Cite as Det. No. 99-272R, 20 WTD 7 (2001)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	F I N A L D E T E R M I N A T I O N
	)	No. 99-272R
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

[1] RULE 178, RULE 211; RCW 82.04.050: RETAIL SALES TAX -- USE TAX – BAREBOAT CHARTER -- TIME CHARTER. In general, a bareboat charter is considered the rental of personal property and is subject to retail sales tax. In contrast, the service of transporting property for hire by the lease of a vessel with a crew is not considered a retail sale. A bare boat charter is a maritime lease or rental agreement that, as opposed to a "time" or "voyage" charter, has the effect of shifting the possession and control of the vessel from the owner to the charterer. In determining whether a given rental agreement, or charter party, as it is termed in admiralty, is a bare boat charter, the crucial test is one of control.

[2] RULE 178, RULE 211; RCW 82.04.050: RETAIL SALES TAX -- USE TAX – BAREBOAT CHARTER -- TIME CHARTER. The taxpayer had exclusive control of the barge for purposes of transporting, navigating, repairing, and unloading the barge, and the charterer only exercised control over the barge's itinerary and the times and dates of departures and arrivals within a specified geographic area. As such the charter party is considered a time charter, not a bareboat charter, and it is not subject to retail 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.

NATURE OF ACTION:

Carrier seeks reconsideration of a determination sustaining the assessment of retail sales tax on fees received for the exclusive use of a barge by a shipper.[1]

FACTS:

Mahan, A.L.J. – The taxpayer owns and operates tugs and barges for hire. One of the barges it owns, the . . . (the "barge"), is a large specialty barge that can be used only for loading, transporting, and unloading cement.

In 1991, the taxpayer entered into a ten year "Contract of Private Carriage" . . . (the "Charterer") for the "use" of the barge. Under the terms of this agreement, the taxpayer is paid a monthly fee, with annual adjustments in accordance with a "monthly lease rate" schedule set forth in Appendix A to the agreement. The taxpayer is also paid an "unloading and maintenance fee" on a per ton basis for the use and maintenance of the cement pumps and other equipment used for unloading the cement from the barge.

Under the terms of the contract, the taxpayer is responsible for unloading the barge and maintaining the barge while it is being loaded. The Charterer is responsible for obtaining marine, hull, and indemnity insurance on the barge. It also has an option to purchase the barge.

Under a separate Towage Agreement between the taxpayer and the Charterer's sister company, . . . (the "Sister company"), which has its principal place of business in . . ., Washington, the taxpayer uses its tugs to tow the barge between Canada and the United States. When notified by the Charterer, the taxpayer tows the barge to Canada for a load of cement. During loading, the taxpayer agrees that "Tug personnel, at no cost to Shipper, perform maintenance and improvements to the '[barge]'." Once the barge is loaded, the taxpayer tows the barge to . . ., Washington, for unloading at the Sister company's facilities. Once unloaded, the barge remains at the Sister company's dock until another load of cement is ready for shipment from Canada. The taxpayer receives a set fee for towing the barge on each round trip.

Although there is nothing explicit in the Contract of Private Carriage requiring the Charterer to use the taxpayer to tow the barge, no other company has ever been used to tow the barge. As a practical matter, no other party would be used to tow the barge, because the taxpayer is responsible for unloading the barge and maintaining it while it is being loaded. According to the testimony, the parties always intended to use the taxpayer to tow the barge and, because of the specialized nature of the equipment, they always intended for the taxpayer to operate the barge for loading and unloading purposes.

The Towage Agreement refers to the taxpayer as the "owner" of the barge. No reference is made to any right of the Charterer to possess, operate, or control the barge. However, the agreement

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

does provide for the right of the Sister company to terminate the agreement should the Charterer exercise the purchase option in the private carriage agreement.

Under these two agreements, the Charterer is responsible for monthly lease payments and unloading/maintenance charges, and the Sister company is responsible for transportation charges. However, the practice of the parties differs from the terms of the contracts in this and other respects. In practice, the taxpayer submits separate invoices to the Charterer for "transportation/unloading" charges and for "lease" payments. The Sister company then pays the taxpayer's invoices.

