

Cite as Det. No. 13 WTD 68 (1993).

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

In the Matter of the Petition)	<u>F I N A L</u>
For Correction of Assessment)	<u>D E T E R M I N A T I O N</u>
of:)	
)	No. 92-144ER
)	
. . .)	
)	
)	

[1] RULE 238 -- RCW 82.08.0266 -- EXEMPTION -- WATERCRAFT -
- NONRESIDENT. If a "bona fide" nonresident purchases
a custom built yacht in this state, that person does
not become a resident and subject to retail sales tax
on the purchase of the yacht if he or she temporarily
lives within the state solely to oversee construction
of the yacht.

[2] RULE 238 -- RCW 82.08.0266 -- FORTY-FIVE DAYS
LIMITATION. Conducting sea trials prior to acceptance
and delivery of a watercraft, even if done personally
by the owner of the vessel, does not constitute "use"
for purposes of the 45 day limitation in RCW 82.08.0266
for a nonresident's use.

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: . . .
WITNESSES: . . .

DATE OF HEARING: . . .

NATURE OF ACTION:

The taxpayer protests the assessment of use tax on a yacht
constructed in the state of Washington on grounds he was a
nonresident and met the exemption requirements of Rule 238.

FACTS AND ISSUES:

Roys, Sr. A.L.J. -- . . . [herein referred to as the taxpayer] was assessed . . . use tax on a custom built cruiser (the yacht). The assessment was issued [in March 1990]. The yacht was constructed for the taxpayer by a Washington company [contractor] on a hull constructed for the taxpayer by a different Washington builder. The taxpayer filed a timely appeal of the assessment. The assessment was sustained in Determination 92-144 and the taxpayer petitioned for executive level review of the decision.

Determination 92-144 included the following facts from the taxpayer's petition:

In October of 1987 [the taxpayer] commissioned [the contractor], a Washington corporation, to construct a 95 foot yacht At the time, [taxpayer] was a resident of the state of Nevada. He had a Nevada driver's license. He voted in Nevada. His financial business was conducted from his home in Nevada. He owned a home and paid taxes in Nevada. He maintained his Nevada residency throughout the construction process.

The yacht was complex in design and construction. Its systems were very technical, complex, and state of the art. [Taxpayer] has an extensive engineering and inventor's background, and determined to serve as his own project manager. In this way, the quality, technical competence, and finish performance were to his taste and direction.

At no time throughout the construction of [the yacht] did the Washington State Department of Revenue advise [taxpayer] that his residency was in question. This is despite the fact that in October of 1987 [taxpayer] served notice of the claim of exemption by providing an exemption certificate relating to the removal of the hull of [the yacht] from the hull contractor's yard . . . to the finish construction contractor's yard, [contractor].

Originally, it was planned that construction would take a little more than a year. Because of the complexity of the design, the logistics of construction, and the desire for performance and appearance perfection, the actual construction took more than two years. [Taxpayer] never changed his legal residence throughout that period, although he lived in a small apartment he rented in the . . . area [in Washington] during the

construction of [the yacht] so he could personally serve as its project manager.

[The contractor] delivered [the yacht] to [taxpayer in February 1990]. As soon as [the yacht] was complete, he removed her from Washington waters. Thus, [the yacht] was never used within the state of Washington for more than 45 days. With his departure from the state of Washington, [taxpayer] terminated all services and relationships with the state of Washington, including his temporary post office box, temporary rental housing, and temporary owner's office provided by [the contractor] at the boat yard

Ironically, [taxpayer] did not even buy any property in Washington State until right before he left. Right before he left, he bought a condominium as an investment. He rented the condominium on a long term lease, and has no intention to return to the state of Washington.

We feel it is also important to note that [the contractor] was able to employ more than 60 people on its payroll during the construction of [the yacht] largely due to [taxpayer's] decision to employ [the contractor]. . . . (Bracketed material added, citation to exhibit omitted.)

In sustaining the assessment, ALJ concluded that the taxpayer was not a "nonresident" of this state when he took delivery of the vessel and that he had used the yacht in this state for more than forty-five days as a consumer.

The taxpayer sought reconsideration of the decision. He contends no legal authority exists for the ALJ's finding that the sale was not exempt because he was a "dual resident" of Washington and Nevada. The taxpayer and the contractor further maintain that the construction given Rule 238 in Det. No. 92-144 fails to give adequate notice to dealers and nonresident purchasers of custom built watercraft of their potential tax liabilities.

