Cite as Det. No. 00-073, 19 WTD 1032 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

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| In the Matter of the Petition For Correction of Interpretation of | ) | D E T E R M I N A T I O N |
| | ) | No. 00-073 |
| . . . | ) | Registration No. . . . |
| | ) | TI&E Letter Dated . . ./00 |

[1] RULE 211; RCW 82.04.050(4): RETAIL SALES TAX – RENTAL OF EQUIPMENT WITH OPERATOR – TRUE OBJECT TEST – LIGHTING AND SOUND AMPLIFICATION. Because the true object of charges for lighting and sound at events is the rental of equipment with an operator, the charges are subject to retail sales tax.

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:

A "sound reinforcement" company protests an interpretation that its charges are subject to retail sales tax.[1]

FACTS:

M. Pree, A.L.J. – . . . (taxpayer) provides sound and lighting systems for live bands, speakers, sporting events, and at fairs in Washington. The taxpayer delivers and sets up sound and lighting equipment, then operates the equipment during the event, and takes it down when the performance is over. The taxpayer pays retail sales tax on the equipment, but is uncertain how its charges to customers should be taxed. The taxpayer became aware some of its competitors charge their customers retail sales tax, while others do not add the tax.

On . . ., 2000, the taxpayer wrote the Department of Revenue (Department) inquiring about the taxability of its receipts. On . . ., 2000, the Taxpayer Information and Education Section (TI&E) of the Department's Taxpayer Services Division replied, advising the taxpayer to charge its

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

customers retail sales tax. TI&E determined the taxpayer derived its receipts from the rental of equipment, a retail activity.[2] The taxpayer appealed TI&E's letter.

The taxpayer asserts it is not renting equipment, but providing a service. The taxpayer contracts with promoters who solicit bids from the taxpayer and the taxpayer's competitors. The taxpayer provides a written estimate. Generally, if the promoters select the taxpayer, no written agreement is executed, nor does the promoter provide further guidance. The taxpayer transports its microphones, speakers, amplifiers, lights, and other equipment to the designated locations, where the taxpayer sets it up for a sound check prior to the performance.

The taxpayer operates the sound and lighting equipment during the performance. While the performer and audience may request changes during the performance, any changes are at the taxpayer's discretion.[3] According to the taxpayer, the promoter who pays the taxpayer after each show never instructs the taxpayer during a show.

The taxpayer contends because it never relinquishes control of the equipment, it is not renting the equipment, but using the equipment to provide a service. It is the taxpayer's sole responsibility to store, maintain, transport, and insure the equipment. If the equipment is damaged, the taxpayer, not the customer, must repair or replace it. The taxpayer states 99% of the time it operates the equipment.[4]

ISSUE:

Are the taxpayer's charges subject to retail sales tax as rental of equipment with an operator, or is the taxpayer only using the equipment to provide a service, the charges for which are not subject to retail sales tax?

DISCUSSION:

Charges for renting equipment with an operator are taxable as retail sales. RCW 82.04.050(4). Generally, unless a business service activity is specifically designated under RCW 82.04.050, charges for services are not subject to retail sales tax. *See* WAC 458-20-224 (Rule 224). We

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[2] TI&E also noted:

> Additionally, since persons who rent equipment with an operator are not purchasing the equipment for resale as tangible personal property such persons must pay retail sales or use tax at the time the equipment is acquired.

[3]For instance, a band member may request the taxpayer turn up the volume on the member's monitor, which the taxpayer will usually do. But, the taxpayer often disregards requests from specific members of the audience, relying on its judgement of how the sound may be heard by the entire audience attending the show.

[4]When asked about the other 1%, the taxpayer never acknowledged it allowed band members to operate its sound equipment, but one of its competitors had in the past, and at some time this could occur. If the taxpayer was not available to personally operate the equipment, it would hire a subcontractor.

must determine whether the taxpayer's charges were for rental of equipment with an operator, or if they were for providing a non-retail service activity.

