Cite as Det No. 08-0122R, 28 WTD 115 (2009)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessments of	)	D E T E R M I N A T I O N
	)	No. 08-0122R
. . .	)	Registration No. . . .
	)	Doc. No. . . .Audit No. . . .
	)	Docket No. . . .
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. . .	)	Registration No. . . .
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[1] RULE 227(3), RULE 178; RCW 82.12.020, RCW 82.04.190(2): USE TAX – DIRECT BROADCAST SATELLITE PROGRAMMING – FREE EQUIPMENT AND INSTALLATION: Providers of direct broadcast satellite programming, as consumers, are liable for deferred sales tax/use tax per on equipment and the installation of that equipment they gave to their subscribers for free.

[2] RULE 116, RULE 178; RCW 82.12.020: USE TAX – PREMIUMS – DIRECT BROADCAST SATELLITE PROGRAMMING – FREE EQUIPMENT AND INSTALLATION: Providers of direct broadcast satellite programming are not exempt from deferred sales tax/use tax on the free equipment and installations that they gave subscribers because the free equipment and installations are not tax exempt premiums.

[3] RULE 178; RCW 82.12.020, RCW 82.14.030; 47 USC § 152, (HISTORICAL AND STATUTORY NOTES): LOCAL SALES/USE TAX – DIRECT BROADCAST SATELLITE PROGRAMMING – FREE EQUIPMENT AND INSTALLATION – NO FEDERAL PREEMPTION: Local jurisdictions are not preempted from imposing the local use tax/deferred sales tax portions of the use tax/deferred sales tax assessed on providers of direct broadcast satellite programming for giving their subscribers free equipment and installations because the federal preemption statute, 47 USC § 152, historical and statutory notes,

> applies only to local taxing jurisdictions taxing the activity of providing direct-to-home satellite service, but does not extend to such local jurisdictions taxing free equipment and installations.

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. – Two related providers of direct broadcast satellite programming seek reconsideration of Det. No. 08-122 by protesting the Department of Revenue's (DOR) Audit Division's assessment of use tax/deferred sales tax on equipment they gave for free to some subscribers of their direct broadcast satellite programming. They further protest the assessment of use tax/deferred sales tax on the free installation of the equipment that they gave to those subscribers. We affirm Det. No. 08-122 and sustain the use tax/deferred sales on the free equipment and installations.[1]

ISSUES

1. Are the providers of direct broadcast satellite programming liable for deferred sales tax/use tax per RCW 82.12.020, RCW 82.04.190(2), WAC 458-20-227(3) (Rule 227) and WAC 458-20-178 (Rule 178) on equipment and the installation of that equipment they gave to some of their subscribers for free?

2. Alternatively, are these providers of direct broadcast satellite programming exempt from deferred sales tax/use tax on the free equipment and installations that they gave some subscribers because the free equipment and installations were tax exempt premiums per WAC 458-20-116 (Rule 116)?

3. Or, are these providers of direct broadcast satellite programming exempt from the local use tax/deferred sales tax portions of the use tax/deferred sales tax assessed on free equipment and installations because of a federal preemption statute, 47 USC § 152, historical and statutory notes?

FINDINGS OF FACT

[Taxpayer Corporation's] business activities in the state of Washington during the audit period October 1, 2001, through December 31, 2003, included providing direct broadcast satellite programming to subscribers in this state. The Audit Division assessed the corporation $. . . in service and other activities business and occupation (B&O) tax, $. . . in use tax/deferred sales tax, $. . . in interest, and $. . . in . . . underpayment penalty, for a total of $. . . .

[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.

[Taxpayer LLC's] business activities in this state during the audit period January 1, 2004, through June 30, 2004, included providing direct broadcast satellite programming to subscribers in this state. The LLC is the successor to the corporation. The Audit Division assessed the LLC $. . . in retail sales tax, $. . . in retailing B&O tax, $. . .in service and other activities B&O tax, $. . . in interest, and $. . . in . . . underpayment penalty, for a total of $. . . .

