

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

[illegible]

- [1] U.S. CONSTITUTION; RULE 190: AGENCY OR INSTRUMENTALITY OF UNITED STATES -- RETAIL SALES AND USE TAX EXEMPTIONS. Taxpayer is exempt from payment of Washington's retail sales and use taxes as an agency or instrumentality of the United States that is directly operated and controlled by the government for the benefit of the public generally.
- [2] RCW 82.08.0258, RCW 82.12.0259: RETAIL SALES AND USE TAX EXEMPTIONS. Taxpayer is exempt from payment of Washington's retail sales and use taxes as an entity incorporated under an act of the congress of the United States whose principal purpose is to furnish volunteer aid to members of the armed forces of the United States and to carry on a system of national and international relief. **[To the extent Det. No. 89-123, 7 WTD 229 (1989) is inconsistent with the ruling in this case, it is overruled.]**

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NATURE OF ACTION:

Civil Air Patrol petitions for review of a decision by the Department of Revenue denying it prospective retail sales and use

tax exempt status as an agency or instrumentality of the United States.¹

FACTS:

Prather, A.L.J -- In April, 1993 the Civil Air Patrol (CAP) solicited an opinion from the Department of Revenue (Department) regarding its claim to a retail sales and use tax exemption as an agency or instrumentality of the United States. The opinion was unfavorable; hence, this appeal.²

The CAP was established in December, 1941. During World War II it assisted the U.S. armed services through involvement in coastal patrols, target towing, mail, cargo, and passenger services, and search and rescue efforts.

In 1943, the CAP became an official auxiliary of the U.S. Air Force and in 1946 Congress conferred upon it status as a federally chartered, non-profit corporation to carry out that role. 36 USC §§ 201-208; 10 USC §9441; 32 CFR Ch. VII §§ 842.137 - 143. The objects and purposes of the CAP were declared to include, inter alia:

[T]o encourage and foster civil aviation in local communities and to provide an organization of private citizens with adequate facilities to assist in meeting local and national emergencies.

(Emphasis added.)

In 1956 Congress enacted 10 USC §9441 to confer upon the Secretary of the Air Force the means to assist the CAP in fulfilling its objectives. Under these provisions, the Secretary was given authority to: (1) give, sell or lend equipment or supplies to the CAP; (2) permit the CAP to use Air Force services and facilities; (3) furnish fuel and lubricants to the CAP as are needed to carry out any mission assigned to it by the Air Force, including unit capability testing and training missions; (4) establish, maintain

¹The Civil Air Patrol has granted the Department permission to publish this determination without redacting its name or any other identifying language.

²The CAP does not request a refund and seeks tax exempt status on a prospective basis only.

and supply Air Force liaison officers at the various national, state and regional CAP headquarters; (5) assign officers or members of the Air Force to any CAP liaison office; (6) assign officers or members of the Air Force to any CAP unit to assist in training; (7) in time of war or national emergency authorize the payment of travel expenses and allowances to CAP members while carrying out any mission specifically assigned by the Air Force.

In 1980 the following was added by amendment to 10 USC §9441:

(8) authorize payment of aircraft maintenance expenses relating to operational missions, unit capability testing missions, and training missions; (9) authorize payment of expenses of placing major items of equipment owned by the CAP into serviceable condition; (10) reimburse the CAP for costs incurred for the purchase of such major items of equipment as the Secretary of the Air Force considers needed by the CAP to carry out its mission; and (11) furnish without cost articles of the Air Force uniform to CAP cadets.

The 1980 amendments also added the following new section:

The Secretary may use the services of the Civil Air Patrol in fulfilling the noncombat mission of the Department of the Air Force, and for purposes of determining the civil liability of the Civil Air Patrol (or any member thereof) with respect to any act or omission committed by the Civil Air Patrol (or any member thereof) in fulfilling such mission, the Civil Air Patrol shall be deemed to be an instrumentality of the United States.

10 USC §9441(c).

Implementing the foregoing amendments are the following federal regulations:

Although not defined in any statute, an Air Force noncombat mission is any mission for which the Air Force is tasked, by statute, regulation, or higher authority, which does not involve actual combat, combat operations or combat training. The Air Force, in lieu of using Air Force resources, can use the services of the Civil Air Patrol to fulfill these type missions. When performing an Air Force noncombat mission, the Civil Air Patrol is deemed to be an instrumentality of United States. In order for a mission to

be a noncombat mission of the Air Force under this part, it must either:

(1) Have a special Air Force mission order assigned, and, the Air Force must exercise operational control over the mission.

