Cite as Det. No. 99-330, 19 WTD 519 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment and Refund of . . .	)))))))	D E T E R M I N A T I O N No. 99-330 Registration No. . . . Warrant No. . . . Refund Petition

[1] RULE 193D; RCW 82.16.050: PUBLIC UTILITY TAX—DEDUCTIONS FOR INTERSTATE SHIPMENTS—THROUGH BILLS OF LADING. In computing public utility tax, there may be deducted from gross income so much thereof as is derived from actually transporting property from another state to this state. The interstate movement of freight ceases when the goods have arrived at the destination to which they were billed by the out-of-state shipper. A motor carrier who moves goods entirely within the state of Washington must move them under authority of a through bill of lading in order to qualify for the deduction. A through bill of lading is one in which the interstate carrier remains obligated for the proper delivery of the goods to the final destination, even though other carriers may be involved in providing transportation services. A typical through bill of lading commonly contains: (1) the name and place of business of the consignor; (2) the name and place of business of the consignee; (3) the identity of the initial carrier, the intermediate carrier, and the delivery carrier; (4) the car/trailer number; (5) a description of the goods being shipped; (6) the delivery route; (7) the gross weight of the goods; (8) a single freight rate for the shipment; and (9) a "bill of lading" number issued by a freight forwarder or other party.

[2] RCW 82.16.010: PUBLIC UTILITY TAX—DETENTION OR DEMURRAGE CHARGES—INCIDENTAL SERVICES. Detention or demurrage charges have a double purpose; one is to secure compensation for use of containers beyond the expected transportation period and the other is to provide a penalty or deterrent against undue detention**.** Rather than being a rental charge, a demurrage or detention charge is an incidental part of the transportation service.

[3] RULE 174; RULE 17401; RCW 82.08.0262; RCW 82.08.0263; RCW 82.12.0254: RETAIL SALES TAX—USE TAX—EXEMPTION FOR INTERSTATE CARRIERS—COMPONENT PARTS. Retail sales tax and use tax exemptions are

provided for component parts purchased by interstate motor carriers. Included are such items as tires, engine repair parts, and items permanently attached to vehicles or held by brackets. Tire chains are also exempt when they are stored in boxes permanently attached to the vehicles.

[4] RULE 174; RULE 17401; RCW 82.08.0262; RCW 82.08.0263; RCW 82.12.0254: RETAIL SALES TAX—USE TAX—EXEMPTION FOR INTERSTATE CARRIERS—MOTOR VEHCILES AND TRAILERS—VALUATION WHEN USE NO LONGER INTERSTATE. Purchases of motor vehicles by interstate motor carriers may be exempt from retail sales tax at the time of purchase, yet use tax may come due on subsequent use when a vehicle is no longer used in substantial part in transporting persons or property for hire across state boundaries. When use tax becomes due, it is based on the fair market value of the vehicle at the time of first non-exempt use. Mere speculation that a significant decline in value may have occurred upon first use of the vehicle is not sufficient evidence of a decline in fair market value.

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.

Mahan, A.L.J. – Freight company protests the assessment of: (1) public utility tax (PUT) on the in-state portion of interstate transportation services; (2) PUT on ocean freight charges on interstate shipments; (3) service business and occupation (B&O) tax on services performed in Alaska; (4) retail sales tax and retailing B&O tax on detention charges; (5) use tax on pallets; (6) use tax on tires, tire chains, and repair parts claimed to be exempt as interstate parts and equipment; (7) deferred retail sales or use tax assessed on vehicles allegedly purchased and first used to haul goods in interstate commerce under one-transit permits; and (8) interest. The taxpayer also seeks a refund with respect to its past reporting of service B&O tax on interstate transportation services now claimed as exempt.[1]

ISSUES

1. Is the taxpayer entitled to the interstate exemption when it delivers goods that originated outside the state and were shipped under through bills of lading?

2. Is the taxpayer entitled to the interstate exemption when, as the originating carrier, it picks up cargo in Washington for shipment to Alaska, issues bills of lading, delivers the goods to ocean carriers, and is liable for ocean freight and final delivery charges?

