

Cite as Det. No. 00-152, 20 WTD 507 (2001)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 00-152
)	
...)	Registration No. . . .
)	FY. . ./Audit No. . . .

- [1] RULE 193; RCW 82.08.0269: RETAIL SALES TAX -- GOODS DESTINED FOR USE IN NONCONTIGUOUS STATE -- DELIVERY OPTIONS. For purposes of the RCW 82.08.0269 noncontiguous state exemption, delivery may be made not only to a "for-hire" carrier, but also to the purchaser's dock, airport, depot, warehouse, or receiving terminal in this state "when the circumstances are such that it is reasonably certain that the goods will be transported directly to their place of ultimate use." [Overruling Det. No. 87-166, 3 WTD 53 (1987)]
- [2] RULE 193; RCW 82.08.0269: RETAIL SALES TAX -- GOODS DESTINED FOR USE IN NONCONTIGUOUS STATE -- COMPLIANCE -- DELIVERY AND DOCUMENTATION. The RCW 82.08.0269 noncontiguous state exemption is available only to those who comply with the delivery and documentation provisions set forth in Rule 193(6)(c).

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:

Petition concerning the waiver of use tax/deferred sales tax assessed on consumable supplies taken by a fishing company to Alaska on its barge.¹

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

FACTS:

M.M. Bauer, A.L.J. -- The business records of . . . (Taxpayer) were examined by the Audit Division (Audit) of the Department of Revenue (Department) for the period January 1, 1996 through December 31, 1999 (audit period). As a result of this audit, the above-referenced assessment was issued on May 10, 2000 in the amount of \$. . . , and interest in the amount of \$. . . , for a total of \$. . . . Taxpayer paid this amount and timely petitioned for a refund on June 16, 2000, electing to use the small claims procedure. However, because of the complexity of the issues presented, this case has been converted from small claims to a mainstream appeal.

The year 1999 was agreed upon as a test period for consumable supplies. Taxpayer urges that certain of the consumable supplies it purchased during that year were for use in Alaska, and thus were exempt from Washington retail sales under RCW 82.08.0269. Taxpayer objects to the assessment of use/deferred sales tax on the following items, whose deletion would affect the 1999 test period:

DATE	INVOICE #	VENDOR	DESCRIPTION	PRICE:
5/7/99	269004	...	HAND HELD TACH	\$. . .
5/6/99		...	PROCESSING SUPPLIES	\$. . .
5/5/99		...	TOOL GAUGE	\$. . .
5/5/99	LO520-1	...	HAND-HELD VHF	\$. . .
5/3/99	115476	...	AMMONIA GAS	\$. . .
4/28/99	19351	...	LUBRICANT	\$. . .
4/30/99	19488	...	FILTERS/FLUIDS/CLEANERS	\$. . .
5/21/99	1003229	...	TOOLS/LUBE/CAULK, ETC	\$. . .
6/10/99	1000700	...	TOOLS	\$. . .
5/10/99	1000702	...	TOOLS	\$. . .
5/10/99	1000704	...	TOOLS	\$. . .
4/29/99	B20448855	...	TIE WIRE/ELECTRICAL TAPE	\$. . .
4/30/99	B20572	...	GRINDERS	\$. . .
4/23/99	74007	...	FAX PAPER	\$. . .
4/26/99	139659000	...	CABLE TIES	\$. . .
4/19/99	166215	...	PILLOW/MATTRESS CLOTH/RAINSUITS	\$. . .
TOTAL				\$. . .

Audit, in finding the above items be taxable, advised:

RCW 82.08.0269 provides an exemption for sales of goods for use in states, territories, and possessions of the United States that are not contiguous to any other state. However, this applies only when, as a necessary incident to the contract of sale, a seller delivers the property to a purchaser or its designated agent at the usual receiving terminal of the for-hire carrier selected to transport the goods. Documentation must be retained to verify, with reasonable certainty, that the goods were transported directly to that state, territory, or possession. Refer to WAC 458-20-193 for proof of exemption requirements.

Audit indicates that most of the items in question had apparently been purchased from local vendors in Washington and picked up at the vendors' locations by Taxpayer. Taxpayer did not supply Audit with any documentation demonstrating that the seller had delivered the goods to a carrier or terminal for transportation directly to Alaska. Audit was, further, not convinced that all items in question were for use only in Alaska, as it appeared that items such as tools and lubricants could be used at Taxpayer's repair shop in Washington as well as being used in Alaska.

Taxpayer fishes from early May to late September in Alaska, where it maintains . . . tenders and numerous processing barges throughout the year. In September, Taxpayer brings one tugboat and one barge back to Washington, where they are docked in . . . , Washington during the "off-season." In May, Taxpayer takes the tugboat and barge from Washington back to Alaska -- a 17 day trip -- with supplies necessary to maintain its fleet for the fishing season. According to Taxpayer, nothing is left in Washington except the building and its lease.

