Revenue. The additional amount paid to the vendor has never been sent to the State of Washington as sales tax.

The taxpayers argue that they are relieved from their obligation to pay use tax because the additional amounts that they paid to the vendors constituted sales tax which they were obligated to pay or be penalized. They rely on RCW 82.12.0252 which exempts from use tax property that the user has paid sales tax stating:

> The provisions of this chapter shall not apply in respect to the use of any article of tangible personal property purchased at retail or acquired by lease, gift or bailment if the sale thereof to, or the use thereof by, the present user or his bailor or donor has already been subjected to the tax under chapter 82.08 or 82.12 RCW and such tax has been paid by the present user or by his bailor or donor. . .

They argue that when the sales tax is imposed, RCW 82.08.050 requires a buyer to pay a seller sales tax to the seller and penalizes the buyer for failure to do so stating:

> The tax hereby imposed <u>shall</u> be paid by the buyer to the seller, and each seller shall collect from the buyer the full amount of the tax payable in respect to each taxable sale . . .
>
> The amount of tax, until paid by the buyer to the seller or to the department, shall constitute a debt from the buyer to the seller . . . The tax required by this chapter to be collected by the seller shall be stated separately from the selling price in any sales invoice or other instrument of sale. . . . For purposes of determining the tax due from the buyer to the seller and from the seller to the department it shall be conclusively presumed that the selling price quoted in any price list, sales document, contract or other agreement between the parties does not include the tax imposed by this chapter. . . .
>
> Where a buyer has failed to pay to the seller the tax imposed by this chapter and the seller has not paid the amount of the tax to the department, the department may, in its discretion, proceed directly against the buyer for collection of the tax, in which case a penalty of ten percent may be added to the amount of the tax for failure of the buyer to pay the same to the seller, regardless of when the tax may be collected by the department; and all of the provisions of chapter 82.32 RCW, including those relative to interest and penalties, shall apply in addition; and, for the sole purpose of applying the various provisions of chapter 82.32 RCW, the fifteenth day of the month following the tax period in which the purchase was made shall be considered as the due date of the tax.

Finally they contend that there is no requirement that the buyer only pay the seller if it is registered. Seller is defined under RCW 82.08.010(2) as:

> (2) "Seller" means every person, including the state and its departments and institutions, making sales at retail or retail sales to a buyer or consumer, whether as agent, broker, or principal, except "seller" does not mean the state and its departments and institutions when making sales to the state and its departments and institutions;

However, RCW 82.08.020(1) which imposes the retail sales tax states in part:

> (1) There is levied and there shall be collected a tax on each retail sale in this state equal to six and five-tenths percent of the selling price. (Emphasis supplied.)

Therefore, sales tax is imposed on retail sales occurring in this state. There seems to be no issue that there were retail sales, but the taxpayer presented no evidence at the hearing to establish where the sales occurred. The auditor states that these were out-of-state vendors and that the sales occurred out-of-state so that the vendors were not required to be registered or pay B&O tax. Since the sales occurred out-of-state, no Washington sales tax was imposed, and, therefore, the additional amounts paid however the buyer chose to designate them did not constitute sales tax exempting them from their use tax obligations. The buyer's only recourse regarding the unregistered vendors is to collect the additional amount paid back from the seller.

[5] The next issue involves the computer software that the taxpayer paid for which never functioned. This issue was not specifically mentioned in the petition because the taxpayer thought that it would be resolved in a post assessment adjustment by the auditor. The auditor contends that since the taxpayer received the software, use tax should be imposed. Certainly, the fact that the taxpayer paid for the software, and that it remains on the books of the taxpayer creates the presumption that it was and is still in use. The taxpayer should explain what its factual basis was for its federal tax treatment so that can be distinguished from the position that it is taking before us.

According to the taxpayer's testimony, what was purchased was a functioning program of an intangible nature. Therefore, according to the taxpayer, it could not be delivered until it worked. The taxpayer was uncertain whether or not physical tapes were delivered in Washington.