3. Are charges for handling and delivering goods in Alaska and for warehouse services in Alaska subject to Washington's service B&O tax?

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

4. Are detention or demurrage charges levied for the rental of equipment or are they part of the costs of transporting goods?

5. Was use tax properly imposed on the taxpayer's purchase of pallets, that is, were they purchased for resale?

6. Are the taxpayer's purchases of tires, tire chains, and certain repair parts subject to the exemption for interstate equipment?

7. Is a retail sales or use tax exemption available for the taxpayer's purchase of its trucks and trailers and, if not, what value must be used for use tax purposes?

8. Should interest be waived in all or in part because of the time spent in conducting the audit and in issuing a post-audit adjustment?

9. Is the taxpayer's petition for a refund barred in part by the statute of limitations?

FINDINGS OF FACT

The taxpayer was a motor carrier licensed by the Interstate Commerce Commission (ICC). It transported goods in interstate and in-state commerce.[2] Its principal place of business was located in . . ., Washington. It had a branch office in . . ., Alaska.

The Department of Revenue (Department) audited the taxpayer's records for the January 1, 1993 through September 30, 1996 period and issued a deficiency assessment in the amount of $. . . . Following the production of additional records, the Department issued a post [assessment] adjustment (PAA), reducing the amount of the deficiency to $. . . . Following a failure to timely pay the new assessment amount, the Department issued a warrant.

The taxpayer timely filed a petition for correction of the assessment. On December 31, 1998, it also filed a refund request for service B&O tax paid from January 1, 1992 through December 31, 1997 that it had reported on its income.[3]

As part of its business operations, the taxpayer picked up goods at railheads and transported them to a designated delivery point within Washington. A representative copy of a bill of lading issued by an out-of-state freight forwarder to the taxpayer shows: (1) the name and place of business of the consignor; (2) the name and place of business of the consignee; (3) the identity of the initial carrier, the intermediate rail carrier, and the delivery carrier (taxpayer); (4) the car/trailer number; (5) a description of the goods being shipped; (6) the delivery route; (7) the

[2] The taxpayer is no longer in business. Shipments that are clearly in-state in nature are not in dispute in this case. See, e.g., invoice no.128621.

[3] The Audit Division has not had an opportunity to review this refund request and we will remand it for that division's initial review. However, the petition does raise the issue of whether it is barred in part by the statute of limitations and that issue is discussed infra.

gross weight of the goods; (8) a single freight rate for the shipment; and (9) a "bill of lading" number issued by the freight forwarder. A letter from the freight forwarder stated "the bills of lading sent to your office are in fact actual [freight forwarder's] bills of lading provided for rail billing purposes." The taxpayer billed the freight forwarder, which remained liable for the delivery of the interstate shipment to the final destination in Washington.[4]

As part of its business, the taxpayer also operated as the originating carrier on goods being shipped to Alaska. It picked up goods in Washington, issued a bill of lading, and delivered the goods to the docks for shipment to Alaska. The ocean carrier billed the taxpayer for the "ocean freight", and the taxpayer, in turn, billed the shipper for its transportation services and the "ocean freight". Often the taxpayer received and delivered the goods in [City], Alaska, where the taxpayer had an office. It billed for the service in Alaska as "[City] handling". The taxpayer's bill file contains the invoices and a copy of the manifest for the goods. The bills of lading were held in a "voyage" file. Initially, the Department treated all of the "ocean freight" as subject to service B&O tax, transportation to the docks as either exempt interstate or motor transportation, services identified only as "pick up" as motor transportation, and the [City] handling as exempt interstate activity. The Department issued an adjustment where some, but not all, of the ocean freight charges were treated as exempt interstate. In the shipments where the ocean freight was treated as exempt interstate, the Department converted the [City] handling charges to service B&O tax.

