Cite as Det. No. 99-177, 19 WTD 350 (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. 99-177
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

[1] RULES 165 and 187; RCW 82. 04.050: RETAIL SALES TAX -- WASHING MACHINES IN APARTMENT COMPLEXES.[1] Operator of washers and dryers placed in apartment complexes owned by another person must report revenues it collects from the machines under the retailing B&O tax category and remit sales taxes thereon, pursuant to a 1993 statutory amendment. Taxpayer failed to show it was not the "operator" for purposes of determining who was to collect and remit sales tax on the machine revenues.

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 petitions for correction of assessment of tax resulting from 1993 reclassification of certain coin-operated laundry activities from service and other activities business and occupation ("B&O") tax classification to retailing B&O/retail sales taxable activities.[2]

FACTS:

Danyo, Policy and Operations Manager and Johnson, A.L.J. – Taxpayer is engaged in the business of placing coin-operated washing machines and dryers on the premises of apartment complexes for use by building tenants in Washington. Its records were audited for calendar years 1993-1996 by the Audit Division of the Department of Revenue. Although taxpayer placed machines at apartment complexes during the audit period using different contracting arrangements, the sole issue under appeal is the portion of the assessment relating to the classification of what the auditor termed the "owner-collected coin" arrangement for sharing revenues derived from some of the machines. The taxpayer was surprised to find, upon being audited, that his reporting method should have been changed following the legislature's

[1] The legislature subsequently amended RCW 82.04.050 to reverse the result of this Determination for periods beginning in 1999.
[2] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

reclassification of certain coin-operated laundry activities from the service and other activities B&O tax category to the retailing category. During the audit period, the taxpayer had reported on its excise tax return only the receipts it received from the building owner, not the gross revenues from the machines.

The auditor and his supervisor reviewed the contracts used by the taxpayer. The contract at issue contained the following provisions:

1. The apartment owner was to provide a designated laundry space in good condition and keep the premises in repair;
2. The owner was to give taxpayer sole and exclusive right to enter the premises for maintenance purposes; agreed not to install any machines other than the taxpayer's during the lease term; and agreed to provide reasonable protection against theft;
3. The owner agreed to give tenants and the taxpayer unobstructed access to the equipment;
4. The apartment owner was to collect coins from the machines, retain a portion and remit the remainder to the taxpayer; and
5. The taxpayer was to remain the owner of the machines throughout the lease term and agreed to maintain insurance against personal injury or property damage resulting from use of the equipment.

The Audit Division concluded the taxpayer was the owner of the machines placed at the premises of the apartment owner, who was granting a license to use the laundry space. As such, the taxpayer owed retailing B&O tax and retail sales tax on the full amount of the machines' coin revenues, without a deduction for the amount retained by the building owner. Audit relied on RCW 82.04.050, as amended during the 1993 legislative session, and WACs 458-20-165 ("Rule 165") and 458-20-187 ("Rule 187"), both of which were amended after the 1993 session to implement the statutory change.

The taxpayer cites Rule 187 and argues:

> Paragraph 4 states - Business and occupation tax. Persons operating vending machines are engaged in a retailing business and must report and pay tax under the retailing classification with respect to the gross proceeds of sales.
>
> Paragraph 8 states – When coin operated machines are placed at a location owned or operated by a person other than the owner of the machines, under any arrangement for compensation to the operator of the location, the person operating the location has granted a license to use real property and will be responsible for reporting and paying tax upon his gross compensation therefor under the service classification.
> Our argument against this rule as controlling and the particular paragraphs mentioned is thus:

