Cited as 1 WTD 75 (1986)

BEFORE THE INTERPRETATION AND APPEALS SECTION
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. 86-229 Registration No. . . .

[1] RULE 159; RCW 82.04.480; RETAILING BUSINESS & OCCUPATION TAX; AGENCY; BROKER; CONSIGNMENT; USED CAR SALES; COMMISSIONS; ETB 386.04.159. Taxpayer, an automobile dealer, is selling used cars on consignment where agreement between taxpayer and vehicle owners clearly stated taxpayer was only a broker; taxpayer had no obligation to pay for vehicles if purchaser not found; title to the vehicles was never in taxpayer's name; and taxpayer's books and records showed sales were made for owner/seller. The fact that the taxpayer's commission was difference between purchase price and agreed net cash amount to be paid to owner, and that sales invoices showed taxpayer as seller, did not make the contracts between the vehicle owners and the taxpayer ones of sale rather than of consignment.

[2] RULE 177; RCW 82.08.0264 RETAILING TAX; RETAIL SALES TAX; INTERSTATE DEDUCTIONS; SALES TO NONRESIDENTS; NONRESIDENT STUDENT;AFTER ACQUIRED DOCUMENTATION; WAC 308-99-040. Taxpayer not permitted to present after-acquired documentation to prove sales were exempt. In absence of affidavits and certificates required by Rule 177 to be taken at time of delivery, exemptions disallowed.

These 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.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: June 5, 1986

NATURE OF ACTION:

The taxpayer protests a portion of Tax Assessment No. . . . issued December 10, 1985. The assessment resulted from an examination of the taxpayer's records for the period May 1, 1981 through June 30, 1985.

FACTS AND ISSUES:

Anne Frankel, Administrative Law Judge--The taxpayer's business includes sales of new and used cars, parts, and service. The taxpayer sells used cars as a broker for a national organization (hereafter referred to as N.O.).

1. The first issue concerns the assessment of retailing tax on the gross receipts of the National AutoFinders sales (Schedule V). The taxpayer contends it acted as a commission agent and is only liable for service tax on its commissions--not retailing tax on the gross receipts. In addition to relying on the listing agreements, the taxpayer stated it discussed this issue with the Department of Revenue before making sales as a broker. The taxpayer states it was advised its income would be taxable under the Service category.

2. The second issue concerns the retailing tax assessed on disallowed interstate deductions (Schedule VIII). The taxpayer contends the sales were in fact out-of-state deliveries but that "due to clerical oversight," the incorrect affidavit was used by the purchasers during the closings of the transactions. The auditor disallowed the interstate deduction where the taxpayer's files contained affidavits showing the vehicles were transported outside Washington under the authority of trip permits or nonresident plates. The taxpayer states it now has the proper affidavits from 73 percent of the purchasers and requests that the deduction be permitted in full.

3. The final issue concerns the retail sales tax assessed on disallowed interstate deductions (Schedule IX). The tax was assessed on two sales in which the taxpayer's records indicated the purchasers had lived and worked in Washington. The taxpayer submitted evidence to support its position that the purchasers were nonresidents and that they met the statutory requirements for the sales tax exemption.

DISCUSSION:

1. Under-reported Brokered Sales--The evidence includes copies of exclusive listing agreements of the national organization. The agreements state the N.O. dealer, in this case the taxpayer, is termed the "broker" and the owner of the used vehicle, the "seller." In a typical agreement, the seller agreed to pay a listing fee of $25 and give the broker the exclusive right to sell the vehicle for 30 days. The agreement provided a net cash amount the seller would accept as full payment if the broker found a buyer during the exclusive listing period. The taxpayer retained as its commission any amount received in excess of the specified payment due the seller.

The agreements also provide for a specified commission to be paid to the taxpayer/broker if a vehicle was sold by someone other than the broker during the exclusive listing period, or sold within 60 days after the listing period to a buyer who had discussed the vehicle with the broker. This commission was ten percent of the selling price with a minimum of $300 in the earlier agreements and a minimum of $400 in the more recent agreements.

The agreements contain the following hold-harmless provision:

> Seller further agrees and understands that it may be necessary to allow prospective buyers to drive and otherwise inspect the listed vehicle and agrees to indemnify and release Broker from any claims Seller may have as a result of allowing prospective buyers to inspect and/or drive the listed vehicle. It is further agreed that Broker, its agents or assigns assume no responsibility for loss or damage to the listed vehicle by fire, theft, accident or any other cause. It is the responsibility of the Seller to provide uninterrupted insurance coverage on the listed vehicle during the exclusive listing period.

