Cite as 1 WTD 183 (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. 86-252
. . .	)	Registration No. . . .

[1] **RULE 187** -- BUSINESS AND OCCUPATION TAX -- MEASURE OF TAX --GROSS INCOME OF THE BUSINESS -- AMUSEMENT DEVICES -- NONDEDUCTIBLE BUSINESS EXPENSE. No deduction is allowed for amounts paid by the owner of an amusement device to the person upon whose premises the device is operated.

[2] **RULE 211** -- RETAIL SALES TAX -- USE -- POSSESSION -- POOL TABLE -- CONSUMER. Retail sales tax is due on lease or rental of pool table even though lessee allows its customers to use the pool table for a consideration. The lessee is not releasing the pool table to its customers where it grants the use but not possession thereof.

[3] **RULE 178** -- USE TAX -- USE IN THIS STATE -- BURDEN OF PROOF -- PRESUMPTIONS. Taxpayer is not required to prove that property purchased outside this state for use outside this state has never been used in this state absent facts supporting presumptive use of the property in this state. Where facts support presumptive use in this state and the taxpayer is unable to overcome presumption of instate use, the state may impose use tax without actually observing such use.

[4] **RULES 224 and 178** -- USE TAX -- OUT-OF-STATE USE -- INSTATE REPAIR -- INSTATE STORAGE. Washington taxpayer operating amusement devices in both Oregon and Washington does not incur use tax liability in respect to Oregon-based amusement devices merely by sending them here for repair or

storage if they are later returned to Oregon without actual use in Washington.

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: February 12, 1986

NATURE OF ACTION:

An examination of the taxpayer's account for the period July 1, 1981 through September 30, 1984 resulted in the assessment of additional taxes and interest. A tax assessment was issued and the taxpayer timely petitioned for a correction of the assessment and a conference for examination and review of the assessment.

FACTS:

Ronald J. Rosenbloom, Administrative Law Judge -- The taxpayer is a Washington corporation doing business in both Washington and Oregon. The taxpayer's office, warehouse and repair facilities are located in Washington. The taxpayer maintains no places of business in Oregon.

The taxpayer owns a number of coin operated amusement devices, such as juke boxes, pool tables, video games, and pinball machines. The taxpayer places these amusement devices at locations owned or operated by others in Oregon and Washington. The juke boxes and all but one pool table are leased for a flat monthly rental fee. The remaining pool table, the video games, and the pinball machines are the subjects of "50-50 split" agreements with each of the various owners or operators of the business premises upon which the amusement devices are located.

Under a "50-50 split" agreement, the taxpayer places one or more of its amusement devices on the business premises of another for use by customers of the business. An employee of the taxpayer visits periodically to remove the money. The taxpayer's employee opens the coin box in the presence of the owner or operator of the business premises. The money is

counted on the spot, and is there and then divided equally between the taxpayer and the owner or operator.

The taxpayer purchased some amusement devices from Washington vendors and paid retail sales tax at the time of sale. The remaining amusement devices were purchased from Oregon vendors without payment of retail sales tax. The taxpayer claims that it uses its best efforts to keep Washington-purchased amusement devices in Washington and Oregon-purchased amusement devices in Oregon. The taxpayer concedes, however, that a small amount of rotation of amusement devices between Washington and Oregon occurs, as well as some commingling and cannibalization of parts. In addition, Oregon-purchased amusement devices are occasionally taken to the taxpayer's Washington facilities for repair or storage.

The taxpayer invariably takes delivery of Oregon-purchased devices at the Oregon vendor's place of business in order to avoid the expense of delivery charges. In over ninety-five percent of the cases, the machines are taken directly from the Oregon vendor to an Oregon business premises. Only in rare instances were the devices taken to the taxpayer's Washington facilities prior to installation in an Oregon business premises. For example, the taxpayer acquired amusement devices for use in a tavern which was in the process of remodeling. The tavern was not yet ready to accept delivery and so the taxpayer took the amusement devices to its Washington facilities for temporary storage.

The taxpayer pays Oregon personal property tax on amusement devices located in Oregon.

TAXPAYER'S EXCEPTIONS:

I. The taxpayer protests the assessment of Service and Other Activities B&O tax on amusement device proceeds paid over to the owner or operator of the business premises upon which the amusement devices are located pursuant to "50-50 split" agreements, as detailed in Schedule II. The taxpayer contends that it has correctly reported only 50% of the proceeds derived from the amusement devices placed under such agreements. The taxpayer asserts that these agreements are in the nature of joint ventures with the taxpayer contributing the amusement devices and the owner or operator of the business premises contributing the location. Thus, the taxpayer concludes that it is liable for tax only upon its 50 percent share of the proceeds derived from the amusement devices.