Taxpayer's representatives explain that all of the items at issue were purchased and transported from Washington on its own barge for use in Alaska. Taxpayer states the barge left Washington sometime between May 5 and May 7 shortly after acquisition of the supplies here at issue.² Taxpayer concedes that its own employees picked up the majority of the contested items from vendors and put them immediately either into its warehouse or onto its barge for transport. However, Taxpayer argues that [two of the sellers] did in fact deliver the supplies purchased from them to the terminal, but has no paperwork documenting these deliveries. Taxpayer strenuously argues that all of these supplies were loaded onto its barge and taken to Alaska with no intervening use in Washington.

ISSUES:

1. Must goods be delivered to and transported by a "for-hire" carrier for the RCW 82.08.0269 noncontiguous state exemption to apply?
2. Is Taxpayer eligible for the RCW 82.08.0269 noncontiguous state exemption even though it did not comply with its delivery and documentation requirements?

DISCUSSION:

RCW 82.08.0269 provides a retail sales tax exemption for items to be used exclusively in a noncontiguous state such as Alaska as follows:

The tax levied by RCW 82.08.020 shall not apply to sales for use in states, territories and possessions of the United States which are not contiguous to any other state, but only when, as a necessary incident to the contract of sale, the seller delivers the subject matter

² We note that three of the invoices from . . . , however, were dated after these dates.

of the sale to the purchaser or his designated agent at the usual receiving terminal of the carrier selected to transport the goods, under such circumstances that it is reasonably certain that the goods will be transported directly to a destination in such noncontiguous states, territories and possessions.

(Emphasis added.) Rule 193 provides requirements for documenting compliance with the above RCW 82.08.0269 requirements:

(6) . . . (c) A statutory exemption (RCW 82.08.0269) is allowed for sales of goods for use in states, territories and possessions of the United States which are not contiguous to any other state (Alaska, Hawaii, etc.), but only when, as a necessary incident to the contract of sale, the seller delivers the property to the purchaser or its designated agent at the usual receiving terminal of the for-hire carrier selected to transport the goods, under such circumstance that it is reasonably certain that the goods will be transported directly to a destination in such noncontiguous states, territories and possessions. As proof of exemption, the seller must retain the following as part of its sales records:

(i) A certification of the purchaser that the goods will not be used in the state of Washington and are intended for use in the specified noncontiguous state, territory or possession.

(ii) Written instructions signed by the purchaser directing delivery of the goods to a dock, depot, warehouse, airport or other receiving terminal for transportation of the goods to their place of ultimate use. Where the purchaser is also the carrier, delivery may be to a warehouse receiving terminal or other facility maintained by the purchaser when the circumstances are such that it is reasonably certain that the goods will be transported directly to their place of ultimate use.

(iii) A dock receipt, memorandum bill of lading, trip sheet, cargo manifest or other document evidencing actual delivery to such dock, depot, warehouse, freight consolidator or forwarder, or receiving terminal.

(iv) The requirements of (i) and (ii) above may be complied with through the use of a blanket exemption certificate³

Issue #1: Must goods be delivered to and transported by a "for-hire" carrier for the RCW 82.08.0269 noncontiguous state exemption to apply?

In 1986, Determination No. 86-220, 1 WTD 37 (1986) summarized the conditions that must exist for the RCW 82.08.0269 exemption to apply as follows:

³ The exemption certificate is described essentially as follows:

We hereby certify that all of the goods which we have purchased and which we will purchase from you will not be used in the State of Washington but are for use in the state, territory or possession of _____.

You are hereby directed to deliver all such goods to the following dock, depot, warehouse, freight consolidator, freight forwarder, transportation agency or other receiving terminal: _____ for the transportation of those goods to their place of ultimate use.

This certificate shall be considered a part of each order that we have given you and which we may hereafter give to you, unless otherwise specified, and shall be valid until revoked by us in writing. . . .

1. The property is sold for use in a noncontiguous state or possession such as Alaska.
2. The property is delivered to the usual receiving terminal of the carrier transporting the goods.
3. It is reasonably certain that the goods will be transported directly to the noncontiguous state.
4. If the buyer is also the carrier, delivery may be to a warehouse receiving terminal or other facility maintained by the buyer if it is reasonably certain that the goods will be transported directly to their place of ultimate use.

(Emphasis added.) However, in 1987, Determination No. 87-116, 3WTD 53 (1987) held that, for the noncontiguous state exemption to be effective, the goods must be delivered to, and transported by, a "for-hire" carrier:

As noted above, for a sale to a purchaser in a noncontiguous state to be exempt, the seller must deliver the property to the purchaser or his designated agent "at the usual receiving terminal of the carrier selected to transport the goods." (Emphasis added.) Rule 193A⁴ repeats this statutory requirement and also requires that the buyer must direct delivery of the goods to a "receiving terminal of the transportation agency designated by him for transportation of the goods." These requirements necessarily imply that the carrier be one regularly engaged in the business of transporting for hire, as only such carriers would have a "usual receiving terminal."

The Washington Supreme Court has held that a "carrier" is one actually engaged in the transportation business. *Wasen's, Inc. v. State*, 63 Wn.2d 67 (1963). In that case, the court upheld the Department's position that sales to an out-of-state purchaser were not exempt when the purchaser acted as the carrier. See also ETBs 93.04.193 and 161.08.193.