Another clause in the agreement gives the broker the authority upon sale to pay off any liens or encumbrances against the vehicle and deduct those amounts from the net price. After the balance was paid to the seller, the seller agreed to release and deliver properly endorsed and executed certificates of title or ownership showing the vehicle free and clear of all encumbrances.

RCW 82.04.480 provides that:

> Every consignee, bailee, factor, or auctioneer having either actual or constructive possession of tangible personal property, or having possession of the documents of title thereto, with power to sell such tangible personal property in his or its own name and actually so selling, shall be deemed the seller of such tangible personal property within the meaning of this chapter; and further, the consignor, bailor, principal, or owner shall be deemed a seller of such property to the consignee, bailee, factor, or auctioneer.
>
> The burden shall be upon the taxpayer in every case to establish the fact that he is not engaged in the business of selling tangible personal property but is acting merely as broker or agent in promoting sales for a principal. Such claim will be allowed only when the taxpayer's accounting records are kept in such manner as the department of revenue shall by general regulation provide.

The auditor believed that the evidence indicated that the taxpayer was the seller of the used vehicles it sold pursuant to the N.O. contracts. He noted the sales were made in the taxpayer's name on the purchase orders and that the taxpayer signed the Department of Licensing registration certificate as the selling dealer. Also, the auditor concluded that the taxpayer established the selling price and retained the proceeds "with the only obligation being to pay for the goods as and when sold at prices fixed by your contract with the consignor." The auditor relied on WAC 458-20-159 (Rule 159) and ETB 386.04.159, copies of which were provided to the taxpayer.

As used in Rule 159, a consignee "refers to one who has either actual or constructive possession of tangible personal property, the actual ownership of such property being in another." The rule provides in part:

> AGENTS AND BROKERS. Any person who claims to be acting merely as agent or broker in promoting sales for a principal or in making purchases for a buyer, will have

> such claim recognized only when the contract or agreement between such persons clearly establishes the relationship of principal and agent and when the following conditions are complied with:
>
> 1. The books and records of the broker or agent show the transactions were made in the name and for the account of the principal, and show the name of the actual owner of the property for whom the sale was made, or the actual buyer for whom the purchase was made.
>
> 2. The books and records show the amount of gross sales, the amount of commissions and any other incidental income derived by the broker or agent from such sales.

The taxpayer argues it meets the Rule 159 requirements and was only acting as an agent of the consignor. The taxpayer contends the following facts support its position:

1. at no time was title to the vehicle at issue in the taxpayer's name;

2. the owners of the vehicles remained at risk and paid insurance costs until the car was delivered to the ultimate buyer;

3. the taxpayer did not include the vehicles as part of its inventory on its books;

4. the agreement clearly states the taxpayer is only a broker;

5. the selling price is a price that is negotiated between the taxpayer, the seller and the purchaser.

We agree that those facts do support a finding that the taxpayer acted as the broker's agent for the consignors. ETB 386.04.159 distinguishes a contract for a consignment from a sale:

> In the department's opinion, a contract of consignment is premised on the uninterrupted retention of title in the consignor. It imports an agency and the consignee is liable to account for the proceeds of the goods when sold. On the other hand, if a consignee can sell at retail at prices he fixes and retain the proceeds, his only obligation being to pay for the goods as when sold at prices fixed by his contract with the consignor, the contract is one of sale, not consignment. 8 CJS 337, 8A Words & Phrases 334-336.

The auditor relied in part on this language in determining the taxpayer was the seller of the used vehicle rather than a consignee. In reviewing the authority cited in the bulletin, though, we conclude that the taxpayer was a consignee rather than the seller of the vehicles. Corpus Juris goes on to provide:

> So also, where property is delivered to be sold for the owner at a price named and, in some instances, by a specified time, and, if not sold, to be returned to the owner, the transaction is a consignment or bailment and not a sale.
>
> . . .
>
> In general, provisions that the consignee shall, on receipt of the goods, or at some stated time or times thereafter, pay for all goods received, whether or not sold, and that he may sell to whom he will, at what price, and on what terms he will, are characteristic of a contract of sale, whatever terms may be used in describing it, and if there arises an obligation of the apparent consignee to buy and pay for the delivered goods, and it is such that suit may be maintained by the consignor as creditor, the transaction is a sale or agreement to sell, and not a consignment for sale.

