Cite as Det. No. 06-0037, 26 WTD 59 (2007)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Refund of	)	D E T E R M I N A T I O N
	)	
	)	No. 06-0037
. . .	)	
	)	Registration No. . . .
	)	FY. . ./Audit No. . . .
	)	Docket No. . . .
	)	

[1] RULE 177; RCW 82.08.0264: RETAIL SALES TAX – EXEMPTION – SALES OF MOTOR VEHICLES TO NONRESIDENTS FOR USE OUTSIDE THE STATE – PROOF REQUIRED. To qualify for the exemption for sales of motor vehicles to nonresidents for use outside the state, a motor vehicle dealer must obtain a signed affidavit from the nonresident purchaser and must certify that the vehicle left the dealer's premises under the authority of a trip permit or under the authority of valid license plates issued to that vehicle by the state of the purchaser's residence. There is no exception for vehicles that are loaded onto a truck or trailer to be transported out of state.

[2] RULE 193; RCW 82.08.0273; ETA 2014: RETAIL SALES TAX – EXEMPTION – SALES TO RESIDENTS OF STATES THAT IMPOSE SALES TAX OF LESS THAN 3%. – BURDEN OF PROOF. The exemption for sales to residents of states that impose sales tax of less than 3% is limited to purchasers who are bona fide residences of one of the states, possessions, or Provinces of Canada listed in ETA 2014. Where the evidence is conflicting as to whether the purchaser is a resident of a qualifying state, possession, or Province, the exemption must be denied.

[3] RULE 238; RCW 82.08.0266: RETAIL SALES TAX – EXEMPTION – SALES OF WATERCRAFT TO NONRESIDENTS FOR USE OUTSIDE THE STATE – APPLICABLE WATERCRAFT – PROOF REQUIRED. The exemption for sales of watercraft to nonresidents for use outside the state is limited to sales of watercraft that require either (1) U.S. Coast Guard registration, or (2) registration with the state in which the vessel will be principally used if that state has assumed the registration and numbering function under the Federal Boating Act of 1958. To qualify for the exemption, the watercraft must leave Washington waters within forty-five days of delivery, the seller must examine

acceptable proof that the buyer is a resident of another state or a foreign country, and the seller must retain a completed exemption certificate to document the exempt nature of the sale.

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.

Zalesky, A.L.J. – Taxpayer made a number of retail sales that were claimed as exempt sales to nonresidents. The Department's Audit Division conducted an audit of the taxpayer's records and disallowed some of the claimed exempt sales. Taxpayer appealed, claiming that it either had sufficient documentation to substantiate the claimed exemption or that the statutory requirements for the exemption did not apply under the circumstances. There are 37 sales in dispute. Based on the documentation and arguments presented, we conclude that only one of the disputed sales is exempt from tax. We grant the taxpayer's petition for refund with respect to that one sale, but deny the petition with respect to the remaining 36 sales in dispute.[1]

ISSUES

1. Whether taxpayer has complied with the requirements of RCW 82.08.0264 (exemption for sales of motor vehicles to nonresidents for use outside the state) where the taxpayer sold on-road motorcycles to nonresidents without issuing a "trip permit" but where the motorcycle was loaded onto a truck or trailer to be transported out of state.

2. Whether taxpayer has sufficient documentation to substantiate the exemption found in RCW 82.08.0273 (exemption for sales of tangible personal property to residents of states that impose no sales tax or a sales tax of 3% or less) with respect to the disputed sales of off-road motorcycles.

3. Whether taxpayer has sufficient documentation to substantiate the exemption found in RCW 82.08.0266 (exemption for sales of watercraft to nonresidents for use outside the state) with respect to a disputed sale of a boat.

FINDINGS OF FACT

[Taxpayer] is a Washington corporation that sells on-road and off-road motorcycles and accessories, all-terrain vehicles (ATVs), personal watercraft, and boats. The taxpayer conducts business as [Business Name], with a retail store in . . . Washington. The taxpayer advertises regionally both through its own internet website and though magazines . . . . As a result of its regional advertising, taxpayer makes a significant [number] of sales to nonresidents.

