Cite as Det. No. 05-0196, 25 WTD 148 (2006)

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. 05-0196
. . .	)	
	)	Registration No. . . .
	)	Doc. No. . . .
	)	Docket No. . . .
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. . .	)	Registration No. . . .
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[1] RULE 175; RCW 82.12.0254: USE TAX EXEMPTION -- WATERCRAFT USED PRIMARILY IN INTERSTATE OR FOREIGN COMMERCE. The referenced use tax exemption for watercraft applies only to persons conducting or engaged in business as a private or common carrier by watercraft primarily used in interstate or foreign commerce to carry passengers or property for hire. It does not apply to a shipper that hires a towing company to tow log booms.

[2] RULE 178; RCW 82.12.020; U.S. CONST. art. 1, § 10. cl. 2: USE TAX - IMPORT-EXPORT CLAUSE – BOOMSTICKS – BOOM GEAR. Use tax assessed on the use of boomsticks and boom gear in Washington after being imported into this state from Canada does not violate the Import-Export Clause of the U.S. Constitution because the tax is not levied on importation or the imported goods themselves, but is levied on the activity of using the items within Washington after they were imported.

[3] RULE 178; RCW 82.12.020, RCW 82.12.035; U.S. CONST. art 1. § 8, cl. 3: USE TAX – FOREIGN COMMERCE CLAUSE – BOOMSTICKS – BOOM GEAR. Use tax assessed on the use of boomsticks and boom gear in Washington after being imported into this state from Canada does not violate the Foreign Commerce Clause because: 1) the tax is externally consistent and fairly apportioned by providing a credit against it for any sales tax or use tax properly paid in another jurisdiction, foreign or domestic, and, therefore, does not reach beyond that portion of value that is fairly attributable to economic activity within this state; 2) by providing a credit the use tax does not create the substantial risk

of international multiple taxation; and 3) the use tax does not prevent the federal government from speaking with one voice in foreign trade because the use tax is not an import duty or a tax on the importation of the goods brought into Washington.

[4] RULE 178, RULE 13501; RCW 82.12.010, RCW 82.04.190: USE TAX – CONSUMER – BOOMSTICKS – BOOM GEAR - DOMINION AND CONTROL. Upon reaching their destinations in Washington log rafts imported from Canada were under the taxpayer's dominion and control and the taxpayer was subject to use tax on the boomsticks and boom gear used in storing the logs.

[5] RULE 211; RCW 82.12.060: USE TAX – BOOM GEAR – BAILMENT – REASONABLE RENTAL VALUE. The measure of use tax on boom gear obtained through bailment is the reasonable rental value of the boom gear to be determined as nearly as possible according to the rental price at the place of use of similar products of like quality and character.

[6] RCW 82.12.010(2): USE TAX – BOOMSTICKS -- VALUATION. For boomsticks that the taxpayer owned and used in Washington it owes use tax on their reasonable rental value for the ones that were used here for less than 180 days in a 365 consecutive days period. For boomsticks it owned that remained in Washington for more than 180 days in a 365 consecutive days period, use tax is due on their full value.

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.

De Luca, A.L.J. – . . . Forestry . . . companies protest the assessment of use tax on boomsticks and boom gear brought into Washington from Canada when they hired a marine towing company to tow their log booms into this state. We hold that use tax is due on boomsticks and boom gear, but we remand the matter to the Audit Division of the Department of Revenue (DOR) to reassess the use tax on the boom gear and possibly on the boomsticks (providing the taxpayers have records) based on the reasonable rental value of the items.[1]

ISSUES

1) Do boomsticks and boom gear together comprise a "watercraft" that is exempt from use tax in this case because it is used primarily in foreign commerce?
2) Is the assessed use tax on boomsticks and boom gear prohibited by the Import-Export Clause or the Foreign Commerce Clause of the United States Constitution?
3) Did the taxpayers use the boomsticks and boom gear in Washington as consumers and, therefore, are they liable for use tax?

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

4) If the taxpayers used the boomsticks and boom gear in Washington as taxable consumers, is the appropriate measure of the use tax their reasonable rental value?

FINDINGS OF FACT

This determination pertains to two successive audits. The facts are nearly identical in both audit periods and the issues are the same. The taxpayers are related companies in the business of selling logs to domestic and foreign markets. Because the taxpayers operate virtually the same business, we will refer to both of them as "the taxpayer." The taxpayer both extracts logs in Canada and purchases logs on the open market there and hires a third party towing company to tow the logs by tug to Washington from where it sells the logs. The logs are bundled into booms so that the logs can be transported by water. A "boom" consists of "boomsticks" that are specially selected floating timbers that are connected by "boom chains" to form a corral to hold the logs within. The boomsticks are chained together at their ends to form the corral. The result is a raft of logs. The boom chains are made of steel and have a ring on one end and a hook on the other. The chain is passed through holes drilled through the ends of two adjoining logs. The hook is then connected to the ring securing the two logs together. The raft is then wrapped in "swifter wire" that binds the boomsticks diagonally to make the raft tighter to prevent the loss of logs while in tow or in rough seas. The chains and wire are known as "boom gear." The taxpayer either builds its own booms to transport the logs that it extracts, or, when it buys logs from third parties, it is customary to purchase them in booms already constructed by the sellers.

