

Cite as Det. No. 01-198, 23 WTD 257 (2004)

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. 01-198
)	
...)	Unregistered
)	Use Tax Assessment
)	Docket No. . . .

- [1] RULE 178; RCW 82.12.0251: USE TAX -- NONRESIDENT -- VESSEL BASED IN WASHINGTON. The exemption from use tax set out in RCW 82.12.0251 does not apply to the use by a nonresident who has based its yacht in Washington and used it here for pleasure and business purposes.
- [2] RULE 178; RCW 82.12.0251: USE TAX -- NONRESIDENT -- USE IN WASHINGTON FOR NONTRANSITORY BUSINESS ACTIVITY. The exemption from use tax set out in RCW 82.12.0251 does not apply to a nonresident's use of a vessel in Washington for non-transitory business activity.
- [3] RULE 178, RULE 238; RCW 82.12.0251, RCW 88.02.030: USE TAX -- NONRESIDENT -- VESSEL PRESENT FOR REPAIR -- REQUIREMENT THAT BE COVERED BY NONRESIDENT REPAIR AFFIDAVIT. Effective January 6, 1996, the Department has presumed that usage of an article of tangible personal property within the state by a nonresident which exceeds 60 days in any 12-month period is more than temporary usage and use tax is due, unless the property is present for repair and is exempt from the state's vessel registration requirements under RCW 88.02.030(5), which exempts vessels present more than 60 days if they are covered by a nonresident repair affidavit.
- [4] RULE 178: USE TAX -- VALIDITY OF ASSESSMENT THAT INCORRECTLY STATES DATE OF FIRST USE. Proof that first taxable use did not occur on the exact date stated in the use tax assessment does not necessarily invalidate the assessment. An assessment of use tax is valid so long as the evidence establishes a date of first use within the statute of limitations.

- [5] MISC.: USE TAX -- REASONABLE NOTICE -- VALIDITY OF ASSESSMENT THAT MISPELLS TAXPAYER'S NAME. If an assessment reasonably provides notice to the correct taxpayer, an error in the spelling of the taxpayer's name does not invalidate the assessment.

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.

NATURE OF ACTION:

Owner of a large motor yacht which is registered outside the United States protests assessment of use tax, contending owner is a nonresident who had the yacht in Washington only temporarily for repairs and sea tests related thereto.¹

FACTS:

Prusia, A.L.J. -- This is an appeal of use tax assessed against . . . (hereinafter [Owner]) on use of the yacht . . . (hereinafter "Yacht") in Washington waters in 1995. The principal issue is whether the use of Yacht in Washington falls under RCW 82.12.0251. That statute exempts from use tax the use of an article brought into the state by a nonresident for his or her use or enjoyment while temporarily in the state, unless the property is used in conducting a non-transitory business activity within the state.

The Compliance Division of the Department of Revenue ("Department") issued the assessment on December 28, 1999. The amount of use tax assessed is \$. . . , on a value of \$ That value figure includes the vessel "and appurtenant watercraft, aircraft, electronics, gear." The total amount of the assessment, including a delinquency penalty and interest to January 31, 2000, was \$ Additional interest has accrued since then.

A cover letter to [Owner], accompanying the assessment notice, stated the use tax became due as of June 28, 1995. The letter asserted use of Yacht was subject to use tax because: Yacht was in Washington waters without benefit of a Nonresident Out-of-State Vessel Repair Affidavit after June 28, 1995; Yacht was used in Washington on multiple occasions as a pleasure vessel; and, Yacht lost its status as a temporary or transient vessel, being regularly moored and dispatched from a dock in . . . , Washington, that is personally owned by [Owner's] owner.

[Owner] petitioned for correction of the assessment. The petition asserts [Owner] is a nonresident of Washington, Yacht is registered outside the United States, and [Owner] has had Yacht in Washington waters only temporarily for maintenance, repairs, refit, warranty work, and sea trials. [Owner] asserts its use of Yacht is not subject to Washington use tax under these

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

circumstances. The Compliance Division and [Owner] filed additional argument and exhibits during this appeal.

. . . . Yacht's owner, [Owner], is a [foreign] company. [Owner] had Yacht built in Washington state by an unrelated company, [Owner] took title to, and delivery of, Yacht in international waters in August 1993. Yacht has always been registered under the [foreign country] flag There are advantages to maintaining the vessel registration in the [foreign country] rather than the United States, including more favorable crewing requirements and the acceptance of the [foreign country] flag worldwide.

[Owner] is owned by . . . (hereinafter [Individual]), a Washington resident. [Management,] a Washington company also owned by [Individual], provides worldwide yacht management services for [Owner] from offices in . . . , Washington. [Management] arranges for Yacht's moorage, repair, and maintenance, and handles billing and bill paying related to Yacht.

[Individual] resides in Washington, and also has homes in . . . and . . . other locations around the world. [Individual] is a well-known international builder, designer, and operator in the boating industry. . . . [Individual] remained active in the boat industry in Washington during the 1990's. [Individual] owned an interest in [Builder A], a boat builder . . . in . . . , Washington, and . . . purchased a . . . interest in [Builder B], a boat builder located in . . . , Washington.

Yacht was developed as a concept or prototype vessel. [Individual] states in a March 9, 2001 letter to the Appeals Division (which is part of [owner's] response of that date):

[Owner] developed [Yacht] to test the concept of manufacturing yachts out of After a world wide search [Owner] decided to have . . . , a Washington Corporation, who had experience in fiberglass boat building build the vessel with these design concepts. . . .

