Cite as Det. No. 98-029, 19 WTD 742 (2000)

BEFORE THE APPEALS DIVISION
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. 98-029
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

[1] RULE 178: USE TAX -- AIRPLANE -- WASHINGTON OWNER -- TRANSPORTATION FINALLY ENDED. The transportation of an airplane, hangared in Oregon but used in Washington by a Washington owner is considered to have "finally ended," for use tax purposes, when the plane is used in Washington. The exemption based on the "transportation finally ended" principle is available only to nonresidents of Washington.

[2] RULE 178: RCW 82.08.0261 -- RCW 82.08.0262 -- RCW 82.12.020 -- RCW 82.12.0254 -- USE TAX -- EXEMPTION -- AIRPLANE -- INTERSTATE COMMERCE: To be exempt from sales/use tax as an instrumentality of interstate commerce, an airplane must be used on a "for hire" basis. A plane owned and used by a company to transport its executives across the country for business purposes does not qualify for the exemption, because such use is not for hire.

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.

NATURE OF ACTION:

Protest of use tax assessed on a Lear jet.[1]

FACTS:

Dressel, A.L.J. -- . . . (taxpayer) is in the business of buying, selling, and managing real property, including forested lands. Its books and records were examined by the Department of Revenue (Department) for the period January 1, 1991 through March 31, 1994. As a result a tax

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

assessment, identified by the above-captioned numbers, was issued for $. . . . The taxpayer appeals a portion of that assessment.

The taxpayer is a corporation headquartered in Washington with other offices [outside Washington]. It is registered as a foreign corporation, qualified to do business in, at least, twelve other states, plus the province of . . . . Oregon is one of the twelve states. In January, 1994 the taxpayer purchased a . . . Lear jet for $. . . from an Oregon owner. Delivery of the jet was taken in Oregon. No sales or use tax was paid by the taxpayer. The airplane is used exclusively for the taxpayer's corporate purposes. It is used to carry company executives to and from its various offices, as well as to conduct other business outside Washington. The most common trips are to . . ., . . ., . . ., and . . . .

To maintain and operate the aircraft, the taxpayer entered into a contract with an Oregon company called [Pilot Co.]. [Pilot Co.] provides pilot services, hangar space, maintenance, and fuel. It does so from its facility at the . . . Airport in . . ., Oregon. The taxpayer figures that by contracting these services out rather than performing them itself, it saves approximately $. . . per year.

Most of the jet's travel entails a landing and departure at . . ., Washington, the taxpayer's corporate headquarters. A typical trip would be for the plane to depart [Oregon], go to [Washington] to pick up taxpayer employees, fly to [City outside Washington], return to [Washington] to drop off the employees, and then return to [Oregon]. All this would take place in a day's time. Typically, on the legs between [Oregon] and [Washington], only the [Pilot Co.] pilots would be aboard. In the two year period examined, during which 66 trips were logged, on no occasion did the jet remain overnight in Washington. It was either hangared in Oregon or sitting overnight, on longer trips, at some other out-of-state airport. All trips, as contrasted with legs of a trip, commenced and terminated at [Oregon].

In assessing the use tax at issue, the Audit Division of the Department (Audit) cited the Washington taxpayer's use of its airplane in Washington. In objecting to the tax assessment, the taxpayer makes two primary claims. First, it argues that all of the flights were in the pursuit of interstate commerce and should be exempt of Washington's use tax for that reason. Secondly, the taxpayer argues that the statute that imposes the use tax requires the transportation of the article in question to have finally ended in this state. Vis-à-vis the Lear jet, the taxpayer claims that never happened.

ISSUE:

Is a Lear jet, owned by a Washington corporation and used to transport corporate executives and clients to and from its Washington headquarters and interstate locations, exempt of use tax, if hangared in Oregon?

DISCUSSION:

WAC 458-20-178 (Rule 178) reads, in part:

> **Use tax.** (1) The use tax supplements the retail sales tax by imposing a tax of like amount upon the use within this state as a consumer of any article of tangible personal property purchased at retail or acquired by lease, gift, repossession, or bailment, or extracted, produced or manufactured by the person so using the same, where the user, donor or bailor has not paid retail sales tax under chapter 82.08 RCW with respect to the property used.
>
> (2) In general, the use tax applies upon the use of any tangible personal property, the sale or acquisition of which has not been subjected to the Washington retail sales tax.

The *statute*[2] that imposes the use tax, during the initial period of the subject audit, read, in part:

> This tax will not apply with respect to the use of any article of tangible personal property purchased, extracted, produced or manufactured outside this state until the transportation of such article has finally ended or until such article has become commingled with the general mass of property in this state.[3]

Essentially, the taxpayer argues that the transportation of its Lear jet never did end in this state nor did it become commingled with the general mass of property in this state. This is because the plane was always flying in and out of this state, never remained overnight in this state, and was hangared in another state. In *Det. No. 87-145*, 3 WTD 99 (1987), Washington residents claimed that a pickup truck, purchased in Oregon and later brought to Washington, was not subject to use tax because they intended to take it back to Oregon where it would be used the majority of the time. In resolving this issue we said, at 104-105:

> . . . when a Washington resident purchases an article of tangible personal property outside this state and the article is brought into and used in this state, the transportation of such article has "finally ended" in Washington even though the property was kept within this state for a relatively short period of time.
>
> . . .
>
> The exemption under the "transportation finally ended" principle is simply not available to residents of Washington.