The taxpayer hires the towing company to tow the booms to locations in Washington that the taxpayer designates. The amount of time that the booms remain in Washington waters depends on how quickly the taxpayer can sell them. Depending on market conditions, sometimes the taxpayer can sell them within days after arrival and other times it can take weeks or even months. The towing company will store the rafts in water at places it chooses at or near the intended destinations in Washington until the taxpayer informs the towing company that it has sold the logs. At that time, the towing company will move the rafts to locations designated by the taxpayer where the booms are dismantled and the logs removed. At other times, the taxpayer will simply sell the boom intact to a buyer.

After dismantling a boom composed of its own extracted timbers and boomsticks it manufactured, the taxpayer brings the boomsticks ashore, cuts off the ends, scales them and places them into inventory to sell as logs. By contrast, the taxpayer gathers the boomsticks it purchases from log sellers in Canada and stores them in water or on shore in Washington until it has approximately two hundred of them. It then puts together a large raft of boomsticks and hires the towing company to tow them back to Canada.

During the audit periods there was an industry-standard list price for boomsticks in Canada that varied by species and grade, which was established by [Company A]. There was little difference in list price between used and new boomsticks largely because these reusable boomsticks will last for fifteen to twenty years and are resold frequently during their service. Upon their return to Canada, the taxpayer resold the boomsticks to suppliers of them at the then-current [Company A] price list. The taxpayer explained these boomsticks are not suitable for sale as logs because of

certain defects in them. The taxpayer also claims that prices on the boomstick price list were approximately three times the cost that the taxpayer experienced in producing logs of similar grade and species. The taxpayer states the reason for this price difference is to encourage the return of the boomsticks to a supply pool in Canada for repeated sale, use, return, and resale. The taxpayer also provided a letter from the towing company that states the towing company is a large user of boomsticks in Washington and there is no demand for Canadian boomsticks in Washington because of the inflated value placed upon them in Canada.

During the first audit period . . . the taxpayer obtained boom gear in two ways. First, when it bought a boom of logs from a supplier, the log vendor also provided the chains and wires and charged the taxpayer a deposit . . . . Second, when the taxpayer assembled a boom from its own logging operations, it obtained the chains and wire from [Company B], a company . . . that manages a pool of boom gear for the timber industry. [Company B] supplied the gear upon receipt of refundable deposits in the same amount as collected by log suppliers. There was no other charge to the taxpayer for the boom gear. According to a letter from [Company A], the replacement costs for the chains and wires were $. . . Canadian and $. . . Canadian, respectively, which are below the deposit amounts. Apparently, the price difference was established to encourage the return of the gear to the supply pool for re-use. The deposit amounts did not differ between new gear and used gear.

The taxpayer states that the boom chains generally are removed from the boomsticks and placed on board the tug when they are returned to Canada to prevent their loss into the sea during transport. The wires generally are returned to Canada by truck. The Audit Division of DOR believes it is impractical to remove the chains from the boomsticks and contends that the chains and boomsticks are sold as a unit. Consequently, the Audit Division treated the boom gear, like the boomsticks, as purchases by the taxpayer. The taxpayer, though, has provided persuasive evidence that it did not purchase the boom gear, at least during the first audit period. It has submitted a letter from [Company A] stating that industry practice in Canada during the first audit period required that boom gear be transferred by deposit and not sold. [Company B] also wrote a letter to the taxpayer stating that [Company B] was established to manage a boom gear pool for temporary use of the gear by persons who were charged a refundable deposit. The taxpayer also provided an invoice from a seller of a boom of logs charging the taxpayer a "gear deposit" rather than a price for the gear. Finally, we have found a Canadian tax case, *MacMillan Bloedel Ltd. v. The Minister of National Revenue*, Appeal No. AP-91-077 Canadian International Trade Tribunal, (1993), that cited expert testimony in the case declaring "boom chains are not normally sold to customers, but usually returned after a boom is delivered." Consequently, we find the taxpayer did not buy boom gear during the first audit period, but obtained them through a refundable deposit.

Effective October 1, 2001, [Company A] informed its customers that it would no longer use the method of transferring boom gear for deposit to its customers when selling or buying log booms.

