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

In the Matter of the Petition For Refund and For Correction of Assessment of	D E T E R M I N A T I O N
	No. 89-328
. . .	Registration No. . . .
	. . . /Audit 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 Rule 211 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. Dept. of Rev., 44 Wash. 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.

[3] RULE 211: DUNCAN CRANE AMENDMENT. The amendment to Rule 211, which incorporated the Wa. Court of Appeals' ruling in Duncan Crane Service, Inc. v. Dept. of Rev., supra, became effective July 1, 1987 as a result of the Department's emergency adoption of the rule as amended.

[4] RULE 211: RULE 178 -- SALES/USE TAX -- CRANE -- RENTAL OF -- WITH OPERATOR -- "TRUE LEASE" -- DATE

OF APPLICATION -- LOANED SERVANT. Leases with operator must be evaluated in terms of whether or not they are "true leases" starting July 1, 1987. There are eight factors, including that of loaned servant, to be considered in determining whether the lessor or the lessee has dominion and control of the equipment. Here, those factors preponderated in favor of control by the lessee. The result is a "true lease" and no sales or use tax owed by the lessor except as a collection agent for sales tax on the rental payments.

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: December 8, 1988

NATURE OF ACTION:

Petition for refund of sales tax paid on purchases of cranes for lease. Also, petition protesting use tax assessed on cranes leased with operator and on parts and repairs to said cranes.

FACTS AND ISSUES:

Dressel, A.L.J. -- . . . (taxpayer) rents cranes. Its books and records were examined by the Department of Revenue (Department) for the period January 1, 1984 through December 31, 1987. As a result a tax assessment, identified by the above-captioned numbers, was issued for $ . . . . Parts of that assessment are being appealed in this action. In addition the taxpayer has petitioned for a refund of retail sales tax it paid on purchases of cranes during the years 1982 through 1986.

The basis for both petitions is the 1986 Washington Court of Appeals case, Duncan Crane v. Dept. of Revenue, 44 Wash.App. 684. That case invalidated WAC 458-20-178 (Rule 178) and WAC 458-20-211 (Rule 211) insofar as they did not provide for leases of construction equipment with a lessor-supplied operator. In response the Department amended Rule 211, first,

on an emergency basis effective July 1, 1987 and, second, on a permanent basis effective September 11, 1987. Under the amended versions leases with operator were recognized, but were limited by certain requirements.

Generally speaking, one who acquires tangible personal property for the sole purpose of leasing it to others is not required to pay sales or use tax. Rule 211 (10) and Rule 178 (6). The taxpayer argues that because of the Court's recognition in Duncan Crane of a lease with operator, all of its crane activity qualifies as leasing and, therefore, it erroneously paid sales tax on its cranes when it purchased them. On others, purchased after the Duncan Crane decision, it purposely did not pay sales tax because of the Court's ruling. In the subject assessment the Department's auditor has subjected those to use tax which action the taxpayer also claims was done in error.

More specifically, the taxpayer's allegations of erroneous tax application may be grouped into three periods of time. They are the period prior to the Duncan Crane opinion, the period after that opinion but before the amendment of Rule 211, and the period following that amendment. As to those three periods, the taxpayer makes two claims which create two issues: Number one, Duncan Crane controls both the old and the amended version of Rule 211 and demands that neither sales or use tax is owed for any period because the cranes were acquired exclusively for resale (rental). Secondly, even if the amended rule is a valid interpretation of the court case, the taxpayer meets the new requirements for a "true" lease with operator anyway.

DISCUSSION:

[1 and 2] The Department has been faced with a barrage of refund claims premised on Duncan Crane. In one of those, Determination (Det.) No. 88-352, __WTD__ (1989), we granted a refund claim for sales tax paid on a crane leased to others. We qualified that relief, however, by saying that after August 11, 1987, the effective date of the referenced Rule 211 amendment, the taxpayer was subject to the new criteria for a "true" lease with operator. We further qualified that relief by adjudging sales tax due on those leases with operator previously reported for B&O tax purposes under the Wholesaling category.