II. The taxpayer protests the reclassification of amounts derived from rentals of juke boxes and pool tables from the Service and Other Activities B&O tax to the Retailing B&O tax, and the assessment of retail sales tax on these amounts, as detailed in Schedule IV. The provision of WAC 458-20-187 cited in the auditor's report explains the tax liability of "persons engaged in operating shuffleboards or games of pool or billiards." The taxpayer does not operate the pool tables in question, but leases them for a flat monthly rental fee. It is the lessee who operates the pool table, empties the coin box, and is entitled to the proceeds. The taxpayer asserts that Service and Other Activities B&O tax was properly reported on amounts derived from juke box and pool table rentals. An alternative argument discussed at the conference was that the taxpayer should be liable for Wholesaling B&O tax, rather than Retailing B&O tax and retail sales tax. The theory is that the premises owner is not the consumer of the juke boxes and pool tables but is re-renting the same to its customers.

III. The taxpayer protests the assessment of use tax on amusement devices purchased without payment of retail sales tax, as detailed in Schedule VI. The taxpayer asserts that most of these amusement devices have never been outside of Oregon where they were originally purchased. Of those that have entered Washington, the majority came here only after substantial use in Oregon, according to the taxpayer.

DISCUSSION:

I. The tax liability of persons operating amusement devices is explained in WAC 458-20-187, which provides in part:

> The term "amusement devices" means those devices and machines which, through the insertion of a coin, will permit the patron to play a game. It includes slot and pinball machines and those machines or devices which permit the patron to see, hear or read something of interest.
>
> . . .
>
> AMUSEMENT DEVICES. Persons operating amusement devices, except shuffleboard, pool, and billiard games, are taxable under the service and other business activities classification on the gross receipts therefrom.

. . .

> When coin operated machines are placed at a location owned or operated by a person other than the owner of the machines, under any arrangement for compensation to the operator of the location, the person operating the location has granted a license to use real property and will be responsible for reporting and paying tax upon his gross compensation therefor under the service classification.

[1] The taxpayer is the owner and operator of the amusement devices and is therefore subject to Service and Other Activities B&O tax on the gross receipts from those amusement devices. The taxpayer is not entitled to deduct amounts paid over to the owner or operator of the business premises upon which the amusement device is located. Washington's B&O tax is a gross receipts tax. The Service and Other Activities tax is measured by the "gross income of the business." RCW 82.04.290. The term "gross income of the business" is defined as follows:

> "Gross income of the business" means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction of account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses. RCW 82.04.080. (Emphasis supplied.)

Recent events have confirmed that the Department's administrative rule and interpretation thereof correctly implements the law. In 1986, both houses of the legislature approved Substitute Senate Bill No. 3110, which provided in part as follows:

> In computing tax there may be deducted from the measure of tax amounts paid by the owner of an amusement device, as defined in RCW 66.44.316, to

> the person upon whose premises the device is operated. Substitute Senate Bill No. 3110.

This bill would have prospectively provided the relief that the taxpayer has requested. However, the bill was vetoed by Governor Booth Gardner. The Governor's veto message is attached and requires no further elaboration.

The assessment of Service and Other Activities B&O tax as detailed in Schedule II is sustained.

II. The portion of WAC 458-20-187 cited in the auditor's report is inapplicable. When a pool table is leased for a flat monthly rental fee the lessee, not the lessor, is the operator of the pool table. The auditor should have cited WAC 458-20-211, which deals with leases or rentals of tangible personal property, providing in part:

> The terms "leasing" and "renting" are used interchangeably and refer generally to the act of granting to another the right of possession to and use of tangible personal property for a consideration. . . .
>
> BUSINESS AND OCCUPATION TAX
>
> The renting or leasing of tangible personal property constitutes a "sale" (RCW 82.04.040) and persons engaged in renting or leasing such property to users or consumers are taxable under the retailing classification upon the gross income from rentals as of the time the rental payments fall due. Persons renting or leasing tangible personal property to persons who will rent or lease such property to others are taxable under the classification wholesaling.
>
> . . .
>
> RETAIL SALES TAX
>
> Persons who rent or lease tangible personal property to users or consumers are required to collect from their lessees the retail sales tax measured by gross income from rentals as of the time the rental payments fall due.
>
> . . .

> The retail sales tax does not apply upon sales of tangible personal property to persons who purchase the same solely for the purpose of renting or leasing such property. However, the retail sales tax applies upon sales to persons who rent such property with operator or who intend to make some use of the property other than or in addition to renting or leasing.

The term "consumer" is defined to include "(a)ny person engaged in any business activity taxable under RCW 82.04.290 (i.e., Service and Other Activities B&O tax) . . . "RCW 82.04.190. (Parenthetical inclusion ours.) Persons engaged in the business of operating juke boxes are taxable under the Service and Other Activities classification. WAC 458-20-187. Thus persons who lease juke boxes for use on their business premises are "consumers."

Persons leasing pool tables for use on their business premises are also "consumers." The term consumer also includes "(a)ny person who purchases, acquires, owns, holds, or uses any article of tangible personal property . . . other than for the purpose . . . of resale in the regular course of business." RCW 82.04.190.

[2] There was some discussion at the conference as to whether lessees of pool tables lease them solely for the purpose of re-renting or releasing them to their customers (i.e., for the purpose of resale in the regular course of business). We find that they do not. The lessee/operator of a pool table does not lease or rent the pool table to its customers. For a consideration the customer is granted the use of the pool table, but not possession. Both use and possession are required for the transaction to constitute a lease or rental. WAC 458-20-211.