In issuing Det. No. 08-122, we remanded the appeal to the Audit Division to adjust the assessments for both B&O tax and use tax/deferred sale tax purposes. The Audit Division made the adjustments and issued a revised assessment for each taxpayer. The revised assessment for the corporation was issued October 2, 2008, and amounted to $. . . in tax and interest. It remains unpaid. The revised assessment for the LLC was also issued October 2, 2008, and amounted to $. . . in tax and interest. The LLC has partially paid its revised assessment. Each one has appealed its revised assessment for purposes of use tax/deferred sales tax assessed on the free equipment and free installations that they provided some subscribers. We will refer to both the corporation and the LLC as the taxpayers or taxpayer, where convenient, because they protest the same issues.

The taxpayers have their business headquarters in [another state]. From the headquarters, they obtain or purchase programming from television networks, . . . programmers . . ., and others who transmit their programming to the taxpayers' uplink sites in [other states]. The uplink sites consist of [multi-] acre sites, . . . with large building[s], [many] dish-shaped antennae., [and a large number of employees]. These facilities receive, process, and transmit signals twenty-four hours a day, seven days a week to the taxpayers' . . . satellites orbiting the earth. . . . The taxpayers' direct broadcasts from their satellites reach their subscribers nationwide.

The taxpayers have no employees or facilities in the state of Washington. They have used sales persons in Washington to sell their direct broadcast satellite services to subscribers in Washington, but they accept the orders outside Washington. . . . The taxpayers do own equipment in this state, such as antennae dishes, cables, and receivers that they sell or give free to their subscribers who need the equipment to be able to receive the signals. Depending on the subscription services that are purchased, the taxpayers may sell the equipment and installation services, for example, to new subscribers that purchase only the basic programming or to existing subscribers that want to upgrade the service. The taxpayers may lease the equipment to other subscribers. To attract new customers that will subscribe to larger programming packages, the taxpayers will, at times, subsidize or give away for free the equipment and installation charges, and even programming for a limited time. We will discuss the tax consequences of the free equipment and free installations of that equipment[2] that the Audit Division assessed use tax/deferred sales tax on.

ANALYSIS

[2] The taxpayers paid third-parties to install the equipment.

[1] Rule 227(1) defines "subscriber television" to include all businesses that provide television programming to consumers for a fee. It includes, but is not limited to cable television and satellite television. Persons engaged in the business of subscriber television are subject to the service and other business activities B&O tax on gross income derived from the charge made for installation and the monthly rental or service fee. Rule 227(2)(a) (citing WAC 458-20-224 (Rule 224)).

In sustaining the use tax/deferred sales tax assessments, we wrote in Det. No. 08-122:

> The . . . issue for [the taxpayer] is use tax/deferred sales tax assessed on the equipment that it provided free to some subscribers. The Audit Division determined that [the taxpayer] was the consumer of all equipment and other tangible personal property provided free to subscribers and was liable for retail sales and/or use tax on the value of the equipment. We agree that [the taxpayer] is liable for the tax, but the amount of tax may need to be adjusted, as discussed [in Det. No. 08-122 and subsequently adjusted on remand]. Use tax is imposed by RCW 82.12.020. DOR adopted WAC 458-20-178 (Rule 178) to administer the tax. The use tax applies upon the use of any tangible personal property, the sale or acquisition of which has not been subjected to the Washington retail sales tax. Rule 178(2).
>
> > Tax liability imposed under the use tax arises at the time the property purchased, received as a gift, acquired by bailment, or extracted or produced or manufactured by the person using the same is first put to use in this state. The terms "use," "used," "using," or "put to use" include any act by which a person takes or assumes dominion or control over the article and shall include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within the state.
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> Rule 178(3). Persons liable for the tax include, among others, the purchaser as well as the donor if the donor has not paid the tax. Rule 178(4). Moreover,
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> > The tax is levied and collected on an amount equal to the value of the article used by the taxpayer. The term "value of the article used" is defined by the law as being the total of the consideration paid or given by the purchaser to the seller for the article used plus any additional amounts paid by the purchaser as tariff or duty with respect to the importation of the article used. In case the article used…was acquired by gift or was sold under conditions where the purchase price did not represent the true value thereof, the value of the article used must be determined as nearly as possible according to the retail selling price, at the place of use, of similar products of like quality, quantity and character.
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> Rule 178(13). The taxpayer purchased the equipment without paying retail sales tax on it. As a donor it gave the equipment for free to some of its subscribers to install on their houses or other places. Consequently, the equipment was put to use in the state and as

> the donor of that equipment, [the taxpayer] is liable for an amount equal to the value of the equipment it provided to the subscribers for free. Rule 178. *See also* Rule 227(3) ("USE TAX Persons engaging in the business of subscriber television are subject to retail sales tax or use tax on all purchases of tangible personal property utilized or required in providing service to subscribers. (See WAC 458-20-178)").

