

Cite as Det. No. 00-045, 19 WTD 965 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 00-045
)	
...)	Registration No. . . .
)	RCW 82.08.130 Petition

RCW 82.08.130: DEDUCTION FOR RETAIL SALES TAXES PREVIOUSLY PAID. Where individuals purchase a yacht, properly paying retail sales tax, the corporation they transfer it to months later in a tax free transaction, is not entitled to the deduction for retail sales taxes previously paid under RCW 82.08.130.

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:

Corporation appeals denial of a deduction for retail sales tax paid by corporate owner on yacht he transferred to the corporation and was personally denied a refund for.¹

FACTS:

Munger, A.L.J. -- The taxpayer, . . . Corporation, is owned by [Mr. A]. On September 20, 1994, [Mr. A and his wife (the couple)] purchased a used . . . yacht for \$635,000. They paid \$52,070 in sales tax on the purchase of the yacht. . . . The [couple's] request for a sales tax refund was denied by the Department of Revenue (the Department), and the denial was upheld by the Board of Tax Appeals (the BTA).

The [couple's] purpose in buying the yacht, stated on appeal, was to rebuild and re-sell it. The yacht is still in the process of being rebuilt. Although the [couple] referred to themselves on appeal as "an emerging business in the form of a proprietorship," they never registered as sole proprietors with the Department.

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

On November 18, 1994, the [couple] formed the [the taxpayer corporation] in which they owned 100% of the stock. It was registered with the Department on January 1, 1995. The [couple] explained that the purchase of the yacht occurred prior to incorporation because the sellers would not wait that long to make the sale. The yacht itself was transferred to the corporation on April 19 or 20, 1995. According to the [couple], the yacht was contributed in exchange for the corporate stock and in a separate transaction [the taxpayer corporation] gave the [couple] a note for the value of the yacht.

Additional documentation obtained from the Department was as follows: On December 5, 1994, [the taxpayer corporation] borrowed \$635, 000 from [Mr. A], using the yacht as collateral. On a Marine Title Company form, dated April 20, 1995, The [couple] gave the Yacht to the corporate taxpayer as a gift. On a U.S. Coast Guard form dated the same day, the corporate taxpayer is listed as the yacht's owner. A Washington Department of Licensing "vehicle title/registration certificate" form dated May 5, 1995 states "use tax waived: gift-documented."

No satisfactory explanation was given for the 5 months between incorporation and the transfer of the yacht to [the taxpayer corporation]. Overall, the evidence shows very disorganized actions in the way the yacht transactions were handled.² It would be difficult to determine exactly when the yacht was transferred from the [couple] to [the taxpayer corporation]. However, its clear that the corporation was the owner by April 20, 1995 and that the [couple] owned it individually for several months after its purchase.

The [couple] stated that the yacht was taken to [a company] for rebuilding. The [couple] characterized their use of the yacht prior to dry-docking, as for testing only. In a letter from the original seller dated January 4, 1995, he refers to the [couple] having stated that the yacht was moored at [another location in King County].³ Because of our analysis below, we do not find it necessary to further address the [couple's] use of the yacht.

The seller of the yacht had refused to accept a resale certificate because the [couple] [was] not registered with the Department. The [couple] contended that they were eligible to provide a resale certificate.⁴ The Department denied the [couple's] request for a refund of the sales tax paid. We upheld the refund denial in Det. No. [xx-x] and again on reconsideration in Det. No. [xx-xx]. The [couple] appealed to the Board of Tax Appeals, and on . . . , 1998 the Board upheld the Department's denial of a refund.

On January 15, 1999, [the taxpayer corporation], filed a petition for a deduction for the retail sales taxes paid by [Mr. A]. The taxpayer asserts that it is entitled to this under RCW 82.08.130.

² We note that this is not the fault of the taxpayer's representatives, who were retained later.

³ The BTA also noted that the [couple] did not show that they were in the business of reselling yachts, and that their storage of the yacht for 5 months constituted taxable intervening "use," which foreclosed the initial purchase from being for resale.

⁴ The BTA also correctly noted in its decision that the [couple] never offered proof that a resale certificate was offered or even existed. As we note below, they were not entitled to offer one whether they actually did so or not.