[1] The Lear jet entered and landed in Washington on numerous occasions during the audit period. Its owner, which is headquartered in [Washington], is a Washington resident. Therefore, the exemption that might have been applicable had transportation of the aircraft been found to

[2] RCW 82.12.020.
[3] Effective July 1, 1994, RCW 82.12.020 was amended to eliminate this sentence.

have *not* finally ended, is not available to this taxpayer. *Pope & Talbot, Inc. v. Department of Revenue*, 90 Wn.2d 191, 580 P.2d 262 (1978), frequently cited by the taxpayer in its briefing materials, is distinguishable, based on the fact that the taxpayer in the cited case was a *nonresident*.

Moreover, the use tax exemption is not available to nonresidents conducting business in this state. In this regard, Rule 178 reads, in part:

> (7) Exemptions. Persons who purchase, produce, manufacture, or acquire by lease or gift tangible personal property for their own use or consumption in this state, are liable for the payment of the use tax, except as to the following uses which are exempt under RCW 82.12.0251 through 82.12.034 of the law:
>
> (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

(Italics ours.) Not only is the taxpayer conducting a nontransitory business activity[4] in this state, but also it is a resident of this state. Its link to this taxing jurisdiction, then, is even greater than that of the nonresident described in the above-quoted portion of Rule 178.

In *Holman Distribution Center of Washington, Inc. v. Department of Revenue*, Formal Docket No. 84-11 (1985), the Board of Tax Appeals faced a situation similar to the one in the instant case. In the cited case about 25 percent of a Washington company's use of an airplane was in Washington, yet the plane was hangared in Portland. The Department successfully argued that a Washington corporation cannot escape use tax liability for property regularly used in Washington simply by storing that property elsewhere.

Based on the foregoing authority, we conclude that, for use tax purposes, transportation of the taxpayer's airplane finally ended when the taxpayer first put it to use in this state by flying it into and landing it in Washington.[5]

Whether transportation of the jet finally ended or not, however, it may still be exempt of tax based on the commerce clause of the U.S. Constitution and implementing state legislation. The pertinent statute in this regard is RCW 82.12.0254, which reads, in part:

> **Exemptions--Use of airplanes, locomotives, railroad cars, or watercraft used in interstate or foreign commerce or outside state's territorial waters--Components--Use of motor vehicle or trailer in the**

[4] The term "nontransitory business activity" means and includes the business of extracting, manufacturing, selling tangible and intangible property, printing, publishing, and performing contracts for the constructing or improving of real or personal property. Rule 178 at § 7(c)(ii).

[5] Tax liability imposed under the use tax arises at the time the property purchased, received as a gift, acquired by bailment, or extracted or produced or manufactured by the person using the same is first put to use in this state. Rule 178 at § 3.

> **transportation of persons or property across state boundaries--Conditions--Use of motor vehicle or trailer under one-transit permit to point outside state.** The provisions of this chapter shall not apply in respect to the use of any airplane, locomotive, railroad car, or watercraft used primarily in conducting interstate or foreign commerce by transporting therein or therewith property and persons *for hire* . . . . (Italics ours.)

[2] In implementing this exemption statute, Rule 178 also contains a qualifier for eligibility by stating the instrumentality of interstate commerce has to be "for hire." Rule 178 at § 7(f). WAC 458-20-175 (Rule 175) is titled "Persons engaged in the business of operating as a private or common carrier by air, rail or water in interstate or foreign commerce." It reads, in part:

> By reason of specific exemptions contained in RCW 82.08.0261 and 82.08.0262 the retail sales tax does not apply upon the following sales:
>
> (1) Sales of airplanes, locomotives, railroad cars, or watercraft for use in conducting interstate or foreign commerce by transporting therein or therewith property and persons *for hire;*

(Italics ours.) With respect to the "for hire" element of the interstate commerce tax exemption, ETB 112.12.178 is on point. As in the instant case and in *Holman Distribution*, *supra*, a company purchased airplanes outside the state, which planes it used, primarily, outside Washington. In making the ruling which was the subject of the ETB, the Tax Commission[6] said that while the interstate commerce exemption might have applied otherwise, it did not in the case before it because the taxpayer was not a carrier for hire. Its conclusion was summarized as follows in the ETB:

> It was clear in this instance that neither of these exemptions were available to the taxpayer since he is not a carrier for hire operating in interstate commerce nor were the planes purchased for use outside the state and substantially so used before bringing them into Washington.
>
> Therefore, since the taxpayer was a resident of Washington and his home office was here, the Commission concluded that the planes were purchased for use within and without the state for the purpose of commuting to out-of-state job sites. There is no statutory exemption available to a taxpayer for property so used.

There is no material difference between the situation in the instant case and the one described in the ETB. Both taxpayers are Washington residents and both used their planes in this state for business purposes. In the instant case, in particular, this is so regardless of the fact that the Lear jet spent little time in Washington each time it was here. The first such use in Washington triggered the use tax. Rule 178 § 3.

. . .

[6] The Tax Commission was the predecessor of the Department of Revenue.

Finally, we note that the taxpayer has suggested that in the event we find that use of the airplane occurred in Washington, the resulting use tax should be apportioned, so as to reflect use of the Lear jet in other jurisdictions as well. ETB 478.12.178 is pertinent. It reads, in part:

> As there is no provision in the law or the published rules for apportionment of the use tax based on the proportion of use occurring in Washington (for use of property owned by the user), the measure of the tax is the full "value of the article used" as defined in RCW 82.12.010(1) and published Rule 178, even though the article may also be used outside the state.

Accordingly, apportionment of use tax on the Lear jet is not possible.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 27th day of February, 1998.