Cite as Det. No. 00-203, 20 WTD 394 (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. 00-203
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

[1] RULE 247; RCW 82.08.010: RETAIL SALES TAX – SELLING PRICE – LIKE-KIND TRADE-IN EXCLUSION – CONSIGNMENT. In order for the like-kind trade-in exclusion in RCW 82.08.010(1) and Rule 247 to apply, both requirements set out in Det. No. 99-005, 19 WTD 223 (2000) must be met. That is, the seller or the seller's agent must actually accept ownership of the trade-in property, and must actually reduce the price of the property it is selling to the person trading in property, at the time of sale, by the value of the trade-in property. When seller S's consignee sells buyer B's "trade-in" on consignment before it completes the sale of S's property to B, the exclusion does not apply. Although the two sales transactions are related, neither S nor S's consignee accepts ownership of the "trade-in."

[2] RULE 247; RCW 82.08.010: RETAIL SALES TAX – SELLING PRICE – LIKE-KIND TRADE-IN EXCLUSION – CONSIGNMENT. In order for the like-kind trade-in exclusion in RCW 82.08.010(1) and Rule 247 to apply, both requirements set out in Det. No. 99-005, 19 WTD 223 (2000) must be met. That is, the seller or the seller's agent must actually accept ownership of the trade-in property, and must actually reduce the price of the property it is selling to the person trading in property, at the time of sale, by the value of the trade-in property. When the facts show seller S's consignee did not actually accept ownership of buyer B's "trade-in" property, despite the exchange of a piece of paper labeled "bill of sale," and required B to pay the full sales price of S's property at the time of the sale to B, despite labeling part of B's payment a "loan" to the consignee, the exclusion does not apply.

NATURE OF ACTION:

Yacht dealer petitions for correction of assessment that disallowed the sales tax exclusion for trade-ins on a number of transactions.[1]

FACTS:

Prusia, A.L.J. -- The taxpayer, . . ., is engaged in business in Washington. Its business activity is the selling of boats and yachts it owns, and the brokerage of boats and yachts owned by others.

The Audit Division of the Department of Revenue (Department) examined the taxpayer's books and records for the period January 1, 1995 through September 30, 1998. On September 8, 1999, the Audit Division issued the above assessment against the taxpayer for additional excise taxes and interest. The principal portion of the assessment was Schedule 9, which assessed $. . . additional retail sales tax on transactions in which the taxpayer sold a vessel as the agent of the vessel owner and reduced the sales tax charged on the sale by allowing a trade-in deduction equal to the value of a boat "traded in," where the owner/seller of the first vessel did not take title to the trade-in boat.

The Audit Division's instructions accompanying the assessment explained that WAC 458-20-247 (Rule 247) allows the value of trade-in property to be excluded from the measure of retail sales tax to be collected and reported by the seller who accepts trade-in property as payment for property sold, provided the trade-in is actually transferred to the seller of the property for which it is traded in. The trade-ins in the Schedule 9 transactions did not qualify for the trade-in deduction because the seller did not accept the trade-in, rather its agent did, the seller had no risk of loss in these transactions, and the sale and the trade-in were not even part of the same transaction. The instructions cited Det. No. 97-228, 17 WTD 170 (1998). The instructions described the Audit Division's understanding of the typical Schedule 9 transaction.[2]

---

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

[2] We summarize that description as follows:

- Seller (S) contacts the taxpayer (TP) to sell S's boat. S and TP enter into a listing agreement stating TP will sell S's boat as S's agent and stating S agrees to pay TP a 10% commission on the sale of S's boat.
- Buyer (B) wants to purchase S's boat, and has a boat that B wants to trade in. S does not want B's boat and does not agree to accept it.
- TP sells S's boat to B, taking in return B's boat on consignment (B agreeing to pay TP a 10% commission) plus cash in the amount of the difference between S's price and a value TP assigns to B's boat. TP gives B a promissory note for the assigned value of B's boat. TP pays S the sale price of S's boat, less a 10% commission.
- TP then sells B's boat on commission, often following the same process with another buyer who wants to trade in a boat. When TP is successful, TP deducts its 10% commission on that sale and pays the remaining net proceeds to B in full satisfaction of the trade-in promissory note. The result is TP gets only a 10% commission on the sale price, and if B's boat has sold for more that the value it was assigned at trade-in, B gets the extra amount.