After the legislature added rental of equipment with an operator to the statutory definition of "retail sale," the Department amended WAC 458-20-211 (Rule 211) to address the distinction between the retail activity of renting equipment, and providing non-retail services using the equipment. Several definitions and tests may be helpful in analyzing various situations, but an example in subsection (8)(g) of Rule 211 appears to be on point:

> ABC Sound Productions provides lighting, amplifying equipment, and speakers as part of the services it sells to entertainment promoters. ABC also provides several operators of the equipment. This is a rental of equipment with operator. In applying the true object test, the promoter is primarily purchasing the use of the lighting and sound equipment. The performer or promoter could be expected to specify the color, location, and degree of lighting and may also request changes and modifications to the level of sound amplification during the performance.

Other than the degree of specificity offered by performers or promoters, we fail to see a relevant distinction between the taxpayer's situation, and that of ABC Sound Productions in Rule 211. Certainly, the taxpayer will try to accommodate its customers by honoring requests from performers or promoters regarding color, location, and degree of lighting, as well as changes and modifications to the level of sound amplification during the performance. Conversely, promoters and performers should defer to the taxpayer regarding operation of the equipment.

The key is the true object test. Subsection (2)(e) defines the test:

> (e) The term "true object test" as it relates to this section means the analysis of a transaction involving equipment and an operator to determine if the lessee is simply purchasing the use of the equipment or purchasing the knowledge, skills, and expertise of the operator beyond those needed to operate the equipment. Even if it is determined that the customer is purchasing the knowledge, skills, and expertise of the operator, the transaction may still be a retail sale if the activity is specifically included by statute within the definition of a retail sale. This test can also be applied to rentals of tangible personal property when the seller performs some service in connection with the rental.

Promoters are primarily purchasing the use of sound and lighting equipment, not expertise of the taxpayer beyond those skills needed to operate the equipment. When greater expertise is needed performing artists will bring their own operators.[5]

Attached to the petition, the taxpayer has highlighted subsection (3) of Rule 211:

[5] During the teleconference, the taxpayer indicated one of its competitors rented equipment to a band, which insisted upon using its own sound and lighting crew.

> 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.

Necessarily in a rental of equipment with operator, an employee or independent operator of the taxpayer will continue to possess the property, and by definition, operate the equipment.

We also understand the taxpayer's confusion because many of the factors listed under subsection (4)(a) would appear to support the taxpayer's position that it keeps control of the equipment. The taxpayer retains physical, operating control of the equipment; and is responsible for its maintenance, fueling, repair, storage, and insurance. However, subsection (4) addresses whether taxpayers renting equipment with operators must pay retail sales tax on their purchase of the equipment by examining whether the equipment was acquired for resale. Subsection (4) addresses the issue of whether the taxpayer acquired the equipment for resale,[6] not the taxability of the taxpayer's charges to its customers. That subsection is not meant to replace the true object test in determining whether the taxpayer is providing a service or renting equipment with an operator.
The example in subsection (8)(g) of Rule 211 applies the true object test to the taxpayer's situation. TI&E correctly determined the taxpayer is renting the sound and lighting equipment with an operator and must charge its customers retail sales tax.

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[6] Purchases of tangible personal property for resale do not fall within the definition of "retail sale." Specifically, subsection (4) states:

> (4) RCW 82.04.050 excludes from the definition "retail sale" any purchases for the purpose of resale, "as tangible personal property." Persons who use equipment in performing services either as prime contractors or as subcontractors are not purchasing the equipment for purposes of reselling the equipment as tangible personal property. These contractors must pay retail sales tax or use tax at the time the equipment is acquired. Generally persons who rent equipment with an operator are not purchasing the equipment for resale as tangible personal property and must pay retail sales or use tax at the time the equipment is acquired. Persons renting operated equipment to others may purchase the equipment without payment of retail sales tax only when the equipment is rented as tangible personal property. This can be demonstrated only when:
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> (a) The agreement between the parties is designated as an outright lease or rental, without reservations; and(b) The lessee acquires the right of possession, dominion, and control of the equipment, even to the exclusion of the lessor.
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> This last requirement is a factual question and the 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 employee. 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. This is true, even though the customer exercises some constructive control over such matters as when and where the equipment is used in connection with the construction work being performed, i.e., the contractor controls the job site.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

Dated this 8th day of May, 2000.