Cite as Det. No. 00 043, 20 WTD 39 (2001)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 00-043
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

[1] RULE 208; RCW 82.04.425; RCW 82.32.070: WHOLESALING B&O TAX – ACCOMODATION SALE: AUTOMOBILE DEALER. Failure of an initiating automobile dealer of an accommodation sale to meet the requirement of keeping in its records a bona fide existing order of a customer prevents the dealer/taxpayer from deducting wholesaling B&O tax for that sale from its gross income.

[2] RULE 177; RCW 82.08.0264: RETAIL SALES TAX EXEMPTION – SALES OF MOTOR VEHICLES TO NON-RESIDENTS FOR USE OUTSIDE THIS STATE. Sales of motor vehicles do not qualify for the retail sales tax exemption if the dealer/taxpayer does not exercise a reasonable degree of prudence in accepting a buyer's statement of non-residency in an affidavit.

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:

Automobile dealer protests assessment of wholesaling business and occupation (B&O) tax on a disallowed accommodation sale, and further protests retail sales tax on disallowed motor vehicle sales to non-residents, and use tax assessed on vehicles used by certain employees for business or personal reasons.[1]

FACTS:

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

De Luca, A.L.J. – The taxpayer is a corporate automobile dealer that sells new and used motor vehicles. The Audit Division of the Department of Revenue (the Department) reviewed the taxpayer books and records for the period September 27, 1994 through March 31, 1998 and granted a net credit of $. . . . Document No. FY. . . .

TAXPAYER'S EXCEPTIONS:

The taxpayer agrees with the audit report except for parts of three schedules. Specifically, Schedule 5 contains an assessment of wholesaling B&O tax on a disallowed accommodation sale (. . .) between the taxpayer and another automobile dealership (. . .). The taxpayer contends this transaction satisfies all the requirement of WAC 458-20-208 (Rule 208), which governs accommodation sales.

In Schedule 11, the Audit Division assessed retail sales tax on disallowed sales of motor vehicles to non-residents. The taxpayer agrees with the schedule except for two transactions. The taxpayer sold one motor vehicle to a person named [Mr. A]. The taxpayer sold the other disputed motor vehicle to a [Mr. B]. The taxpayer states the sale to [Mr. A] was made in accordance with WAC 458-20-177 (Rule 177), which concerns the sales of motor vehicles to non-residents of Washington. That is, the taxpayer claims the non-resident affidavit required by Rule 177 was completed and all documents were available for review to substantiate the exemption. The taxpayer adds the paperwork clearly showed [Mr. A] was not stationed or serving with the armed forces within this state.

The taxpayer also contends the paperwork for the sale to [Mr. B] conformed to Rule 177's requirements. The taxpayer claims [Mr. B] had moved from this state prior to the purchase, but he had stated his previous address on his credit application. Furthermore, [Mr. B] used "his mother's name and telephone number on the application as a contract [sic] person."

Finally, the taxpayer protests a part of Schedule 16, where use tax was assessed for the audit period on cars used by the taxpayer's managers for personal or business purposes. The taxpayer claims the use of cars by several managers was terminated as of December 31, 1996 and not December 31, 1997 as the Audit Division found. Therefore, the taxpayer contends some use tax should be deleted for periods after 1996.

ISSUE:

Did the taxpayer's transactions meet the requirements of Rule 208 or Rule 177?

DISCUSSION:

[1] Much of the disputed tax in this matter involves record-keeping, specifically for wholesaling B&O tax deductions for accommodation sales and retail sales tax exemptions for non-resident motor vehicle sales. One of the basic requirements for entitlement to a tax deduction or exemption is proof. Tax deductions and exemptions are narrowly construed. Budget Rent-a-Car of Washington-Oregon, Inc. v. Department of Rev., 81 Wn.2d 171, 174, 500 P.2d 764 (1972). The taxpayer has the burden of proof. Budget Rent-a Car, 81 Wn.2d at 174-75. Accordingly, taxpayers are required to keep and preserve their business records:

> (1) 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. All his books, records, and invoices shall be open for examination at any time by the department of revenue. . . . 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.