The taxpayer petitioned for correction of Schedule 9, and associated interest, contending the Audit Division's description was incomplete, the taxpayer handled trade-ins like all other yacht brokers, and the Audit Division had added a requirement of risk and passage of title that was not present in the statute (RCW 82.08.010(1)), or in Rule 247. The petition also alleged the Audit Division had incorrectly concluded the taxpayer did not assume any financial risk in its trade-in transactions.

During the pendency of the appeal, the Department published Det. No. 99-005R, 19 WTD 223 (2000). That determination overruled the determination cited in the audit instructions (Det. No. 97-228), and held that for purposes of the applicable statute and rule, the term "seller" includes an agent or consignee of the seller/owner. It concluded that when the buyer of a consigned vehicle delivers a trade-in vehicle to the consignee as consideration for the buyer's purchase of the consigned vehicle, and the consignee accepts ownership of the trade in, the consignee may reduce the price of the purchased (consigned) property at the time of sale by the value of the trade-in property.

The Audit Division subsequently considered the relevance and effect of Det. No. 99-005R on this appeal, and submitted a letter stating its conclusion that Det. No. 99-005R does not affect the assessment, in that the taxpayer does not take title to the trade-ins either, but rather takes them on consignment. The letter stated that closing statements the taxpayer prepared for the transactions indicated the taxpayer received the entire sale amount when it sold a boat on consignment, and the trade-in vessels were not consideration for the purchased vessels. It stated the closing statements showed the taxpayer deducted its 10% commission and moorage and other expenses on each consignment sale, and remitted the balance to the seller. It stated some closing statements indicate the sale of the "trade-in" boat occurred before the sale of the other boat. It argued the "trade-in" transactions are actually two entirely separate consignment transactions.

The taxpayer responded to the Audit Division's letter. Its response contended its facts are substantively similar to those in Det. No. 99-005R. It contended the taxpayer does accept the trade-ins as part of the consideration for the consigned property, and stated it would produce documents at hearing supporting its position. It contended Det. No. 99-005R errs in interpreting the statute and rule as requiring that the seller, or the seller's agent, must take title to the trade-in property or assume a risk of loss as to the trade-in property. The response also stated that some of the transactions under Schedule 9 did meet the requirements for the trade-in exclusion set out in Det. No. 99-005R.

The Audit Division responded to the taxpayer's response, reiterating again that its review of the transactions "revealed that [the taxpayer] received the entire amount of the sale in cash, without the 'trade-in' being used as consideration for the purchase price of the boat." The response described the sale of the "trade-in" as a separate consignment sale, on which the taxpayer earns another 10% commission.

The taxpayer provided additional evidence at hearing, which results in the following description of its typical consignment transaction involving a trade-in:

- Seller (S) contacts the taxpayer (TP) to sell S's boat. S and TP enter into a listing agreement stating TP will sell S's boat as S's agent and stating S agrees to pay TP a 10% commission on the sale of S's boat.

- Buyer (B) wants to purchase S's boat, and B has a boat B wants to trade in. S does not want B's boat and does not agree to accept it.

- B agrees to buy S's boat, subject to a marine inspection, and the inspection is ordered. The inspection usually is done within 2-3 days. At about the same time, B signs a "Vessel Purchase and Sale Agreement" and pays a 10% deposit. The agreement usually makes the sale subject to the inspection and the buyer obtaining financing.

- When the marine inspection is completed, assuming it is satisfactory, B pays the full purchase price of S's boat to TP, in the form of two checks. The amount of one check is the estimated value ("trade-in value") of B's boat. The amount of the second check is the difference between the sales price of S's boat and the amount of the first check. TP treats the first check as a loan to TP, and promises to pay it back, occasionally giving B a promissory note in that amount.

- At the same time, TP takes B's boat as a trade-in, and B gives TP a bill of sale for the boat. However, TP and B agree to treat the transfer of B's boat as a consignment rather than an outright sale, and agree that if B's boat sells for a price different than the assigned trade-in value plus 10%, B will pay, or be paid, the difference.

  Here there is a gap in the facts, which we asked the taxpayer to clarify. The taxpayer did not respond to the request for clarification. Specifically, we asked the taxpayer whether we are correct in understanding that TP and B agree to treat the transfer of B's boat as a consignment, and, if so, whether their agreement is oral or they enter into a written listing agreement like that described in the first step above. In the absence of clarifying information, we find that TP and B agree to treat the transfer of B's boat to TP as a consignment rather than a transfer of ownership to TP.