> Regarding paragraph 4, "Persons operating….", it is our contention that the apartment building owners are operating the equipment as lessees of the equipment in a true lessor/lessee relationship with [Taxpayer] and are engaged in a retailing business.
>
> Regarding paragraph 8, " . . . under any arrangement for compensation to the operator of the location. . .", it is our contention that . . . is not compensating the apartment building owners to utilize real property, but that the apartment building owners are compensating [Taxpayer] in the form of equipment rental fees in a true lessor/lessee relationship.
>
> Therefore, we believe that the portion of equipment leased to apartment building owners and the related income derived falls under WAC 458-20-211 … "Leases or Rentals of Tangible Personal Property, Bailments." With respect [to] the lease agreement related to equipment rentals (attached), between [taxpayer] and certain apartment building owners, dominion and control is exercised by the apartment building owners with respect to the property, as operation of the equipment occurs solely with the apartment building owners or their tenants, and the apartment building owners have exclusive right to the coin box to retrieve any income derived from such rental machines. The apartment building owners pay an agreed upon rental fee, and [taxpayer] charges and collects retail sales tax on such fees, which were properly included as part of the retail sales in reporting on the monthly combined excise tax return. Weight is also given in favor that there is a true lessor-lessee relationship in that the apartment building owners have physical operating control of the equipment, are responsible for storage, provide reasonable protection against the theft or loss, provide for the safety and security for operating the equipment, and provide the necessary water, electrical, gas and sewer connections required for operating the equipment.

ISSUE:

Whether taxpayer's arrangement of placing equipment on apartment owners' premises under the "owner-collected coin" terms qualifies as a lease of the equipment.

DISCUSSION:

WAC 458-20-211 (Rule 211) implements RCW 82.04.050(4) and states:

> (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 . . .

In general, a lease, rental, or bailment of tangible property requires the relinquishment of possession and control over the item by one party and the acceptance of such possession and control by the other party. Duncan Crane v. Department of Rev. 44 Wn. App. 684, 689, 723 P.2d 480 (1986); Collins v. Boeing Co., 4 Wn. App. 705, 711, 483 P.2d 1282 (1971). Whether possession and control has in fact been transferred is a question of fact. As stated in Collins:

> Whether there is a change or acceptance of possession depends on whether there is a change or acceptance of actual or potential control in fact over the subject matter . . . . In determining whether control exists, it is relevant to consider the subject matter's amenability to control, steps taken to effect control, the existence of power over the subject matter, the existence of power to exclude others from control, and the intention with which the acts in relation to the subject matter are performed.

Collins at 711 (emphasis supplied.).

In this case, the taxpayer clearly does not relinquish possession and control when it puts washers and dryers in apartment buildings under the "owner-collected coin" arrangement in place during the audit period. Although not conclusive proof that the arrangement is or is not a lease, the agreement expressly refers to the parties as "operator" (taxpayer) and "owner" (apartment building owner). The building owner shares some responsibilities, including a duty to provide a safe operating place for the equipment and basic utilities for its operation. However, the agreement expressly states the building owner shall give the taxpayer and building tenants "free and unobstructed access to said laundry space and equipment at all reasonable hours." Taxpayer is also required to "keep the equipment in good repair, and to maintain and service the same" during the lease term and to provide liability insurance protecting the apartment building owner against personal injury or property damage resulting from use of the equipment. Most persuasive, however, is the agreement's provision that all "equipment and venting systems installed on the premises and in the laundry space by Operator shall remain at all times the sole property of Operator and upon termination of this Lease, Operator may remove said laundry equipment and venting systems without any claim by Owner thereto." Contrary to taxpayer's assertion that the building owner has possession and control, we believe the agreement's terms show taxpayer has failed to surrender complete possession and dominion and control over the equipment. As such, the taxpayer's situation falls squarely Rule 165's definition of "laundry or dry cleaning business", which includes "…operating . . . or contracting with others, for laundering, cleaning . . . such articles as clothing, linens, bedding, towels . . ." Rule 187(8) clearly covers the taxpayer's situation, and the assessment is sustained.

During the discussions about the assessment, taxpayer's president indicated he was considering revising the agreements used for his company's service, in order to make the transaction more clearly reflect the transaction and to obtain the tax-reporting result the company desires. We agree that different terms could create a different tax result but are unable to find, on the facts present during the audit period, that the necessary condition—transfer of possession, dominion, and control as required by the statute—occurred. Should taxpayer seek to change its agreements, we recommend it avail itself of the assistance of the Department's Taxpayer Education and Information Division. Taxpayer can write to that division requesting a written ruling on its tax liability following a change to its agreement. If the facts are fully presented and contracts are provided to that division for consideration, a binding ruling that would remain unchanged unless there is a change in the law or facts could be issued to assist the taxpayer in avoiding a future assessment.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

Dated this 14th day of June 1999.