Instead it would sell the boom gear along with the boomsticks and the log booms with the price of the boom gear being separately itemized.[2]

As noted, the Audit Division reviewed the taxpayer's records and assessed the taxpayer $. . . in use tax and interest on the value of the boomsticks and boom gear used in Washington. In the subsequent audit, the Audit Division reviewed the taxpayer's records for [a later period] and assessed the taxpayer $. . . . The Audit Division assessed use tax on the boom gear and boomsticks based on the values the taxpayer listed on the bills of lading it used for U.S. Customs purposes when entering Washington. Those values were the prices the taxpayer paid for the boomsticks and the deposits it paid for the boom gear. The taxpayer notes that it has since learned that the boomsticks and boom gear enter the U.S. duty free as "instruments of international traffic" and the proper amount of value to report on them for U.S. Customs is $0.00, *infra*. The taxpayer states that it has corrected its previous practice of reporting such values to U.S. Customs and now reports $0.00 for the Canadian boomsticks and boom gear.

The taxpayer does not dispute that it owed the use tax on the boomsticks it manufactured for its own use in Washington and, accordingly, it made a payment . . . towards the first assessment, with the balance remaining unpaid. In the second assessment, the taxpayer does not protest the wholesaling B&O tax. But the entire assessment remains unpaid. In both assessments, the taxpayer protests the use tax on the boom gear and boomsticks. Our decision applies to both assessments.

ANALYSIS

The taxpayer does not dispute that it buys boomsticks from the third party sellers when it purchases log booms in Canada. But it does dispute both the assessment of any use tax and, in the alternative, the value the Audit Division applied to the purchased boomsticks in assessing tax on their use in this state. As noted, the taxpayer disputed the Audit Division's finding that the taxpayer purchased the boom gear rather than merely using the gear under a refundable deposit, at least during the first audit period. The taxpayer continues to dispute both the assessment of any use tax and, in the alternative, the amount of tax on the use of the boom gear in Washington.

RCW 82.12.020 imposes the use tax:

> (1) 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: (a) Any article of tangible personal property purchased at retail, or acquired by lease, gift, repossession, or bailment, or extracted or produced or manufactured by the person so using the same . . . .

[2] We do not know if [Company B] changed its policy of transferring boom gear for deposit. If it changed its policy as [Company A] did then the transfers of boom gear would be sales. If it retained its policy of requiring deposits for the boom gear then transfers would be bailments, *infra.*

Watercraft Exemption:

[1] There are exemptions to the use tax, including the one the taxpayer cites when it argues that the log booms including the boomsticks and boom gear enclosing them are exempt from use tax under RCW 82.12.0254, as watercraft used primarily in interstate or foreign commerce:

> (1) The provisions of this chapter shall not apply in respect to the use of any airplane, locomotive, railroad car, or watercraft used primarily in conducting interstate or foreign commerce by transporting therein or therewith property and persons for hire . . . .

DOR adopted WAC 458-20-175 (Rule 175), in part, to administer RCW 82.12.0254. The taxpayer cites the definition of "watercraft" in Rule 175 to support its argument that the boomsticks and boom gear are tax exempt:

> The term "watercraft" includes every type of floating equipment which is designed for the purpose of carrying therein or therewith persons or cargo. It includes tow boats, but it does not include floating dry docks, dredges or pile drivers, or any other similar equipment.

The rule further declares:

> The use tax does not apply upon the use of . . . watercraft, including component parts thereof, which are used primarily in conducting such businesses.

Rule 175 defines the terms "such persons" and "such businesses" as "the persons and businesses described in the title of this rule." The title of the rule is "**Persons engaged in the business of operating as a private or common carrier by air, rail or water in interstate or foreign commerce."** Consequently, "such businesses" refers to "the business of operating as a private or common carrier by air, rail or water in interstate or foreign commerce."

We need not reach the question whether the log booms are watercraft because there is another reason the use tax exemption is not available to the taxpayer. The taxpayer owns the log booms that are towed into Washington. But the exemption is applicable only to persons conducting or engaged in business as a private or common carrier by watercraft primarily used in interstate or foreign commerce to carry passengers or property for hire. The taxpayer is not engaged in the business of operating as a private or common carrier by water in interstate or foreign commerce. It is a shipper that hires a towing company to tow the logs. Consequently, we reject the claim that the taxpayer is entitled to the watercraft tax exemption under RCW 82.12.0254.

Import-Export Clause:

[2] The taxpayer next contends the use tax assessment on the boomsticks and boom gear violates the Import-Export Clause that forbids states to impose "Impost or Duty" on goods from foreign countries. U.S. Const. art. 1, § 10, cl. 2. According to the taxpayer, the assessment violates the

Import-Export Clause on two grounds. First, the taxpayer asserts the use tax is invalid because it was imposed on goods "in transit" (*i.e.*, the boomsticks and boom gear) due to the provision that the use tax statute is imposed on the first act within this state by which the taxpayer takes or assumes dominion or control over the article. WAC 458-20-178(3) (Rule 178). The taxpayer cites *Michelin Tire Co. v. Wages*, 427 U.S. 276, at 285-86, and 290 (1976), and *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130 (1986). The taxpayer adds that under U.S. Customs law the boomsticks and boom gear are considered duty free "instruments of international traffic" and are not considered imports.[3]

Second, the taxpayer contends the use tax assessment violates the general interest of the federal government in "speaking with one voice" on commercial relations with foreign governments, citing *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 452 (1979), and *Michelin*, 423 U.S. at 285. In *Japan Line*, the U.S. Supreme held that a California property tax on shipping containers used in foreign commerce was unconstitutional by interfering with this federal interest. 441 U.S. at 453-54.