The taxpayer also had warehouse and office space in [City], Alaska. It received shipments at the docks and either delivered or stored the goods in its warehouse. It also rented some of its warehouse space in Alaska to the owners of several fishing boats. In addition to assessing service B&O tax on some of the [City] handling services, the Department assessed service B&O tax on the warehouse charges.[5]

The taxpayer collects detention charges, also called demurrage or per diem charges, from its customers. Typically, a carrier provides transportation equipment, such as containers, for a specified period without any charge other than the transportation charge. If a customer takes too long in unloading or loading the equipment, an additional charge is levied for detaining the equipment. Such charges are made on a per diem basis. The Department assessed retailing B&O tax and retail sales tax on those charges.

The Department also assessed use tax on the taxpayer's purchase of pallets, tires, tire chains, and certain repair parts. The taxpayer bought a large number of pallets and provided the pallets to businesses located in Alaska.[6] Although pallets were used on items in the taxpayer's warehouses, the shipper almost always provided the pallets with the goods being shipped. During the audit period, the taxpayer purchased tires worth over $. . . from the . . . Tire

[4] For reasons that are unclear, the Department denied the interstate deduction for shipments the taxpayer picked up outside the state, with the freight forwarder issuing a bill of lading showing the taxpayer as the initial carrier picking up goods in Oregon for delivery to a railhead in Washington. See, e.g., invoice no. 128539, dated January 4, 1996.
[5] See, e.g., invoices no. 1285083 – 4, regarding "monthly [City] reimbursement".
[6] See, e.g., invoice no. 128681 – 3, for $. . . for "pallets to [City]".

Company. The company accepted the taxpayer's ICC license and sold the tires without charging retail sales tax. When noted on the invoices, the company identified large truck tires. In one instance, it identified pick-up size tires. The taxpayer owns and operates a pick up for deliveries in Alaska. The taxpayer also purchased tire chains for its trucks, and welded boxes on the trucks specifically for storage of the tire chains.

The taxpayer purchased trucks and trailers without payment or retail sales tax. The Department assessed deferred retail sales tax or use tax on the purchase of trucks and trailers, because the taxpayer did not provide evidence the equipment met the requirements for a retail sales or use tax exemption. Even with the presentation of trip permits for the first use of the equipment on appeal, the taxpayer did not provide support for a use tax exemption. During the test period, only two trucks crossed state lines out of 350 hauls. It also did not provide evidence that the use tax amount would be any different from the purchase price for the trucks and trailers.

Substantial interest accrued on the assessment, because of the length of time taken to complete the audit and post [assessment] adjustments. Despite extensions of time for production of business records, the Department issued the original assessment based on incomplete records. The taxpayer also had not filed returns since a November 1995 return, and the Department estimated amounts for the period when returns were not filed. The Department then issued a post [assessment] adjustment based on the additional records. Even then, the records were not complete. For example, on appeal the taxpayer provided records for the first time as to actual, as opposed to estimated, amounts for the period when returns were not filed.[7]

ANALYSIS

[1] 1. **Interstate Motor Transportation Deduction**.

The PUT is imposed upon every person engaging within this state in the motor transportation business. RCW 82.16.020. RCW 82.16.050(6) allows a deduction from gross income in computing the tax for amounts "derived from business which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States." WAC 458-20-193D (Rule 193D) identifies the taxes on interstate transportation services that the Department considers to constitute an impermissible burden upon such commerce. In relevant part, it provides:

> In computing public utility tax, there may be deducted from gross income so much thereof as is derived from actually transporting persons or property . . . from this state to another state or territory or to a foreign country and vice versa.
>
> . . .

[7] These records were not reviewed on appeal, and any adjustment based on these records will be made on remand to the Audit Division.

> Insofar as the transportation of goods is concerned, the interstate movement of cargo or freight ceases when the goods have arrived at the destination to which it was billed by the out-of-state shipper, and no deduction is permitted of the gross income derived from transporting the same from such point of destination in this state to another point within this state. Thus, freight is billed from San Francisco, or a foreign point, to Seattle. After arrival in Seattle it is transported to Spokane. No deduction is permitted of the gross income received for the transportation from Seattle to Spokane. Again, freight is billed from San Francisco, or a foreign point, to a line carrier's terminal, or a public warehouse in Seattle. After arrival in Seattle it is transported from the line carrier's terminal or public warehouse to the buyer's place of business in Seattle. No deduction is permitted of the gross income received as transportation charges from the line carrier's terminal or public warehouse to the buyer's place of business in Seattle.