This case is virtually indistinguishable from the one cited. The only significant difference is that the audit period in

this one extends past the date of the rule amendment. We will address that period later in this determination. For the period 1982 to the date of the amendment, however, our ruling is the same as in Det. No. 88-352. Sales or use tax paid on the acquisition of cranes used exclusively for rental with or without operator will be refunded. Sales tax will be assessed, however, on all rental-with-operator payments received unless the taxpayer can demonstrate such rentals were for re-rental. In such case the lessee would have been eligible to give the taxpayer a resale certificate. Rules 102 and 211.

[3] There is a minor modification of the previous decision that is necessary. In Det. No. 88-352 it was said that the effective date of amended Rule 211 was August 11, 1987. Actually, the amended rule was adopted on an emergency basis effective July 1, 1987. That is the date after which the taxpayer in Det. No. 88-352 should have been required to comply with the "true" lease criteria. Henceforth, July 1, 1987 is the date that will be applied to this taxpayer as well as others similarly situated.

Next, we will address the period following July 1, 1987. The taxpayer has alternatively argued that Rule 211, as amended, is an unlawful implementation of Duncan Crane and that it meets the new requirements for a "true" lease regardless. We choose to take the easy way out, namely, we will determine whether the taxpayer's leases with operator are "true" ones. The pertinent part of amended Rule 211 reads:

> (3) A true lease, rental, or bailment of personal property does not arise unless the lessee or bailee, or employees or independent operators hired by the lessee or bailee actually takes possession of the property and exercises dominion and control over the personal property and actually operate it, the owner has not generally relinquished sufficient control over the property to give rise to a true lease, rental, or bailment of the property.
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> (4) RCW 82.04.050 excludes from the definition "retail sale" any purchases for the purpose of resale, "as tangible personal property." Also, under this statutory definition, the term "retail sale" includes the renting or leasing of tangible personal property to consumers. However, equipment which is operated by the owner or an employee of the

> owner is considered to be resold, rented, or leased only under the following, precise circumstances:
>
> (a) The property consists of construction equipment;
>
> (b) The agreement between the parties is designated as an outright lease or rental, without reservations; and,
>
> (c) The customer acquires the right of possession, dominion, and control of the equipment, even to the exclusion of the lessor.

[4] In the case before us, (a) and (b) are satisfied. Cranes are construction equipment and the agreements between the taxpayer and its customers are labelled "rental agreement". Requirement (c); possession, dominion, and control; is the difficult one. Rule 211 continues in part:

> (5) The third requirement above [c] is a factual question and the burden of proof is upon the owner/operator of the equipment to establish that the degree of control has been relinquished necessary to constitute a lessor-lessee relationship. Weight will be given to such factors as who has physical, operating control of the equipment; who is responsible for its maintenance, fueling, repair, storage, insurance (risk of loss or damage), safety and security of operation, and whether the operator is a loaned servant. If control of these factors is left with the owner/operator, then as a matter of fact, there has not been a relinquishing of control of the equipment to the degree necessary to create a lessor-lessee relationship. This is true, even though the customer exercises some constructive control over such matters as when and where the equipment is used in connection with the construction work being performed, i.e., the contractor controls the job site.
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> (6) Thus, the terms leasing, rental, or bailment do not include any arrangements pursuant to which the owner of the equipment reserves dominion and control of the equipment and either operates the equipment or property or provides an employee operator,

> whether or not such employee operator works under the general supervision or control of the customer.

(Brackets ours.)

The rule lists eight factors which are to be considered in determining who has "dominion and control" of the leased equipment. The taxpayer was queried about those factors. The taxpayer (lessor) acknowledges that it is responsible for fueling and routine maintenance. Both lessor and lessee are responsible for repairs. The lessor makes "ordinary" repairs whereas the lessee pays for those occasioned by rough or improper use of the cranes while on the job for a lessee. Both parties carry insurance on the crane. The rental agreement states that the lessor's insurance does not cover liability of the lessee. Storage is by the lessee in that the crane is left overnight at the job site which is controlled by the lessee. Of the eight factors, then, that leaves physical, operating control; safety and security of operation; and loaned servant.