We disagree that the use tax assessment on the use of the boomsticks and boom gear in Washington violates the Import-Export Clause. *Itel Containers International Corp. v. Huddleston*, 507 U.S. 60 (1993), supports the assessment. The U.S. Supreme Court decided *Itel* subsequent to *Japan Line* and *Michelin, supra*, and discussed those cases while addressing, among others, two of the very issues raised by the present taxpayer. Itel is a lessor of cargo containers that are used exclusively in international shipping. The state of Tennessee assessed Itel retail sales tax on the proceeds from the lease of the containers delivered in Tennessee. Itel paid the tax and sought a refund, which Tennessee denied. The taxpayer appealed the decision to the U.S. Supreme Court, which decided in favor of Tennessee and its sales tax.

Itel, like the present taxpayer, argued that the Tennessee tax violated the Import-Export Clause. The U.S. Supreme Court disagreed and held that the Tennessee tax did not violate either the Import-Export Clause or the ruling in *Michelin, supra*, which first announced the modern Import-Export Clause test. 507 U.S. at 76. In brief, the three part *Michelin* test provides: (1) the federal government must speak with one voice when regulating commercial relations with foreign governments; (2) import revenues were to be a major source of revenue of the federal government and should not be diverted to the states; and (3) harmony among the states might be disturbed unless seaboard states were prohibited from levying taxes on citizens of other states by taxing goods merely flowing through their ports to the other states. *Id.*

The U.S. Supreme Court in *Itel* held that the Tennessee sales tax on container leases did not violate any of the three parts of the *Michelin* Import-Export Clause test. We will discuss the first and third parts below when we address the Foreign Commerce Clause issue because those parts of the *Michelin* test apply to that analysis as well. That is, the one voice component of the

[3] The taxpayer cites Treasury Decision TD 56311, 1964 WL 10355 (Customs), 99 Treas. Dec. 677 (Nov. 20, 1964), and states boomsticks and boom gear may be brought into the U.S. without entry or payment of duty under 19 U.S.C. § 1322(a) and 19 C.F.R. § 10.41a. But the taxpayer has cited no authority that prevents states from assessing use tax on the use of items designated as "instruments of international traffic" for U.S. Customs' purposes.

Michelin test is the same as the one voice component of the *Japan Line* test for the Foreign Commerce Clause, and the third component (state harmony) of the *Michelin* test parallels the *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), test that is also used in the *Japan Line* test for the Foreign Commerce Clause, *infra*. *Itel*, 507 U.S. at 77. The U.S. Supreme Court in *Itel* ruled that the Tennessee tax did not violate the second part of the *Michelin* test (diverting import revenues) or the Import-Export Clause itself because that tax . . . .

> is not a tax on importation or imported goods, but a tax on a business transaction occurring within the taxing State. The tax does not draw revenue from the importation process and so does not divert import revenue from the Federal Government. For similar reasons, we reject the argument that the tax violates the prohibition on the direct taxation of imports and exports "in transit," . . . . Tennessee's sales tax is levied on leases transferring temporary possession of containers to third parties in Tennessee; it is not levied on the containers themselves or on the goods being imported in those containers. The tax thus does not divert import revenue from the Federal Government because "the taxation falls upon a service distinct from [import] goods and their value."

507 U.S. at 77-78 (citations omitted). Like Tennessee's valid sales tax on the container leases, Washington's use tax is not levied on the logs, or the boom gear, or boomsticks that are imported or otherwise brought into Washington. Rather, the tax is imposed on the privilege of using the boomsticks and boom gear in Washington, which is distinct from a tax on the items themselves. *Id;* RCW 82.12.020(1), *supra.* Thus, Washington's use tax is not a tax on imported goods (logs) or other goods (boomsticks or boom gear that serve a purpose similar to Itel's containers) brought into Washington, but is a tax on an activity (use of the boomsticks and boom gear) occurring within Washington. The tax does not violate the Import-Export Clause. *Id.*

Foreign Commerce Clause:

[3] The taxpayer next asserts that the use tax as assessed violates the Foreign Commerce Clause on three grounds. U.S. Const., Art. I, § 8, cl. 3. First, the taxpayer contends the use tax assessment fails to provide for "fair apportionment" under the second prong of *Complete Auto*, 430 U.S at 279. Second, it argues the assessment "creates a substantial risk of international multiple taxation" as forbidden by *Japan Line*, 441 U.S. at 451. Third, it asserts the assessment interferes with the federal government's ability to "speak with one voice" on international commercial relations as forbidden by *Japan Line*, 441 U.S. at 452-53.