See also Excise Tax Advisory 250.16.179/193 (ETA 250).[8]

Consistent with Rule 193D and ETA 250, the Department has held that income from the interstate transportation of goods under a through bill of lading is entitled to the deduction from PUT. *See* Det. No. 97-080, 16 WTD 218 (1987); Det. No. 93-240, 13 WTD 369 (1994); Det. No. 89-503, 8 WTD 341 (1989); Det. No. 87-138, 3 WTD 73 (1987).

Uniform Commercial Code (UCC) § 1-201(6), codified at RCW 62A.1-201(6), defines the term "bill of lading" as "a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and include an airbill." A bill of lading constitutes a receipt for the goods received, and a transportation contract between the carrier and the shipper. *See Wasem, Inc. v. State*, 63 Wn.2d 67, 385 P.2d 530 (1963). A through bill of lading is one in which the interstate carrier remains obligated for the proper delivery of the goods to the final destination, even though other carriers may be involved in providing transportation services. Bills of lading must contain certain specific information. *See* E. Ovens, Transportation and Traffic Management, 228 (1981).

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[8] The Department has consistently taken the position that a motor carrier who moves goods entirely within the state of Washington must move them under authority of a through bill of lading in order to qualify for the deduction. For example, in Det. No. 87-138, 3 WTD 73 (1987), the Department held that a taxpayer who transported Alaska salmon from a Seattle, Washington terminal to another city in Washington was not entitled to a deduction of interstate hauling, because it did not haul under the authority of a through bill of lading. Similarly, in Det. No. 89-503, 8 WTD 341 (1989), the Department held that a taxpayer who picked up packages at the Spokane, Washington airport and delivered them to recipients in the local area could deduct income attributable only to hauls that it made under authority of a through bill of lading. The Department concluded:

> Thus, when a motor carrier moves goods within Washington under the authority of an interstate bill of lading, the interstate commerce deduction applies. If such movement is not under the authority of such a through bill of lading, the deduction will not apply.

For state tax purposes, the fact that the goods originated outside Washington and were identified at the time of shipment to their ultimate destination is immaterial. The interstate journey ends when the interstate carrier's obligation ends. Subsequent intrastate transportation by another carrier can then be taxed by the state.

In this case, the taxpayer presented a through bill of lading issued by the freight forwarder. It contained the specific information typically required to be in a bill of lading. The freight forwarder remained liable for the delivery of the goods to the final destination in Washington. It hired the taxpayer to act as the delivery carrier on the interstate shipments for which it remained liable.

The Department did not accept the bill of lading as evidence the shipments involved interstate shipments under a through bill of lading because the freight forwarder's letter stated the bill of lading was "used for billing (charging) for the railroad services." While separate freight bills are usually issued, we are aware of no authority that would prohibit a freight forwarder from also using a through bill of lading for billing purposes. Accordingly, we find for the taxpayer on this issue.

For similar reasons, we also find the shipments where the taxpayer was responsible for paying the ocean freight involved exempt interstate transportation services, where the taxpayer was operating as the originating carrier and was responsible for delivering the goods to their final destination.

Some of the taxpayer's shipments involved purely intra-state shipments, as shown on the Department's Exhibit A to the assessment, which remain subject to tax. This issue is remanded to the Audit Division for deletion of the exempt interstate transportation services and the services otherwise exempt under RCW 82.16.050.

2. **Activities in Alaska**.

The only basis presented for assessing tax on some of the [City] handling charges, warehouse charges, and related charges in Alaska stem from the assertion that the taxpayer "may" have been a freight forwarder and, if so, some of those charges may be apportioned to Washington. No evidence has been submitted to even suggest the taxpayer was a freight forwarder. To the contrary, all of the evidence points to the fact the taxpayer is an interstate carrier for hire. Accordingly, the taxpayer's petition is granted in this respect.

[2] 3. **Detention Charges**.

