Cite as Det. No. 07-0120, 27 WTD 109 (2008)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of	)	D E T E R M I N A T I O N
	)	
	)	No. 07-0120
. . .	)	
	)	Registration No. . . .
	)	Appeal of TI&E Letter Ruling
	)	Docket No. . . .
	)	
	)	

Rule 155; RCW 82.04.050(6), RCW 82.08.020: RETAIL SALE TAX -- PREWRITTEN COMPUTER SOFTWARE -- MULTIPLE USE LICENSING. Washington imposes sales tax on the retail sale of prewritten computer software that is delivered to the buyer in this state. Sales tax is owed on the selling price of the prewritten software even though the software could lawfully be copied and used simultaneously in more than one state.

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.

Zalesky, A.L.J. – Nationwide fashion specialty retailer that purchased prewritten computer software under a multiple use license arrangement seeks refund of sales tax paid on software programs received in Washington but loaded onto desktop computers for use at its stores located outside this state. We find that the retail sale occurred in Washington and that there is no provision in Washington law that permits proration or apportionment of the taxable sale price in the case of "multiple points of use" property. . . . Taxpayer's petition for refund is denied.[1]

ISSUES

1. Is Washington retail sales tax owed on the full selling price of prewritten computer software delivered to taxpayer in this state when the software is acquired through a licensing

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410. Nonprecedential portions of this determination have been deleted.

agreement that allows the taxpayer to make a specified number of copies of the software for use at multiple locations, many of which are outside this state?

2. If Washington retail sales tax is not owed on the full selling price of the prewritten computer software delivered to taxpayer in this state, what portion of the selling price is subject to the Washington tax?

3. . . .

FINDINGS OF FACT

[Taxpayer] is a . . . retailer offering . . . apparel, shoes, cosmetics and accessories for women, men and children. Taxpayer is headquartered in . . . Washington, but has retail stores located throughout . . . the United States. . . .

In January 2002 Taxpayer entered into an [agreement] with a software company that creates, manufactures, markets, and sells a wide range of prewritten computer software.[2] The express purpose of the [agreement] is to "give . . . customers that wish to license one or more of [Software Company's] platform products across their enterprise the means to ensure that their entire enterprise will be licensed." . . .

Under the terms of the [agreement], Taxpayer ordered a number of different software products. The license agreement with the software company gave Taxpayer the right to use up to a stated number of copies of each prewritten computer software product ordered. . . .

One copy of each software product was delivered to Taxpayer [in] Washington . . . . Upon receipt of the software product, Taxpayer exercised a number of its license rights and transferred copies of the product to select stores and office locations throughout its organization. The transfer of copies of the software programs was accomplished by loading the program onto a computer located at Taxpayer's [Washington] office and sending electronic copies to the various stores and office locations via the internet. The Taxpayer retained a number of unexercised license rights for possible future use.

The prewritten computer software products at issue in this appeal all qualify as tangible personal property under Washington law and are subject to the Washington sales tax. Because delivery of the products occurred in Washington, the seller collected and remitted Washington sales tax on the full contract price. According to a worksheet provided by the Taxpayer, a total of $. . . was collected and remitted on prewritten software sale made to Taxpayer during 2002 through 2004. . . .

[2] Prewritten computer software, which is sometimes referred to as "canned" software, "means computer software . . . that is not designed and developed by the author or other creator to the specifications of a specific purchaser." RCW 82.04.215(6).

On . . ., 2006, Taxpayer made a request for refund of a portion of the Washington sales tax that had been paid to the software company and remitted to the Department. The refund claim was denied in a TI&E letter . . . . This appeal followed.

ANALYSIS

A. Tax is Owed on the Selling Price of the Prewritten Software even though the Software could Lawfully be Copied and Used Simultaneously in More than One State.

Washington imposes a sales tax on the sale of tangible personal property and certain services that qualify as "retail sales." RCW 82.08.020. The tax is measured by the "selling price" of the item or service at issue and applies when the sale is made in this state. A sale of tangible personal property is made in this state when the goods sold are delivered to the buyer in this state. WAC 458-20-103. Prewritten computer software is considered to be tangible personal property and is subject to Washington sales tax. RCW 82.08.010(7); WAC 458-20-155. *See also*, RCW 82.04.050(6) ("The term [sale at retail or retail sale] shall also include the sale of prewritten computer software other than a sale to a person who presents a resale certificate under RCW 82.04.470, regardless of the method of delivery to the end user . . . .").