At the appeal hearing, we raised the issue of whether the taxpayer's request was timely, given that refund requests are limited by RCW 82.32.060. However, because of our ruling below, we need not determine whether the time limitations in RCW 82.32.060 apply to credit requests under RCW 82.08.130.

ISSUE:

Whether a corporation is entitled to a deduction for retail sales taxes paid by its owner, when the owner has already been denied a refund?

DISCUSSION:

Initially we note that the facts and law regarding this matter have not materially changed since our [prior] determinations, as well as the BTA decision. . . .

The determination of the appeal involves several issues including the definition of "retail sale" and the circumstances under which a resale certificate may be issued. Retail sales are defined in RCW 82.04.050 as follows:

(1) "Sale at retail" or "retail sale" means every sale of tangible personal property . . . to all persons irrespective of the nature of their business . . . other than a sale to a person who presents a resale certificate under RCW 82.04.470 and who:

(a) Purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person

The requirements for resale certificates are set forth in RCW 82.04.470:

(5) As used in this section, "resale certificate" means documentation provided by a buyer to a seller stating that the purchase is for resale in the regular course of business, . . . and containing the following information:

(a) The name and address of the buyer;

(b) The uniform business identifier or revenue registration number of the buyer, if the buyer is required to [be] registered;

(c) The type of business engaged in;

(d) The categories of items or services to be purchased for resale . . .

(e) The date on which the certificate was provided;

(f) A statement that the items or services purchased either: (i) Are purchased for resale in the regular course of business

(Emphasis added.)

The [couple] contended they were not required to be registered under WAC 458-20-101 (Rule 101) and that RCW 82.04.470(5)(b) (cited above) does not require registration as a prerequisite for the issuance of a valid resale certificate. Rule 101 sets forth the requirements for taxpayer registration

with the Department. A detailed analysis of whether the [couple] should have been registered is not necessary, however, because the [couple] clearly failed to satisfy one of the key requirements of RCW 82.04.050 and RCW 82.04.470.

For a sale to be wholesale and not subject to sales tax, both RCW 82.04.050(1)(a) and RCW 82.04.470(5)(f) require the buyer to make the purchase for resale "in the regular course of business." This phrase was defined in an Excise Tax Bulletin issued by the Department on July 31, 1974. In referring to RCW 82.04.050 and the term "in the regular course of business" the Department stated:

The Department has held that to determine that a sale is for resale, it must be determined that the purchaser is actually and regularly engaged in selling the type of property purchased, is registered with the Department of Revenue and reporting the appropriate taxes, and that at the time of the transaction the purchaser intended the sale to be for resale without intervening use by the purchaser.

The above means, for example, that a sale to a doctor of office furniture is not a sale for resale, even if the doctor subsequently resells the furniture, because the doctor is not regularly engaged in selling office furniture. Therefore, the doctor must pay either sales tax on the purchase of the furniture or use tax on its use, as the above described sale would be a "retail sale."

ETA 482.12.178.

In the present case, the [couple] were never "actually and regularly engaged in selling the type of property purchased." They had just moved to Washington shortly before purchasing the yacht. The [couple] had not previously been involved in yacht rebuilding, and they are not involved in that type of business now. Their purchase of the yacht was one time only and was not a regular activity. Consequently, the [couple] were not entitled to issue a resale certificate, and the retail sales tax was correctly paid.

The [couple] also asserted that they should have been allowed to issue a resale certificate as agents for the taxpayer, [. . .]. WAC 458-20-159 describes the requirements that must be met for this theory to apply:

A consignee, bailee, factor, agent or auctioneer, as used in this ruling, refers to one who has either actual or constructive possession of tangible personal property, the actual ownership of such property being in another...

. . .

AGENTS AND BROKERS. Any person who claims to be acting merely as agent or broker in promoting sales for a principal or in making purchases for a buyer, will have such claim recognized only when the contract or agreement between such persons clearly

establishes the relationship of principal and agent and when the following conditions are complied with:

(1) The books and records of the broker or agent show the transactions were made in the name and for the account of the principal, and show the name of the actual owner of the property for whom the sale was made, or the actual buyer for whom the purchase was made.

(Emphasis added.)

