BEFORE THE BOARD OF TAX APPEALS
STATE OF WASHINGTON

DAVID F. WOMSLEY dba WOMSLEY LOGGING COMPANY,	)	
Appellant,	)	Docket No. 36932
v.	)	Re: Excise Tax Appeal
STATE OF WASHINGTON DEPARTMENT OF REVENUE,	)	FINAL DECISION
Respondent.	)	

This matter came before the Board of Tax Appeals (Board) at an informal hearing on December 11, 1989, appealing the decision of the Department of Revenue (Department) holding the appellant, David F. Womsley dba Womsley Logging Co., liable for retail sales tax and business and occupation tax arising out of the operation of the appellant's business. David F. Womsley, owner, and John C. Bomgardner, C.P.A., appeared for the appellant. Mark Pree, Administrative Law Judge, appeared for the Department.

FACTS AND CONTENTIONS

The appellant has operated a contract logging business since the late 1970s in North Bend, Washington. Originally operated as a sole proprietorship, the business was incorporated in 1984 under the name Womsley Logging, Inc. Mr. Womsley is the president of the corporation and its sole stockholder. He and his wife serve as its only directors. Mr. Womsley receives a salary of $1,000 per month to serve as the company's president.

At the time of incorporation, Mr. Womsley owned several items of logging equipment, a computer, and vehicles used in the business. This equipment was leased to the corporation pursuant to a written lease. Under the terms of the lease, the corporation had the right to possess and use the equipment. The corporation was responsible for maintaining and insuring it. The corporation bore the risk of loss of the equipment. Mr. Womsley retained the right to inspect the equipment and to take any deductions, credits (e.g., Investment Tax Credit), or other benefits in respect to ownership of the equipment under the Internal Revenue Code.

The corporation was responsible for any fees, fines or taxes relating to the equipment.

In the day-to-day operation of the business, Mr. Womsley himself operated most of the equipment most of the time. He exercised direct supervision and control of how and where the vehicles and equipment would be driven and operated. He selected and designated the individual employees of the corporation who operated the equipment in his absence. He himself performed most of the repair and maintenance work on the equipment. When a mechanic or expensive repair part was required, the corporation paid the bill.

When not in use in logging operations, the vehicles and equipment were stored in buildings on Mr. Womsley's homestead. The vehicles and equipment were, in fact, stored more days than they were in use.

In addition to his salary as company president, the corporation paid Mr. Womsley $5,000 per month rent for the equipment and vehicles, whether in use or not. Although nothing in the written lease would prevent Mr. Womsley from using the equipment for business unrelated to the logging business, in fact, Mr. Womsley has never so used the equipment other than for minor land clearing on his own property.

The Department audited the appellant's business for the period January 1, 1984 through June 30, 1988. Upon discovering that Mr. Womsley reported the $5,000 per month lease payments as rental income on his federal income tax returns, the Department assessed retail sales tax and retailing business and occupation taxes against Mr. Womsley as lessor/owner of the equipment in the amount of $21,928. The Department contends that the lease between Mr. Womsley as owner of the equipment and Womsley Logging, Inc. is a true lease of equipment without operator and thus is subject to retail sales tax pursuant to RCW 82.04.050, which defines "retail sale" to include renting or leasing of tangible personal property to consumers.

Mr. Womsley contends that the transaction is not a true lease, but rather involves compensation to him as owner/operator of the equipment. Claiming that he has retained dominion and control over the equipment and vehicles at all times, Mr. Womsley contends that under WAC 458-20-211 (Rule 211) he has not relinquished sufficient control over the property to give rise to a true lease.

ANALYSIS AND CONCLUSIONS

The leasing of tangible personal property is defined as a retail sale and is therefore subject to the retail sales tax. RCW 82.04.050; Black v. State of Washington, 67 Wn.2d 97, 406 P.2d 761(1965). A lease is a "contract whereby one party gives to another the right to the use and possession of property for a specified time and, ordinarily, for fixed payments." Gandy v. State of Washington, 57 Wn.2d 690, 694, 359 P.2d 302 (1961). Here, the written agreement between Mr. Womsley and Womsley Logging, Inc., on its face, gives the corporation the right to use and possession of the equipment and vehicles for a specified period of time and for fixed payments of $5,000 per month. The agreement is clearly a lease and therefore payments ordinarily would be subject to the retail sales tax.

Mr. Womsley attempts to escape the sales tax consequences of his agreement by arguing: (1) he has not relinquished use and possession of the equipment; (2) the lease document should be disregarded, and (3) his characterization of the payments from the corporation as "rent" for federal income tax purposes is not inconsistent with his position that the agreement is not a lease for state sales tax purposes.

If a lessor/owner retains control over the "leased" equipment, a "true lease" (i.e., a taxable lease) is not created. WAC 458-20-211 (Rule 211) sets forth the circumstances differentiating between a true lease and other types of agreements common in the business world today. Rule 211 provides, in pertinent part:

> (3) A true lease, rental, or bailment of personal property does not arise unless the lessee or bailee, or employees or independent operators hired by the lessee or bailee actually takes possession of the property and exercises dominion and control over it. Where the owner of the equip-ment or the owner's employees or agents maintain dominion and control over the personal property and actually operate it, the owner has not generally relinquished sufficient control over the property to give rise to a true lease, rental, or bailment of the property.
> (4) RCW 82.04.050 excludes from the defini-tion "retail sale" any purchases for the purpose of resale, "as tangible personal property." Also, under this statutory definition, the term "retail sale" includes the renting or leasing of tangible personal property to consumers. However, equipment

which is operated by the owner or an employee of the owner is considered to be resold, rented, or leased only under the following, precise circumstances:

(a) The property consists of construction equipment;

(b) The agreement between the parties is designated as an outright lease or rental, without reservations; and,

(c) The customer acquires the right of possession, dominion, and control of the equipment, even to the exclusion of the lessor.

