

Cite as Det. No. 06-0305, 26 WTD 196 (2007)

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. 06-0305
)	
)	Registration No. . . .
)	TDA No. . . .
)	Docket No. . . .
)	

- [1] RULE 178; RCW 82.12.035: VALUE ADDED TAX -- USE TAX CREDIT. The Swedish value added tax (VAT) is not the equivalent of a retail sales tax for the purposes of the RCW 82.12.035 use tax credit for sales taxes paid to foreign countries.
- [2] RULE 178; RCW 82.12.035: "DROIT DE SUITE"-- USE TAX CREDIT. The Swedish Droit de Suite charge is not the equivalent of a retail sales tax for the purposes of the RCW 82.12.035 use tax credit for sales taxes paid to foreign countries.

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.

Munger, A.L.J. – Taxpayer appeals the denial of RCW 82.12.035 credits against Washington’s use tax for Swedish value added tax (VAT) and Droite de Suite charge paid when he purchased a vase in Sweden. As neither of these taxes are “retail sales taxes” as that term is used in Washington’s tax codes, the petition is denied.¹

ISSUES

1. Is the Swedish value added tax (VAT) the equivalent of a retail sales tax for the purposes of RCW 82.12.035, which grants a use tax credit for sales taxes paid to foreign countries?
2. Is the Swedish Droit de Suite charge the equivalent of a retail sales tax for the purposes of RCW 82.12.035, which grants a use tax credit for sales taxes paid to foreign countries?

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

FINDINGS OF FACT

In August 2005, [Taxpayer], a Washington State resident, purchased a vase in Sweden. The vase cost . . . Swedish Kroner (SEK) . . . , and was purchased from . . . a prominent Swedish art auction business. In addition to the purchase price, the Taxpayer also paid . . . SEK in “Droit de Suite” and . . . SEK in Swedish value added tax or “VAT.” There was no Swedish sales tax charged. After receiving information from the US Customs Department, the Department’s Compliance Division in April 2006 assessed use tax on the vase, along with the 25% late payment penalty, and the 5% assessment penalty. The Department denied the Taxpayer’s request to be given credit for the Swedish VAT and Droit de Suite, not considering them to be retail sales taxes for purposes of the RCW 82.12.035 credit provisions. . . .

ANALYSIS

1. VAT Issue

[1] RCW 82.12.035 provides a credit against Washington’s use tax for retail sales or use taxes paid to any other state or foreign country, as follows:

A credit shall be allowed against the taxes imposed by this chapter [use tax] upon the use of tangible personal property, . . . in the state of Washington in the amount that the present user thereof . . . has paid a retail sales or use tax with respect to such property, . . . to any other state of the United States, . . . and any foreign country or political subdivision thereof, prior to the use of such property, . . . in Washington.

At issue in this case is whether the taxpayer, when paying a value added tax, paid a retail sales or use tax upon which credit can be given. Under the use tax provisions, RCW 82.12.020 imposes a “tax or excise for the privilege of using within this state as a consumer . . . any article of tangible personal property purchased at retail” Under the retail sales tax provisions, RCW 82.08.020 imposes a retail sales tax on the “selling price” of each retail sale, which is defined to include the sale of tangible personal property other than for resale. RCW 82.04.050. The term “selling price” means total consideration paid, without deduction of:

(a) The seller's cost of the property sold; (b) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller; (c) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges; (d) delivery charges; (e) installation charges; and (f) the value of exempt tangible personal property given to the purchaser where taxable and exempt tangible personal property have been bundled together and sold by the seller as a single product or piece of merchandise.

In contrast, a VAT is neither for the privilege of using tangible personal property nor imposed only on the sale to a consumer and measured by the purchase price of tangible personal property without deduction. The WG&L Tax Dictionary (2006) defines a value added tax as:

a tax imposed by the European Common Market countries and certain others, imposed at each stage of production. It is calculated by subtracting raw materials costs from earlier stages of production (e.g., wheat bought by a miller) from selling price of the product (e.g., flour sold to bakers). See *International Tax Glossary* 285 (IBRD 1988). The value added tax (VAT) system is sometimes proposed as an alternative to an *income tax*. See also Bittker & Lokken, *Federal Taxation of Income, Estates and Gifts* ¶3.7, Hardesty, *Electronic Commerce: Taxation and Planning* ¶11A.02.

. . . We have held that “A value-added-tax (VAT) is such that it is not the equivalent of a retail sales tax on goods sold for export.” Det. No. 01-096, 22 WTD 126 (2003), *see also* Det. No. 87-105, 3 WTD 001 (1987). . . .

In arguing for treating the VAT as being similar to a sales tax, the taxpayer erroneously relies on Det. No. 87-105, 3 WTD 001 (1987). In that case we reasoned:

Our understanding of the . . . VAT is based on the . . . Business Law Guide, 1986 CCH Edition. The . . . VAT is based on a tax credit mechanism that allows each taxable person (excluding ultimate consumers) to calculate tax based on the price of goods that the person sells, or services rendered, after deducting the tax borne by the elements that made up this price. As a result, the total amount paid . . . by successive sellers of a product is equal to the tax based on the final sales price to the customer. . . . Any item imported . . . is subject to . . . VAT as it enters customs. Items exported . . . are untaxed, that is, the exporter receives a refund of the input VAT paid on the elements that make up the cost price of the export. Thus, if the property sold is destined for a foreign country, the . . . VAT is not due since the export exemption comes into play.

