Cite as Det. No. 99-027, 19 WTD 44 (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. 99-027
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

[1] RULE 100(9); RCW 82.32A.020: ESTOPPEL. A taxpayer may not rely on a letter from the Department to an undisclosed third party. Furthermore, the taxpayer failed to show it detrimentally relied on the letter. The taxpayer merely possessed the letter.

[2] RULE 211; RCW 82.04.050(4); RCW 82.08.020(1): RETAIL SALES TAX – RENTAL OF EQUIPMENT – TRUE LEASE. True leases existed where surgeons and hospitals rented tangible personal property from the taxpayer by taking possession of medical equipment and exercising dominion and control over the equipment when performing surgeries. The surgeons were in total charge of how and when to use the equipment to perform the surgeries.

NATURE OF ACTION:

A foreign corporation (the taxpayer) protests the reclassification of its gross income from service business and occupation (B&O) tax to retailing B&O tax and [the assessment of] retail sales tax.[1]

FACTS:

De Luca, A.L.J. – The taxpayer provides laser equipment to physicians for surgeries at hospital operating rooms and outpatient surgery centers. Technicians employed by the taxpayer arrive at the surgery sites with the laser equipment. Once there, the technician sets up the equipment for use by the surgeons. The technician also provides any necessary tools, gauze, and other disposable items. When the surgical equipment is in place, the technician turns on the

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

equipment and the physician verifies that the equipment is working properly by testing it and signing a statement that it is in proper order. The technician sets the wattage output of the equipment at the level determined by the surgeon. The surgeon is the person who decides how, when, and where to use the laser equipment and is the only one who actually uses it to perform the surgery. If the surgeon needs the laser equipment's power adjusted during the operation, the surgeon will instruct the technician to adjust the power to the desired level. Otherwise, the technician simply monitors the equipment's power level during surgery. We note the state does not require the technicians to be licensed or certified in order to perform their services. Following the surgery, the technician enters into a journal the patient's name, the amount of time the surgeon used the laser equipment, the wattage levels reached, and whether or not the equipment was damaged. The technician disposes of the used supplies, removes the laser equipment from the operating area, and goes to the next appointment.

The Department of Revenue (the Department) reviewed the taxpayer's books and records for the period April 3, 1996 through March 31, 1997 and assessed $. . . in retail sales tax, retailing B&O tax, and interest after crediting the taxpayer $. . . of service B&O tax it had reported. Document No. FY. . ./Audit No. . . . . The Department's Audit Division determined that the taxpayer was actually renting or leasing the laser equipment to the physicians and hospitals rather than providing medical services. Hence, the rental of equipment is a retail sale subject to retail sales tax and retailing B&O tax, infra.

TAXPAYER'S EXCEPTIONS:

The taxpayer argues it is not simply renting surgical equipment to physicians or hospitals, but is actually providing the above-described medical services as a substantial part of the surgical procedures. The taxpayer contends it has not relinquished dominion and control over the laser equipment to the surgeons to allow the transactions to be retail sales rather than medical services.

In support of its argument, the taxpayer attached to its petition a copy of a . . . letter from the Department's Taxpayer Information and Education Section (TI&E) to a person who represented an undisclosed third party taxpayer. The letter's addressee is not the same taxpayer representative involved in the present matter. The present taxpayer believes the letter confirms its position that it provides medical services and not retail sales.

According to the TI&E letter, the undisclosed taxpayer declared that its medical services included providing all disposable items and tools used in surgery, surgical support, and monitoring and adjusting the surgical equipment by its technician. TI&E's letter in reply reads in part:

> Based on the information provided, its appears that your client provides more than just a "rental" of tangible personal property. In other words, it provides a surgical facility and

> the support personnel necessary for such a facility to be operational. If this is so, your client is considered to be providing medical services.
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> If no services are provided in addition to the use of the equipment and mobile facility, it appears that you client is merely providing for the rental of tangible personal property. In other words, the hospital or the physician assumes all responsibility for operating the facility. This includes providing personnel to operate the facility. In this situation, the rental charge is subject to retail sales tax.

ISSUES:

1. May the taxpayer rely on TI&E's letter to an undisclosed third party?

2. Is the taxpayer providing medical services or renting tangible personal property?

DISCUSSION:

According to the Taxpayer Rights and Responsibilities Act, Chapter 82.32A RCW, taxpayers have…

> (2) The right to rely on specific, official written advice and written tax reporting instructions from the department of revenue to that taxpayer, and to have interest, penalties, and in some instances, tax deficiency assessments waived where the taxpayer has so relied to their proven detriment;

(Underlining ours). RCW 82.32A.020. Similarly, WAC 458-20-100 (Rule 100) provides:

> (9) **Rulings of prior determination of tax liability.** Any taxpayer may make a written request to the department for a written opinion of future tax liability. Such a request shall contain all pertinent facts concerning the question presented and may contain a statement of the taxpayer's views concerning the correct application of the law. The department shall advise the taxpayer in writing of its opinion. The opinion shall be binding upon both the taxpayer and the department under the facts presented until the department changes the opinion by a determination or subsequent opinion issued to the taxpayer, or the legal basis of the opinion has been changed by legislative, court, or WAC rule action. When changes occur, a taxpayer may contact the department to determine if a change in the legal basis of the opinion has occurred. Any future change in the opinion shall have prospective application only. (Underlining ours).