In this case the title to the vehicles remained in the owners' names until sold, the property was to be returned to the owner if not sold, the taxpayer was to pay the net proceeds of sale to the consignor, and there was no obligation for the taxpayer to purchase the vehicles if a buyer was not found. Those facts indicate the transaction was a consignment and not a sale.

Also, when considering whether a contract creates a sale or a consignment, the controlling question is what was the intent of the parties. Id. at 340-41 (the contract between the parties must be given effect as written where its words are clear and plain, and it is only where the meaning is doubtful that both the agreement and the acts of the parties must be taken into consideration). See also, Metropolitan Park District of Tacoma v. Olympia Athletic Club, 42 Wn.2d 179, 254 P.2d 475 (1953). The language of the listing agreements was clear and plain and created an agency arrangement rather than providing for a conditional sale to the taxpayer.

A contract may be one of agency "although the agent receives an amount from third persons above the principal's price to him." 8 CJS at 341, See also, Ludvigh v. American Woolen Co., 231 U.S. 522, 34 S.Ct. 161 (1913) (consignee's profit was the difference between the invoice prices and selling prices of goods; any increase in profits by varying terms of trade went to consignee).

Finally, we reviewed some of the cases cited in Words and Phrases and Corpus Juris for the proposition that a contract is one of sale "if a consignee can sell at retail at prices he fixes and retain the proceeds, his only obligation being to pay for the goods as and when sold at prices fixed by his contract with the consignor." We find those cases distinguishable from the present case. For example, in In re U.S. Electrical Supply Co., D.C. I11, 2 F.2d 378, 380 (1924) the "consignor" had furnished wire to the electric company to be sold and used as required in its business. The contract required the electric company to report monthly quantity used and sold and then pay the "consignor" for the same. The electric company was not required to keep the proceeds separate and apart and it deposited the proceeds in its general bank account. The issue was whether this practice was fraudulent to the electrical company's creditors. The court found it was if a vendee may consume or sell goods and apply the proceeds to his own use.

In this case, we do not find the transactions were fraudulent to the taxpayer's creditors if treated as consignment sales. The taxpayer did not keep the used vehicles as part of its inventory on its books. Its records clearly identified the owners as having the right to the "net payment amount" and that amount was kept separate on the taxpayer's books.

The transactional substance of this case is not overcome by the fact that the sales were made in the taxpayer's name on the purchase orders. Nothing in Rule 159 or RCW 82.04.480 obviates the common law concept of undisclosed principal; furthermore, the purchasers knew the taxpayer was selling the vehicles for others and the registration certificate and the title of the auto listed the owner/seller as the former owner, not the taxpayer.

As we conclude the taxpayer made the sales as agent of the actual owner, the commission income is taxable under the Service and Other Business Activities classification. Rule 159.

2. Retailing Tax on Disallowed Interstate Deductions--Interstate deductions were denied where the taxpayer's files indicated the vehicles were sold to nonresidents but the vehicles were delivered to the purchasers in Washington. In such cases, even though the buyers may be entitled to a statutory exemption from the retail sales tax, no corresponding deduction is permitted from the business and occupation tax. WAC 458-20-177 (Rule 177).

The taxpayer now contends that incorrect affidavits were used. The affidavits in the taxpayer's file at the time of the audit stated that the purchasers either affixed valid out-of-state license plates to the vehicle prior to the time the vehicles left the premises of the dealer or that they drove the vehicles from the dealer's premises under the authority of a one-transit permit.

The taxpayer contends one of its employees drove the vehicles under the authority of a one-transit permit to an out-of-state licensing office as required by the sales agreement. It states it now has the proper affidavits from 73 percent of the purchasers as proof of the out-of-state deliveries.

Rule 177 contains a sample affidavit and dealer's certification which the dealer must take <u>at the time of delivery</u> as evidence of the exempt nature of the transaction. The rule clearly states:

> 3. RECORDS TO BE RETAINED BY SELLER. The affidavits and certificates referred to in this rule must be retained by the seller in his files as a part of his permanent records subject to audit by the department of revenue. In the absence of such proof, claims that transactions were exempt from tax will be disallowed.

This recordkeeping requirement is in accord with RCW 82.32.070 which provides that every person liable for the business tax must keep, for a period of five years, suitable records as may be necessary to determine the amount of any tax which may be due.