The Department treated "detention" payments as the rental of containers by the taxpayer. The Department erred in concluding that such charges are for the rental of the containers.

Detention charges are commonly referred to as demurrage charges. In general, demurrage charges have a double purpose; one is to secure compensation for use of the containers beyond the expected transportation period and the other is to provide a penalty or deterrent against undue detention**.** Such charges are an integral part of the efficient movement of freight. *See Interstate Commerce Comm. v. Oregon Pacific Industries, Inc.*, 420 U.S. 184 (1975).[9]

[9] In that case, the court cited, at p. 901, n.7, *Iverson v. United States*, 63 F. Supp. 1001, 1005-1006, *aff'd per curium*, 327 U.S. 767, as follows:

The case relied on by the Department, Det. No. 93-139E, 13 WTD 278 (1994), concerned per diem rental charges for rail cars, not demurrage or detention charges. Rather than being a rental charge, a demurrage or detention charge is an incidental part of the transportation service. *See* RCW 82.16.010; Det. No. 90-280, 10 WTD 79 (1990). Det. No. 90-280 held "charges for delayed return of containers" are subject to the PUT, as income derived from services "incidental" to the transportation services. Similarly, the detention or demurrage charges in this case are subject to the PUT. To the extent the transportation charges are exempt from the PUT, the related detention or demurrage charges are exempt. If not exempt, the charges are subject to the PUT, not retail sales tax.

4. **Use Tax on Pallets**.

WAC 458-20-115 (Rule 115) provides that packing material is considered for resale and retail sales tax would not be imposed on the sale of the packaging materials to a manufacturer. The rule defined the term "packing material" to mean:

> [A]ll boxes, crates, bottles, cans, bags, drums, cartons, wrapping papers, cellophane, twines, gummed tapes, wire, bands, excelsior, waste paper, and all other materials in which tangible personal property may be contained or protected within a container, for transportation or delivery to a purchaser.

Section (5)(c) or Rule 115 identifies how pallets are generally taxed:

> The use tax applies to the use of pallets by a manufacturer or seller where the pallets will not be sold with the product, but are for use in the manufacturing plant or warehouse.

See also Det. No. 90-302, 10 WTD 101 (1990). The concept behind charging sales tax on pallets used in the warehouse is such pallets are put to intervening use. Such use subjects those pallets to use tax.

In this case, the taxpayer purchased a large number of pallets in Washington. It also shipped a large number of pallets to Alaska for use by businesses in Alaska. Missing from the records before us are invoices for the sale of the pallets, showing that the taxpayer purchased them for resale. Based on the record we are unable to tell whether the taxpayer put the pallets to its own

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> [Demurrage] charges are in part compensation and in part penalty; . . . in full character they are neither, not being rates as that term is used in connection with rate-making, nor penalties as that term is used in respect to penal impositions. They are sui generis. Historically, textually, in purpose and in content, they are an integral part of the established rules and regulations relating to the use and movement of cars.

use as part of its shipment of goods from Alaska or sold them to the Alaskan businesses without any intervening use. Accordingly, the Department is sustained the assessment of deferred sales or use tax on the purchase of the pallets.

[3] 5. **Exempt Interstate Component Parts**.

WAC 458-20-174 (Rule 174) implements the retail sales tax and retail sales tax exemptions provided by RCW 82.08.0262 and 82.08.0263, for interstate motor carriers that purchase component parts. WAC 458-20-17401 (Rule 17401) implements a corresponding use tax exemption provided by RCW 82.12.0254. As to component parts, Rule 174 provides that the exemption is not limited to vehicles that meet crossing requirements, as follows:

> RCW 82.08.0262 provides an exemption from the retail sales tax for sales of component parts and repairs of motor vehicles and trailers. This exemption is available only if the user of the motor vehicle or trailer is the holder of a carrier permit issued by the Interstate Commerce Commission or its successor agency which authorizes transportation by motor vehicle across the boundaries of Washington. Since carriers are required to obtain these permits only when the carrier is hauling for hire, the exemption applies only to parts and repairs purchased for vehicles which are used in hauling for hire. The exemption includes labor and services rendered in constructing, repairing, cleaning, altering, or improving such motor vehicles and trailers.
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> (i) This exemption is available whether the motor vehicles or trailers are owned by, or operated under contract with, persons holding the carrier permit. This exemption applies even if the motor vehicle or trailer to which the parts are attached will not be used substantially in interstate hauls, provided the vehicles are used in hauling for hire.
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> (ii) The seller must retain as a part of its records a completed exemption certificate . . . .