We continued in Det. No. 08-122 by discussing the use tax/deferred sales tax assessed on the free installations:

> [The taxpayer] did not sell the installations to the qualified subscribers. It gave them the installations for free as it plainly stated in all of its free promotions. [The taxpayer], as the purchaser and donor, was the consumer of the free installations and is liable for use tax/deferred sales tax on their value.
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> > (3) "Value of the service used" means the purchase price for the service, the use of which is taxable under this chapter. If the service is received by gift or under conditions wherein the purchase price does not represent the true value thereof, the value of the service used shall be determined as nearly as possible according to the retail selling price at place of use of similar services of like quality and character under rules the department may prescribe;
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> RCW 82.12.010(3). Accordingly, the use tax statute provides:
>
> > The tax shall be levied and collected in an amount equal to the value of the article used…or value of the service used by the taxpayer multiplied by the rates in effect for the retail sales tax under RCW 82.08.020….
>
> RCW 82.12.020(5).

We affirm our analysis in Det. No. 08-122 that the use tax/deferred sales tax was properly imposed on the free equipment and free installations of that equipment.

See also the definition of "consumer" in RCW 82.04.190(2)(a): "any person engaged in any business activity taxable under RCW 82.04.290 or 82.04.2908." The taxpayer is engaged in a business taxable under RCW 82.04.290. *See* Rule 227(2)(a), *supra.* Consequently, the taxpayer is liable for the use tax/deferred sales tax on the free equipment and installations because it is the consumer of the free equipment and free installations.

[2] In seeking reconsideration, the taxpayer contends that Rule 227(3), *supra,* (persons engaged in the subscriber television business are subject to use tax/sales tax on all purchases of tangible personal property utilized or required in providing the service to subscribers) is too broad in that it imposes the tax in all instances on such persons. Instead, the taxpayer contends Rule 116 and its provision for "premiums" applies. "Premium" is defined as "an item offered free of charge or at a reduced price to prospective customers as an inducement to buy." Rule 116(2)(a). The rule

explains that in some instances premiums are not taxable to the seller. Accordingly, the taxpayer argues that the free equipment and installations it gave to its subscribers are for its purposes non-taxable premiums. We discuss Rule 116 below.

But, first, we disagree that Rule 227(3) is too broad in imposing use tax. Use tax applies only in this matter where the taxpayer purchased the equipment without paying sales or use tax and gave it to its subscribers without charge. Rule 178, *supra*. The Audit Division did not assess use tax where the taxpayer purchased the equipment at wholesale and sold the equipment to its subscribers as provided in WAC 458-20-102. . . .

[W]e also conclude that Rule 116 . . . does not provide the relief the taxpayer seeks . . . The taxpayer cites Rule 116(3)(b) and (c) as authority for situations when premiums are resold and are not subject to retail sales tax:

> (b) Sales of premiums to persons who pass title to the premium along with other articles which are sold by them, when the passing of title to the premiums is not contingent upon the returning of coupons or other evidence of prior purchase.
>
> (c) Sales of premiums to persons who in turn sell the same to customers at a reduced price.

[S]ubsection (b) does not apply to the present matter because we are dealing with a service being sold along with tangible personal property (the premium), and not tangible personal property being sold along with other tangible personal property (the premium). And subsection (c) does not apply because we are dealing with items provided free of charge and not at a reduced price. Consequently, these two provisions do not support the taxpayer's claim that the free equipment and installations are tax-free premiums.