When a sale is made at the [Washington] dealership, taxpayer will charge the Washington retail sales tax unless the purchaser can establish that he is a resident of another state. "Company

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

policy has been to require at least two pieces of verifiable identification for nonresidents wishing to purchase items without sales tax." Petition, p. 3. In addition, in most cases where the purchaser is a nonresident, the taxpayer will collect the state vehicle licensing fee from the customer and submit the fee and the license and registration paperwork directly to the state where the purchaser resides. Finally, when the sale involves an on-road motorcycle that is being driven off the lot by the nonresident purchaser, the taxpayer will issue a trip permit under authority granted by the Washington Department of Vehicle Licensing. *See* RCW 46.16.160(6) ("The department may appoint . . . businesses as agents for the purpose of selling trip permits to the public."). A trip permit authorizes the vehicle owner to operate the vehicle within Washington for up to three days without having to license or register the vehicle in this state. No trip permits are issued by the taxpayer when it sells off-road motorcycles or when it sells on-road motorcycles that are loaded onto a truck or trailer for transport.

According to the estimate provided during the hearing, only about 5% of motorcycles sold at the [Washington] dealership to nonresident purchasers are driven off the lot. The vast majority (roughly 95%) are loaded onto the bed of a pickup truck or onto a trailer to be transported. As stated above, during the periods at issue, the taxpayer did not issue a trip permit in those cases where the motorcycle was loaded onto a truck or trailer.[2]

The taxpayer was audited by the Department for the January 2000 through December 2003 reporting periods. Among the various audit adjustments was the disallowance of the exemption claimed by the taxpayer for sales to nonresidents. Not all sales to nonresidents were recharacterized as non-exempt. However, the audit staff did disallow the exemption with respect to sales of on-road motorcycles sold without evidence of a trip permit, and sales of off-road motorcycles where there was insufficient or conflicting evidence relating to the purchaser's state of residence. The audit staff also disallowed an exemption claimed on the sale of a boat.

The audit resulted in an assessment of $. . . . The assessment was made up of a deficiency in tax of $. . . , assessment penalty of $. . . , and interest in the amount of $. . . . The taxpayer paid the entire assessment and is seeking a refund of the portion of that assessment relating to those sales to nonresidents that were recharacterized as non-exempt.

The taxpayer's Petition lists 46 sales that it claims were recharacterized by the Department's Audit Division as non-exempt retail sales. . . . The Audit Division has pointed out that nine of the listed sales were not treated as non-exempt retail sales in the final audit report. . . . As a result, there are only 37 sales that are in dispute. The principal question presented is whether the taxpayer has provided sufficient documentation relating to any of these 37 disputed sales to substantiate that the sale was exempt from retail sales tax. The taxpayer is also questioning whether the exemption found in RCW 82.08.0264 (relating to sales of motor vehicles, trailers, and campers to nonresidents for use outside the state) should be strictly applied to on-road motorcycles that are loaded onto pickup trucks or trailers to be transported out of state.

[2] At the hearing the taxpayer's representative stated that the taxpayer has changed this policy as a result of the audit findings. Currently the taxpayer is issuing trip permits for all motorcycles sold to nonresidents.

. . . We have broken the disputed sales into three categories: (1) on-road motorcycles and trailers, (2) off-road motorcycles, and (3) watercraft.

ANALYSIS

In general, all retail sales that take place within the state of Washington are subject to the Retail Sales Tax. RCW 82.08.020. Unless there is a specific exemption that applies, it makes no difference whether the purchaser is a resident of this state or not. So long as the sale meets the definition of a retail sale, takes place in Washington, and is not otherwise exempt, the sales tax applies.

