Cite as 1 WTD 167 (1986)

BEFORE THE INTERPRETATION AND APPEALS SECTION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Notice of Use Tax and Refund of	)	D E T E R M I N A T I O N
	)	No. 86-251
. . .	)	Registration No. . . .

[1] RULE 178 and RCW 82.12.0272: USE TAX -- YACHT --INTERVENING USE -- DEMONSTRATION. Use tax upheld on yacht used for showing and demonstration sails. Only limited use for demonstration purposes is exempt from use tax. ETB 332.12.178; ETB 61.12.178 distinguished.

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: July 29, 1986

NATURE OF ACTION:

The taxpayers petitioned for a cancellation of the balance of use tax assessed on a sailing vessel and a refund of the use tax they already paid.

FACTS:

Anne Frankel, Administrative Law Judge--The taxpayers are a retired couple living in this state. They formerly resided in Arizona and on a sailboat which moored out of California. Their present vessel, a 44 foot pilot house, was purchased from a California yacht company in 1983, FOB Keelung, Taiwan, for $98,000.

The taxpayer has provided a detailed account of the facts relating to the vessel's purchase. The narrative begins in April of 1981 when the taxpayers arrived in Hong Kong on their previous sailboat which they had been living and traveling on for the previous ten years. At that time, they decided they wanted to return to a "productive life." They explored various business opportunities and decided to try to sell Amway products in Hong Kong. That venture was not successful (their customers spoke Chinese) and they decided to try to sell yachts instead. They investigated the purchase of the yacht at issue and became convinced it could be the "ideal" boat for world cruising by an average retired couple, the market they hoped to address. They believed that their years of sailing would provide invaluable experience for redesigning and selling the yachts.

In August of 1981, they first negotiated for the yacht's purchase and their potential business association with the chief engineer and shipbuilder at the Taiwanese yacht company. By phone, they also discussed their potential business association with the president of the yacht company at the head office in California.

They tried to sell their own sailboat while in Hong Kong, but were unsuccessful. In May of 1982, they left Hong Kong and sailed it back to the states. That journey was filled with adventure and problems. Upon return to the states in the fall of 1982, they contacted the president of the yacht company in California and discussed their ideas for changes in design of the 44PH and marketing ideas. They stated that the $98,000 purchase price is a manufacturer's invoice cost, $22,000 less than dealer's cost. They contend they were able to purchase the vessel for that amount because of their intent to promote and sell the vessels in the United States.

The taxpayers purchased a home in . . . , Washington in April of 1983. The 44PH was shipped to Washington in the fall of 1983. It was carried aboard a larger ship. The taxpayers finished the interior and made changes in the arrangement of the vessel. They also purchased such items as carpet, microwave, and custom seats. The taxpayer testified that Washington sales tax was paid on the items added to the vessel.

The taxpayers registered the vessel with the Coast Guard in California in June 1984. The California Board of Equalization sent the taxpayers a Notice of Use Tax Due in the state of California. The request was sent to the taxpayers' Arizona address listed on the invoice. The taxpayers responded to that notice stating that no use tax was due because the vessel had never been in California. The reply was postmarked . . . , Washington.

The Washington Department of Revenue sent a letter to the taxpayers on Aprilá5, 1985. The letter was sent to the Arizona address and asked the taxpayers to verify the location of the vessel's storage--whether the vessel was being stored and used in the state of Washington. On Aprilá19, 1985, the revenue officer stated that the taxpayer called him from . . . and told him the vessel was being moored and used by him in Washington. The Revenue officer stated that the taxpayer mentioned no business activity at that time. The Revenue officer explained the taxpayers' use tax liability and sent a Notice of Use Tax Due on Aprilá10, 1985, with the understanding the taxpayer would pay a portion of the tax liability on or before Mayá15, 1985 and then a balance due would be issued. The assessment was based on a stated value of $85,000.

On Mayá14, 1985, the taxpayer made payment of $3,000 toward the use tax due. A balance due for $2,950 was then sent to the taxpayers. In June, the taxpayers sent a check for the $2,950 balance due. In clearing the check, however, the bank debited the taxpayer's account by $29.50 instead of $2,950. The Department contacted the taxpayer and understood that the taxpayer would send another check for $2,920.50 to pay the amount of the balance due. Instead, the taxpayers, through their accountant, sent a letter to the Department asserting that no sales tax or use tax was due because the yacht was not purchased for personal use but to promote sales. The letter stated that the taxpayer is a manufacturer's representative in the business of representing and selling yachts. A copy of the sales representative agreement between the taxpayer and the California yacht company was enclosed. The taxpayer requested a form to claim a refund for the amount paid and copies of "applications for sales tax license."

The "sales representative agreement" was executed on Januaryá23, 1984. It states the contract is for one year and both parties must mutually consent to the extension of the agreement. It provides that the taxpayers will receive a commission of five percent of the dealer's wholesale price on all 44PH's purchased from the yacht company. The agreement states the current dealer's wholesale price on a 44PH is $121,785 FOB Taiwan and that the taxpayers and the yacht company will share the cost of promotional materials.

The taxpayers purchased a VCR which they used as a sales tool in selling their former sailboat and to market the 44PH. They stated the 44PH has not been used other than for business purposes. Although they have shown the boat at yacht shows and personally demonstrated her to approximately 30 potential buyers from various states, to date they have not made a sale.