- TP tries to sell B's boat for the amount of the "loan" from B, plus a 10% commission. Usually that is what the boat sells for. When TP sells B's boat, TP pays back the "loan" from B out of the sale proceeds, and keeps 10%.

- If TP sells B's boat for more than the assigned trade-in value plus 10%, TP pays B the surplus. If TP sells B's "trade-in" for less than the assigned trade-in value plus 10%, TP asks B for the difference. The latter scenario has occurred only a few times, and most times TP's customer has not paid the difference. TP cannot make the customer pay the difference.

. . .

Sometimes, the marine survey will reveal substantial problems with S's boat, and S has to make repairs to its boat before the sale to B can be completed. In such cases, TP may sell B's boat on consignment before the sale of S's boat to B is completed. In such a case, B will have signed the "Vessel Purchase and Sale Agreement" to buy S's boat, and will have paid a deposit toward the purchase, before TP sells B's boat. When TP sells B's boat, TP writes B a check for the sales price, less a 10% commission, and puts the check in TP's trust account where it is held until the sale of S's boat can be completed. When time for closing of the sale of S's boat arrives, the closing statement shows B's trust account check as a deposit, and B pays TP the difference (balance) between that figure and the purchase price of S's boat. TP then pays S the sales price of S's boat, less a 10% commission . . . .[3]

ISSUE:

Did the taxpayer properly give a retail sales tax trade-in deduction to purchasers of vessels under either of the scenarios set out above?

DISCUSSION:

The retail sales tax is imposed on retail sales of tangible personal property, based on the "selling price" of the property. RCW 82.08.020. RCW 82.08.010(1) defines "selling price" as "the consideration, whether money, credits, rights, or other property **except trade-in property of like kind**, expressed in the terms of money paid or delivered by a buyer to a seller." (Emphasis added). The trade-in exclusion was added to RCW 82.08.010 as the result of Initiative Measure No. 464, approved November 6, 1984. The purpose of the initiative was "to reduce the amount on which sales tax is paid by excluding the trade-in value of certain property from the amount taxable."

Rule 247 explains the trade-in exclusion. However, Rule 247 does not specifically address the question of whether the trade-in exclusion is available in transactions involving consigned property. In pertinent part, Rule 247 provides:

> [T]he value of "trade-in property" may be excluded from the measure of retail sales tax to be collected and reported by the seller who accepts the trade-in property as payment for new or used property sold.
>
> . . .

[3] In addition to the above transaction scenarios, customers for whom the taxpayer is selling a boat on consignment sometimes accept a trade-in from another boat owner, and the taxpayer sometimes sells the trade-in on a consignment basis for the customer who accepted it. The Audit Division allowed the trade-in deduction in such cases. Those transactions are not included in Schedule 9, and are not the subject of this appeal.

> The terms, "trade-in," "traded-in," and "property traded-in" have their ordinary and common meaning. They mean property of like kind to that acquired in a retail sale which is applied, in whole or in part, toward the selling price.

Under RCW 82.08.010, a buyer must deliver "trade-in property of like kind" as part of the consideration given to the seller to qualify for the reduction in the measure of tax. In this case, there is no question that the "trade-in" was property "of like kind." The issues are: 1) whether such property was delivered to the "seller," i.e., whether a dealer/consignee can be treated as the "seller" for purposes of the exclusion; and 2) whether such property was delivered as "consideration."

Det. No. 99-005R, *supra*, helps us resolve both questions. In Det. No. 99-005R, the Department held a consignee may qualify as a "seller" for purposes of the trade-in exclusion. This holding was based on an interpretation of RCW 82.08.010(2)'s definition of "seller," RCW 82.04.040, and Rule 159. Det. No. 99-005R concluded that the trade-in exclusion should be allowed where a consignee/seller accepts like-kind property as part of the consideration paid by the buyer for the consigned property. In reaching this conclusion, the Department overruled Det. No. 97-228, 17 WTD 170 (1998), the determination upon which the Audit Division relied in its instructions to the present taxpayer.

Det. No. 99-005 addressed the consideration issue, as follows:

> In order for the trade-in exclusion to apply, the buyer must deliver the like-kind trade-in property to the seller as "consideration" for the purchased property. See RCW 82.08.010. In other words, the seller must actually accept ownership of the trade-in property and reduce the price of the purchased property at the time of sale by the value of the trade-in property; as stated in Rule 247, the seller must apply the value of the trade-in toward the selling price of the purchased property. In short, the taxpayer may not accept the trade-in property on consignment, because the agreement to sell property on consignment would not constitute consideration "paid or delivered by a buyer to a seller." See RCW 82.08.010.