We find the taxpayer has not established all the required elements of RCW 82.32A.020(2). First, TI&E's written advice was not directed to the taxpayer. Instead, it was intended for an undisclosed third party. Similarly, Rule 100(9) explains that the ruling is binding upon the taxpayer that requests

the ruling and the Department. The rule does not state that the written ruling is binding upon anyone who happens to have a copy of the ruling.

Second, there is no evidence the taxpayer acted on the faith of the subject written advice. It simply has submitted a copy of the ruling to support its argument.

Third, we fail to see how the taxpayer has been injured or has detrimentally relied on the letter. If the taxpayer provided medical services that were subject to the service B&O tax classification, it would owe sales tax (or use tax) upon the full purchase price of the laser equipment because of its own use of the equipment. RCW 82.04.040. Conversely, if the taxpayer merely rents tangible personal property to others without intervening use of the equipment, the taxpayer would not owe sales tax or use tax upon acquiring the equipment because the equipment was purchased for resale. RCW 82.04.050(1)(a). In such an instance, we would assume, of course, the taxpayer would have provided the vendor with a resale certificate when purchasing the equipment. RCW 82.04.470.

In fact, rather than suffering injury, we believe the taxpayer may be better off under the retailing B&O tax and retail sales tax classifications than under the service B&O tax classification. As noted, if the taxpayer is providing medical services, it would owe sales tax or use tax on the equipment's full purchase price. Plus, it would have to pay B&O tax at the service rate, which is much higher than the retailing B&O tax rate. On the other hand, if the taxpayer is renting tangible personal property for resale, it would not owe sales tax or use tax on the equipment's purchase price and would pay B&O tax at the lower retailing rate. In such a case, only the rental payments from the physicians would be subject to retail sales tax.

For these reasons, we find that the taxpayer does not have a right to rely on the TI&E letter.

Furthermore, in our opinion the TI&E letter is not definitive enough to allow reasonable reliance, especially by third parties that were not participants in the ruling request, such as the present taxpayer. The TI&E letter merely states that the undisclosed taxpayer appeared to be providing more than just a rental of tangible personal property because of language in the request letter referencing surgical support provided by the undisclosed taxpayer's personnel. However, the TI&E letter does not disclose exactly what the services were or what surgical equipment was actually involved. Without such vital facts, we find that the letter is too vague for reliance. This vagueness and lack of facts is reflected in the letter's next paragraph, quoted above, that states if the undisclosed taxpayer did not provide services other than the use of the equipment then it appeared the undisclosed taxpayer was merely providing for the rental of tangible personal property. In short, the TI&E letter was simply a general statement of the law. Depending on the facts, the letter could support finding either a service classification or a retail classification. There is simply not enough information in the TI&E letter to determine whether the present taxpayer is providing the same services and equipment that the undisclosed taxpayer provided.

The next issue is whether the taxpayer is providing medical services or renting tangible personal property. The Audit Division determined that the rental of the laser equipment was a "true

lease" because the dominion and control of the equipment had been relinquished to the surgeons during the surgeries. After the surgeries, the taxpayer's technicians removed the laser equipment from the hospitals and surgical centers and went to their next appointments. WAC 458-20-211 (Rule 211) explains how persons are taxable who rent or lease tangible personal property. Rule 211 provides in part:

> (2) **Definitions.** (a) The terms "leasing" and "renting" are used interchangeably and refer generally to the act of granting to another the right of possession to and use of tangible personal property for a consideration. When "lease," "leasing," "lessee," or "lessor" are used in this section, these terms are intended to include rentals as well, even if not specifically stated.
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> . . .
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> (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.
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> (f) The term "true lease" (often referred to as an "operating lease") refers to the act of leasing property to another for consideration with the property under the dominion and control of the lessee for the term of the lease with the intent that the property will revert back to the lessor at the conclusion of the lease.
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> . . .
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> (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.
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> . . .
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> (5) **Business and occupation (B&O) tax**.
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> (a) Outright rentals of bare (unoperated) equipment or other tangible personal property as well as leases of operated equipment are generally subject to the retailing classification of the business and occupation tax.
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> . . .

(6) **Retail sales tax**. Persons who rent or lease tangible personal property to users or consumers are required to collect from their lessees the retail sales tax measured by gross income from rentals as of the time the rental payments fall due.

Under the "true lease" and "true object test" of Rule 211, we find the surgeons and hospitals simply purchased (rented) the use of the equipment from the taxpayer. The surgeons took possession of the property and exercised dominion and control over it by performing surgeries with it on their patients. The surgeons were clearly and totally in charge of how and when to use the laser equipment to perform the surgical procedures. The surgeons were not purchasing the knowledge, skill, or expertise of the technicians who merely monitored the power output and operated the equipment's control panels by increasing or decreasing power only at the direction of the surgeons.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

Dated this 19th day of February 1999.