RCW 82.32.070. In the context of an auto dealer that makes accommodation sales, that would include enough information to enable a Department auditor to trace an accommodation sale and find there was a "bona fide existing order of a customer." *Infra.* It would also mean enough information to justify tax-exempt sales of motor vehicles to non-residents. *Infra*.

RCW 82.04.425 exempts accommodation sales from B&O tax. Rule 208 implements the statutory exemption by restating the statute and adding explanatory language:

> The term "accommodation sales" means only sales for resale by persons regularly engaged in the business of making sales of the type of property so sold to other persons similarly engaged in the business of selling such property where (1) the amount paid by the buyer does not exceed the amount paid by the seller to his vendor in the acquisition of the article and (2) the sale is made as an accommodation to the buyer to enable him to fill a bona fide existing order of a customer or is made within fourteen days to reimburse in kind a previous accommodation sale by the buyer to the seller.
>
> The "amount paid by the seller to his vendor" may under some circumstances include certain actual costs incurred by the seller and billed as such to the buyer in addition to the invoice cost of the article sold at an accommodation sale. The facts concerning such added costs must be submitted to the department of revenue for specific rulings. The "amount paid by the seller to his vendor" shall not be reduced by the amount of any manufacturer's holdbacks or discounts received after an article has been sold at an accommodation sale even though such holdbacks or discounts may be retained by the seller.

> In computing tax under the wholesaling-Other classification, there may be deducted from the reported gross amount so much as represents receipts from accommodation sales. Each seller claiming this deduction must retain as a part of his sales records sufficient evidence to prove the nature of the transactions.

Thus, requirements for accommodation sales include – One, amounts paid by buyers cannot exceed the amounts paid by the sellers to the vendors in acquiring the articles. The Audit Division found the taxpayer met this requirement in the . . . purchase. Two, the sale must be made as an accommodation to the buyer to enable that person to fill a bona fide existing order of a customer. The Audit Division stated in its audit report the taxpayer was unable to provide any evidence that a bona fide order existed at the time it acquired the vehicle.

The Department, the Washington State Automobile Dealers Association (WSADA), and a CPA firm . . . jointly prepared and published the "Auto Dealers Guide to Excise Taxes" (Auto Dealers Guide), the most recent copy is dated August 1993. The Auto Dealers Guide discusses accommodation sales on pages 1-1 through 1-3. The Auto Dealers Guide also summarizes the statutory requirements for an accommodation sale:

> **What are accommodation sales?** Automobile dealers occasionally sell a vehicle or other items at cost to another dealer so that the receiving dealer can fill an existing order. These transactions are generally referred to as "accommodation sales".
>
> **Taxable?** Accommodation sales made by one dealer to another are not taxable to the first dealer if the amount charged does not exceed the original cost of the item, provided that the receiving dealer has an existing order of a customer for the item.
>
> **Reimburse previous accommodation sale**[.] The receiving dealer may reimburse the first dealer in kind within fourteen days of the original accommodation sale.

Under the heading "documentation," the Auto Dealers Guide states:

> Accomodation sales must be documented. An example of accepted documentation is on page 1-3. These forms may be purchased from the Washington State Auto Dealers Association. Similar forms may be purchased at business stationery stores or drafted by each dealer for their own use.

The form ("Motor Vehicle Accommodation Sale Invoice") contains two boxes, one of which must be checked. The first box is adjacent to this explanatory language:

> Filling a bona fide order of one of my customers, which order is presently in my files and will be retained and available for examination at any time by the Tax Commission within five years from this date.

This language follows the second box:

Reimbursing the following accommodation sale made on _____, 19__

The purpose of the forms is to help substantiate (to the Department) why value received should not be taxed as wholesale sales. The initiating auto dealer completes a form, describing the car it purchases from the responding auto dealer and stating the amount paid, and checks the first box. The initiating auto dealer signs the form and gives it to the responding auto dealer to keep in its tax records. The form signed by the initiating dealer and delivered to the responding dealer is to substantiate the B&O tax deduction for the responding dealer.