In Det. No. 99-005R, it appeared that the taxpayer, a recreational vehicle dealer, "took title" to the trade-in vehicles, accepted them into its inventory, and reduced the selling price of the consigned vehicles by the value of the trade-ins, although the matter was remanded to the Audit Division to determine the facts.

Under Det. No. 99-005R's holding, the trade-in exclusion applied to the taxpayer's sales only if the taxpayer accepted ownership of the "trade-in," and accepted the "trade-in" as consideration for the vessel being sold (i.e., reduced the price of the purchased vessel at the time of sale by the value of the trade-in vessel).

The Audit Division contends the taxpayer's records show neither the taxpayer nor the seller of the boat being purchased accepted the trade-in.[4] Rather, the trade-in boat remained the property of the person who offered to trade it in (the buyer). The taxpayer required the buyer to pay the full price of the boat being purchased, and merely sold the "trade-in" boat on a consignment arrangement for the buyer, paying the buyer the proceeds less a commission after selling the "trade-in." The taxpayer contends it did accept the trade-ins as part of the consideration for its sale of a yacht in the above scenarios, as shown by the bills of sale it received from the buyers trading in a vessel.

[1] We conclude that in transactions such as the sale of the ". . .," [described in the second scenario, above] where the "trade-in" (B's boat) is sold by the taxpayer on consignment before the sale of the other vessel (S's boat) is completed, the trade-in exclusion (subtracting the value of the "trade-in property" from the measure of retail sales tax to be collected) clearly is inapplicable. Although the two sales transactions are related, neither the taxpayer nor the owner-seller of the first vessel ever accepts ownership of the "trade-in."

[2] In transactions such as the sale of the ". . .," [described in the first scenario, above] the result is not as clear-cut. The taxpayer takes a document labeled "bill of sale" from the buyer, and the consideration the buyer must pay for the purchased boat is ostensibly reduced by the value assigned to the "trade-in." However, based upon the facts provided, we find this is more illusion than reality. The taxpayer never accepts ownership of the "trade-in," despite the exchange of a piece of paper labeled "bill of sale." The taxpayer does not actually reduce the price of the purchased property at the time of sale by the value of the "trade-in." Rather, the buyer (B in the scenario) must pay the full consideration for the purchase at the time of purchase, and only has the possibility of later being paid proceeds from the sale of the "trade-in" vessel. The key factor is that the taxpayer and the buyer agree, either orally or in writing, to treat the transfer of the buyer's (B's) boat as a consignment when they enter into the sales transaction. We find that in these transactions the buyer does not deliver the like-kind trade-in property to the seller as consideration for the purchased property, and therefore the seller cannot give the buyer the benefit of the trade-in exclusion provided by RCW 82.08.010(1) and Rule 247.

In order for the trade-in exclusion to apply, both requirements set out in Det. No. 99-005 must be met. That is, the seller or the seller's agent must actually accept ownership of the trade-in property, and must actually reduce the price of the purchased property at the time of sale by the value of the trade-in property. The taxpayer's typical scenarios do not meet those requirements. As we understand the facts, those two scenarios cover all the transactions for which the Audit Division disallowed trade-in deductions the taxpayer gave its customers during the audit period. Therefore, the Audit Division's assessment of additional retail sales tax on the trade-in deduction amounts, in Schedule 9, was correct, even though based on authority later reversed, and on incomplete facts.

[4] See footnote [3]. The Audit Division found that in some instances a customer for whom the taxpayer was selling a boat on consignment did accept the trade-in. It allowed trade-in deductions on those transactions.

Finally, the taxpayer argues that Rule 247 states the term "trade-in" has its ordinary and common meaning, and the taxpayer took "trade-ins" within the ordinary meaning of "trade-in" in the yacht business. The taxpayer provided no support for that assertion.[5] Besides, Rule 247 proceeds to state what the ordinary meaning of the term is, and Det. No. 99-005 provides further clarification of its meaning for purposes of RCW 82.08.010(1). The typical transactions described by the taxpayer do not fit that meaning.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

Dated this 30th day of November, 2000.

[5] The taxpayer undercut his own argument, stating, at hearing, that he consulted with [a yacht broker association] to ask how they have handled and documented trade-ins in the past, and was told there is no right way.