The tax is imposed on the buyer but is collected and remitted by the seller. RCW 82.08.050. The term "retail sale" includes "every sale of tangible personal property . . . other than a sale to a person who presents a resale certificate under RCW 82.04.470 and who: (a) Purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person . . . ." RCW 82.04.050(1) (incorporated by reference into the retail sales tax code by RCW 82.08.010(5)). There is no dispute that the sales at issue in this petition are "retail sales."

The Washington Legislature has enacted a number of exemptions to the sales tax. To the extent an exemption applies, the transaction is not subject to the tax. However, tax exemptions are not presumed, and the person claiming the exemption must clearly establish that he is entitled to the exemption. *Group Health Co-op v. Tax Comm'n*, 72 Wn.2d 422, 429, 433 P.2d 201, 205 (1967).

There are three exemptions that we are concerned with in this appeal. The three exemptions are (1) the exemption for sales of motor vehicles, trailers, or campers to nonresidents for use outside the state (RCW 82.08.0264); (2) the exemption for sales of tangible personal property to residents of states, U.S. possessions, or Canadian Provinces, that do not impose a sales tax or impose a sales tax of 3% or less (RCW 82.08.0273); and (3) the exemption for sales of watercraft to nonresidents for use outside the state (RCW 82.08.0266). For purposes of this Determination, we will apply the requirements of RCW 82.08.0264 to sales of on-road motorcycles and trailers, the requirements of RCW 82.08.0273 to sales of off-road motorcycles, and RCW 82.08.266 to sales of watercraft.

[1] 1. <u>Exemption for Sales of Motor Vehicles and Trailers to Nonresidents for Use Outside the State.</u>

RCW 82.08.0264 provides as follows:

> The tax levied by RCW 82.08.020 shall not apply to sales of motor vehicles, trailers, or campers to nonresidents of this state for use outside of this state, even though delivery be made within this state, but only when (1) the vehicles, trailers, or campers will be taken from the point of delivery in this state directly to a point outside this state under the authority of a one-transit permit issued by the director of licensing pursuant to the provisions of RCW 46.16.160,

> or (2) said motor vehicles, trailers, or campers will be registered and licensed immediately under the laws of the state of the purchaser's residence, will not be used in this state more than three months, and will not be required to be registered and licensed under the laws of this state.

The Department has adopted WAC 458-20-177 (Rule 177)[[3]] pursuant to authority conferred by RCW 82.01.060 and RCW 82.32.300. Rule 177 provides in pertinent part:

Retail Sales Tax

> (1) Sales to nonresidents. Under RCW 82.08.0264 the retail sales tax does not apply to sales of vehicles to nonresidents of Washington for use outside this state, even though delivery be made within this state, but only when either one of the following conditions is met:
>
> (a) Said vehicle will be taken from the point of delivery in this state directly to a point outside this state under the authority of a trip permit issued by the department of licensing pursuant to the provisions of RCW 46.16.160; or
>
> (b) Said vehicle will be registered and licensed immediately (at the time of delivery) under the laws of the state of the purchaser's residence, will not be used in this state more than three months, and will not be required to be registered and licensed under the laws of this state.
>
> Thus, in determining whether or not this particular exemption from the retail sales tax is applicable the dealer must establish the facts, first, that the purchaser is a bona fide nonresident of Washington and that the vehicle is for use outside this state and, second, that the vehicle is to be driven from his premises under the authority of either (a) a trip permit, or (b) valid license plates issued to that vehicle by the state of the purchaser's residence, with such plates actually affixed to the vehicle at the time of final delivery.

As the foregoing provisions illustrate, to be entitled to the exemption the dealer must not only verify that the sale was to a nonresident for use outside the state, but also that certain requirements relating to delivery of that vehicle to the purchaser's state of residence are satisfied. Rule 177 goes on to provide additional guidance to dealers who make sales of motor vehicles to nonresidents. In order to prove that the requirements of the exemption have been met, the dealer is required to obtain a signed affidavit from the purchaser and is required to complete a seller's certification. More specifically, Rule 177 provides:

> As evidence of the exempt nature of the sales transaction the seller, at the time of sale, is required to take an affidavit from the buyer giving his name, the state of his residence, his address in that state, the name, year and motor or serial

[[3] Rule 177 has been revised and now specifically addresses the issue raised in this determination.]