We, again, disagree because this issue also was addressed in *Itel, supra*, in favor of Tennessee. The U.S. Supreme Court in *Itel* restated the Foreign Commerce Clause test it previously announced in *Japan Line*. 507 U.S. at 71-73, 77. The first part of the test requires a review of the four part test for Domestic Commerce Clause purposes posed in *Complete Auto, supra.* Those four parts are: nexus (the activity must be sufficiently connected to the state to justify the tax), apportionment (the tax must be fairly apportioned), nondiscrimination (the tax must not discriminate against interstate commerce), and the tax must be fairly related to the benefits the state provides the taxpayer. 430 U.S. at 279.

The present taxpayer contends the use tax assessment violates the second prong of the *Complete Auto* test by not being fairly apportioned because the tax does not have "external consistency."[4] External consistency looks to the economic justification for a state's claim upon the value taxed to discover "whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." *Oklahoma Tax Commission v. Jefferson Lines, Inc.* 514 U.S. 175, 185 (1995). The U.S. Supreme Court in that case sustained an assessment of retail sales tax on the gross price of bus tickets purchased in Oklahoma by consumers for interstate travel originating in that state. The Court, while discussing apportionment and external consistency, declared:

> Nor has the taxpayer made out a case that Oklahoma's sales tax exposes any buyer of a ticket in Oklahoma for travel into another State to multiple taxation from taxes imposed upon passengers by other States of passage. Since a use tax, or some equivalent on the consumption of services, is generally levied to compensate the taxing State for its incapacity to reach the corresponding sale, it is commonly paired with a sales tax, . . . being applicable only when no sales tax has been paid or subject to a credit for any such tax paid. Since any use tax would have to comply with Commerce Clause requirements, the tax scheme could not apply differently to goods and services purchased out-of-state from those purchased domestically. Presumably, then, it would not apply when another State's sales tax had previously been paid, or would apply subject to credit for such payment. In either event, the Oklahoma ticket purchaser would be free from multiple taxation.

Id. at 193-94. Washington taxed the value of the boomsticks and boom gear only when those items were used in this state. It was acting within its jurisdiction. RCW 82.12.020. Consistent with the quote from *Jefferson Lines* immediately above, Washington law provides for a credit against its use tax when a taxpayer has paid retail sales tax or use tax to another taxing jurisdiction with respect to tangible personal property, such as boomsticks or boom gear:

> A credit shall be allowed against the taxes imposed by this chapter upon the use of tangible personal property, or services taxable under RCW 82.04.050 (2)(a) or (3)(a), in the state of Washington in the amount that the present user thereof or his or her bailor or donor has paid a retail sales or use tax with respect to such property to any other state of the United States, any political subdivision thereof, the District of Columbia, and any foreign country or political subdivision thereof, prior to the use of such property in Washington.

RCW 82.12.035. Consequently, we find that Washington's use tax is externally consistent and, therefore, fairly apportioned as required by *Complete Auto, supra,* because Washington was not reaching beyond that portion of value that is fairly attributable to economic activity within its borders. *Jefferson Lines,* 514 U.S. at 185.

After reviewing the *Complete Auto* test, an analysis of the Foreign Commerce Clause test requires us to inquire whether the use tax assessment "creates a substantial risk of international

[4] The taxpayer does not contend the use tax assessment violates the other three prongs of the *Complete Auto* test.

multiple taxation," and whether the tax prevents the federal government from "speaking with one voice when regulating commercial relations with foreign governments." *Itel,* 507 U.S. at 72 (quoting *Japan Line,* 441 U.S. at 451). The U.S. Supreme Court in *Itel* found that the Tennessee retail sales tax did not violate either one of these Foreign Commerce Clause tests. First, there was not a substantial risk of international multiple taxation because:

> Tennessee has decided to tax a discrete transaction occurring within the State . . . . And . . . Tennessee credits against its own tax any tax properly paid in another jurisdiction, foreign or domestic, on the same transaction . . . . By these measures, Tennessee's sales tax reduces, if not eliminates, the risk of multiple international taxation. Absent a conflict with a "consistent international practice [or] . . . federal policy,". . . the careful apportionment of a state tax on business transactions conducted within state borders does not create the substantial risk of international multiple taxation that implicates foreign commerce clause concerns.

Itel, 507 U.S. at 74-75. The same reasoning applies to Washington's use tax. As shown, it provides a credit against the tax for any sales tax or use tax properly paid in another jurisdiction, domestic or foreign. Consequently, Washington's use tax does not create the substantial risk of international multiple taxation.

The U.S. Supreme Court in *Itel* also concluded that Tennessee's sales tax did not prevent the United States from speaking with one voice in foreign trade because, as explained, the tax did not create the substantial risk of international multiple taxation that implicates Foreign Commerce Clause concerns. 507 U.S. at 75. Moreover, the U.S. Supreme Court explained that Tennessee's sales tax did not cause foreign policy concerns in the opinion of the U.S. Government because Tennessee's tax was not an import duty or a tax on the importation of the cargo containers. *Id.*

Again, for the same reasons stated in *Itel*, Washington's use tax does not prevent the federal government from speaking with one voice in foreign trade. That is, Washington's tax does not create a substantial risk of international multiple taxation because of its credit provisions. And it is not an import duty or a tax on the boomsticks or boom gear brought into Washington, as explained above. The use tax assessment does not violate the Foreign Commerce Clause.