The responding auto dealer completes another form, describing the car it purchases from the initiating auto dealer and stating the amount paid, and checks the second box (because it is receiving a car to replace the one it sold to the initiating auto dealer). The responding auto dealer signs the form and gives it to the initiating auto dealer to keep in its tax records. The form completed by the responding dealer and delivered to the initiating dealer is to help substantiate the B&O tax deduction for the initiating dealer.

To qualify for the deduction for the transfer of the vehicle to the responding dealer under a checked second box, the transfer by the initiating dealer (the taxpayer) must be within fourteen days of an original accommodation sale. RCW 82.04.425 and Rule 208. The deduction applies only if a valid original accommodation sale (sale by the responding dealer to the initiating dealer to fulfill an existing order of the initiating dealer (the taxpayer)) exists. It is only the initiating dealer (the taxpayer) that has the records to support a valid original accommodation sale (a bona fide existing order of a customer), and both RCW 82.04.425 and Rule 208 require documentation.

In response to the taxpayer's petition, the Audit Division in a June 8, 1999 letter again stated there was no evidence in the taxpayer's records that a bona fide order existed at the time of the transaction. Specifically, the Audit Division declared the taxpayer's records showed the automobile dealers (the taxpayer and . . .) traded vehicles on January 28, 1998. The taxpayer confirms it requested the vehicle from . . . on January 28, 1998. Yet, the Audit Division has twice stated the taxpayer's records showed the first evidence of a bona fide order occurred six days later on February 3, 1998. As noted, Rule 208 requires taxpayers retain records in their files as to the nature of these transactions. Det. No. 88-155, 5 WTD 179, 192-93 (1988). The taxpayer, as the initiating dealer, has failed to meet the requirement of keeping in its records a bona fide existing order of a customer and, therefore, does not qualify for the tax deduction.

[2] RCW 82.08.0264 exempts from retail sales tax sales of motor vehicles to non-residents for use outside this state. Rule 177 implements the statute and explains in detail what is necessary for nonresidents to qualify for the exemption. Among other things, the rule requires a non-resident buyer to complete an affidavit, which is specified in the rule. The rule also provides:

> The foregoing affidavit will be prima facie evidence that sales of vehicles to nonresidents have qualified for the sales tax exemption provided in RCW 82.08.0264 when

> there are no contrary facts which would negate the presumption that the seller relied thereon in complete good faith. The burden rests upon the seller to exercise a reasonable degree of prudence in accepting statements relative to the nonresidence of buyers. Lack of good faith on the part of the seller or lack of the exercise of the degree of care required would be indicated, for example, if the seller has knowledge that the buyer is living or is employed in Washington, if for the purpose of financing the purchase of the vehicle the buyer gives a local address, if at the time of sale arrangements are made for future servicing of the vehicle in the seller's shop and a local address is shown for the shop customer, or if the seller has ready access to any other information which discloses that the buyer may not be in fact a resident of the state which he claims. A nonresident permit issued by the department of revenue may be accepted as prima facie evidence of the out of state residence of the buyer, but does not relieve the seller from obtaining the affidavit and completing the certificate required by this rule.
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> Members of the armed services who are temporarily stationed in Washington pursuant to military orders will be presumed to be nonresidents unless such persons were residents of this state at the time of their induction. This presumption is not applicable in respect to civilian employees of the armed services.
>
> In all other cases where delivery of the vehicle is made to the buyer in this state, the retail sales tax applies and must be collected at the time of sale. The mere fact that the buyer may be or claims to be a nonresident or that he intends to, and actually does, use the vehicle in some other state are not in themselves sufficient to entitle him to the benefit of this exemption. In every instance where the vehicle is licensed or titled in Washington by the purchaser the retail sales tax is applicable. (Underlining added.)