WAC 458-20-178 (Rule 178) discusses when use tax is imposed, stating in part:

> (3) When tax liability arises. Tax liability imposed under the use tax arises at the time the property purchased, received as a gift, acquired by bailment, or extracted or produced or manufactured

> by the person using the same is first put to use in this state. The terms "use," "used," "using," or "put to use" include any act by which a person takes or assumes dominion or control over the article and shall include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within the state. Tax liability arises as to that use only which first occurs within the state and no additional liability arises with respect to any subsequent use of the same article by the same person. As to lessees of tangible personal property who have not paid the retail sales tax to their lessors, liability for use tax arises as of the time rental payments fall due and is measured by the amount of such rental payments.

First, it is still necessary for the taxpayer to verify for what it paid over $85,000. The Department needs to know whether it was produced exclusively for the taxpayer as an original, one-of-a-kind program or a derivative of other programs developed for others and protected by restrictions on use by others. A contract would best describe what was purchased and it could be supplemented by the vendor's advertising pamphlets and other materials. With that information, we can determine if it is custom or canned and what rights as well as physical traits exist. Second, we need to know where it went. Was it physically shipped or electronically delivered to the taxpayer in Washington? Third, we need to know what happened to it. How did the taxpayer know it was not functional. Did the taxpayer try to use it? What did not work. We need to know whether it was purchased or leased. Finally, we get to the issue that the taxpayer wanted resolved at the hearing, how to prove that it did not use it. Obviously, proving a negative is more difficult than proving something exists or was used. It is even more difficult when you don't know what you are looking for. It would be premature to suggest a proof of nonexistence of something that we have not yet been able to describe. This is an issue of a factual nature for which the auditor upon determining the relevant facts and circumstances outlined above can propose a reasonable method to determine whether the taxpayer used or did not use the asset it carries on its books for $85,000. If no additional information is provided, the fact that it is on the taxpayer's books creates the presumption that it was placed in service and that the taxpayer still owns it.

Once the auditor gathers the facts with the taxpayer, they can consider whether or not the taxpayer used tangible personal property within this state (see RCW 82.12.020, WAC 458-20-178, and WAC 458-20-155). If the parties are still in disagreement we will reconsider the issue, based on written responses to the questions raised above.

[6] Finally, the auditors have indicated that the taxpayers have not made all the records available in several issues of dispute. While the taxpayers dispute this, they indicate that they will cooperate with reasonable requests and work with the auditors to resolve the outstanding issues. Our position is that information should first be obtained and considered at the audit level. RCW 82.32.070 states in part:

> Every person liable for any fee or tax imposed by chapters 82.04 through 82.27 RCW shall keep and preserve, for a period of five years, suitable records as may be necessary to determine the amount of any tax for which he may be liable, which records shall include copies of all federal income tax and state tax returns and reports made by him. <u>All his books, records, and invoices shall be open for examination at any time by the department of revenue.</u> . . . <u>Any person who fails to comply with the requirements of this section shall be forever barred from questioning, in any court action or proceedings, the correctness of any assessment of taxes made by the department of revenue based upon any period for which such books, records, and invoices have not been so kept and preserved.</u> (Emphasis supplied.)

Taxpayers must make records available to auditors. Auditors can then consider them in any assessment. If auditors are denied a reasonable request for relevant information, they should present the specific request in writing to the taxpayers, noting the date and the person (including title and entity if applicable) that the request was submitted to. If the lack of information results in an assessment of additional tax, it should be so stated in the audit report with a copy of the request attached to the report as an exhibit. The Interpretation and Appeals division will normally not examine records which taxpayers refuse to make available to auditors.

In this situation everyone seems willing and anxious to cooperate in resolving the outstanding issues at this time.

We believe that it is reasonable given the number of unresolved factual issues to expect this to occur within 60 days from the date of this determination.

DECISION AND DISPOSITION:

Issued 1. - Cash over and short - all taxpayers' petitions for correction of assessments and refunds are denied.
Issue 2. - Cooperative advertising - all taxpayers' are referred back to audit for further investigation consistent with this opinion.
Issue 3. - Internal distributions - all taxpayers' petitions are denied.
Issue 4. - Unregistered vendors - all taxpayers' petitions are denied.
Issue 5. - Computer software use tax - referred to audit for development and resolution.

DATED this 20th day of October 1989.