The Department of Revenue (Department) audited the taxpayer's records and, as part of a deficiency assessment, treated the income from the use of the barge as rental income subject to retail sales tax. The Department apportioned that income based on the time the barge was in or outside Washington waters.

The taxpayer contends that income for the use of the barge was from providing carriage services, subject to the interstate deduction, and not from a lease of the barge. Despite any contrary language in the contract, it contends the intent was not for the Charterer to have dominion and control over the barge. Rather, the parties intended for the Charterer to have exclusive use of the barge and, in exchange, for the taxpayer to receive a minimum monthly carriage fee. Accordingly, the taxpayer contends the Private Carriage Contract should not be construed as a lease of the barge.

Alternatively, the taxpayer contends that the Charterer should be treated as a private carrier, and its lease payments for carrier property subject to the exemptions provided for by RCW 82.08.0261 and .0262. *See* WAC 458-20-175 (Rule 175). In support of this argument, the taxpayer cites to *Weyerhaeuser Co. v. Department of Rev.,* No. 82-64 (Bd. of Tax Appeals 1982).

ISSUES:

1. When a carrier by agreement operates and maintains a barge and the shipper has the exclusive right to use the barge for a set monthly fee and insures the barge, is the agreement a lease or a contract for service for state tax purposes?

2. If the taxpayer is the lessor of the barge, did the lessee of the barge become a private carrier for hire when the purchaser of goods from the lessee arranges for the transportation of the goods?

DISCUSSION:

The leasing of tangible personal property is defined as a retail sale and is subject to retail sales tax. RCW 82.04.050; *Black v. State*, 67 Wn.2d 97, 406 P.2d 761 (1965) (concerning retail sales tax on lease of a vessel to be used as a floating hotel). A lease is a "contract whereby one party gives to another the right to the use and possession of property for a specified time and, ordinarily, for fixed payments." *Gandy v. State*, 57 Wn.2d 690, 694, 359 P.2d 302 (1961).

If an owner retains dominion and control over the tangible property, a "true lease" (i.e., a taxable lease) is not created. WAC 458-20-211 (Rule 211). Rule 211(2)(f) defines a "true lease" as:

> The term "true lease" (often referred to as an "operating lease") refers to the act of leasing property to another for consideration with the property under the dominion and control of the lessee for the term of the lease with the intent that the property will revert back to the lessor at the conclusion of the lease.

In general, a lease, rental, or bailment of tangible property requires the relinquishment of possession and control over the item by one party and the acceptance of such possession and control by the other party. *Duncan Crane v. Department of Rev.*, 44 Wn. App. 684, 689, 723 P.2d 480 (1986); *Collins v. Boeing Co.*, 4 Wn. App. 705, 711, 483 P.2d 1282 (1971). Whether possession and control has actually been transferred is a question of fact. As stated in *Collins*:

> Whether there is a change or acceptance of possession depends on whether there is a change or acceptance of actual or potential control in fact over the subject matter . . . . In determining whether control exists, it is relevant to consider the subject matter's amenability to control, steps taken to effect control, the existence of power over the subject matter, the existence of power to exclude others from control, and the intention with which the acts in relation to the subject matter are performed.

Collins, 4 Wn.App. at 711.

At issue in the present case is whether the private carriage contract provided for a change in dominion and control over the barge.[2] Contracts for private carriage may take different forms. Such contracts commonly involve bare boat charters, time charters, or voyage charters, which have been described as follows:

> Under a Time Charter, the charterer engages for a fixed period of time a vessel, which remains manned and navigated by the vessel owner, to carry cargo wherever the charterer instructs. Under a voyage charter the charterer engages the vessel to carry goods only for a single voyage; and under a demise, or bareboat, charter, the charterer takes complete control of the vessel, mans it with his own crew, and is treated by law as its legal owner. See Gilmore & Black, *supra*, § 4-1, at 193.