Merely accepting an affidavit from a buyer is not sufficient to exempt the transaction from sales tax. The seller must also exercise a reasonable degree of prudence in accepting the buyer's statements of non-residency. In its June 8, 1999 letter in reply to the taxpayer's petition, the Audit Division notes [Mr. A] and his wife signed a non-resident affidavit stating he was a California resident. The sales agreement shows a California address for the buyer. However, according to the Audit Division, [Mr. A] presented the following documents to prove his California residency:

- A blank check with a Pennsylvania address
- His voter registration card with a Florida address
- Her Florida driver's license with a Maryland address
- Her Florida driver's license with a Florida address
- An insurance card with a Pennsylvania address.

[Mr. A] also presented military identification, but the Audit Division was not sure why the identification was part of the sales file because the required military orders were not found in the sales records. As noted above, the taxpayer contends [Mr. A] was not serving or stationed in the armed services in this state.

We agree with the Audit Division concerning the [Mr. A]'s sale in light of the documents in the sales file and Rule 177's requirement that a seller exercise a reasonable degree of prudence in accepting a buyer's statement. Other than the buyer's statement in the affidavit that he was a California resident, there is no evidence to support that claim. Instead, the documents show ties to Florida, Maryland, and Pennsylvania, but not to California. As Rule 177 provides, the mere fact that a buyer claims to be a nonresident and intends to, and actually does, use the vehicle in some other state are not in themselves sufficient to entitle the buyer to the benefit of this exemption. Because of the lack of connection between the buyer's documents and California, reasonable prudence required the taxpayer to demand that [Mr. A] present other documentary evidence to support his claim of California residency. Failure to provide such proof denies the [Mr. A] transaction the exemption.

We reach a similar conclusion in the [Mr. B] transaction, which occurred in November 1997. In its June 8, 1999 letter, the Audit Division wrote the taxpayer's records revealed [Mr. B] provided the taxpayer with a local telephone number. He banked with [local] Bank at that time. His credit application showed his previous address in . . ., WA. Furthermore, the Audit Division stated that the 1991-92, 1996, and 1997 [Washington City] telephone books showed the same [Washington City] address for [Mr. B]. The Audit Division also wrote that [Mr. B] apparently moved to [another Washington City] in 1998. Again, Rule 177 requires a seller to exercise a reasonable degree of prudence in accepting a buyer's statement. Examples given in the rule that show a seller's lack of the necessary degree of care required include: accepting the affidavit with knowledge that the buyer is living or is employed in Washington, or knowing the buyer is using a local address for the purpose of financing the purchase. Clearly, the facts show the taxpayer had enough information about [Mr. B]'s local connections that indicated he might have not been a resident of the state he claimed. As noted, the mere fact a person claims to be a nonresident does not entitle that person to the exemption.

The last item is the use tax assessed on the automobiles used by some of the taxpayer's managers. The taxpayer explained certain managers no longer had use of vehicles after December 31, 1996 and not December 31, 1997 as the Audit Division found. The Audit Division replied in its June 8, 1999 letter that it would be happy to verify the taxpayer' claim. This matter is simply a factual question that the Audit Division can decide by reviewing the taxpayer's records.

DECISION AND DISPOSITION:

The taxpayer's petition is conditionally granted. The taxpayer has sixty days (60) days from today's date (or additional time if granted by the Audit Division) to provide the Audit Division suitable records in support of the taxpayer's claim. Specifically, the use tax assessed in Schedule 16 shall be adjusted if the taxpayer's records show, as it claims, certain managers did not use motor vehicles after December 31, 1996. Furthermore, if the taxpayer can provide the Audit Division suitable records to support its claims for the disallowed accommodation sale (. . .) and

the two disallowed non-resident sales ([Mr. A] and [Mr. B]), then it should provide them as well at that time. As discussed above, the records reviewed thus far by the Department do not satisfy the requirements for the respective tax deduction and exemptions. Additional, suitable records are required. Failure to timely provide the Audit Division with suitable records will result in the sustaining the assessment in full.

Dated this 17th day of March 2000.