(Emphasis added.) *See also* Rule 17401.

With respect to component parts subject to the exemption, Rule 17401(7)(a) in relevant part provides:

> For the purposes of this section, the term "component parts" means any tangible personal property which is attached to and becomes an integral part of the motor vehicle or trailer. It includes such items as motors, motor and body parts, batteries, paint, permanently affixed decals, and tires. "Component parts" includes the axle and wheels, referred to as "converter gear" or "dollies," which is used to connect a trailer behind a tractor and trailer. "Component parts" can include tangible personal property which is attached to the vehicle and used as an integral part of the motor carrier's operation of the vehicle, even if the item is not required mechanically for the operation of the vehicle. It includes cellular telephones, communication equipment, fire extinguishers, and other such items, whether themselves permanently attached to the vehicle or held by brackets which are permanently attached. If held by brackets, the brackets must be permanently attached to

> the vehicle in a definite and secure manner with these items attached to the bracket when not in use and intended to remain with that vehicle. It does not include antifreeze, oil, grease, and other lubricants which are considered as consumed at the time they are placed into the vehicle, even though required for operation of the vehicle. It does include items such as spark plugs, oil filters, air filters, hoses and belts.

(Emphasis added.)

As set forth in this rule, tires and engine repair parts are exempt when purchased for vehicles which are used in hauling for hire. Based on the nature of the taxpayer's business, testimony at the hearing, and a review of representative invoices, we found the tire purchases and repair part purchases to be exempt component parts. Accordingly, the taxpayer's petition in this regard is granted. The taxpayer also purchased tire chains, which were stored in boxes permanently attached to the vehicles. As such they qualify for the exemption in the same manner as fire extinguishers that are held by permanently attached brackets.

The taxpayer also claimed that certain services provided by . . . involved washing services, not lubrication services (which would be subject to retail sales tax). At the hearing, the taxpayer testified that such mobile services involved only cleaning, not lubrication services. In support, it provided copies of bills for actual lubrication services from other providers. We also note that in the PAA, the Department converted one bill from . . . to nontaxable, but not other billings from the same vendor. Under such circumstances, we find that the invoices from . . . were not subject to retail sales tax as consumable purchases.[10]

[4] 6. **Vehicles First Used to Haul Goods in Interstate Commerce.**

Rule 174 also implements retail sales tax exemptions provided by RCW 82.08.0262 and 82.08.0263, for interstate motor carriers that purchase motor vehicles and trailers. WAC 458-20-17401 (Rule 17401) implements the corresponding use tax exemption provided by RCW 82.12.0254. Effective July 1, 1995, these provisions were amended to eliminate the requirements for ICC carriers to obtain one-transit (trip) permits and for the first haul to be interstate in nature as a condition for retail sales or use tax exemptions to apply to the purchase and use of motor vehicles and trailers. Accordingly, different rules apply depending on when the equipment was purchased and used.

With respect to the purchase of trucks and trailers used in interstate commerce, Rule 174 in effect prior to July 1, 1995 provided:

> In computing tax liability under the retailing classification, persons engaged in the business of selling motor vehicles, trailers, parts and accessories, and persons engaged in the business

[10] The Department also listed as a consumable purchase a May 3, 1995 charge for $. . . from . . . Trucks, Inc. According to the taxpayer, this was a down payment for the purchase of trucks in 1995. A May 3, 1995 invoice from . . . Trucks clearly shows a $. . . down payment for the purchase of two trucks. The Department also assessed tax on the purchase of capital assets under Schedule 10, including the 1995 truck purchases. On remand this duplicate charge under Schedule 8 should also be deleted.