> number of the vehicle purchased, the date of sale, his declaration that the described vehicle is being purchased for use outside this state and, finally, that the vehicle will be driven from the premises of the dealer under the authority of a trip permit (giving the number) or that the vehicle has been registered and licensed by the state of his residence and will be driven from the premises of the dealer with valid license plates (giving the number) issued by that state affixed thereto. . . . The seller must himself certify by appending a certification to the affidavit, to the fact that the vehicle left his premises under the authority of a trip permit or with valid license plates issued by the state of the buyer's residence affixed thereto. . . .
>
> Failure to take this affidavit and to complete the dealer's certification, in full, at the time of delivery of the vehicle will negate any exemption from the buyer's duty to pay and the dealer's duty to collect the retail sales tax under RCW 82.08.0264 . . . .

According to the audit staff, "[n]one of the deal [sic] files examined had evidence of valid plates from the state of residence of the purchaser being attached at the time of sale. None of the deal [sic] files examined had a copy of the affidavit required by WAC 458-20-177. Only one deal [sic] file had one trip permit." Response to Petition, p. 2.

The taxpayer counters by asserting that it has substantially complied with the requirements of WAC 458-20-177. According to the taxpayer:

> Our company has always followed the spirit of the Department of Revenue laws and procedures. Company policy has been to require at least two pieces of verifiable identification for nonresidents wishing to purchase items without sales tax. We also have a policy to license vehicles in the customers' home state, which is not required by law. However, it ensures that the customer is a bona-fide nonresident.

Petition, p. 3.

The taxpayer contends that the requirement of issuing a trip permit does not make sense when the motorcycle is not being driven off the lot but, instead, is loaded onto a truck or trailer for transport out of the state. At the hearing the taxpayer's representative indicated that approximately 95% of the motorcycles sold to nonresidents were loaded onto a truck or trailer for transport. In those cases, the taxpayer did not see the need to issue a trip permit and, in fact, did not issue a trip permit. The taxpayer also asserts that Rule 177 is confusing and does not directly address the situation where the motor vehicle is not being driven out of the state. . . .

While we certainly understand the taxpayer's argument, the applicable code and rule are clear. The exemption will apply **only** when (1) the vehicle is transported out of state under authority of a trip permit or (2) the vehicle is licensed and registered in the purchaser's state of residence immediately upon delivery and is transported out of state under authority of a valid license plate issued by that foreign state. *See* Det. No. 87-23, 2 WTD 163 (1986) ("the vehicle must have a

trip permit or out-of-state plates when delivered in Washington for the transaction to be exempt from retail sales tax.")

The statute and rule do not provide an exception to the trip permit or out-of-state license plate requirement in those cases where the motor vehicle is transported out of state by truck or trailer. To the extent the Washington Legislature wanted to carve out an exception for vehicles delivered out of state by truck or trailer, it could have easily done so.[4] To create such an exception here, without statutory or regulatory authority on point, would be tantamount to re-writing the statute. It is beyond our power to add words to an unambiguous statute in order to give that statue a different meaning. *Vita Food Products v. State*, 91 Wn.2d 132, 134, 587 P.2d 535, 536 (1978) ("It is not within our power to add words to a statute even if we believe the legislature intended something else but failed to express it adequately.").

But even if we could disregard the requirement for a trip permit or valid out-of-state license plate in those cases where the motorcycle is loaded onto a truck or trailer for transport, there is still no evidence that the taxpayer obtained the affidavit and certification required under Rule 177. Without the affidavit and certification, the exemption must be denied. *Catholic Archbishop v. Johnson*, 89 Wn.2d 505, 507, 573 P.2d 793, 794 (1978) (the burden of showing qualification for the tax exemption rests with the taxpayer).