The concept of a loaned servant was discussed in Nyman v. MacRae Bros. Construction Co., 69 Wash.2d 285 (1966). This case involved personal injuries sustained by a worker from the negligent use of a crane leased with operator. The Court found that the operator was a loaned servant because the lessee had nearly complete control of his work activities at the job site. The lessee told the operator what, when, and where to do something, and the operator did it. The Court made this ruling notwithstanding that the operator was on the payroll of the lessor. The effect of the ruling was that the lessee worker was deemed injured by a co-worker so he could not sue the lessor, a third party, for damages under the Worker's Compensation Act.

As to the matter of control of the operator at the job site in the present case, the taxpayer's representative has produced affidavits from five different customers. All say they have virtually complete control of the crane operator while leasing a crane. This quotation from one of the affidavits is typical:

> My Company will inform . . . as to when and where the crane and operator are to report.
>
> Once at the job site we control every aspect of the operations. The crane operator is expected to use the crane in a manner described by our Company. For

example, some of the specific orders given, which are fully expected to be obeyed, are as follows:

(1) When to begin work;

(2) Which object to lift and in what order;

(3) Where to put the objects;

(4) The direction in which the objects are to be placed in their desired location;

(5) When to stop crane during a pick; and

(6) When to lower objects during a pick.

The only discretion the operator has once the project commences is to be sure the crane is being operated within its capabilities and capacities.

If the crane operator would refuse to obey our orders, we certainly have the right to immediately terminate the relationship.

We fail to see how a lessee could have more control over a non-employee operator of leased equipment than it does in the situation described in the affidavit. Furthermore, we are advised that in all cases the operators are qualified specialists hired out of a union hall. They are not full-time employees of the lessor. Such circumstance makes the relationship between the lessor and the operator even more tenuous, in our opinion. It is, therefore, our finding that the taxpayer's operators are loaned servants.

The final two factors are physical, operating control; and safety and security of operation. As to the first and as pointed out earlier, the lessee has the right to direct all lifting activities. In that sense it has physical, operating control of the crane albeit through the medium of a loaned servant who receives its directions. Considering that plus the tenuous relationship between the servant and the taxpayer, we conclude that the lessee, for purposes of the rule requirement, has physical, operating control.
As to safety and security of operation, our analysis is similar. The only control the taxpayer has in this regard is through the loaned servant who as an expert and as the actual operator may exercise his independent judgment. In that regard he or she can decline to do something that would

endanger persons or property based on his or her experience. But is the control he or she may exercise over safety and security necessarily to be imputed to the taxpayer? Arguably, it is just as easily imputed to the lessee in that the operator is a loaned servant to the lessee. Otherwise, safety and security of operation is controlled by the lessee in that it tells the crane operator what, where, how, and when to do something and whatever is done is accomplished on a job site which the lessee controls. The nod on this factor goes to the lessee as well.

Let us now tabulate the results. Of the eight factors which the rule deems influential in determining who has "dominion and control" of the rented machinery, the preponderance is in favor of the lessee. The lessee is a winner in four of the categories, the lessor (taxpayer) in two, and there are two ties. But the real winner is the lessor because the consequence of finding the lessee in dominion and control of the leased equipment is that the leases are "true" ones. That means that the cranes were continuously held for rental, that there was no intervening use by the taxpayer, and that the taxpayer does not owe use tax on the cranes. See Rules 211 and 178 and RCW 82.04.050 (1)(a) and (4).

For the period following the July 1, 1987 emergency adoption of Rule 211, then, neither sales nor use tax is owed by the taxpayer on the value of its cranes or on parts and repairs made thereon. It remains liable as indicated above for collection of sales tax on rental payments. It does not, however, owe sales tax on rental payments made to . . . National Bank for cranes the taxpayer re-rented to others. Such tax was assessed in audit schedule V.

DECISION AND DISPOSITION:

The taxpayer's petition is granted. The Audit Division will issue an amended assessment consistent with this Determination after examining any further records it deems necessary. As to the refund claim, the Audit Division will verify that sales tax was paid at the subject cranes' acquisition and that the cranes were not put to other personal use by the taxpayer. If that is established, it will offset any refund or credit by the amount of sales tax that was not paid on rental payments, assuming that such assessment is within the statute of limitations and that the sales tax amounts have not already been collected from the lessees.

DATED this 23rd day of June 1989.