> of installing, cleaning, repairing or otherwise altering or improving such vehicles or parts are not permitted any deduction by reason of the fact that such sales or services are made to or for persons for use in conducting interstate or foreign commerce. Insofar as concerns the tax liability of vendors of such property or services it is immaterial that the purchaser may be entitled to a statutory exemption from payment of the retail sales tax.
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> (1) Sales of motor vehicles and trailers. Under RCW 82.08.0263 of the law, sales of motor vehicles and trailers to be used for the purpose of transporting therein persons or property for hire in interstate or foreign commerce whether such use is by the owner or whether such motor vehicles and trailers are leased to the user with or without driver, are not subject to the retail sales tax when delivery is made to the purchaser in this state: PROVIDED, both of the following requirements are met:
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> (a) The purchaser or user is the holder of a carrier permit issued by the Interstate Commerce Commission; and
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> (b) Said vehicle will move upon the highways of this state from the point of delivery in this state to a point outside the state under the authority of a trip permit issued by the director of motor vehicles pursuant to the provisions of RCW 46.16.160.
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> In order to qualify for this exemption from the retail sales tax such buyers must furnish to their vendors the number of the permit issued to the carrier by the Interstate Commerce Commission and must have affixed to the vehicle before it leaves the premises of the dealer the necessary trip permit. In addition, and as evidence of the exempt nature of such sales, the seller is required to obtain from the buyer an exemption certificate. . . .

In this case, on appeal the taxpayer presented one way trip permits and bills of lading showing the first use of the vehicles purchased prior to July 1, 1995 qualified for the retail sales tax exemption. In order for the vehicles to not be subject to use tax, however, the vehicles must continue to be used in part for trips outside Washington.

With respect to use tax on trucks and trailers used in interstate commerce, WAC 458-20-17401 (Rule 17401) in effect prior to July 1, 1995 provided:

> All of the following conditions must be met for the exemption to apply:
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> (i) The user is, or operates under contract with, a holder of an ICC permit;
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> (ii) The vehicle is used in substantial part in the normal and ordinary course of the user's business for transporting therein person or property for hire across the boundaries of the state; and
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> (iii) The first use in Washington is actual use in conducting interstate or foreign commerce.

Thus, use tax is due immediately on first use in Washington if either element one or three is not satisfied. If the exemption's first and third requirements are initially met, however, the exemption requires fulfillment of the second requirement to remain exempt from the tax. The Washington Supreme Court in *UPS. v. Department of Rev.*, 102 Wn.2d 355, 687 P.2d 186 (1984) interpreted this exemption's second requirement. In *UPS*, the Court found that "substantial part

in the normal and ordinary course of the user's business for transporting therein persons or property for hire" meant that vehicles or trailers must be involved in actually transporting goods for hire across state lines on 25% or more of the total trips made by any particular vehicle in any single calendar year to be exempt. The Department has chosen among several methods to determine whether a vehicle is used in substantial part in interstate commerce. The methods have included the number of trips across state lines, interstate mileage, amount of interstate hauling revenue and ton-miles traveled in interstate commerce. The method to be used depends on the type of business records retained and the nature of transportation services being performed. *See* Det. No. 93-240, 13 WTD 369 (1994).

In the present case, the taxpayer did not meet the crossing requirement in order for the vehicles to be exempt of use tax. The issue then becomes one of valuation.

As to valuation, Rule 17401(5) provides for valuation at market value when a vehicle is first used in a nonexempt manner, as follows:

> The value of the motor vehicle or trailer subject to the use tax is its fair market value at the time of first use within the review period for which the exemption cannot be maintained. However, because the taxpayer will not know until the close of the period whether the usage met the exemption requirements, the use tax is due and should be reported on the last excise tax return for that review period. For example, a motor carrier who has previously met the exemption requirements for a particular truck determines this truck no longer was substantially used in interstate hauls during calendar year 1996. Use tax should be reported on the last tax return filed for 1996 with the taxable value based on the value of the truck at January 1, 1996.
>
> (a) The department of revenue will accept independent publications containing values of comparable vehicles if those values are generally accepted in the industry as accurately reflecting the value of used vehicles. The department will also consider notarized valuation opinions signed by qualified appraisers and/or dealers as evidence of the fair market value. In the absence of a readily available fair market value, the department will accept a value based on depreciation schedules used by the department of licensing to determine the value of vehicles for licensing purposes.