The taxpayer also cites the example in Rule 116(7)(b) to support its argument that the free equipment and installations given to subscribers upon purchasing the direct broadcast satellite service are non-taxable premiums:

> MT Gas, a gasoline and service station, offers customers a free set of stemware with any gasoline purchase of ten gallons or more. Customer purchasing seven to nine gallons of gasoline may purchase the same set of stemware for a nominal amount. MT Gas may purchase the stemware without paying retail sales tax. The stemware is offered as a premium, and is considered to be resold along with the gasoline. It is immaterial that the sale of gasoline is exempt from the retail sales tax. MT Gas must report the retailing B&O tax and collect and remit retail sales tax on the price charged for the stemware sold to those customers purchasing seven to nine gallons of gasoline.

We note Rule 116(7)(d) provides another example of a premium, but this one involves a service and has a different outcome from the free stemware example relied upon by the taxpayer:

> BC Bank offers a choice of various premiums to customers opening new savings accounts. In some cases, a charge may be made to the customer for the premium, with the amount of the charge based on the amount of deposit the customer makes in the new savings account. BC Bank may give a resale certificate to its suppliers for those premiums which will be resold to its new customers. For those premiums which will be given to customers without charge, BC Bank must pay either the retail sales tax to its suppliers or use tax to the department on the cost of the premiums. (Refer to WAC 458-20-102.) It also must report the retailing B&O tax and collect and remit retail sales tax on any amounts charged to its customers.

Between the two examples set forth above, we conclude that the bank example is more applicable to the free equipment and installations at issue. The sale of direct broadcast satellite programming is a taxable service. Rule 227. Similarly, banking involves a service provided to customers. Like the bank example, the taxpayer is offering an upfront gift to induce subscribers to enter into an ongoing service relationship. To be more similar to the gas station example, the taxpayer would need to be selling tangible property along with the premium. The gas station is promoting individual sales by offering a premium, tangible personal property (stemware) with the purchase of a specific item of tangible personal property (gas). With each subsequent purchase of gas the customer is entitled to additional free or discounted stemware. But in this case, the taxpayer offers a single inducement or gift involving tangible personal property and installation services to encourage customers to purchase services – direct broadcast satellite programming. The subscriber is not eligible for an additional satellite dish with each monthly payment for the satellite broadcast service. Therefore, like the bank in Rule 116(7)(d), the taxpayer is the consumer of the free satellite dishes and other equipment and installations and owes use tax on the purchase prices of that equipment and installations.

Accordingly, we affirm the Audit Division's assessment of use tax/deferred sales on the purchase price of free satellite dishes, other equipment, and installations given away without charge by the taxpayer to subscribers who signed up for the qualifying direct broadcast satellite programming service contracts and we deny the taxpayers' petition on this issue.

[3] The last issue is whether the local use tax/deferred sales tax portion of the use tax/deferred sales imposed on the free equipment and installations is preempted by 47 USC §152, historical and statutory notes (Pub.L. 104-104, Title VI, §602, 110 Stat. 144(a)(1996)). The pertinent subsections of the statute provide:

> (a) Preemption. A provider of direct-to-home satellite service shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service.
>
> (b)(1) Direct-to-home satellite service. The term "direct-to-home satellite service" means only programming transmitted or broadcast by satellite directly to the subscribers' premises without the use of ground receiving or distribution equipment, except at the subscribers' premises or in the uplink process to the satellite.

> (b)(3) Local taxing jurisdiction. The term "local taxing jurisdiction" means any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee, but does not include a State.

This section has been construed to mean what it plainly states. Local taxing jurisdiction, such as cities and counties, but not states, are preempted from imposing any tax or fee on direct-to-home satellite service. But states are explicitly permitted to impose a tax on such satellite service. *Direct TV, Inc. v. Tolson*, 498 F.Supp.2d 784, at 801-802 (E.D. N.C. 2007). And in accordance with that plain statutory language, we conclude that the preemption applies only to local taxing jurisdictions taxing the activity of providing direct-to-home satellite service. There is no reference, express or implied, in the statute that local taxing jurisdictions are preempted from imposing a tax, such as a local use tax, on the equipment or installation of that equipment that the satellite service provider gives to its subscribers free of charge. The taxpayer has cited no case law, regulations, or other authority to support the position that the preemption extends to local taxing jurisdictions taxing equipment and installation and not just direct-to-home satellite service. We deny the taxpayers' petition on this issue.

DECISION AND DISPOSITION

Taxpayer[s'] petition is denied.

Dated this 21st day of April 2009.