Taxpayer as the Consumer:

[4] The taxpayer next argues that it is not liable for use tax on the boomsticks and boom gear because it never used the items as a consumer within the meaning of RCW 82.04.190 or former RCW 82.12.010(5) (now RCW 82.12.010(6)). It claims to have never exerted dominion or control over the goods in Washington.

Instead, the taxpayer asserts that the towing company had exclusive possession and control of the log booms because the towing company was a bailee. The taxpayer cites *American Tug Boat Co. v. Washington Toll Bridge Authority,* 48 Wn.2d 117, 291 P.2d 668 (1955), where it states:

> There can be no question under the authorities but that appellant, as owner and operator of the tug, was a bailee of the boomsticks and logs which it had in its possession for towage purposes.

Id. at 121. Accordingly, we agree that during the towing from Canada to the intended destinations in Washington the towing company had possession and control of the log booms, including the boomsticks and boom gear. But we disagree that the towing company had dominion or control over the boomsticks and boom gear once the log booms reached their intended destinations and were put into storage upon water pursuant to the taxpayer's instructions.

The definition of "consumer" in RCW 82.04.190 includes "any person who purchases, acquires, owns, holds, or uses any article of tangible personal property irrespective of the nature of the person's business . . . ." The taxpayer owned property (the boomsticks) in Washington and, as we will show, it used both the boomsticks and boom gear in Washington, thereby making it a consumer. The definition of "consumer" in RCW 82.12.010(5) references the meaning of the word as found in RCW 82.04.190 and RCW 82.08.010. The definition in RCW 82.08.010 merely lists numerous types of entities that can qualify as a consumer, including limited partnerships such as the taxpayer.

The term "using" is broadly defined in RCW 82.12.010(4) to include both its ordinary meaning and a special statutory meaning, as follows:

> "Use," "used," "using," or "put to use" shall have their ordinary meaning, and shall mean:
>
> (a) With respect to tangible personal property, 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, withdrawal from storage, distribution, or any other act preparatory to subsequent actual use or consumption within this state . . . .

Under this statutory framework, the issue is whether the taxpayer took or assumed dominion or control over the boomsticks and boom gear in Washington. The taxpayer owned the log booms. It owned the boomsticks and was financially responsible for its use of the boom gear. It hired the towing company to tow the log booms from Canada to destinations in Washington that the taxpayer chose. Upon their arrival at the intended destinations in Washington, the taxpayer used the boomsticks and boom gear to store the logs until it found buyers for the logs. At the time of the subsequent sales, the taxpayer instructed the towing company where to deliver the log booms and to dismantle them.

"Possession" is defined as: "1. the fact of having or holding property in one's power; the exercise of dominion over property." Whereas, "constructive possession" is defined as: "control or dominion over a property without actual possession or custody of it." Black's Law Dictionary 1183 (7th ed. 1999). Clearly, the facts show the taxpayer had, after the log booms reached their intended destinations, if not actual possession, then constructive possession of the boomsticks

and boom gear. That is, the taxpayer had control or dominion over the boomsticks and boom gear that were used in Washington to form corrals to hold its logs while they were stored here awaiting subsequent sales by the taxpayer. As such, the taxpayer is liable for use tax as a consumer of the boomsticks and boom gear in Washington. *See* Det. No. 00-208, 20 WTD 402 (2001).

Moreover, WAC 458-20-13501 (Rule 13501) is DOR's rule for timber harvest operations. The rule addresses boomsticks in the following context:

> (f) **Transporting logs by water.** Gross income received for transporting logs by water (e.g., log booming and rafting) or log patrols is subject to the "other public service business" classification of the public utility tax.
>
> This tax classification applies to the gross income from this activity even if the person segregates a charge for boomsticks used while transporting the logs. In many cases logs will be towed to a location specified by the customer for storage. Any charges for boomsticks while the logs are stored are rentals of tangible personal property and subject to the retailing B&O and retail sales tax if to a consumer. (See also WAC 458-20-211 for more information regarding the rental of tangible personal property.)

(Underlining ours.) Rule 13501(9)(f). Thus, the rule recognizes there is a difference between charges for boomsticks when they are being used to tow the log booms (subject to public utility tax) and when they are used for storage after the tow is completed (subject to retail sales tax). That is, once the transporting of the log booms has ended and their storage, as directed by the customer (the shipper/owner of the logs), has begun, charges for the boomsticks are rentals of tangible personal property. Such rental of tangible personal property means once the towing is completed the customer, either by itself or through its employees or third party contractors, is a consumer that has dominion and control over the property. *See also* WAC 458-20-211(3) (Rule 211(3)).