The customer <u>is</u> liable for retail sales tax, and perhaps that is why it is difficult to conceive of the lessee/operator as the consumer. However, the retail sales tax applies to the customers' use of the pool table not because the lessee/operator is leasing or renting the table, but because the term "retail sale" is defined to include the sale of or charge made for services rendered by persons engaged in "amusement and recreation businesses including but not limited to . . . pool . . . ." RCW 82.04.050(3)(a).

The taxpayer should have collected and remitted retail sales tax from Washington lessees who leased juke boxes and pool tables for use on their business premises. Having failed to collect the tax, the taxpayer is personally liable for payment thereof. RCW 82.12.050.

The assessment of Retailing B&O tax and retail sales tax as detailed in Schedule IV is sustained.

III. Many of the amusement devices placed in Oregon business premises were purchased in Oregon without payment of retail sales tax. The taxpayer asserts that the great majority of these amusement devices have never entered Washington, but concedes that a very few have. Despite any documented evidence of actual use in Washington, the auditor assessed use tax on all such amusement devices. The auditor took the position that the taxpayer is required to prove that the amusement devices never entered Washington in order to avoid the tax.

[3] We disagree. The burden of proof does not rest with the taxpayer to show that tangible personal property purchased outside the state for use outside the state has never been used in the state absent facts supporting presumptive use of the property in this state.

When a Washington resident purchases tangible personal property outside this state, a presumption is raised that the resident intends to use the property in this state. Rimer v. Department of Revenue, Board of Tax Appeals, Docket No. 5867. The taxpayer's testimony that Oregon-purchased amusement devices were placed in Oregon business premises and that Oregon personal property tax was paid on these devices is sufficient to overcome the presumption that they were purchased for use in Washington.

This does not necessarily mean that the Department must prove actual use of the amusement devices in Washington. The Board of Tax Appeals also held that when the facts support the presumptive use of the property in this state, the Department may impose use tax without actually observing such use. Id. The burden of proof then shifts to the taxpayer to overcome the presumption of instate use. Rimer was a Washington resident who purchased a boat in Oregon. The boat was moored on the Oregon side of the Columbia River and used extensively in that body of water. The Board held that Rimer's statement that he did not knowingly use the boat in the waters of the state of Washington was insufficient to refute the strong

presumption that a boat operator making the 70-mile passage from Portland to the Columbia River bar would travel part of the distance in Washington waters. In other words, the facts in the Rimer case supported a strong presumption that the boat was used in Washington and Riner was not able to overcome the presumption so the Department was not required to prove such use in order to assert the use tax.

In the present case, there are no facts to support the presumption that the bulk of the Oregon-purchased amusement devices were used in this state. If the taxpayer had simply denied that any Oregon-purchased amusement devices had ever been used in Washington, then we would surely have cancelled the assessment of use tax thereon absent some evidence that they were used here. It would be unseemly to reward the taxpayer's candid and forthright admission that a few of these amusement devices may have been used here by taxing them all.

We understand from conversations with the auditor that it is difficult to determine the location and movement of individual amusement devices from the taxpayer's records. Be that as it may, we do not believe that the Department is entitled to presume that every one of the taxpayer's amusement devices is subject to Washington use tax. If there are no records to establish actual use of Oregon-purchased amusement devices in Washington, then the taxpayer and Audit Section shall agree to a reasonable estimate, subject to our review if such an agreement cannot be reached.

[4] Incidentally, we should mention at this point that only those amusement devices placed on business premises located in this state are subject to use tax. The taxpayer does not incur use tax liability with respect to amusement devices shipped here from Oregon for repairs or storage; and later returned to Oregon without actual use in Washington.

The use tax applies upon "the privilege of using within this state as a consumer any article of tangible personal property . . . ." RCW 82.12.020. A taxable use occurs in this state when the taxpayer first "takes or assumes dominion or control over the article of tangible personal property (as a consumer) . . . ." RCW 82.12.010(2). The term "consumer" includes "any person engaged in any business activity taxable under RCW 82.04.290." RCW 82.04.190(2).

The taxpayer is taxable under RCW 82.04.290 on amounts received from amusement devices which are placed in Washington business premises. It is therefore a "consumer" of these

amusement devices. The taxpayer may assume dominion or control over Oregon-purchased machines that are sent here for repair, but it does not do so as a consumer. Furthermore, storage in this state is defined as a taxable "use" only when such storage is "preparatory to subsequent actual use or consumption within this state." RCW 82.12.010(2).

DECISION AND DISPOSITION:

The taxpayer's petition for correction is granted as to Schedule VI. We shall remand this matter to the Audit Section for a redetermination of the taxpayer's use tax liability with respect to amusement devices purchased without payment of retail sales tax. If there are no records to conveniently establish actual use in Washington, a reasonable estimate may be used. If the taxpayer and the Audit Section are unable to agree as to a reasonable estimate of use in Washington, we shall consider the matter further.

DATED this 17th day of September 1986.