In this case the taxpayer presented an argument regarding valuation based on the speculation that a significant decline in value from the purchase price occurred upon first use of the vehicles. As quoted above, Rule 17401 identifies several different methods to arrive at fair market value. Those methods do not include the taxpayer's speculative approach. In the absence of actual evidence of fair market value, as outlined in the rule, we sustain the Department's assessment based on the purchase price.[11]

[11] Although we decided against the taxpayer on valuation in general, several corrections need to be made to Schedule 10 on remand. First, the Department assessed tax on an estimated value of $75,000 for the purchase of a 1982 Kenworth truck. On appeal the taxpayer provided a copy of a May 27, 1993 bill of sale from a leasing company for this truck. Pre-1993 lease payments would be beyond the statute of limitations and, accordingly, Schedule 10 should be adjusted to reflect the actual 1993 payment rather than the $75,000 estimate. The

7. **Interest**.

RCW 82.32.105(3), effective January 1, 1997, provides for the waiver of interest under the following circumstances:

> (a) The failure to timely pay the tax was the direct result of written instructions given the taxpayer by the department; or
>
> (b) The extension of a due date for payment of an assessment of deficiency was not at the request of the taxpayer and was for the sole convenience of the department.

See also WAC 458-20-228(7). Because of the length of time taken for completion of the audit, the taxpayer contends the delay in issuing the deficiency assessment was for the sole convenience of the Department. The record, however, shows delays were not solely for the convenience of the Department. At times the taxpayer was either slow or not responsive in responding to record requests. As a consequence, once additional documents were provided, a PAA was issued. Only on appeal were some of the documents requested by the auditor finally provided. Even on appeal some documents, such as invoices for pallet sales, were not provided. Accordingly, the request for a waiver of interest is denied.

8. **Statute of Limitations on Refund Claim.**

With respect to refund requests, WAC 458-20-229(3)(b) (Rule 229), provides:

> When a taxpayer discovers that it has overpaid taxes, penalties, or interest, it may file an amended return or a petition for refund or credit with the department. The petition or amended tax return must be submitted within the statute of limitations. Refund or credit requests should generally be made to the division of the department to which payment of the tax, penalty, or interest was originally made. The amended tax returns or petitions are subject to future verification or examination of the taxpayer's records. If it is later determined that the refund or credit exceeded the amount properly due the taxpayer, an assessment may be issued to recover the excess amount, provided the assessment is made within four years of the close of the tax year in which the taxes were due or prior to the expiration of the statute of limitations waiver.

In this case, the refund request was not submitted to the division to which payment of the tax was originally made. Accordingly, we will remand the refund request with the remand of the petition for correction of the assessment. In doing so, we note that RCW 82.32.060 limits the period in which a refund or credit may be sought. The refund request includes taxes paid in 1992. That year is beyond the statute of limitations and beyond any potential set-off claim. *See*

Department also assessed tax (based on federal income tax returns) on a purchase price of $24,000 for the capital purchase of a 1987 Kenworth truck. On Schedule 10, the Department assessed tax on an estimated value of $75,000 for the purchase of this same Kenworth truck. These schedules should be adjusted to avoid this duplication and to reflect the actual purchase price rather than the $75,000 estimate.

Paacar, Inc. v. Department of Rev., 135 Wn.2d 301, 957 P.2d 669 (1998). Accordingly, the refund claim for 1992 is denied prior to the remand of the rest of the taxpayer's refund claims.

DECISION AND DISPOSITION

The taxpayer's petition for correction of the assessment is granted in part and denied in part. The case is remanded to the Audit Division for adjustment in accordance with this decision. The taxpayer's petition for refund is also remanded to the Audit Division for consideration in conjunction with the assessment, with the exception of the refund claim for 1992, which is denied.

Dated this 21st day of December, 1999.