(2) Involve a peacetime mission the Air Force is tasked to perform by higher authority which requires the expenditure of Air Force resources to accomplish, and the Air Force specifically approves the mission as a noncombat mission, and assigns the mission to the Civil Air Patrol to perform.

32 CFR Ch. VII §842.138.

On October 1, 1983, the Air Force issued the first of its annual "M" series orders providing that all CAP flying is designated as "authorized Air Force mission flying," and further dividing these missions into "reimbursed Air Force missions," which are flights occasioned at the direction of the Air Force, and "non-reimbursed Air Force missions," which would include missions to support requests from a local, county, state, or federal governmental agency. The effect of the "M" series orders is to make the CAP an "instrumentality" or "agency" of the United States in all of its flying missions.

Congress has not been unkind to the CAP with regard to its fiscal needs. For example, in the legislative history of Public Law 96-342, Title X, §1007(a),(b)(1), 94 Stat. 1121, 1122 (1980), which was enacted as 10 USC §9441(c), it was stated:

The Civil Air Patrol (CAP) is a congressionally chartered, non-profit, volunteer organization which has been designated by the Congress as an official auxiliary of the United States Air Force. The CAP has been instrumental in recent emergency rescue missions at the volcanic eruption of Mt. St. Helens, Cuban refugee operations, Michigan tornadoes and other incidents.

The Committee recommends a statutory change which would authorize an additional \$500,000.00 to provide reimbursement for the maintenance of CAP aircraft resulting from flying official Air Force search and rescue missions, and extension of current authorization for reimbursement of fuel and lubricants expended in official Air Force search and rescue missions.

Furthermore, in 1987 Congress appropriated the sum of \$7 million so the CAP could "increase its participation in and make significant contribution to the drug interdiction efforts of the Federal Government." Pub. L. 99-570, Title III, Subtitle A., §3059, 100 Stat. 3207-79 (1986).

The CAP is organized into a national headquarters, eight regional headquarters, and a "wing" in each state, including one in Puerto Rico. The "wings" are the primary operational units and are further divided into groups and squadrons. The CAP also has squadrons in Germany and Japan which assist in crowd control, disaster clean-up, and emergency services operations. The Executive Director of the CAP is always an active-duty Air Force officer. At present that officer is a colonel stationed at Maxwell AFB in Alabama. Operating through a full-time staff, the colonel directly controls the day-to-day operations of the CAP and is the commanding officer for Headquarters, CAP-USAF.

CAP members serve strictly on a volunteer basis. While on active duty, however, they wear Air Force uniforms (with CAP-distinctive emblems), enter military bases, purchase uniforms at Army/Air Force military clothing stores, shop at military base exchanges, and utilize military airlift transportation. CAP members are expected to follow military customs and courtesies while in uniform, including saluting superiors and properly honoring the flag of the United States.

All CAP acquisitions of aircraft and new vehicles, as well as mission funding, are made with funds received from the Air Force. Some vehicles are transferred directly to the CAP by the Air Force or other military services. The CAP participates in missions involving emergency services and disaster relief, military training route surveys, and customs and drug interdiction. The Drug Enforcement Agency, United States Forest Service, and the United States Customs Service utilize CAP resources through agreements with the Air Force and CAP aircraft routinely transport agents and employees of these federal agencies. The CAP also assists the state of Washington in carrying out its search and rescue and disaster relief missions.

The Washington Wing of the CAP is located on McChord Air Force Base in Tacoma. The wing liaison officer is an active duty Air Force officer who maintains offices and an active duty staff in the CAP wing headquarters building.

The CAP presents a two-fold argument in support of its claim for an exemption from the retail sales and use taxes: (1) that it is an "instrumentality" of the United States government and, therefore, is exempt from state taxation under the Supremacy Clause of the U.S. Constitution; and (2) that it is exempt from state taxation under the provisions of RCW 82.08.0258 and RCW 82.12.0259.³

ISSUE:

1. Whether the CAP is exempt from payment of retail sales and use tax as an agency or instrumentality of the United States.
2. Whether the CAP is exempt from payment of retail sales and use tax under RCW 82.08.0258 and RCW 82.12.0259.

DISCUSSION:

It is well-settled that a state may not, consistent with the Supremacy Clause of United States Constitution, "lay a tax directly upon the United States or upon any agency or instrumentality so closely connected to the United States that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." United States v. New Mexico, 455 U.S. 720 (1982).