Nothing in the yacht's purchase records show the [couple] as acting on behalf of [the taxpayer corporation] or show [the taxpayer corporation] as the actual owner. The taxpayers took title to the yacht themselves. Indeed, it would have been impossible to do otherwise because [the taxpayer corporation] did not even exist at the time of the purchase. Additionally, no authority has been cited for the proposition that an incorporator, such as the [couple], can avoid individual tax liability for transactions occurring prior to incorporation.

In the present appeal, the taxpayer has requested a deduction under the terms we have highlighted below in RCW 82.08.130:

RCW 82.08.130 Resale certificate--Purchase and resale--Rules. If a buyer normally is engaged in both consuming and reselling certain types of articles of tangible personal property and is not able to determine at the time of purchase whether the particular property acquired will be consumed or resold, the buyer may use a resale certificate for the entire purchase if the buyer principally resells the articles according to the general nature of the buyer's business. The buyer shall account for the value of any articles purchased with a resale certificate that are used by the buyer and remit the sales tax on the articles to the department.

A buyer who pays a tax on all purchases and subsequently resells an article at retail, without intervening use by the buyer, shall collect the tax from the purchaser as otherwise provided by law and is entitled to a deduction on the buyer's tax return equal to the cost to the buyer of the property resold upon which retail sales tax has been paid. The deduction is allowed only if the taxpayer keeps and preserves records that show the names of the persons from whom the articles were purchased, the date of the purchase, the type of articles, the amount of the purchase, and the tax that was paid. The department shall provide by rule for the refund or credit of retail sales tax paid by a buyer for purchases that are later sold at wholesale without intervening use by the buyer.

[Emphasis added.]

There are several significant problems with the taxpayer's request to use RCW 82.08.130.

First, there is no authority for the Department to pre-authorize deductions, the availability of which is contingent on the occurrence of a future sale. Additionally, there must be no

intervening use of the yacht by the taxpayer, prior to the sale.⁵ The Department will not, and RCW 82.08.130 does not, allow a deduction to be authorized *prior* to the resale without intervening use.⁶

Second, the request under RCW 82.08.130 assumes that we will treat the taxpayer as the buyer who paid the retail sales tax on the yacht. We decline to do this. The [couple] and [the taxpayer corporation] are not the same entities, and they can not be treated so for tax purposes. The Department has long limited a taxpayer's ability to elevate substance over form. Det. No. 85-112A, 1 WTD 343 (1985) and Det. No. 92-166, 12 WTD 211 (1992). The corporate form should not be lightly disregarded. See Washington Sav-Mor Oil Co. v. State Tax Comm'n, 58 Wn.2d 518, 364 P.2d 440 (1961). Consequently, the corporate taxpayer is not entitled to a deduction under RCW 82.08.130, because it was not "A buyer who pays a tax . . ." under that statute.⁷

Third, even if we had evidence to establish the taxpayer as the statutory successor to the [couple], *and* RCW 82.08.130 allowed deductions based on predecessors' tax payments, we would still disallow it because of this appeals' history. The [couple] [was] properly denied a refund, and this denial was upheld by the BTA. Consequently, this issue has already been resolved. No new determinative evidence has been admitted, and given that [Mr. A] owns [the taxpayer corporation], there can be no claim of ignorance of prior events or lack of opportunity to present relevant facts.

In conclusion, the [couple] properly paid the retail sales tax on the purchase of the [yacht]. As described above, they were not entitled to a refund of those taxes. [The taxpayer corporation]'s request under RCW 82.08.130, is premature, but because of the [couple's] disqualification for a refund, [the taxpayer corporation] can never qualify for the deduction, regardless of whether there is a future sale without intervening use. Additionally, RCW 82.08.130 does not allow for deductions for taxes that were never paid by the retail seller.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

Dated this 20th day of March 2000.

⁵ And there must have been no use by the [couple] as well, a fact for which the evidence is unclear.

⁶ Because this petition is being denied on the merits, this timing issue is not to be interpreted as an invitation to re-file this request, in the future event the taxpayer sells the [yacht].

⁷ The transaction under which [the taxpayer corporation] obtained the yacht from the [couple] (a gift or stock transfer), was not taxed, so there would be no future deduction for [the taxpayer corporation] because it paid no taxes in obtaining the yacht.