In the present matter, the taxpayer did not rent the boomsticks, but, as noted, owned them. Nonetheless, when the log boom shipments from Canada came to rest at their intended destinations in Washington the taxpayer instructed the towing company to keep them in storage on water until the taxpayer notified the towing company of their subsequent sales. The taxpayer was exercising the same type of dominion and control over the boomsticks (and boom gear) as the example in Rule 13501 of the shipper of the log booms (the customer) that becomes the lessee of the boomsticks once the logs booms are put into storage. In sum, the taxpayer used the boomsticks and boom gear to store its logs in Washington while finding buyers for its logs. Instead of being subject to retail sales tax as a lessee of the boomsticks and boom gear, the taxpayer is subject to use tax as the owner of the boomsticks and bailee of the boom gear, *infra*.

Valuation of Boom Gear and Boomsticks:

Boom Gear

[5] In the alternative, the taxpayer contends if use tax is due, then the measure of the tax on the boom gear and boom sticks is their reasonable rental value. We found above that the taxpayer did not purchase the boom gear, at least, during the first audit period, but obtained it on a refundable deposit basis. When the taxpayer returned the boom gear its deposits were refunded in full. Thus, the taxpayer incurred no net cost for its use of the boom gear. It was liable only for damaged or lost gear. We agree with the taxpayer that this arrangement is a bailment, which is defined as "the act of granting to another the temporary right of possession to and use of tangible personal property for a stated purpose without consideration to the grantor." Rule 211(2)(b) (Rule 211). As shown above, use tax applies to the use of bailed property. RCW 82.12.020(1).

RCW 82.12.060 declares that DOR may by regulation provide for the payment of use tax in installments based on the reasonable rental value of property acquired by bailment as determined under RCW 82.12.010(2). That statute provides in part:

> (b) In case the articles used are acquired by bailment, the value of the use of the articles so used shall be in an amount representing a reasonable rental for the use of the articles so bailed, determined as nearly as possible according to the value of such use at the places of use of similar products of like quality and character under such rules as the department of revenue may prescribe.

See Rules 211(7) and 178(13). Rule 211(7) declares:

> (a) Bailment. The value of tangible personal property held or used under bailment is subject to use tax if the property was purchased or acquired under conditions whereby the retail sales tax was not paid by the bailor. Tax liability is that of the bailor, or of the bailee if the bailor has not paid the tax. The measure of the tax to the bailor is the fair market value of the article at the time the article was first put to use in Washington. The measure of the use tax to the bailee for articles acquired by bailment is the reasonable rental with the value to be determined as nearly as possible according to the rental price at the place of use of similar products of like quality and character. In the absence of rental prices for similar products, the reasonable rental may be computed by prorating the retail selling price over the period of possession had by a bailee and payable in monthly installments. No further use tax is due upon property acquired by bailment after tax has been paid by the bailee or any previous bailee upon the full original value of the article.

Consequently, the measure of the use tax applicable to the taxpayer as a bailee for the use of the boom gear is the reasonable rental value to be determined as nearly as possible according to the rental price at the place of use of similar products of like qualify and character. The rental price for boom gear in Washington would apply, if that information is available. Det. No. 01-072, 22

WTD 193 (2003). If not available, then the rule provides an alternative measure of determining the reasonable rental by prorating the retail selling price over the period of possession and payable in monthly installments. Because the boom gear is shared among several bailees, the use tax may be pro rated among them. *Id.;*Det. No. 92-218, 14 WTD 145 (1995). The burden is on the taxpayer to provide comparable rental prices, or, if not available, then provide reliable information to compute the reasonable rental value by prorating the retail selling price of similar used equipment over the period of possession by the taxpayer. Det. No. 91-322, 11 WTD 521 (1991).

If the taxpayer continued to obtain boom gear from [Company B] or others on a deposit basis during the second audit period then this same bailment analysis for the boom gear applies to the second audit period as it does to the first audit period. If during the second audit period the taxpayer purchased boom gear from [Company A] or others then the analysis of boomsticks immediately below applies to those purchases.

Boomsticks

[6] Unlike the boom gear, the taxpayer purchased the boomsticks. It was not a bailee of them. Nonetheless, it contends the measure of use tax on the boomsticks is their reasonable rental value. The taxpayer submits the prices it paid for the Canadian boomsticks did not reflect their fair market value and, therefore, those prices are an unlawful basis by which to determine the use tax. As discussed, the taxpayer explained the prices were not market prices determined by supply and demand, but were intentionally set high in Canada to ensure the eventual return of the boomsticks so they could be purchased and sold again in the boomstick exchange pool at the then-current published prices. The boomsticks have a useful life expectancy of fifteen to twenty years.