The foregoing principle has been incorporated into Washington law

³In Det. No. 89-123, 7 WTD 229 (1989), we held that a seller was required to collect retail sales tax on sales of tangible personal property to the CAP. In reaching that result we held that the CAP was not tax exempt because it was not a department, institution, or instrumentality of the United States and that, even if it was, it was not directly operated and controlled by the federal government as required by WAC 458-20-190 (Rule 190). The CAP correctly argues that the determination is not binding upon it since it was not a party to that appeal. More importantly, however, is the fact that the determination did not discuss the applicability of RCW 82.08.0258 or RCW 82.12.0259 and did not develop a sufficient factual record to properly determine whether the "direct control" requirement of Rule 190 had been met. Therefore, to the extent Det. No. 89-123, 7 WTD 229 (1989) is inconsistent with our ruling in this case, it is overruled.

under WAC 458-20-190 (Rule 190) which provides in relevant part as follows:

The retail sales [and use] tax does not apply to sales to [and use by] the United States, its departments, institutions and instrumentalities, except sales to such institutions as have been chartered or created under federal authority, but which are not directly operated and controlled by the government for the benefit of the public generally.

(Bracketed material ours.)

Thus, we must first determine whether the CAP is an instrumentality of the United States and whether it is directly operated and controlled by the government for the benefit of the public generally.

One conclusion which can be drawn from our research is that no simple test exists for determining whether a particular entity is an instrumentality of the federal government since, as noted by the U.S. Supreme Court, "the line between the taxable and the immune has been drawn with an unsteady hand." United States v. New Mexico, *supra*, at 730.

Some general guidelines espoused by the Court are: Whether a particular entity has "become so incorporated into the government structure as to become an instrumentality," United States v. Boyd, 378 U.S. 39 (1964); whether it has become "so assimilated as to become a constituent part," United States v. Township of Muskegan, 355 U.S. 484 (1958); or whether it is an "arm of the federal government deemed by it essential for the performance of governmental functions," and is an "integral part of a governmental department and shares in fulfilling the duties entrusted to it," Standard Oil v. Johnson, 316 U.S. 481 (1942).

Of more practical value, however, are those factors identified in the two decisions of the Court in which instrumentality status has been found and which are most analogous to the present case: Department of Employment v. United States, 385 U.S. 355 (1966), in which the Court found the American National Red Cross to be a federal instrumentality; and Standard Oil Co. v. Johnson, *supra*, in which the Court found army post exchanges to be federal instrumentalities.

In Department of Employment v. United States, *supra*, the Court relied upon the following factors in determining that the American National Red Cross was an instrumentality of the United States: (1) Congress chartered the Red Cross in 1905, subjecting it to government supervision and to a regular financial audit by the Defense Department; (2) its principal officer is appointed by the President, who also appoints seven (all government officers) of the remaining 49 Governors; (3) the Red Cross is obligated by statute to meet U.S. commitments under the various Geneva Conventions, to perform a wide variety of functions indispensable to the workings of the U.S. Armed Forces around the globe, and to assist the federal government in providing disaster assistance to the states in time of need; (4) although its operations are financed primarily from private contributions, the Red Cross does receive substantial material assistance from the federal government; and (5) time and time again, both the President and the Congress have recognized and acted in reliance upon the Red Cross' status virtually as an arm of the government.

In addition, it has been stated that the obligations imposed upon the Red Cross to aid the government in the fulfillment of its duties under the Geneva Treaties should, perhaps, be emphasized as the most telling indication of its stature as an instrumentality of the United States. In an opinion dated August 15, 1918, the Honorable John W. Davis, then solicitor General of United States, put the matter as follows:

When any question arises as to the scope and activities of the American Red Cross, it must always be remembered that its charter is not only a grant of power but an imposition of duties. The American Red Cross is a quasi-governmental organization, operating under Congressional charter, officered in part, at least, by government appointment, disbursing its funds under the security of a government audit and designated by Presidential order for the fulfillment of certain treaty obligations into which the government has entered.