The issues presented are (1) whether a sale of watercraft to a nonresident is subject to sales tax if the purchaser temporarily lives in this state to oversee or supervise construction of the vessel; and (2) whether the 45 day period for purposes of Rule 238 begins after the date of "delivery" of the vessel to the purchaser.

DISCUSSION:

RCW 82.08.0266 provides an exemption from sales tax for watercraft sold to nonresidents. The statute states:

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 provided 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, one copy to be filed with the department of revenue with the regular report and a duplicate to be retained by the dealer.

WAC 458-20-238 (Rule 238) provides a form for documenting exempt sales to nonresidents. The form requires the purchaser to state under penalty of perjury that he or she is a bona fide resident of another state; that the watercraft will be registered or documented with the Coast Guard or State of principal use and will not be used in Washington State more than 45 days. The taxpayer completed an exemption certificate [in September 1987] when he purchased the hull and [in February 1, 1990] when he accepted delivery of the yacht from [contractor]. In both cases the taxpayer swore that he was a bona fide resident of the state of Nevada and provided his Nevada driver's license and evidence he was registered to vote in Nevada.

The term "resident" is not defined in RCW 82.08.0266. Determination No. 92-144 found that the taxpayer was a "dual resident" of Washington and Nevada. The decision distinguishes the terms "domicile" and "residence." Residence refers to "living in a certain place whereas 'domicile' refers to one's legal relation to that place" Det. No. 92-144 The ALJ found that although the taxpayer was clearly domiciled in Nevada, he had also taken up residence in Washington during the construction of the vessel, and thus the Rule 238 exemption did not apply.

The taxpayer protests the finding that he was a "dual resident" during the construction of the yacht. The taxpayer contends that he never relinquished any aspects of Nevada residency in favor of Washington residency, and that he never intended to remain in Washington or return after completion of the yacht. The taxpayer

also challenges the "dual resident" concept, indicating that no statutory or case law authority exists for such a doctrine.

Determination No. 92-144 noted that we have consistently held that a person may be a dual resident for use tax purposes. The Determination quoted Det. No. 87-65, 2 WTD 293 (1987). That Determination sustained the assessment of use tax on a yacht. The facts in that case, however, are distinguishable from the present case. The taxpayers in that case were Oregon residents who had purchased a yacht in British Columbia. That same year, they had purchased a second residence in this state. Use tax was assessed and sustained because they subsequently lived in Washington State two to four months every year and kept the yacht in this state more than half of the year.

Most of the published Determinations relying on the "dual residency" concept have involved the assessment of sales or use tax on motor vehicles. A Washington resident may not purchase a vehicle and be exempt from sales tax as a "nonresident" because that person intends to reside out-of-state or has property in another state as well as this state. See, e.g., Det. 87-67, 2 WTD 331 (1987), and Det. 86-321, 2 WTD 105 (1986).

WAC 458-20-178 is the administrative Rule which explains the application of use tax. Section seven of Rule 178 provides that the following "uses" are exempt from use tax:

(a) The use of tangible personal property brought into the state of Washington by a nonresident thereof for use or enjoyment while temporarily within the state, unless such property is used in conducting a nontransitory business activity within the state; or

(b) The use by a nonresident of a motor vehicle or trailer which is currently registered or licensed under the laws of the state of the nonresident's residence and which is not required to be registered or licensed under the laws of this state, . . . ;

. . .

(i) Use by a nonresident. The exemptions set forth in (a) and (b) of this subsection, do not extend to the use of articles by a person residing in this state irrespective of whether or not such person claims a legal domicile elsewhere or intends to leave this state at some future time, nor do they extend to the use of property brought into this state by a nonresident for the purpose of conducting herein a nontransitory business activity.

For purposes of vehicle license registration, a "resident" formerly included a person who resided in this state more than six months in any continuous twelve-month period. RCW 46.16.028(1)(b). That provision was amended in 1987 to state that a "resident," for the purposes of vehicle license registration, is a person "who manifests an intent to live or be located in this state on more than a temporary or transient basis." Evidence of residency would include becoming a registered voter in this state, receiving public assistance, or declaring that he or she is a Washington resident for obtaining a state license or tuition fees at resident rates. For the period at issue, the taxpayer would not be a "resident" for purposes of vehicle license registration as he did not intend to live in this state on more than a temporary basis.