The Department requires strict compliance with the recordkeeping requirement. Because the taxpayer did not take and retain affidavits and a dealer's certificate of the alleged out-of-state deliveries, the tax on these sales is upheld.

3. Retail Sales Tax Assessed on Disallowed Interstate Deductions--RCW 82.08.0264 provides that sales of vehicles to nonresidents for use outside this state are exempt from sales tax

> . . . 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.

At issue are the sales of a 1981 Mercury Lynx on April 5, 1984 . . . and a 1984 Mazda on March 24, 1984 . . . In both cases, the purchasers of the vehicles have now submitted affidavits stating the vehicles were purchased for use outside the state; that they were residents of another state; that they attached valid license plates issued under the state of their residence upon delivery; and that they left the state of Washington within 90 days after purchasing the vehicles.

The auditor denied the interstate deductions because information in the taxpayer's files indicated both of the purchasers had lived and worked in Washington. Rule 177 contains the requirements for the sales tax exemption set forth in RCW 82.08.0264. The rule contains a sample of an affidavit and dealer's certificate which the dealer must take and complete at the time of delivery to permit the sales tax exemption.

The 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. (Emphasis added.)

Mercury Lynx sale - The financing statement submitted by the purchaser of the Mercury Lynx indicated he was living in Washington at the time of the sale. It indicated he had lived and worked in Washington for three years. The taxpayer explained that the purchaser had been a student at Gonzaga Law School. He was registered as an out-of-state student, had completed school, and was leaving for Montana when he

purchased the car. Furthermore, his credit application showed employment in Montana.

The vehicle was licensed in Montana prior to delivery and the purchaser left the state within 90 days. WAC 308-99-040 provides an exemption from Washington registration requirements for nonresident students. Nonresident students can drive a vehicle properly licensed and registered in their resident state without further registration requirements if he or she meets the requirements of WAC 308-99-040. This added information seems to rebut the facts in this purchaser's file indicating he was not entitled to the nonresident exemption.

Woods Sale - The purchasers of the 1984 Mazda submitted an affidavit which stated at the time of the purchase they were residents of Oregon; that they had valid Oregon drivers' licenses since 1983, a Washington tax exempt card, and had filed 1984 Oregon income taxes. The purchasers stated they showed the taxpayer the tax exempt card at the time of the purchase and that the taxpayer took the number of the card for its records.

The auditor denied the deduction because the taxpayer's file also indicated these purchasers had lived and worked in Washington. The purchasers, however, state they worked for a company located in Washington but that all the work was done in Idaho. They state they lived in Idaho during that time with the wife's parents. They state the husband did have the property in Washington that the auditor noted in their file. However, they state they had not lived at that address since 1983, that they were in the process of selling the property in 1984, and the property did sell in 1984.

On the financing statement, however, the purchasers gave the Washington address as their present street address. They stated a "previous address" as the Idaho address. The Eagle Creek, Oregon, address, which they state is their present address and was their address at the time of the sale, is listed on their financing statement as the husband's brother's address. Also, on the insurance form, the purchasers stated their mailing address was "Eagle Creek," but gave the Washington number as their work phone number.

The financing statement suggests that these purchasers had not established Oregon residency at the time of the sale. Washington residents in the process of moving out of state are not nonresidents. The facts are not clear that these purchasers were entitled to the nonresident exemption

We deny the taxpayer's petition regarding the sales tax exemptions on these two sales, however, for the same reason we upheld the retailing tax on the disallowed interstate deductions. Rule 177 provides the dealer must take the nonresident affidavit and complete the dealer's certificate at the time of delivery. The taxpayer failed to meet this requirement.

Rule 177 provides that such failure negates 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. Furthermore, a copy of the completed affidavit and certificate must be attached to the dealer's excise tax report. As noted above, Rule 177 states in the absence of the required affidavit and certificates, claims that transactions were exempt from tax will be disallowed.

DECISION AND DISPOSITION:

The taxpayer's petition is granted as to the assessment of retailing tax on the gross receipts of the N.O. sales. The tax assessed in Schedule V shall be deleted. The taxpayer shall pay service tax on amounts earned as commissions.

The retailing and retail sales tax assessed in Schedules VIII and IX is upheld.

An amended assessment shall be issued which shall be due on the date provided thereon.

DATED this 15th day of August 1986.