In summary, we hold that the taxpayer has not met the requirements of the exemption set out in RCW 82.08.0264 and WAC 458-20-177 with respect to any of the disputed sales of on-road motorcycles. Therefore, we uphold the audit determination with respect to those sales . . . .

[2] 2. <u>Exemption for Sales of Tangible Personal Property to Certain Nonresidents for Use Outside the State.</u>

RCW 82.08.0264 applies to motor vehicles, trailers, and campers that are driven on-road and require either a trip permit or a valid vehicle license in order to be operated lawfully. With respect to off-road vehicles, the Department's practice is to require that sales tax be collected by the dealer at the time of purchase unless the purchaser fits within the exemption set out in RCW 82.08.0273.

RCW 82.08.0273 allows an exemption from retail sales tax for sales of tangible personal property to certain nonresidents for use outside the state. The section provides in relevant part as follows:

> (1) The tax levied by RCW 82.08.020 shall not apply to sales to nonresidents of this state of tangible personal property for use outside this state when the purchaser (a) is a bona fide resident of a state or possession or Province of Canada other than the state of Washington and such state, possession, or

[4] We note that at the time of the drafting of this Determination the Washington Legislature is considering just such an exception. *See* 2005 House Bill 2040 (reintroduced 1/9/06).

> Province of Canada does not impose a retail sales tax or use tax of three percent or more . . . .

Excise Tax Advisory 2014.08.193 (6/26/03) lists the states, possessions, and Canadian Provinces that qualify for the exemption. They are, as of June 1, 2003:

Alaska	American Samoa	Alberta
Colorado	Commonwealth of Northern Marian Islands	New Brunswick
Delaware	Guam	Newfoundland and Labrador
Montana	Puerto Rico	Nova Scotia
New Hampshire	Virgin Islands	Northwest Territories
Oregon		Nunavut
		Quebec
		Yukon Territory

. . .

Of the 37 sales that are in dispute, eight relate to sales of off-road motorcycles. . . . Of these eight sales, five were to individuals claiming to be residents of states not listed in Excise Tax Advisory 2014.08.193. . . . Therefore, no exemption is allowed with respect to those five sales. The remaining 3 disputed sales were made to individuals who purported to be residents of [other states]. To the extent the taxpayer is able to meet the verification and record keeping requirements of RCW 82.08.0273(3), the exemption will apply.

[One instance] relates to the sale of an off-road motorcycle to a customer who claimed that he was residing in Montana but working in Washington. The customer provided the taxpayer with a copy of his Montana driver's license. However, the credit application filled out by the customer listed a . . . Washington, address. As a result, we have conflicting evidence as to whether this purchaser was truly a nonresident of this state. We also have conflicting evidence as to whether the off-road motorcycle was purchased for use outside this state.[5]

Because the evidence is conflicting as to whether this purchaser was a nonresident of Washington and whether the off-road motorcycle was purchased for use outside this state, the exemption must be denied. *Budget Rent-A-Car v. Department of Rev.*, 81 Wn.2d 171, 174 - 5, 500 P.2d 764, 767 (1972) (Tax exemptions are narrowly construed and anyone claiming the benefit of the exemption has the burden of showing that he qualifies for it.); *Group Health Co-op v. Tax Comm'n*, 72 Wn.2d 422, 429, 433 P.2d 201, 205 (1967) (A person claiming a tax exemption has the burden of proving he or she qualifies).

[Another instance] relates to the sale of an off-road motorcycle to a customer who claimed to be a resident of Colorado. The customer provided a copy of his Colorado driver's license. The audit report does not indicate any conflicting evidence as to this customer's state of residency.

[5] RCW 82.08.0273 applies only to "sales to nonresidents of this state of tangible personal property <u>for use outside this state</u> . . . ." (Emphasis added.) Thus, an item purchased for use in Washington will not qualify even if all the other elements for the exemption are met.

