

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	<u>D E T E R M I N A T I O N</u>
for Refund of)	
)	No. 88-18
)	
. . .)	Registration No. . . .
)	Tax Assessment No. . . .
)	

[1] **RCW 82.08.0262:** RETAIL SALES TAX -- EXEMPTION -- SALES OF WATERCRAFT -- USED IN INTERSTATE OR FOREIGN COMMERCE -- USED IN COMMERCIAL DEEP SEA FISHING OPERATIONS. The sale of watercraft for use in conducting interstate or foreign commerce or for use in conducting deep sea fishing operations outside the territorial waters of the state is exempt from retail sales tax.

[2] **RCW 82.04.2904(2), RCW 82.08.0262 AND RCW 82.04.250:** B & O TAX -- RETAILING -- SALES OF WATERCRAFT -- USED IN COMMERCIAL DEEP SEA FISHING OPERATIONS -- SEPARATE RETAILING TAX CLASSIFICATION -- INTERSTATE TRANSPORTATION EQUIPMENT. The effect of RCW 82.04.2904(2), enacted in 1983, combined with RCW 82.08.0262 and RCW 82.04.250 with respect to sales of watercraft at retail for use in conducting commercial deep sea fishing operations outside Washington's territorial waters is that such sales are subject to a separate tax classification of Retailing-- Interstate Transportation Equipment (RITE) with a tax rate of .00581 effective March 1, 1983 until June 30, 1983, and a tax rate of .00484 effective July 1, 1983 and thereafter while the tax rate of Retailing B & O remained at 00471.

[3] **RCW 82.04.2904(2) AND RULE 176:** B & O TAX -- RETAILING B & O TAX -- SALES OF WATERCRAFT -- USED IN DEEP SEA FISHING OPERATIONS -- GILL NET FISHING -- PURSE SEINE FISHING. WAC 458-20-176 (Rule 176) provides that watercraft using the fishing methods of gill netting and purse seining are not deemed to be used in commercial deep sea fishing. Where taxpayer sold watercraft to Alaskan buyers for use in Alaskan territorial waters in

gill netting and purse seining fishing operations, the sales were not subject to the higher RITE B & O tax rate which was split, effective March 1, 1983, from the Retailing B & O tax rate per RCW 82.04.2904(2), because the sold watercraft were not for use in commercial deep sea fishing.

- [4] **RULE 178 AND RCW 82.12.020:** USE TAX -- USE IN THIS STATE -- AIRPLANE -- ALSO USED IN ALASKA. The use tax is imposed on the use in this state as a consumer of any article of tangible property. Where Washington taxpayer corporation purchased an airplane in Washington without payment of sales tax, the taxable use of the airplane occurred in Washington when taxpayer exercised dominion and control over the airplane by flying it in Washington and storing it in Washington prior to subsequent actual use in Washington. The use tax is not barred by taxpayer's use of the airplane for four months annually in Alaska. Assessment of use tax sustained.

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.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: December 22, 1987

NATURE OF ACTION:

Petition for Refund of taxes paid when found to be due arising out of reclassification of taxpayer's tax classification to a higher tax rate and sales/use tax due on taxpayer's purchase of an airplane without payment of sales tax.

FACTS AND ISSUES:

Krebs, A.L.J. -- . . . (taxpayer) is engaged in the business of manufacturing and selling of fishing boats and their equipment.

The Department of Revenue examined the taxpayer's business records for the period from January 1, 1983 through September 30, 1986. As a result of this audit, the Department issued Tax Assessment No. . . . On April 7, 1987 asserting excise tax liability in the amount of \$. . . and interest due in the amount of \$. . . for a total sum of \$. . . which has been paid in full.

The taxpayer's claim for a refund involves Schedules III and IV of the audit report.

Schedule III

In Schedule III, amounts previously reported by the taxpayer for the period of March 1, 1983 through September 30, 1986 as subject to Retailing business and occupation (B & O) tax at the tax rate of .00471 were reclassified to the tax classification of Retailing Interstate Transportation Equipment (RITE) B & O tax at the higher tax rate of .00581. This resulted in \$. . . additional tax plus interest being due.

The auditor took this action because, effective March 1, 1983, the Retailing B & O classification was split into the special RITE B & O and Retailing B & O, and the RITE classification applied to sales of aircraft, locomotives, railroad cars and watercraft for use in interstate or foreign commerce including deep sea fishing vessels. The auditor found that the taxpayer had reported the "sales of commercial deep sea fishing vessels" under Retailing B & O throughout the audit period. The auditor asserted that two notices (. . .) were sent to all taxpayers notifying them of the change in taxability.

