Cite as Det. No. 99-005R, 19 WTD 223 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Reconsideration of	)	F I N A L D E T E R M I N A T I O N
	)	No. 99-005R
. . .	)	
	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

[1] RULE 159; RULE 247; RCW 82.08.010; RCW 82.08.020; RCW 82.08.040: SALES TAX – SELLING PRICE -- EXCLUSION -- TRADE-IN PROPERTY OF LIKE KIND – CONSIGNMENT SALES. A consignee may exclude from the retail sales tax the value of a vehicle traded-in by a purchaser of a consigned vehicle provided the traded-in vehicle was delivered as consideration for the purchase of the consigned vehicle. In other words, the seller must actually accept ownership of the trade-in property and reduce the price of the purchased property at the time of sale by the value of the trade-in property. Because the definition of "seller" for purposes of the retail sales tax includes an agent or consignee, a consignee can qualify as a seller for retail sales tax purposes. OVERRULING DET. NO. 97-228, 17 WTD 170 (1980).

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:

Recreational vehicle dealer petitions for reconsideration of Det. No. 99-005, in which we upheld the assessment of retail sales tax with respect to the taxpayer's sales of consigned vehicles, without deduction for the value of like-kind property traded-in by the purchasers of the consigned vehicles.[1]

FACTS:

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

C. Pree, A.L.J. (successor to Krebs, A.L.J.) -- The taxpayer was audited for the period of January 1, 1991, through December 31, 1994. The audit resulted in a total assessment of . . . . The taxpayer protested the assessment of retail sales tax of . . . with respect to disallowed trade-in credits.

On January 25, 1999, we issued Det. No. 99-005, which denied the taxpayer's petition for correction of assessment.

The facts, which are not in dispute, were set forth in Det. No. 99-005 as follows:

> The taxpayer sells recreational vehicles. It sells some of the vehicles on consignment for its customers. During the audit period, when a customer purchased a vehicle that the taxpayer was selling on consignment, and the customer traded-in a vehicle for the consigned vehicle, the taxpayer gave the customer a sales tax credit for the amount of the trade-in.

The Audit Division concluded that the taxpayer should not have given the trade-in credit to its customers because the taxpayer was not the actual seller of the consigned vehicles. The Audit Division reasoned that the consignor (i.e., the person with title to the vehicle) was the seller and the taxpayer was simply the seller's agent. Further, the Audit Division reasoned, for a trade-in to offset the sales tax to be charged, the sale and the trade-in must be part of the same transaction. According to the Audit Division, because the taxpayer sold the vehicle as an agent for the consignor, who had title to the vehicle sold, and the taxpayer took title to the traded-in vehicle, there were two separate transactions. The Audit Division adjusted the assessment accordingly, and we sustained that adjustment in Det. No. 99-005.

The taxpayer notes that, prior to selling a vehicle on consignment, it reaches an agreement with the owner as to the selling price of the vehicle and it has the owner "sign off" the certificate of title. Therefore, the taxpayer reasons, it has "either actual or constructive possession of tangible personal property, with power to sell the property in taxpayer's possession." As such, the taxpayer argues, it should be deemed the "seller" of the property and should be entitled to grant the trade-in credit to buyers. See WAC 458-20-159 (Rule 159).

In its petition for reconsideration, the taxpayer notes that WAC 458-20-247 (Rule 247), the rule that implements the trade-in exclusion set forth in RCW 82.08.010(1), does not define the term "seller." The taxpayer then argues:

> WAC 458-20-159 was not mentioned nor distinguished in Determination No. 99-005. It specifically provides that a consignee who is authorized, engaged or employed to sell tangible personal property belonging to another, and so selling, is deemed a **seller**. . . . Neither of the WAC's [sic] cited make [sic] any distinction that would indicate the word "seller" is to be construed differently between the different sections of the WAC.