ISSUE:

Whether the facts support the taxpayers' position that no use tax is due because they purchased the vessel for assembly and resale and have not used it as "consumers."

DISCUSSION:

The auditor's basis for asserting the use tax was that the taxpayers put the yacht to personal use.

RCW 82.12.020 imposes the use tax in these terms:

> There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a consumer any article of tangible personal property purchased at retailá.á.á.

Thus, if the taxpayers purchased the boat at retail and used it within this state as a consumer, they are liable for the tax.

A retail sale is defined by RCW 82.04.050 as:

> .á.á.áevery sale of tangible personal property (including articles produced, fabricated, or imprinted) to all persons irrespective of the nature of their businessá.á.á.áother than a sale to a person who (a) purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person .á.á.

RCW 82.12.010(2) states:

> "Use," "used," "using," or "put to use" shall have their ordinary meaning, and shall mean the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within this state;á.á.á.

RCW 82.04.190 defines a consumer as:

> (1) Any person who purchases, acquires, owns, holds, or uses any article of tangible personal property irrespective of the nature of his businessá.á.á. other than for the purpose (a) of resale as tangible personal property in the regular course of businessá.á.á.

We do not believe the evidence clearly supports a finding that the taxpayers purchased the vessel for resale in the regular course of business. Excise Tax Bulletin (ETB) 482.12.178 states the Department's position regarding "resaleá.á.á. in the regular course of business." To determine that a sale is for resale, the purchaser must actually and regularly be engaged in selling the type of property purchased, be registered with the Department of Revenue and reporting the appropriate taxes, and intend the sale to be for resale without intervening use at the time of the initial purchase.

In this case, the taxpayers were not regularly engaged in the business of purchasing and selling yachts when they purchased the 44PH. Nor were they registered with the Department of Revenue in this state or in another state for the purpose of selling yachts. The Abstract of Title indicates the vessel was purchased by the taxpayers' partnership which was a holding company for their personal assets. The partnership sold the boat to the taxpayers as joint tenants with right of survivorship on April 11, 1984. It was not until the summer of 1985 that they applied for a Certificate of Registration with the Department.

The taxpayers contend that the contract with the California yacht company is evidence that their sole and regular business is the resale of Class 44PH yachts (letter of Augustá29, 1985). We do not agree. The marketing agreement only provides the taxpayers will receive a commission on any 44PH that is sold in the United States, unless sold to one of the named buyers listed on an addendum to the agreement. The agreement only requires the taxpayers to have their 44PH available for showing and demonstration sails as requested by the selling dealer and potential buyer in order to be due the five percent commission--not that they must sell their own vessel.

We do not agree, therefore, that the marketing agreement, purchase invoice, or any other evidence clearly shows that the taxpayers' vessel was purchased for resale. The taxpayers' own letter of Mayá23, 1985, closes with the following statement:

> This boat has been used for business reasons only. The engine hour meter is presently 125 hours. If results do not appear potentially profitable within a year, we will put her up for sale and abandon our project.

Furthermore, even if the taxpayers did purchase the vessel for resale in the regular course of business, we believe the evidence supports the auditor's conclusion that the use tax is due because the taxpayers have used the vessel as consumers.

WAC 458-20-178 (Rule 178) is the Department of Revenue's published rule implementing the use tax. The rule includes the above statutory provisions regarding the use tax and gives examples of uses of tangible personal property that are exempt under RCW 82.12.030. Example number 19, which states the exemption provided by RCW 82.12.0272, is the closest to the taxpayers' situation. That example provides:

> The use of tangible personal property held for sale and displayed in single trade shows for a period not in excess of thirty days, the primary purpose of which is to promote the sale of products or services.

In this case, the taxpayer has held the vessel for over two years. Although we recognize that the market for such a vessel is limited and that sales may be infrequent, the taxpayer does not fit into the exemption provided for those who use property held for sale for limited demonstration purposes.

The Department's position is also set out in ETB 332.12.178. That bulletin deals with use tax on display merchandise, noting the tax is not applicable to the "brief and superficial use" which occurs when articles held for sale are displayed in single trade shows for short periods and then sold as new merchandise.

We do not agree with the taxpayer's contention that if the property is held "specifically" for demonstration purposes, it is exempt from the use tax. In making that contention, the taxpayer relied on ETB 61.12.178 issued by the Department in 1966. That tax bulletin found the use tax was not applicable to a taxpayer "using a specific machine for demonstration purposes only in connection with efforts to sell that same machine." The later bulletins, and Rule 178, however, clarify that only limited use for demonstration purposes is exempt from use tax.

The taxpayer also argues that no taxable use has occurred because the vessel has not been used for sailing on the high seas which the taxpayer asserts is the vessel's "only practical use." (Letter of Augustá29, 1985.) That argument is novel, but we do not agree that the Department must find that taxable use does not occur if the property is used for less than its intended use.

We find the taxpayers' use of the vessel to market 44PH's is taxable use, similar to the taxable use of automobiles that are held for demonstration purposes. See WAC 458-20-132 (where an automobile dealer purchases a passenger car or pickup truck without paying retail sales tax in respect thereto, and uses such car or truck for personal use or demonstration purposes, the use tax is due irrespective of the fact that such personal car or demonstrator may later be sold by the dealer).

DECISION AND DISPOSITION:

The use tax assessment is sustained.

DATED this 12th day of September 1986.