The taxpayer contends that it never received the two notices, . . . , nor was it ever previously made aware of the split in the Retailing B & O tax classification which resulted in the special RITE tax classification with a higher tax rate. The taxpayer asserts that because the law is not clear and it sells all of its boats "F.O.B. . . .", it believes that the RITE tax classification does not apply to it.

The issue is whether the taxpayer's sales of fishing boats is properly subject to the special RITE tax classification.

Schedule IV

In Schedule IV, use tax was assessed on the taxpayer's purchase of a Cessna airplane in August 1984 without payment of sales tax.

The taxpayer bought the airplane for \$15,029 from an aircraft dealer, . . . in . . . , Washington. The taxpayer, at the time of purchase in 1984, told the seller that the airplane was for use in Alaska and was not charged sales tax. The taxpayer's corporate president, . . . , has a pilot's license. The taxpayer took delivery of the airplane in The taxpayer had a mechanic-pilot inspect the airplane and fly it to Thereafter, Mr. . . . flew the airplane to Alaska.

The taxpayer uses the airplane during the months of May through August in Alaska to deliver equipment to fishing vessels and to make installations and repairs. The airplane covers a 300 mile area in Alaska and lands on the beach. In August, the airplane flies back to . . . where it is hangared, receives an annual inspection and is serviced. The airplane remains hangared until the following May when it is again flown to Alaska with equipment to engage in servicing fishing vessels. The taxpayer maintains

that use tax is not appropriate because the airplane was purchased for use in Alaska and used in Alaska.

The issue is whether, under the above-described circumstances, the airplane is properly subject to use tax.

DISCUSSION:

Schedule III

The focal issue here is whether the higher tax rate of the RITE B & O tax applies to the taxpayer's sales of fishing boats which the taxpayer reported during the period from March 1, 1983 through September 30, 1986 as subject to Retailing B & O tax.

The 1983 Legislature, convened in 2nd Extraordinary Session, enacted Laws of 1983, Chapter 3, which in pertinent part was codified as RCW 82.04.2904. This statute in pertinent part states:

(2) There is also levied and shall be collected from every person for the act or privilege of engaging in the business activity of making sales at retail which are exempt from the tax imposed under chapter 82.08 RCW by reason of . . . RCW 82.08.0262 . . . as a part of the tax imposed under RCW 82.04.250, an additional tax equal to ten percent multiplied by the tax payable on those activities under RCW 82.04.250. (Emphasis supplied.)

[1] RCW 82.08.0262 exempts from the retail sales tax imposed by RCW 82.08.020 "sales of . . . watercraft for use in conducting interstate or foreign commerce by transporting therein or therewith property and persons for hire or for use in conducting commercial deep sea fishing operations outside the territorial waters of the state."

[2] The effect of RCW 82.04.2904(2) combined with RCW 82.08.0262 and RCW 82.04.250 with respect to sales of watercraft is that persons who sell watercraft at retail for use in conducting commercial deep sea fishing operations outside Washington's territorial waters were to report B & O tax under a special retailing tax classification of RITE with a tax rate of .00581 effective March 1, 1983 until June 30, 1983, and a tax rate of .00484 effective July 1, 1983 and thereafter while the tax rate of Retailing B & O remained at .00471 and has so remained until the present time.

The Department issued notices (. . .) to all taxpayers advising of the change in tax rates effective March 1, 1983 and July 1, 1983. See Line 17 in the March 1, 1983 Notice which states:

Line 17 Retailing . . . Instrumentalities of Interstate
Commerce .00581

Also see July 1, 1983 Notice where it states:

Retailers of interstate transportation equipment [RITE]
.00484

It should be noted here that the auditor used incorrectly the March 1, 1983 rate of tax of .00581 for the entire audit period of March 1, 1983 through September 30, 1986. Correctly, the auditor should have used the tax rate of .00581 for the period from March 1, 1983 through June 30, 1983 and the tax rate of .00484 for the period from July 1, 1983 through September 30, 1986. The error was caused by somebody's failure to reprogram the computer when the tax rates were changed effective July 1, 1983.

It should also be noted here that the notices of March 1, 1983 and July 1, 1983, while making reference to "sales of . . . watercraft for use in interstate or foreign commerce" and "vessels used in interstate commerce," do not make any reference, as done in the language of RCW 82.08.0262, to "sales of . . . watercraft . . . for use in conducting commercial deep sea fishing operations . . ." Furthermore, the tax classifications as printed on the monthly tax returns for March through June 1983 state "Instrumentalities of Interstate Commerce," and subsequent monthly tax returns state "Retailing of Interstate Transportation Equipment" (RITE).

It is obvious that the two notices, even if received by the taxpayer, and the monthly tax returns did not properly inform the taxpayer that, as a business selling fishing boats, it was affected by the splitting of the Retailing B & O tax classification.