[2] A common carrier holds itself out to the public as engaging in the business of transporting goods for hire and offers its services to the public generally. In contrast, a contract for private carriage involves a ship owner providing the entire vessel to one person or where only one shipment takes up the whole vessel. *See* 2A *Benedict on Admiralty* § 21, at 3-1 (1997).

Nissho-Iwai Co. v. M/T Stolt Lion, 617 F.2d 907, 917 (2d Cir. N.Y. 1980). A time charter may specify which party has the duty to load, stow and discharge the cargo. *Id.; see also* C. Gilbert & C. Black, *The Law of Admiralty* § 4-1, at 194 (2d ed. 1975). Some of the legal consequences that arise from the different types of charters have been described as follows:

> In maritime law the contract for the lease of a vessel is called a charter party. There are two distinct types of charter party -- (1) the demise or bare boat charter, by which the vessel is turned over completely to the charterer, who mans her and operates her throughout the period of hire and becomes her owner for that time, and (2) other types of charter, either time or voyage, by which the owner of the vessel agrees to carry cargo provided by the charterer and which leave the control or management of the vessel in the hands of her owner. *Fish v. Sullivan*, 40 La.Ann. 193, 3 So. 730; *Leary v. U.S.*, 14 Wall. 607, 20 L.Ed. 756.
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> In *Leary v. U.S.*, *supra*, the United States Supreme Court said:
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> > "There is no doubt that under some forms of a charter-party the charterer becomes the owner of the vessel chartered for the voyage or service stipulated, and, consequently, becomes subject to the duties and responsibilities of ownership. Whether in any particular case such result follows must depend upon the terms of the charter-party considered in connection with the nature of the service rendered. The question as to the character in which the charterer is to be treated is, in all cases, one of construction. If the charter-party let the entire vessel to the charterer with a transfer to him of its command and possession and consequent control over its navigation, he will generally be considered as the owner for the voyage or service stipulated. But, on the other hand, if the charter-party let only the use of the vessel, the owner at the same time retaining its command and possession and control over its navigation, the charterer is regarded as a mere contractor for a designated service, and the duties and responsibilities of the owner are not changed. In the first case the charter-party is a contract for the lease of the vessel; in the other, it is a contract for a special service to be rendered by the owner of the vessel."

Rojas v. Robin, 230 La. 1096, 1107, 90 So. 2d 58, 62 (1956).

The distinction between a bare boat charter and other charters is one of control:

> A bare boat charter or demise is a maritime lease or rental agreement which, as opposed to a "time" or "voyage" charter, has the effect of shifting the possession and control of the vessel from the owner to the charterer, just as the shore-side lease of real property shifts many of the incidents of ownership from lessor to lessee. C. Gilbert and C. Black, *supra* at 215.

. . .

> In determining whether a given rental agreement, or charter party, as it is termed in admiralty, is or is not a bare boat charter, the crucial test is one of *control*. If the owner retains control over the vessel, merely carrying the goods or providing the services designated, no bare boat charter exists. C. Gilbert & C. Black, *supra* at 217. To create a demise, the owner of the vessel must completely and exclusively relinquish possession, command, and navigation of the vessel to the charterer.

Potashnick-Badgett Dredging Inc. v. Whitfield, 269 So. 2d 36, 43 (Fla. App. 1972), *cert denied*, 272 So. 2d 820 (Fla. 1973).

Because of the degree of dominion and control that must be exercised by the captain of a vessel, the lease of a boat with crew is generally not considered a lease within the contemplation of Washington's retail sales or use tax statutes. *See, e.g.*, Det. No. 91-151, 11 WTD 193 (1991); ETA 356.12.211; ETA 481.12.178. See also WAC 458-20-211(5)(d), which provides that "[w]here a specific tax classification applies to the activity, the income is subject to the business and occupation tax (or public utility tax) according to the classification of the activities performed by the equipment and operator." More specifically, under subsection (5)(d)(vi), the rule provides that "[i]ncome from transporting persons or property for hire by vessel is not a retail equipment rental with operator." In contrast, a bare boat charter is generally considered to be subject to retail sales or use tax. *See, e.g.*, Det. No. 87-171A, 5 WTD 281 (1988); WAC 458-20-211(5)(a).