See generally, Sturges, The Legal Status of the Red Cross, 56 Mich. L. Rev. 1 (1957)

In Standard Oil Co. v. Johnson, *supra*, the Court found the following factors determinative in holding that army post exchanges are instrumentalities of the United States: (1) that by authority of Congressional enactments the Secretary of War had

promulgated regulations establishing the post exchanges, that those regulations had been amended from time to time and the exchanges had become a regular feature of Army posts; (2) Congressional recognition that "the activities of post exchanges are governmental" has been frequent, including appropriations for the construction and maintenance of post exchange buildings; (3) the establishment and operation of the exchanges are subject to the military commander of the post and a military officer is detailed to manage it under a supervisory council of military officers; (4) the military officers receive no extra pay for these services and the "object of the exchange is provide convenient and reliable sources where soldiers can obtain their ordinary needs at the lowest possible prices"; and (5) the government assumes no financial obligation of the exchange; profits, if any, do not go to individuals; instead they are used "to improve the soldiers' mess, to provide various types of recreation, and in general to add to the pleasure of and comfort of the troops." "From all this," said Justice Black for the Court, "we conclude that post exchanges as now operated are arms of the Government deemed by it essential for the performance of Governmental functions."

[1]One can conclude from these decisions that the Red Cross and post exchanges have in common the fact that each was created by Congress for the specific purpose of fulfilling, on a full-time, continuous basis, what have clearly been identified as important federal governmental responsibilities and functions, while subject to a significant degree of ongoing operational supervision by employees of the federal government. Applying this conclusion to the facts of this case, we find that the CAP is an instrumentality of the United States and is sales and use tax exempt.

[2]Furthermore, we find that the CAP meets the requirements of the statutory exemptions for retail sales and use taxes created by RCW 82.08.0258 and RCW 82.12.0259:

The sales tax levied by RCW 82.08.020 shall not apply to sales to corporations which have been incorporated under any act of the congress of the United States and whose principal purposes are to furnish volunteer aid to members of the armed forces of the United States and also to carry on a system of national and international relief and to apply the same in mitigating the sufferings caused by pestilence, famine, fire, floods, and other national calamities and to devise and carry on measures for preventing the same.

It is uncontroverted that the CAP was incorporated under an act of the congress of the United States and that as an auxiliary of the Air Force provides volunteer assistance to the armed forces of the United States. It is equally uncontroverted that CAP missions, both nationally and internationally, encompass a variety of disaster relief and search and rescue activities, the sole purpose of which is to reduce suffering and save lives. That the CAP is involved in these latter activities was recognized by our legislature in the enactment of RCW 47.68.370, which provides as follows:

It is the public policy of the state of Washington to direct the financial resources of this state toward the support and aid of air search, rescue, and emergency services within the state in order to promote the general welfare of its citizens. The legislature further declares that the operation of crash, rescue, emergency operations, and organization communications in the event of natural or other disasters, the performance of emergency missions for other federal and state agencies such as the patrol of forests, pipelines, flood areas, the transportation of critical parts and supplies, and the education and character development of our young people with the cadet program of the Washington wing civil air patrol serves the public interest. The Washington wing civil air patrol is a nonprofit, federally chartered, private corporation, which is an auxiliary of the United States Air Force and is engaged in cooperation with the national, state, and local emergency services effort and the department, which serves the public interest and purpose, and is staffed by civilian volunteers engaged in their contribution to the public welfare with no reimbursement for their efforts.

In expending moneys appropriated by the legislature, the Washington wing civil air patrol shall consult and cooperate with the department so that maximum education and development in aeronautical matters can be accomplished and the maximum contribution to emergency services can be made. The department may contract with the Washington wing civil air patrol to accomplish the purposes set forth in this section, and to furnish accommodations, goods, and services to the Washington wing civil air patrol as may be necessary to accomplish the purposes of this section.

The original version of this statute, passed in 1976, contained an appropriation for the CAP which read as follows:

To carry out the provisions of this act there is appropriated to the aeronautics commissions from the aeronautics account in the general fund for the biennium ending June 30, 1977, the sum of thirty-eight thousand dollars, or so much thereof as may be necessary, to be used for actual and necessary expenses, including the acquisition, installation, conditioning, and maintenance of equipment and facilities, and for defraying expenses incurred in actual training, or rescue work, or mercy missions, for aviation and emergency services training.

Washington Laws, 1975-76 2nd ex.s., Ch. 73, Section 3.

Based upon the foregoing, we hold that the CAP is entitled to the retail sales and use tax exemptions afforded by RCW 82.08.0258 and RCW 82.12.0259.

DECISION AND DISPOSITION:

Taxpayer's petition is granted. The CAP shall be entitled to the requested retail sales and use tax exemptions on a prospective basis only.

DATED this 29th day of March, 1994.