In any event, the higher tax rate of the RITE B & O tax would apply to the taxpayer only if it made sales at retail of watercraft for use in conducting deep sea fishing operations outside the territorial waters of Washington. RCW 82.04.2904 and RCW 82.08.0262.

The taxpayer constructs two types of boats which are sold to customers in Alaska. The taxpayer ships the boats to the Alaskan customers by delivering them to a pier where they are loaded on transports for delivery in Alaska. The taxpayer hired the shipping company which operates the transports.

One type of boat is 32 feet long and is used for gill netting by the Alaskan buyer for coastal fishing in Bristol Bay, Alaska. This boat operated in shallow water with a depth of two feet up to 35 feet depending on the tide. The boat drifts with the tide but never goes more than one mile offshore.

The other type of boat is a skiff, 17 to 22 feet long, which is used by the Alaskan buyer for purse seining and is anchored about one-fifth of a mile offshore where the depth is 2 to 10 feet before

the tide comes in. Nets are put in the water where it is 2 to 10 feet deep. When the tide comes in, the water is 20 feet deep.

[3] WAC 458-20-176 (Rule 176), . . . , deals with "Persons engaged in the business of conducting deep sea fishing operations outside the territorial waters of Washington." Rule 176 in pertinent part states:

. . . Nor do the terms [persons engaged in the business of conducting deep sea fishing operations outside the territorial waters of Washington] include persons who operate or purchase watercraft for kelping, purse seining, or gill netting, because such fishing methods can be legally engaged in only within the territorial waters of the state (the three mile limit). Therefore, watercraft rigged for fishing by any of these methods will be deemed for use in other than commercial deep sea fishing. (Bracketed words and emphasis supplied.)

Because the watercraft sold by the taxpayer to the Alaskan buyers were purchased for and used for purse seining or gill netting fishing methods within the territorial waters of Alaska, that is, within Alaska's three mile limit, we conclude that the taxpayer did not make "sales of watercraft . . . for use in conducting commercial deep sea fishing operations." Rule 176.

Accordingly, the taxpayer's sales of watercraft were not entitled to the retail sales tax exemption granted by RCW 82.04.0262. It follows then that the higher tax rate of the RITE B & O tax does not apply to the taxpayer's sales of watercraft. We conclude that the auditor's reclassification of the amounts reported by the taxpayer as subject to Retailing B & O tax was in error and that the amounts were incorrectly subjected to the RITE B & O tax which has a higher tax rate.

Schedule IV

The issue here is whether the taxpayer's purchase of an airplane in Washington without payment of sales tax is subject to use tax. The airplane is hangared in Washington most of the year and used in Alaska during the months of May through August.

[4] The use tax is imposed on persons using tangible personal property in this state which they have purchased at retail without paying sales tax. RCW 82.12.020. Because of the complementary nature of the sales tax and use tax, where tangible personal property, such as the airplane in this case, is purchased without payment of the sales tax, the buyer who uses the property in this state becomes liable for use tax (deferred sales tax). WAC 458-20-178 (Rule 178). The same rates of tax apply whether use tax or sales tax is assessed.

RCW 82.12.010 contains the following definitions:

"Use," "used," "using," or "put to use" shall have their ordinary meaning, and shall mean 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, or any other act preparatory to subsequent actual use or consumption within this state; . . .

In this case, the airplane was used by the taxpayer in Washington when it took delivery from the seller in . . . and was flown to its base in The airplane was again used in Washington when it flew on its way from . . . to Alaska. Under the statute any use of the airplane in Washington would subject it to use tax. Use is so broadly defined in the statute as to include the taking or assuming "dominion or control" over the airplane and includes "storage, withdrawal from storage . . . preparatory to subsequent actual use" of the airplane within this state. That is what, in this case, actually occurred in this state. The use tax is not barred by the taxpayer's other use of the airplane for four months annually in Alaska.

Furthermore, the seller of the airplane should have correctly collected the sales tax from the taxpayer-buyer. Under sales tax statute RCW 82.08.050, the Department of Revenue may proceed directly against the taxpayer-buyer for collection of the sales tax (same amount as the use tax) where it has failed to pay sales tax to the seller.

For the reasons stated and the law set forth, we conclude that the assessment of use tax was proper.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part as indicated below.

Schedule III. The taxpayer's petition is granted. The amounts reported as subject to Retailing B & O tax were incorrectly reclassified to the RITE B & O tax which has a higher tax rate. The taxpayer is entitled to a refund of the tax and interest paid resulting from the reclassification plus statutory refund interest.

Schedule IV. The taxpayer's petition is denied.

This matter is being referred to the Department's Audit Section for computation of the amount of the refund including applicable interest in line with the holding in this Determination and authorization of the issuance of the appropriate refund to the taxpayer.

DATED this 8th day of February 1988.