> It is reasonable to believe that the term "seller" is to be given the same construction throughout any legislation so as to render the whole harmoniously unless a different intention is shown. No such intention is shown. In fact WAC 458-20-159 states:
>
> > The mere fact that consignee***makes a sale raises a presumption that such cosignee***actually sold in his or its own name. The presumption is controlling unless rebutted by proof satisfactory to the department of revenue.
>
> Determination No. 99-005 makes no mention or reference to this presumption or rebuttal of it.
>
> Therefore, the consignee taxpayer is entitled to that presumption and, in keeping with the provisions of WAC 458-20-159, the taxpayer, as consignee, is to be "deemed a seller", and should be treated as a "seller" under WAC 458-20-247 and not be required to collect tax on "trade-in property of like kind"[.]

(Emphasis original.)

With respect to the taxpayer's argument that it should be presumed to be the seller under Rule 159, the Audit Division argues:

> In the situation at hand, the records (consignment agreements with the vehicles' owners) indicate that [the taxpayer] is selling as an agent in the consignment sales at issue. The taxpayer's records establish the fact that they are indeed not the seller, but the seller's agent. As such, service and other business and occupation tax is due on the commissions received from selling on consignment, instead of retailing or wholesaling tax that would be due on the full selling price of the vehicles if sold as the owner of the vehicle.[2]

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[2]The taxpayer reported its sales of consigned vehicles under the retailing classification of the business and occupation (B&O) tax. The taxpayer does not dispute the Audit Division's reclassification of its income from consignment sales to the service classification.

Rule 159 explains the B&O tax principles applicable to consignees. It provides in pertinent part:

> Every consignee . . . having either actual or constructive possession of tangible personal property, or having possession of the documents of title thereto, with power to sell such tangible personal property in his or its own name and, actually so selling, shall be deemed the seller of such tangible personal property and taxable under the retailing or wholesaling classification of the business and occupation tax, depending upon the nature of the transactions. . . . .
>
> The mere fact that [a] consignee . . . makes a sale raises a presumption that such consignee . . . actually sold in his or its own name. This presumption is controlling unless rebutted by proof satisfactory to the department of revenue.

See also RCW 82.04.480. The Audit Division concluded that the presumption that the taxpayer sold the vehicle in its own name was overcome, based on the taxpayer's consignment agreement with the vehicle's owner. The agreement indicated that the taxpayer was selling the vehicle as the owner's agent. As such, the Audit Division concluded that service B&O tax was due on the commissions. See Rule 159 ("Every consignee . . . who makes a

(Emphasis original; footnote added.)

In response to the taxpayer's petition for reconsideration in general, the Audit Division argues:

> [The taxpayer] is asking that we treat [it] as both a seller and an agent at the same time. This is not possible. Either [the taxpayer] is the seller or they [sic] are the agent of the seller. They [sic] cannot be both at the same time. . . .
>
> The "trade-in" vehicles that were received from the purchaser in a consignment sale were accepted by [the taxpayer], the seller's agent, not the owner/seller.
>
> [The taxpayer] is not the seller of the consigned vehicle. It has no risk of loss in the event that the vehicle does not sell. Any repairs that the vehicle may need prior to sale are the owner's responsibility.

ISSUE:

Whether the taxpayer properly granted a retail sales tax trade-in credit to purchasers of vehicles the taxpayer sold on consignment, where the purchasers traded-in like-kind vehicles at the time they purchased the consigned vehicles.

DISCUSSION:

The retail sales tax is imposed on retail sales of tangible personal property, based on the "selling price" of the property. RCW 82.08.020. RCW 82.08.010(1) defines "selling price" as "the consideration, whether money, credits, rights, or other property **except trade-in property of like kind**, expressed in the terms of money paid or delivered by a buyer to a seller." (Emphasis added.) The trade-in exclusion was added to RCW 82.08.010 as the result of Initiative Measure No. 464, approved November 6, 1984. The purpose of the initiative was "to reduce the amount on which sales tax is paid by excluding the trade-in value of certain property from the amount taxable."