As noted, the taxpayer submitted a letter from the towing company it uses to tow logs from Canada. The letter states that the towing company is a large user of boomsticks in Washington and claims "there is no viable market for Canadian boomsticks in the U.S. due to a lack of demand." The towing company states it has no interest in them because of "the inflated Canadian value associated with these sticks."[5]

RCW 82.12.010(2)(a) provides in part:

> In case the article used . . . is sold under conditions wherein the purchase price does not represent the true value thereof, the value of the article used shall be determined as nearly as possible according to the retail selling price at place of use of similar products of like quality and character under such rules as the department of revenue may prescribe.

[5] We note though the Audit Division did find one isolated sale by the taxpayer of seven Canadian boomsticks to a port in Washington.

The taxpayer asserts that part (a) of RCW 82.12.010(2) is inapplicable because there is no market for Canadian boomsticks in Washington. It appears to us that the purchase prices of the Canadian boomsticks do not represent their true value. But we do not agree with the argument that this statutory subsection is inapplicable. The statute states that the value of the article shall be determined as nearly as possible according to the retail selling price at place of use of similar products of like quality and character. The statute does not require an exact product, but only a similar product to determine the value of the article for use tax purposes. We find that the retail selling price of domestic boomsticks would suffice to provide a value to measure the use tax. The burden is on the taxpayer to provide this information. Det. No. 91-322, *supra*. Likewise, if the taxpayer purchased boom gear during the second audit period, then the retail selling price of domestic boom gear would suffice to provide a value to measure the use tax if the purchase price does not represent the true value of the boom gear. We note that [a Company A] letter stated [that] beginning October 1, 2001 it would sell boom gear at replacement cost and the boom gear would be exempt from provincial sales tax.

But the taxpayer raises another argument why part (a) of RCW 82.12.010(2) is not applicable. It contends the measure should be the "reasonable rental value" of the boomsticks (and boom gear that it may have purchased during the second audit period) as prescribed by RCW 82.12.010(2)(c):

> In the case of articles owned by a user engaged in business outside the state which are brought into the state for no more than one hundred eighty days in any period of three hundred sixty-five consecutive days and which are temporarily used for business purposes by the person in this state, the value of the article used shall be an amount representing a reasonable rental for the use of the articles, unless the person has paid tax under this chapter or chapter 82.08 RCW upon the full value of the article used, as defined in (a) of this subsection.

Thus, in the present matter the taxpayer asserts this part applies to it because it is engaged in business in Canada and brings the boomsticks (and boom gear) it owns into Washington for use in its business here and returns them to Canada where it resells them. The taxpayer claims it has records that show how long the boomsticks (and boom gear) remained in Washington. It adds if they were here less than 180 days in any period of 365 consecutive days then the value of the boomsticks (and boom gear that it purchased during the second audit period) shall be an amount representing a reasonable rental for the use of the articles rather than a tax on their full value.

The taxpayer asserts that the application of part (c) of RCW 82.12.010(2) is not dependent on whether part (a) is or is not applicable to it. In other words, the taxpayer argues that part (c) does not necessarily follow part (a) because it is not an exemption to part (a). It stands on its own merits and is applicable to taxpayers who meet its criteria regardless of part (a).

We construe the statute as follows. Part (c) does reference part (a) for the situation when a person has paid retail sales or use tax on the "full value of an article" as defined in part (a). Thus part (a) applies to situations when the full value of an article is concerned. Part (c) applies only

to the situation when a taxpayer doing business within and without Washington brings in an article for use for less than 180 days in a 365 consecutive days period. In such a situation only the reasonable rental value of the article applies. If a taxpayer cannot qualify under part (c) because, for example, the article remains in Washington for more than 180 days within a 365 day period, use tax is due on its full value. Thus, we hold that part (c) is an exemption to part (a) and is applicable if the taxpayer's records show it meets the requirements of part (c) by having its boomsticks (and boom gear that it owned) here less than 180 days in a 365 consecutive days period. A specific statute controls a general one. *Martinelli v. Department of Rev.*, 80 Wn. App. 930, 940, 912 P.2d 521 (1996).

In sum, the taxpayer owes use tax on the reasonable rental value of boomsticks (and boom gear it owned) brought into Washington that were used here for less than180 days in a 365 consecutive day period. The taxpayer must provide adequate records to demonstrate this claim. For boomsticks (and boom gear it owned) that remained in Washington for more than 180 days in a 365 consecutive day period, use tax is due on their full value. Because there is virtually no market in Washington for Canadian boomsticks, the value of similar domestic boomsticks will apply to the measure of the tax both for rental and full values of the articles used. Similarly, if there is no market in Washington for Canadian boom gear then the value of similar domestic boom gear should suffice.

DECISION AND DISPOSITION

The taxpayer's petition is conditionally granted to the extent that the use tax shall be reassessed according to the reasonable rental values of the boomsticks and boom gear as discussed above if the taxpayer timely provides adequate records for the adjustment to the assessment. Boomsticks and boom gear it owned that remained in Washington in excess of 180 days in a 365 consecutive days period are taxable on their full value as discussed above.

Dated this 31st day of August 2005.

STATE OF WASHINGTON DEPARTMENT OF REVENUE