

Cite as Det. No. 00-024, 19 WTD 710 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
...)	No. 00-024
)	Use Tax Assessment
)	File No. . . .

RULE 211; RCW 82.12.020: BARE BOAT CHARTER -- LEASE WITH OPERATOR -- USE TAX -- INTERVENING USE. If a taxpayer purchases and uses a boat solely for the purpose of chartering it to consumers under bare boat charters, no retail or use tax is due. Retail or use tax is due when the boat is chartered with the owner as the operator, because the owner has not relinquished dominion and control over the vessel. Under such circumstances the owner uses the boat in operating the business and use tax is due measured by the full purchase price.

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:

Taxpayer protests assessment of use tax on a boat allegedly used in a charter business.¹

FACTS:

Mahan, A.L.J. – The taxpayer is a general contractor. The Department of Revenue (Department), in reviewing property tax records pertaining to charter boats, sent the taxpayer a request for information concerning a boat he owned, In response, the taxpayer noted he purchased the boat in 1994 and reported any charter income under the registration number for his construction company. For property tax purposes, the taxpayer reported the value as \$. . . in 1994.

In discussions with the Department, the taxpayer stated there had been little charter activity and the boat had been in dry dock over several extended periods during the last several years. Records of the United States Customs Service, Department of the Treasury, show the boat had

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

returned from Canada on only one occasion, on February 15, 1997, with the taxpayer operating as the master of the boat.

The Department issued a use tax assessment, in the amount of \$. . . , based on a purchase price of \$. . . , with interest accruing after February 15, 1997.

The taxpayer had no previous experience chartering boats. He originally agreed to purchase the boat in partnership with another individual, who was more knowledgeable on chartering and operating boats. That partnership failed, and the taxpayer attempted to have the boat chartered through independent charter companies. Because of the nature and condition of the boat, this was not feasible. The taxpayer then tried to charter the boat on his own. Over the period covered by the assessment, the taxpayer entered into four "Crewed Yacht Charter Agreements" for the charter of the boat. He explained that he chose to operate the boat while it was being chartered because insurance was considerably more expensive if he chartered the boat without operating it. The taxpayer also acknowledged he used the boat on a personal basis on occasion.

ISSUE:

Whether a vessel was used exclusively for bare boat charters or, instead, was put to intervening personal use.²

DISCUSSION:

When retail sales tax has not been paid, RCW 82.12.020 imposes use tax as follows:

There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail

Thus, if a taxpayer purchases a boat at retail without paying retail sales tax and uses the boat within this state as a consumer, the taxpayer is liable for use tax.

RCW 82.12.010(2) broadly defines the term "using" as:

"[U]sing," or "put to use" shall have their ordinary meaning, and shall mean the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include installation, storage,

² The term "bare-boat charter" is defined in the vessel licensing and registration laws as:

Bare-boat charter means the unconditional lease, rental or charter of a boat by the owner, or his or her agent, to a person who by written agreement, or contract assumes all responsibility or liability for the operation, navigation, and provisioning of the boat during the term of the agreement or contract, except when a captain or crew is required or provided by the owner or owners

RCW 88.04.015(11).

withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within this state; . . .

RCW 82.04.190 defines a "consumer" as:

(1) Any person who purchases, acquires, owns, holds, or uses any article of tangible personal property irrespective of the nature of his business . . . other than for the purpose (a) of resale as tangible personal property in the regular course of business. . . . [RCW 82.04.050(4) similarly provides that the resale of tangible property includes the "renting or leasing of tangible personal property to consumers." RCW 82.04.050(4) was amended effective July 1, 1993 to include the phrase "and the rental of equipment with an operator."]

Accordingly, if the taxpayer purchased the boat solely for the purpose of leasing it without an operator to consumers in the regular course of his business, no use tax is due. But if the taxpayer asserted dominion and control over the boat as a consumer, use tax will be due measured by the full purchase price of the property. ETA 481.12.178; See, e.g., Det. No. 90-397, 10 WTD 341 (1990).

In this regard, WAC 458-20-211 (Rule 211) provides, in relevant part:

(3) A true lease, rental, or bailment of personal property does not arise unless the lessee or bailee, or employees or independent operators hired by the lessee or bailee actually takes possession of the property and exercises dominion and control over it. Where the owner/lessor of the equipment or the owner's/lessor's employees or agents maintain dominion and control over the personal property and actually operate it, the owner/lessor has not generally relinquished sufficient control over the property to give rise to a true lease, rental, or bailment of the property.

In discussing what constitutes dominion and control, Rule 211(4)(a) further provides:

[T]he burden of proof is upon the owner/operator of the equipment to establish that the degree of control has been relinquished necessary to constitute a lessor-lessee relationship. Weight will be given to such factors as who has physical, operating control of the equipment; who is responsible for its maintenance, fueling, repair, storage, insurance (risk of loss or damage), safety and security of operation, and whether the operator is a loaned servant. If control of these factors is left with the owner/operator, then as a matter of fact, there has not been a relinquishing of control of the equipment to the degree necessary to create a lessor-lessee relationship for the rental of tangible personal property.

Because of the degree of dominion and control that must be exercised by the captain of a vessel, the lease of a boat with operator is generally considered to be a use by the owner and not a lease within the contemplation of the applicable statutes. See, e.g., Det. No. 91-151, 11 WTD 193 (1991); ETA 356.12.211; ETA 481.12.178.

Even if the intention was to purchase the vessel for resale through bare boat charters, the exemption under RCW 82.04.050 for "a sale for resale" is not available where a person both leases the property for resale and uses it for personal purposes. Thus, when there is evidence of personal use of the property by an owner, use tax is owed on such use "despite the claim that the property was at all times held for rental purposes." ETA 356.12.211. This Excise Tax Advisory (ETA) also states:

Based on an interpretation of this statute, the department has consistently held that a taxpayer who both uses and leases the same article of tangible personal property is subject to the retail sales tax or the use tax based on the purchase price of the property and in addition, is required to collect and report retail sales tax on gross rentals received.
³

In the present case, the taxpayer both chartered the boat on other than a bare-boat basis and used it on an intervening basis as a consumer. As such, we sustain the assessment of use tax.

DECISION AND DISPOSITION:

The petition is denied.

Dated this 29th day of February, 2000.

³ ETA 481.12.178 also explains that:

A person who purchases an article of tangible personal property for resale or lease without intervening use need not pay the sales or use tax. However, no such exemption exists for a purchaser who both leases the article and uses it for personal purposes. Therefore, the Department holds the sales or use tax to be applicable to the purchase or use of any item of tangible personal property used by the purchaser for both leasing and personal purposes. The measure of the tax is the entire purchase price, or value of the article used. The tax is not applied pro rata on the basis of the comparative percentages of personal and leasing use.

Further, ETA 418.12.102.178 states: "the legislature clearly intended to allow an exemption in cases of 'purchases for resale' only where there is 'no intervening use.'"