Taxpayer recognizes that Washington imposes sales tax on the retail sale of prewritten computer software that is delivered to the buyer in this state. However, Taxpayer asserts that in the case of prewritten software purchased pursuant to a multiple use license, the transaction "consists of two distinct and separate parts," namely the sale of the "single copy of prewritten computer software delivered to [Taxpayer] in . . . Washington," and the sale of "all the additional intangible software license rights acquired by [Taxpayer]." Appeal Petition, p. 1. Under Taxpayer's theory, only that portion of the sales price that relates to the "single copy of prewritten computer software" that is transferred from the seller to Taxpayer by disk or other tangible media is subject to sales tax. The remaining portion of the sales price is allocated among the "additional intangible software license rights." The amount allocated to each additional license right is subject to use tax when the right is exercised by loading the software on a desktop computer or similar device.

We are unable to find any legal support for the tax treatment being advanced by Taxpayer. The Washington sale and use tax laws simply do not differentiate between software acquired under a single use license arrangement and software acquired under a multiple use license arrangement. In either case, the sales tax is computed based on the selling price of the software program. Dividing the selling price into various "tangible" and "intangible" components is simply not contemplated. The term "selling price" or "sales price" is defined as "the total amount of consideration, except separately stated trade-in property of like kind, . . . for which tangible personal property [is] sold, leased, or rented." RCW 82.08.010(1). Whether the property is capable of being copied, capable of being used more than once, or capable of being copied and used simultaneously by multiple users, does not change or otherwise affect the "selling price"

upon which the tax is imposed. In short, there is no provision in the law that allows the tax treatment being requested by Taxpayer in this appeal.

Taxpayer points out that Colorado has enacted an administrative rule that specifically addresses the sale of computer software that is acquired under a multiple use license. *See* Department of Revenue Special Regulation SR-7 - Computer Software, 1 Colo. Code Regs. § 201-5.[3] The fact that Colorado has specifically addressed this issue serves only to highlight the fact that Washington has not enacted a similar provision. It is also worth noting that the Governing Board of the Streamlined Sales and Use Tax Agreement (SSUTA) considered but eventually rejected a "multiple points of use" sourcing rule relating to prewritten computer software. As explained in a recent state tax newsletter:

> As originally adopted, [the Streamlined Sales and Use Tax Agreement] provided a special sourcing rule for business purchases of products that are available for concurrent use in more than one jurisdiction. The rule required the business purchaser to apportion the receipts from the sale of such products among the jurisdictions in which the products would be used and to remit the tax to the proper jurisdiction on a direct pay basis . . . .
>
> Though seemingly an elegant solution to the theoretical and practical problems of multiple use, the multiple points of use (MPU) provisions were fraught with substantive and administrative challenges, and they were ultimately repealed effective December 14, 2006. The heart of the problem lay in (1) the administrative challenge of anticipating the location of future use, coupled with the uncertain tax consequences when actual use deviated from anticipated use, and (2) the risk that the jurisdiction of initial delivery would claim a superior right to tax the unapportioned sales price.

Walter Hellerstein and John A. Swain, The Streamlined Sales and Use Tax: Overview of Current Status, RIA State & Local Commentary at p. 3 (March 2007).[4]

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[3] Available on-line at http://www.revenue.state.co.us/taxstatutesregs/3926regSR7ComputerSoftware.html.

[4] In a footnote, Professors Hellerstein and Swain also note that "the difficulties of apportioning a retail sales tax underlie the well-entrenched (and constitutionally sanctioned) tradition of generally assigning the retail sales tax base to a single jurisdiction . . . ." *Id.* at note 5 (*citing Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 US 175, 115 S.Ct. 1331 (1995)). In *Jefferson Lines*, the Supreme Court held that the sales price of a bus ticket did not have to be apportioned among the state in which the bus was scheduled to travel. According to the Court:

> A sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale, and the transaction itself does not readily reveal the extent to which completed or anticipated interstate activity affects the value on which a buyer is taxed. We have therefore consistently approved taxation of sales without any division of the tax base among different States, and have instead held such taxes properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future. *See e.g.*, *McGoldrick v. Berwind-White Coal Mining Co.*, [309 U.S. 33, 60 S.Ct. 388 (1940)].

Jefferson Lines at 187, 115 S.Ct. at 1339.

As we have noted, Washington's sales and use tax laws do not include a multiple points of use sourcing provision. Until the Washington Legislature enacts such a provision, there is no legal basis for treating a sale of software under a multiple use licensing arrangement differently from a sale under a single use licensing arrangement. In both cases, the selling price is the amount paid for the software notwithstanding the number of times the software can lawfully be copied and used.

Taxpayer's Petition for Refund is rejected as to this issue.

B. . . .

DECISION AND DISPOSITION

For the reasons stated in this determination, Taxpayer's petition for refund is denied.

Dated this 10th day of May, 2007.