At issue in this case is whether the private carriage contracting for the barge was a bare boat charter or a time charter. A second issue then arises as to the effect of the use of the barge by the Sister company for the delivery of the product it purchased from the Charterer and the related towage agreement or charter party between the Sister company and the taxpayer.[3]

In construing the private carriage agreement, we find the Charterer did not enter into a bare boat charter for the barge; rather it entered into a time charter. Although general language in the charter agreement, when viewed alone, could be read to allow the Charterer dominion and control over the barge, particularly in light of a purchase option and the responsibility to acquire insurance, other factors dictate against such a finding.[4] For example, specific contract language required the taxpayer to repair the barge during loading and to be responsible for unloading. Such language is consistent with the taxpayer's testimony and the Charterer's testimony that the intent of the contracting parties was for the taxpayer to always operate the barge. It was also the undisputed testimony that the taxpayer was the only party who ever towed, operated, or navigated the barge during the term on the contract. Based on our review of the contract as a

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[3] We note that the parties to the written agreements did not adhere to all of the terms of the agreements. In this regard, written agreements may be modified by subsequent oral agreements between the parties (*Consolidated Electrical Distributors, Inc. v. Gier Co.*, 24 Wn. App. 671, 677, 602 P.2d 206 (1979)) and by the conduct of the parties (*Davis v. Altose*, 35 Wn.2d 807, 814, 215 P.2d 705 (1950)).

[4] Although the responsibility to acquire insurance is normally on the owner in a time charter, the parties may shift this responsibility. *Benedict, § 188, at 17-63.*

whole and the conduct of the parties under the contract, we conclude the taxpayer had exclusive control of the barge for purposes of transporting, navigating, repairing, and unloading the barge. In contrast, the evidence shows the Charterer only exercised control over the barge's itinerary and the times and dates of departures and arrivals within a specified geographic area, which authority is generally consistent with a finding of a time charter. *See Benedict*, § 224, at 20-6.

Of concern to the Department was the use of a separate towage agreement with the Sister Company rather than with the Charterer. The Sister company purchased the Charterer's product FOB the Charterer's plant and then transported the product to [Washington] using the chartered barge. As between these related parties, there was an informal subcharter of the barge. Consistent with the original charter, the taxpayer operated and navigated the barge.

Under these circumstances, we find that the private carriage agreement only allowed the Charterer (or its subcharterer) the use of the vessel for a defined period of time in a defined geographic location, whereas the taxpayer at the same time retained command, possession, and control over the barge's navigation and operation. As such, the Charterer is regarded as a mere contractor for a designated service, and the duties and responsibilities of the owner were not changed, as would occur under a bare boat charter.

Accordingly, the monthly lease payments are not subject to retail sales tax.[5] On remand the Department should determine whether the payments, instead, are subject to the exemption for watercraft used for hire in transporting goods interstate or between the United States and another nation. *See* Det. No. 91-323ER, 13 WTD 39 (1993).

DECISION AND DISPOSITION:

Taxpayer's petition for reconsideration is granted and the matter remanded to the Audit Division for adjustment of the assessment in accordance with this decision.

Dated this 12th day of May, 2000.

[5] With respect to the argument that the Charterer should be treated as a private carrier, the business records, export documents, and agreements all show it is the shipper or consignor of record, not a private carrier. Rather, it hires the taxpayer, which is a carrier for hire. As the carrier, the taxpayer controls the movement and operation of the tug and barge while goods are being transported. The taxpayer's reliance on *Weyerhaeuser Co. v. Department of Rev*., No. 82-64 (Bd. of Tax Appeals 1982) is misplaced. In that case, a Weyerhaeuser marine transportation division chartered vessels under agreements that gave it full control over the operation and movement of the vessels and the cargo being transported. It also issued bills of lading and was responsible for the risk of loss of the cargo. Under such circumstances, the Board of Tax Appeals considered Weyerhaeuser to be operating as a private carrier. Similar facts do not exist in the present case.