(5) The third requirement above is a factual question and the burden of proof is upon the owner/operator of the equipment to establish that the degree of control has been relinquished necessary to constitute a lessor-lessee relationship. Weight will be given to such factors as who has physical, operating control of the equipment; who is responsible for its maintenance, fueling, repair, storage, insurance (risk of loss or damage), safety and security of operation, and whether the operator is a loaned servant. If control of these factors is left with the owner/operator, then as a matter of fact, there has not been a relinquishing of control of the equipment to the degree necessary to create a lessor-lessee relationship. This is true, even though the customer exercises some constructive control over such matters as when and where the equipment is used in connection with the construction work being performed, i.e., the contractor controls the job site.

(6) Thus, the terms leasing, rental, or bail-ment do not include any arrangements pursuant to which the owner of the equipment reserves dominion and control of the equipment and either operates the equipment or property or provides an employee operator, whether or not such employee operator works under the general supervision or control of the customer.

Pursuant to Rule 211, the issue, in the case of construction equipment,[1] turns on whether the corporation

[1] The Board assumes, for purposes of this analysis, that logging equipment is "construction equipment" within the meaning of Rule 211. This issue was not briefed by the

acquired the right of possession, dominion, and control of the equipment, even to the exclusion of the lessor. See, also, Duncan Crane Service v. Department of Revenue, 44 Wn.App. 684, 723 P.2d 480 (1986).

The evidence shows that the equipment and vehicles were operated by Mr. Womsley and employees of the corporation at all times. Although Mr. Womsley claims that he was operating the equipment in his personal--as opposed to corporate-capacity, there is no evidence to show that he operated the equipment for any purpose other than in the furtherance of the business of the corporation. He received no payment from the corporation other than his salary as a corporate officer and the rental on the equipment. He is not registered with the Department of Revenue as an independent contractor.

The corporation was responsible for maintenance, fueling, repair, insurance, and safety and security of the operation. Although Mr. Womsley himself performed much of the repair work for no stated compensation, the corporation would pay for expensive repair parts. The only factor which Mr. Womsley arguably performed in his personal capacity as owner/lessor was the storage of the equipment on his property when not in use by the corporation. This factor, standing alone, is insufficient to overcome the overwhelming evidence showing that the corporation, including Mr. Womsley acting on his capacity as corporate president, acquired the exclusive possession, use, and control of the equipment and vehicles.

Mr. Womsley argues that he could have used the equipment at any time in his personal capacity because there is nothing in the lease agreement to prevent him from doing so. True, the lease agreement is silent as to the lessor's rights to use the equipment, but that does not mean that Mr. Womsley has not relinquished possession and control to the corporation. Indeed, using the equipment for his own business purposes would be inconsistent with his duties as corporate president. The Board, particularly when the evidence indicates that Mr. Womsley, in fact, never used the equipment for his own business purposes (except for some minor brush clearing on his own property), will not attribute questionable actions or motives to a party in the absence of evidence thereof.

In sum, the evidence clearly shows that the equipment and vehicles were operated by the corporation, and not the owner/lessor. The corporation acquired the right of posses-

---

parties and we need not decide it in order to reach our decision on the merits.

sion, dominion, and control over the equipment and vehicles. Pursuant to RCW 82.04.050 and WAC 458-20-211, the arrangement between Mr. Womsley and Womsley Logging, Inc. was a true lease.

Mr. Womsley further argues that the lease document itself should be disregarded because it was a "canned" lease form which did not reflect the substance of the transaction. This argument is without merit. The lease form was a detailed, specific document drafted by Mr. Womsley's attorney pursuant to his instructions. It is not a "canned" lease. Furthermore, as discussed above, it reflects the substance of the transaction--a true lease granting the corporation possession and control of the leased equipment and vehicles. Finally, we agree with the Department's argument that a "dangerous precedent would be set if self-serving oral assertions made after the fact were given more weight in factual considerations than objective evidence." The taxpayer, presumably with competent legal and accounting advice, elected a form of business, signed agreements, and, for the most part, followed them. We can see no reason why Mr. Womsley should not be bound by the terms of the agreements.

The Department also argues that Mr. Womsley's treatment of the payments from the corporation as "rental payments" for federal income tax purposes shows that the transaction between Mr. Womsley and the corporation was a true lease. The Department asserts that a taxpayer cannot take inconsistent positions for federal and state tax purposes. While there is merit in the Department's position, we regard Mr. Womsley's federal tax position as merely cumulative evidence showing the nature of the transaction. Mr. Womsley may be correct in asserting that treating the payments as "rental income" for federal tax purposes is consistent with his view that the transaction is not a "true lease" for state tax purposes. It is also true, however, that treating the payments as "rental income" is consistent with the Department's view of the transaction as a "true lease." Because the other evidence overwhelmingly shows the transaction to be a true lease, we are inclined to view Mr. Womsley's federal tax position as evidence merely tending to show--as opposed to conclusively demonstrating--the nature of the transaction.

DECISION

Based on the foregoing analysis and conclusions, Determination No. 89-57A, issued by the Department of Revenue in this matter, is sustained in its entirety.

DATED this _____ day of _____, 1990.

BOARD OF TAX APPEALS

_____

LUCILLE CARLSON, Chair

_____

RICHARD A. VIRANT, Vice Chair

_____

MATTHEW J. COYLE, Member

* * * * *

A timely Petition for Reconsideration may be filed to this Final Decision pursuant to WAC 456-09-955, a copy of which was provided to you earlier.