Under the VAT system, where the buyer is the ultimate consumer, the seller is not required by law to separately state the tax nor is the tax customarily separately stated from the sales price. In American parlance, it would be a "hidden tax." There is no need to separately state the VAT because the ultimate consumer is no player in the tax credit mechanism. The seller and his suppliers and vendors need to know the amount of VAT paid because they can claim a credit for the amounts paid by others. The VAT is separately stated to them but never to the ultimate consumer except where the goods sold are exported, in which case, the VAT is either deducted from the charge or refunded to the customer, and the customer has no credit to claim under RCW 82.12.035.

Because the VAT on a sale to the ultimate consumer is not separately stated nor customarily separately stated from the sales price, we find that it does not meet the definition of "sales tax" in RCW 52.56.010 and the VAT is not qualified as a credit allowed under RCW 82.12.035.

While Det. No. 87-105 was correctly decided, it erred in describing the VAT as not being separately stated In Det. No. 87-105 the discussion of the [VAT] was in fact dicta and unnecessary to the outcome

A more comprehensive and useful description of the VAT than the one in Det. No. 87-105 may be found at the European Commission's website on the Taxation and Customs Union, "How VAT works".² When viewed in its entirety, the VAT is clearly a different form of taxation than a more simple retail sales tax.

General overview

What is VAT?

The Value Added Tax, or VAT, in the European Union is a general, broadly based consumption tax assessed on the value added to goods and services. It applies more or less to all goods and services that are bought and sold for use or consumption in the Community. Thus, goods which are sold for export or services which are sold to customers abroad are normally not subject to VAT. Conversely imports are taxed to keep the system fair for EU producers so that they can compete on equal terms on the European market with suppliers situated outside the Union. . . .

Even if we were to consider taxpayer's interpretation of the credit provision as reasonable, it is a long standing rule of statutory construction that the Department is to construe tax exemptions narrowly. *Spokane County v. City of Spokane*, 169 Wn. 355, 358, 13, P.2d 1084 (1932). Where there is an exemption, it should be expressed in "unambiguous terms." *Columbia Irrigation District v. Benton County*, 149 Wn. 234, 240, 270, P. 813 (1928). See also Det. No. 03-0079, 23 WTD 83 (2004). VATs have been in use in Europe and Canada for decades, and no mention is made of them in the RCW 82.12.035 credit provision. If the Legislature had wanted to include the VAT within the scope of the RCW 82.12.035 credit provisions it could easily have done so. We cannot expand the scope of the credit beyond which the law provides

2. Droite de Suite Issue

[2] The "Droite de Suite" also known as an "artists' resale right" is a charge on the purchase of certain art objects that is largely unfamiliar to those in the United States. Unlike the VAT discussed above, the Droite de Suite largely is limited to wealthier European countries. Roughly translated from the French, it means "right of continuation." The following is a description of from the British Parliament of the "Droite de Suite"

Droite de suite is a right given to the creator of an original work of art (painting, sculpture, etc) so that each time the work is resold the creator gets a percentage of the price. This means, for example, that a painter who starts off as unknown and sells paintings for a few pounds can benefit from any subsequent fame achieved. It also means that, if a work falls in value, the subsequent seller's loss is compounded.

[The art auction house] where the Taxpayer purchased the vase in question, describes the "Droit de Suite"

4.2 In accordance with the Copyright Act (SFS 1960:729), § 26 j, a droit de suite charge of 5% of the sale hammer price is made on the sale of works of art, ceramics, glass,

² http://ec.europa.eu/taxation_customs/taxation/vat/how_vat_works/index_en.htm

silver, furniture and textiles. This charge pertains only to works protected by copyright. Copyright protection extends for 70 years after the death of the originator

The only American version of the “Droite de Suite” is the California Resale Royalty Act. The California Arts Council describes it on its website (<http://www.cac.ca.gov/95/>) as follows:

The **California Resale Royalty Act** (Civil Code section 986) entitles artists to a royalty payment upon the resale of their works of art under certain circumstances. This California law is unique in the United States, although it is a well-established legal right in some other countries of the world. The right of artists to share in the appreciated value of their works when resold is important both in principle and in dollars. However, in part because many artists are unaware of their rights and in part because some artists are afraid to assert their rights, money due to artists has gone uncollected.

As these descriptions show, a Droite de Suite charge bears little resemblance to a retail sales tax. The Droite de Suite charge is a government enforced payment to the original artist. Unlike the VAT described above, the *only* resemblance it bears to a retail sale tax is that it shows up to the purchaser as a percentage of the sales price at the time of the purchase. We also note that the definition of a “sales tax” in . . . RCW 82.56.010 “does not include a tax imposed exclusively on the sale of a specifically identified commodity.” The Droite de Suite has only a very limited application to certain art objects. The previously cited rules on statutory interpretation apply equally here. We are to construe these credits narrowly, and any exemptions should be laid out in “unambiguous terms.”³ Again, had the Legislature intended the RCW 82.12.035 credits to include a Droite de Suite charge, it would have said so.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 26th day of December 2006.

³ *Spokane County v. City of Spokane*, 169 Wn. 355, 358, 13, P.2d 1084 (1932) and *Columbia Irrigation District v. Benton County*, 149 Wn. 234, 240, 270, P. 813 (1928).