RCW 82.08.0273, which provides an exemption for sales to nonresidents of tangible personal property for use outside the state, also includes examples of acceptable proof of nonresident statute. Unlike Rule 178, neither RCW 82.08.0273 nor RCW 82.08.0266 state that temporarily residing in this state would deny the exemption for a "nonresident."

We have no reason to doubt the testimony by the Washington contractor in this case that nonresident persons who contract to have million dollar yachts built in this state usually come to supervise or at least oversee the construction. RCW 82.12.0254, the only use tax exemption provision which defines "nonresident," includes a user who has one or more places of business in this state as well as in one or more other states. Where a bona fide resident of another state lives in this state solely to oversee construction of watercraft they have purchased, we find that person should be considered a "nonresident" as that term is used in RCW 82.08.0266 and Rule 238.

2. Use tax. Determination No. 92-144 also sustained the assessment of use tax on grounds the taxpayer used the vessel as a consumer for more than 45 days. RCW 82.08.0266 and Rule 238 state that the use tax will apply to the use by a nonresident of watercraft when the watercraft was purchased from a Washington vendor and is first used within this state for more than forty-five days. The taxpayer argues that he did not use the yacht, as a consumer, in Washington waters for 45 days. In making this argument, the taxpayer maintains that use of the yacht for "sea trials" was not "taxable use" because he had not assumed dominion and control of the vessel as a consumer.

Determination No. 92-144 noted that if the taxpayer had purchased a yacht from the contractor's inventory and sea trials were conducted without personal use, that the sea trial period of use

would not be considered in the forty-five day limitation. Such use would be similar to the test drive of an automobile. Because the taxpayer owned the yacht at all times and conducted sea trials, Determination No. 92-144 found the taxpayer was using it as a consumer.

As the taxpayer noted, Coast Guard documented vessels are usually large vessels built for ocean cruising. Many, if not most, are not purchased from a dealer's inventory. Instead, most are constructed as the yacht at issue was constructed--on a time and materials basis, with progress payments as the vessel proceeds towards completion.

We believe the exemption provided by RCW 82.08.0266 should apply to purchases of vessels on a time and materials basis as well as to vessels purchased from a dealer's inventory. Although we agree that use in this state prior to the delivery date could be taxable use, we are not convinced that the taxpayer's use of the vessel in this case was taxable use. Both the taxpayer and the contractor testified at length as to the problems that were discovered and the work that was done during the "sea trial" period.

The log shows the taxpayer left Washington waters [in August 1989] for British Columbia and returned to this state [in December 1989]. During that time he discovered several problems with the yacht. During the months of December and January, the log shows some of the following entries:

- 12-04-89 Returned to [contractor's location] for crew to continue work;
- 12-09-89 Crew training.
- 12-15-89 Port main engine throttle disconnected. Bow thruster would not engage.
- 1-02-90 Hauled boat for Shaft removal, Coupling installed.
- 1-03-90 Discovered bent & distorted shaft log tubes. Bending Port Shaft 3/8", Star Shaft 1/4."
- 1-11-90 Still working on shaft log tube repair.
- 1-17-90 Returned to [contractor's] dock. [Contractor] immediately started to work on the repair of Shaft Logs and reline engines for new couplings.
- 1-20-90 Departed [contractor's location] for outside breakwater. Checking B&G speed, Check Steer #1, Check Steer #2. Vibration & Starboard Shaft & coupling runs out .030". Port OK .005" runout. Check low air alarm.

These entries and others support the taxpayer's testimony that the yacht required substantial sea trials and repairs before it was ready for delivery. The yacht cost more than four million and was built with state of the art features. Even if the taxpayer enjoyed the sea trials and some of the days were "good

days" as the log notes, we believe the use of the vessel for the sea trials was part of the construction process and did not constitute taxable "use" by the taxpayer.

The use tax notice states that the sale occurred [in February 1990] when the petitioner accepted delivery and took possession of the vessel. [In February 1990], the yacht left Washington waters.

We therefore find that the taxpayer meets the exemption requirements of RCW 82.08.0266 and WAC 458-20-238.

DECISION AND DISPOSITION:

The taxpayer's petition is granted.

DATED this 14th day of May 1993.