Because Colorado is one of the states listed in ETA 2014.08.193, the exemption will be allowed.[6]

[A third instance] relates to the sale of an off-road motorcycle to a customer who claimed to be a resident of Alaska. According to the audit report, no driver's license or other form of identification establishing residency was contained within the taxpayer's files. We have received nothing from the taxpayer establishing that this sale was made to a bona fide resident of Alaska. As a result, the exemption is denied.

[3] 3. Exemption for Sales of Watercraft to Nonresidents for Use Outside the State.

The final sale . . . relates to a boat that was sold to an individual who provided the taxpayer with proof that he was in the military. The boat was delivered by the taxpayer to [Washington Location] where it was placed on a barge and shipped to [Foreign Location]. It is not clear from the record before us whether the taxpayer's files contained documentation establishing that the purchaser was a nonresident of Washington.

RCW 82.08.0266 provides as follows:

> The tax levied by RCW 82.08.020 shall not apply to sales to nonresidents of this state for use outside of this state of watercraft requiring coast guard registration or registration by the state of principal use according to the Federal Boating Act of 1958, even though delivery be made within this state, but only when (1) the watercraft will not be used within this state for more than forty-five days and (2) an appropriate exemption certificate supported by identification ascertaining residence as required by the department of revenue and signed by the purchaser or his agent establishing the fact that the purchaser is a nonresident and that the watercraft is for use outside of this state, a copy of which shall be retained by the dealer.

WAC 458-20-238 (Rule 238) "explains the retail sales tax exemption provided by RCW 82.08.0266 for sales to nonresidents of watercraft requiring United States Coast Guard documentation or state registration." Rule 238(1). That administrative rule goes on to emphasize that the exemption "is limited to sales of watercraft requiring United States Coast Guard documentation or registration with the state in which the vessel will be principally used, but only when that state has assumed the registration and numbering function under the Federal Boating Act of 1958." Rule 238(3)(a).

In order to be entitled to the exemption the following requirements must be met:

[6] This sale was . . . prior to the June 1, 2003 effective date of ETA 2014.08.193. The ETA in effect during [the sale taxable] period was ETA 316.08.193 (issued 7/25/93). Colorado was not listed as a qualifying state in ETA 316.08.193. However, our research shows that effective January 1, 2001, Colorado lowered its sales tax rate from 3% to 2.90%. . . . Because the Colorado sales tax rate was less than 3% at the time of this sale, and all the other requirements of RCW 82.08.0273 have been met, we will allow the exemption.

- The watercraft must leave Washington waters within forty-five days of delivery;

- The seller must examine acceptable proof that the buyer is a resident of another state or a foreign country; and

- The seller must retain a completed exemption certificate to document the exempt nature of the sale.

Rule 238(3)(b).

The record before us does not indicate whether the purchaser of the boat . . . was a nonresident of Washington. We are also not sure whether the boat in question is a "watercraft requiring coast guard registration or registration by the state of principal use according to the Federal Boating Act of 1958." Finally, we have not been provided with a copy of a completed exemption certificate relating to this sale. In short, virtually none of the elements required under RCW 82.08.0266 and Rule 238 has been met.

We have also considered the exemption for export sales set out in WAC 458-20-193C. However, the taxpayer has not produced any documentation of the type listed in that administrative rule.[7] As we have stressed throughout this Determination, no exemption will be allowed without adequate documentation supporting the exempt nature of the transaction.

It is up to the taxpayer to prove all the elements necessary under a claimed exemption. *Budget Rent-A-Car*, *supra*; *Group Health Co-op v. Tax Comm'n*, *supra*. The taxpayer has not met its burden with respect to this sale. As a result, the exemption is denied.

DECISION AND DISPOSITION

For the reasons stated above, taxpayer's Petition for refund is granted with respect to the sale [of the off-road motorcycle sold to a resident of Colorado]. In all other respects, the Petition is denied.

Dated this 2nd day of March, 2006.

[7] See WAC 458-20-193C for an explanation of requirements necessary to claim the exemption for export sales and the list of acceptable documentation.