Similarly, the United States Supreme Court has strictly limited the export and interstate tax exemptions. See, e.g., *Kosydar v. National Cash Register Company*, 417 U.S. 62 (1974); *Coe v. Errol*, 116 U.S. 517 (1886). An article is not an export until it has been "irrevocably committed" to overseas shipment. *Carrington Company v. Department of Revenue*, 84 Wn.2d 444, 466 (1974).

Accordingly, the assessments of the sales to the Alaska purchasers are upheld where the buyer or buyer's agent took delivery of the equipment in Washington. The fact that the taxpayer's evidence shows the equipment was transported to Alaska for use in that state is not controlling.

⁴At the time Det. No. 87-166 was issued, the Department's rule addressing the RCW 82.08.0269 exemption was WAC 458-20-193A. It contained identical language as the current Rule 193 with the exception that the word "buyer" was used instead of "purchaser."

(Emphasis added.) *Wasen's, Inc., supra.* was written to construe the word "carrier" in the context of deductible interstate commerce sales (i.e., sales not taxable under the commerce clause of the United States Constitution), when sellers deliver products to out-of-state destinations and must retain in their files bills of lading to prove their entitlement to the deduction. Similarly, *Kosydar, Coe,* and *Carrington, supra,* were also written in the context of sales in interstate and foreign commerce. While we believe *Wasen's* is still an accurate statement of the law as to the requirements of interstate commerce sales, we do not believe this construction to be applicable as to the RCW 82.08.0269 noncontiguous state deduction, even though its requirements are also contained in Rule 193.

In order to qualify for deduction for the sale of goods to be used in noncontiguous states, RCW 82.08.0269 merely requires the goods be delivered to a "carrier" selected to carry the goods, and that such delivery within this state be "under such circumstances that it is reasonably certain that the goods will be transported directly to a destination in such noncontiguous states"

While Rule 193(3)(b) requires exempt interstate commerce deliveries to be made either by the seller's own transportation equipment or a "carrier-for-hire," Rule 193(6)(c), for purposes of the RCW 82.08.0269 noncontiguous state exemption, allows not only in-state delivery to a "for-hire" carrier, but also in-state delivery to the purchaser:

. . . the seller delivers the property to the purchaser or its designated agent at the usual receiving terminal of the for-hire carrier selected to transport the goods, under such circumstance that it is reasonably certain that the goods will be transported directly to a destination in such noncontiguous states, territories and possessions.

(Emphasis added.) Rule 193(6)(b)(ii) goes on to state:

Where the purchaser is also the carrier, delivery may be to a warehouse receiving terminal or other facility maintained by the purchaser when the circumstances are such that it is reasonably certain that the goods will be transported directly to their place of ultimate use.

(Emphasis added.) Further, neither RCW 82.08.0269 nor Rule 193(6)(c) require that a "for-hire" carrier be used, nor do they require that through bills of lading issued by a for-hire carrier evidencing delivery outside the State of Washington be kept as evidence. Under Rule 193(6)(c)(i), (ii), and (iii), an entirely different set of documents are required:

(i) A certification of the purchaser that the goods will not be used in the state of Washington and are intended for use in the specified noncontiguous state, territory or possession.

(ii) Written instructions signed by the purchaser directing delivery of the goods to a dock, depot, warehouse, airport or other receiving terminal for transportation of the goods to their place of ultimate use.

(iii) A dock receipt, memorandum bill of lading, trip sheet, cargo manifest or other document evidencing actual delivery to such dock, depot, warehouse, freight consolidator or forwarder, or receiving terminal.

[1] (Emphasis added.) We do not believe, in accordance with the analysis set forth above, that Det. No. 87-166 was correct in determining that goods must be delivered to a "for-hire" carrier in order to qualify for the RCW 82.08.0269 noncontiguous state exemption. To the extent it so held, Det. No. 87-166 is therefore overruled. Rather, we determine that delivery to a "for-hire" carrier is only one option under Rule 193(6)(c). Goods may also be delivered to the purchaser's dock, airport, depot, warehouse, or receiving terminal in this state "when the circumstances are such that it is reasonably certain that the goods will be transported directly to their place of ultimate use."

Audit found no documentation evidencing delivery by sellers to the purchaser in compliance with Rule 193(6)(c). Taxpayer has conceded that, in most instances, goods were not delivered to the purchaser, but were taken from the vendors' places of business when purchased. Although Taxpayer alleges that in three instances the vendors actually delivered the goods to Taxpayer's warehouse, Taxpayer concedes it has none of the required documentation even relative to these deliveries. Taxpayer, however, assures us that all of the items in question were taken directly to Alaska and were not used in this state. The veracity of this statement is not at issue.

[2] The RCW 82.08.0269 noncontiguous state exemption is available only to those who comply with its provisions and those set forth in Rule 193(6)(c). Because Taxpayer's vendors did not deliver the majority of the goods here at issue in compliance with RCW 82.08.0269 and Rule 193(6)(c), and because required documentation was not kept in any instance, we are not able to grant Taxpayer entitlement to the exemption.

DECISION AND DISPOSITION:

Taxpayer's petition for refund is denied.

Dated this 9th day of August, 2000.