Rule 247 explains the trade-in exclusion. However, Rule 247 does not address the issue of whether the trade-in exclusion is available in transactions involving consigned property. In pertinent part, Rule 247 provides:

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sale in the name of the actual owner, as agent of the actual owner, . . . is taxable under the service and other business activities classification upon the gross income derived from such business." Rule 159 also sets forth additional conditions for qualification as an agent.)

> [T]he value of "trade-in property" may be excluded from the measure of retail sales tax to be collected and reported by the seller who accepts the trade-in property as payment for new or used property sold.
>
> . . .
>
> The terms, "trade-in," "traded-in," and "property traded-in" have their ordinary and common meaning. They mean property of like kind to that acquired in a retail sale which is applied, in whole or in part, toward the selling price.

Under RCW 82.08.010, a buyer must deliver "trade-in property of like kind" as part of the consideration given to the seller to qualify for the reduction in the measure of tax. In this case, there is no question that the traded-in property was "of like kind." The issues are: 1) whether such property was delivered to the "seller"; and 2) whether such property was delivered as "consideration."

The taxpayer/consignee qualifies as a "seller" for purposes of the trade-in exclusion. RCW 82.08.010(2) defines "seller," in pertinent part, as "every person . . . making . . . retail sales to a buyer or consumer, **whether as agent, broker, or principle**." (Emphasis added.) RCW 82.08.040 further explains:

> Every consignee . . . authorized . . . to sell . . . tangible personal property belonging to another, and so selling . . . shall be deemed the seller of such tangible personal property within the meaning of this chapter and all sales made by such persons are subject to its provisions. . . . Every consignee . . . shall collect and remit the amount of tax due under this chapter with respect to sales made . . . by him . . . .

See also Rule 159. Thus, an "agent," and specifically a "consignee," qualifies as a "seller" for retail sales tax purposes. In other words, a person need not be the owner of property to be deemed the seller of that property. As such, we conclude that the trade-in exclusion should be allowed where the consignee/seller accepts like-kind property as part of the consideration paid by the buyer for the consigned property.

In reaching this conclusion, we reverse our holding in our original determination, Det. No. 99-005. Further, we overrule Det. No. 97-228, 17 WTD 170 (1998), which we relied upon in denying the taxpayer's petition for correction of assessment in our original determination.[3]

The issue of whether the buyer of the consigned vehicle delivered the trade-in vehicle to the taxpayer as "consideration" for the buyer's purchase of the consigned vehicle is remanded to the Audit Division. In order for the trade-in exclusion to apply, the buyer must deliver the like-kind trade-in property to the seller as "consideration" for the purchased property. See RCW

[3]In Det. No. 97-228, we held that because the taxpayer/consignee did not own the boats it sold on consignment, the taxpayer could not give the buyers of the consigned boats an exclusion from the sales tax for the value of the like-kind property they traded-in.

82.08.010. In other words, the seller must actually accept ownership of the trade-in property and reduce the price of the purchased property at the time of sale by the value of the trade-in property; as stated in Rule 247, the seller must apply the value of the trade-in toward the selling price of the purchased property. In short, the taxpayer may not accept the trade-in property on consignment, because the agreement to sell property on consignment would not constitute consideration "paid or delivered by a buyer to a seller." See RCW 82.08.010.

We note that the Audit Division stated that the taxpayer "took title" to the trade-in vehicles and that "The 'trade-in' vehicles. . . were accepted by [the taxpayer]." These statements indicate that the taxpayer probably accepted the trade-in vehicles into its inventory and reduced the selling price of the consigned vehicles by the value of the trade-ins. However, because the Audit Division has not yet had the opportunity to review the taxpayer's records in this context, we will remand this issue to the Audit Division for its review.

DECISION AND DISPOSITION:

The taxpayer's petition is remanded to the Audit Division for adjustment consistent with this decision. The taxpayer has 60 days to provide documentation to the Audit Division with respect to whether the taxpayer received the trade-in vehicles as consideration in the sale of the consigned vehicles.

Dated this 14th day of December, 1999.