

Cite as Det No. 11-0363, 32 WTD 123 (2013)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
)	No. 11-0363
)	
...)	
)	Registration No. . . .
)	Document No. . . . /Audit No. . . .
)	
)	Docket No. . . .

[1] RCW 82.04.050; RCW 82.08.050: RETAIL SALES TAX—LIABILITY FOR UNCOLLECTED TAX. While RCW 82.08.050 allows the Department to proceed directly against the buyer or the seller for the sales tax, the statute anticipates that the Department will only collect the same tax once.

[2] RCW 82.12.035: USE TAX – CREDIT FOR RETAIL SALES TAX PAID TO ANOTHER STATE. If the Texas retail sales tax was legally imposed and paid with respect to cranes that were delivered in Texas, the taxpayer was entitled to a credit under RCW 82.12.035.

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.

Pree, A.L.J. – An out of state company protests retail sales tax assessed on amounts it charged to rent cranes with an operator in Washington. The company did not own the cranes, but rented them in Texas where it paid retail sales tax, then shipped the cranes to Washington. We remand the assessment to the Audit Division to credit the taxpayer for Texas retail sales tax it paid against the use tax assessed during the period of its leases, as well as to adjust the assessment for any deferred sales/use tax that the subcontractor paid on the taxpayer's charges. Petition granted in part.¹

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

ISSUES

1. Under RCW 82.04.050 and RCW 82.08.050, was the taxpayer liable for retail sales tax it failed to collect from its customer?
2. Under RCW 82.12.035 was the taxpayer entitled to a credit against use tax assessed for retail sales tax it paid to Texas?

FINDINGS OF FACT

[Taxpayer] is [an out-of-state] limited liability company that rented large cranes from an affiliate in Texas. The affiliate charged the taxpayer Texas retail sales tax. The cranes were then shipped to Washington. In Washington, its employees operated the cranes to assist a subcontractor The taxpayer did not charge [the subcontractor] retail sales tax.

The Department of Revenue reviewed the taxpayer's books and records for the period from January 1, 2007 through June 30, 2010. On October 20, 2011, the Department's Audit Division assessed \$. . . retail sales tax and \$. . . retailing business and occupation (B&O) tax on the taxpayer's charges to the Washington subcontractor, plus \$. . . use tax on the cranes used by the taxpayer in Washington. The \$. . . assessment also included a delinquent penalty of \$. . . , an assessment penalty of \$. . . , an unregistered business penalty of \$. . . , and \$. . . interest. The taxpayer appealed the entire assessment.

When the taxpayer rented cranes in Texas, it paid its affiliate Texas retail sales tax.² After shipping the cranes to Washington, the taxpayer's employees operated the cranes to assist [a subcontractor]. The taxpayer's agreement with [the subcontractor] provides that the taxpayer would provide an operator and further provides:

9. The customer . . . to have control – the customer shall have sole and exclusive control in directing the manner and details of work being performed by the company [taxpayer] and all personnel provided by the company [taxpayer]. . . . Any operator of the rental equipment or other personnel provided by the company [taxpayer] shall be deemed an employee of the customer. It is further understood that no personnel while working under the direction of the customer shall be considered a borrowed servant or employee of the company [taxpayer].

The taxpayer billed [subcontractor] an hourly rate for "Crane w/operator" plus per diem for the operator. The invoice identified the Washington location. The taxpayer did not charge [subcontractor] retail sales tax. However [subcontractor] acknowledges that it paid use tax and/or deferred sales tax directly to the Department on the taxpayer's charges.³ The taxpayer contends that the retail sales taxes were not due because its purchaser . . . re-rented the cranes

² Also included was [a city] sales tax

³ [Subcontractor] submitted the Department's Certification of Use and/or Deferred Sales Tax Paid from after the hearing.

with operators to the general contractor, and the crane rentals were, therefore, exempt from retail sales tax.

ANALYSIS

Washington has both a retail sales tax and a use tax. Retail sales tax is an excise tax imposed on each retail sale in this state, to be paid by the buyer to the seller. RCW 82.08.020. Under RCW 82.08.050, sellers who fail to collect and remit retail sales tax from the buyer are liable for the tax. The assessment at issue includes retail sales tax that the taxpayer did not collect from [subcontractor] when it provided cranes with operators. RCW 82.04.050(9) includes within the definition of a “retail sale”:

The term also includes the charge made for providing tangible personal property along with an operator for a fixed or indeterminate period of time. A consideration of this is that the operator is necessary for the tangible personal property to perform as designed. For the purpose of this subsection (9), an operator must do more than maintain, inspect, or set up the tangible personal property.

WAC 458-20-211(Rule 211) defines “rental of equipment with operator:”

(d) The term “rental of equipment with operator” means the provision of equipment with an operator to a lessee to perform work under the specific direction of the lessee. In such cases the lessor is generally not responsible for performing work to contract specification and does not determine how the work will be performed. Though not controlling, persons who rent equipment with an operator typically bill on the basis of the amount of time the equipment was used.

The taxpayer’s charges to [subcontractor] for rental of the cranes with operators were retail sales under RCW 82.04.050(9). Because the taxpayer failed to charge [subcontractor] sales tax, the Audit Division determined that the taxpayer was liable for the sales tax it failed to collect under RCW 82.08.050. However, [subcontractor] provided a certificate that it paid use tax on its rental of cranes from the taxpayer. While RCW 82.08.050 allows the Department to proceed directly against the buyer or the seller for the sales tax, the statute anticipates that the Department will only collect the same tax once. Therefore, the taxpayer would not owe tax that it failed to collect and remit to the Department for taxes [subcontractor] paid directly to the Department. The Audit Division should remove use tax/deferred retail sales tax assessed on the taxpayer’s charges where [subcontractor] paid those taxes directly to the Department.

The assessment also includes use tax on the taxpayer’s use of the cranes in Washington. Use tax is imposed on the privilege of using within this state, as a consumer, any article of tangible personal property purchased at retail, but is not due if retail sales tax has already been paid by the user or his bailor or donor. RCW 82.12.020(1)(a); RCW 82.12.020(3)(b). The use tax, for the most part, complements the retail sales tax by imposing a tax of like amount in cases where retail sales tax was not paid. WAC 458-20-178 (Rule 178). The Washington purchaser will owe use tax to Washington. Under Rule 211(4), persons renting equipment with an operator are not

purchasing the equipment for resale, and must pay sales/use tax on the equipment when acquired.⁴ The taxpayer incurred use tax.

Our issue is not whether the taxpayer owed use tax on its use of the cranes, but whether the taxpayer was entitled to a credit for the Texas retail sales tax that the taxpayer paid. RCW 82.12.035 allows a credit for retail sales or use taxes paid to other jurisdictions with respect to property used in Washington:

A credit is allowed against the taxes imposed by this chapter upon the use in this state of tangible personal property, extended warranty, digital good, digital code, digital automated service, or services defined as a retail sale in RCW 82.04.050 (2) (a) or (g), (3)(a), or (6)(b), in the amount that the present user thereof or his or her bailor or donor has paid a legally imposed retail sales or use tax with respect to such property, extended warranty, digital good, digital code, digital automated service, or service defined as a retail sale in RCW 82.04.050 (2) (a) or (g), (3)(a), or (6)(b) to any other state, possession, territory, or commonwealth of the United States, any political subdivision thereof, the District of Columbia, and any foreign country or political subdivision thereof.

If the Texas retail sales tax was legally imposed and paid with respect to the cranes, the taxpayer was entitled to a credit under RCW 82.12.035. To determine whether the Texas retail sales tax was legally imposed, we must review Texas excise tax law in effect during the audit period. During the audit period, Texas imposed retail sales tax on sales in Texas. TEX TAX. CODE ANN. §151.051(a). Sales included lease or rental of tangible personal property. TEX TAX. CODE ANN. §151.005(2). The Texas tax rule provided:

An operating lease executed while the property is within the state is subject to sales tax. Tax will be due on the total lease amount for the entire term of the lease regardless of where the property is used if the lessee takes delivery in the state. Any renewal of the contract, extensions, or options exercised while the tangible personal property is outside the state will not be subject to Texas tax unless the property reenters the state.

34 Tex. Admin. Code §3.294(f)(1)(A) (2011).

⁴ Rule 211 provides an example in subsection (8) with an explanation that use tax is also imposed upon the company providing the equipment with an operator:

(d) ABC Company purchases a crane which it rents to others as a bare rental. It periodically rents the crane to lessees on this basis for two years. Beginning in the third year of ownership of this crane, ABC decides to start providing these customers with an employee to operate the crane. The employee will operate under the direction of ABC with ABC retaining dominion and control over the crane. Does ABC owe use tax on the crane, and if so, what is the measure of the use tax?

ABC owes use tax upon the first use of the crane as a consumer. This occurred in the third year of ownership when ABC began supplying an operator. The measure of the tax is the retail market value of the crane at the time it is put to use by ABC.

Under Texas law, Texas retail sales tax was properly imposed upon the total lease amount for entire terms of the leases if the taxpayer took delivery of the cranes in Texas before removing them to use in Washington. Thus, if the leases were signed when the cranes were in Texas, delivery was in Texas, and the cranes were then shipped to Washington during the term of the lease, the Texas sales tax would have been properly imposed. If the taxpayer paid that tax, then the taxpayer would be entitled to a credit for the Texas sales tax paid. However, Texas sales tax was not properly imposed if the leases were signed or renewed while the cranes were outside of Texas.⁵ Under RCW 82.12.035, for the credit to apply, the Texas tax had to be properly imposed. In this matter, the taxpayer must show that each crane was delivered in Texas when it signed the lease agreement for that crane. Acceptable proof to show that the cranes were delivered to the taxpayer in Texas would include shipping documents dated after each lease was signed. The signed leases with the shipping documents would show whether each crane was shipped out of Texas after the taxpayer signed the leases. If the crane was shipped out of Texas prior to the date the lease was signed, the taxpayer would not be eligible for a credit for Texas sales tax paid against the use tax assessed and due. For cranes shipped after the leases were signed, because the Texas sales tax was properly imposed, the taxpayer would be eligible for a use tax credit under RCW 82.12.035.

DECISION AND DISPOSITION

We are remanding the case to the Audit Division for possible adjustment to the assessment based on records Taxpayer must provide.

Dated this 22nd day of December, 2011.

⁵ The term of the rental began when the carrier picked up the crane and ran until the crane was returned with a minimum term of four months. Unless the crane was returned, the taxpayer's leases did not necessarily expire after four months.