The efforts of [Owner] proved successful. The concept and design developed by [Owner] is now being used by [Builder A], and [Builder B]. [Builder B] just launched the first major production yachts using the principles, design and testing that [Owner] provided. Major profits will be generated in the State of Washington as customers recognize yachts built with [Yacht] type systems are better products, are more cost effective to build and therefor the best yachts to purchase.

Large, fast composite boats such as [Yacht] and [Builder B]'s new . . . production yacht have not been understood well by the certification agencies such as [named agencies omitted]. [Owner] and [Builder B] through [Yacht] and [Builder B]'s production motor yacht, will be able to effectively demonstrate to these agencies that the new engineering and testing can be certified. This is a critical component in gaining customer confidence.

At hearing, [Owner] added that when [Individual] sold [a boat building business], a non-competition restriction prevented him from competing in the small boat niche. [Individual] then focused on large yachts, establishing [Owner] to built Yacht as a prototype for mass-producing

large yachts, with the intention that [Owner] would either build large yachts itself, or enter into joint ventures with others.

[Owner] itself has not commercially produced yachts based on the Yacht prototype. However, other companies in which [Individual] has had an interest ([Builder B] and [Builder A]) are already utilizing technology developed in the design and use of Yacht.²

After taking delivery of Yacht in August 1993, [Owner] took Yacht on a shakedown cruise to Alaska. In the fall of 1993, Yacht was in Washington for warranty and repair work. From December 1993 to April 1995, Yacht was on a lengthy cruise to the Caribbean and Europe. On April 28, 1995, Yacht returned to Washington waters, and since then has spent most of its time upon Washington waters. Yacht has maintained a seasonal cruise schedule, going on a summer cruise and a winter cruise most years, outside Washington. The out-of-state seasonal cruises are for the pleasure of . . . and his guests, and for design testing and evaluation. Yacht has not been used in interstate or foreign commerce. Regular maintenance and outfitting have been performed in Washington, and outside the state during extended cruises. Warranty work, major repairs, major alterations, refit work, and sea trials have been performed in Washington between cruises.

When in Washington, Yacht has spent most of the time moored at a dock/repair . . . (hereinafter "Moorage"). Moorage is owned by [Individual]. Moorage is managed by [Individual]-owned [management]. [Management] arranges to have most maintenance and repair of Yacht performed at Moorage's . . . dock.

Between April 28, 1995 and the end of 1997, [Owner] filed one 60-day Nonresident Out-of-State Vessel Repair Affidavit (hereinafter "nonresident repair affidavit"), of the type required by RCW 88.02.030, with the Department, on April 28, 1995.³ In February 2000, Taxpayer late-filed nonresident repair affidavits for all subsequent periods Yacht was in Washington.

During 1995, 1996, and 1997, Yacht went on a number of short trips from, and back to, the [Moorage] dock. These trips were for work at other facilities, and for what [Owner] describes as sea trials related to warranty, repair, and refit work. Some of the trips were entirely within Washington, but others were to, or included a stop at, the . . . , Canada, home of Yacht's designer. Yacht's logs show that Yacht docked at resort locations in the San Juan Islands, and at state parks, on several of the short voyages. . . . The logs show several arrivals and departures by persons labeled guests during short voyages. [In 1996, Yacht was used on a trip exclusively

² See [Individual's] letter quoted above. [Owner] March 9, 2000 response expands on [Individual's] letter, adding that elements of Yacht's exterior styling and details, window installation techniques, and sound level and acoustic noise-dampening techniques, were used on [Builder B's] vessels The concepts and design used in Yacht are now being used by [Builder A]. . . in its . . . footers and upcoming . . . footers.

Yacht has been the subject of numerous industry articles describing its innovative structures and techniques. . . .

³ [Owner] previously filed nonresident repair affidavits for periods in 1993.

within Washington.] [Individual] and wife were on board, as were several guests, including . . . , then owner of [Builder B]. No member of Yacht's repair facilities was on board.

...

In March 1993, before it took delivery of Yacht, [Owner], through [management], requested from the Department's Taxpayer Information and Education section (TI&E) an interpretation of Washington sales and use tax laws based upon described circumstances. Among other things, the request asked for confirmation that a foreign-owned vessel that would be in Washington only for two purposes -- to allow its builder or subcontractors to show the vessel to prospective purchasers of other vessels, and for general repair, maintenance, and warranty work -- would not be subject to use tax because of the repair activity. . . . In an April 14, 1993 response to the request, TI&E stated, with respect to presence for repairs:

Vessels in Washington waters for repairs are not considered in use during that period. An affidavit, copy enclosed, must be completed by the vessel owner for every sixty-day period the vessel is in Washington undergoing repair and maintenance. The crew may live on the vessel during the repair period. This will not be considered use unless the vessel is taken for a cruise for reasons other than testing and without someone from the repair facility on the vessel. See RCW 88.02.030(5), copy enclosed.

...

ISSUES:

1. Was Yacht in Washington only "temporarily" for purposes of qualifying for the RCW 82.12.0251 exemption for use by a nonresident while temporarily within the state?
2. Was Yacht used in conducting non-transitory business activity within the state, for purposes of the exception to RCW 82.12.0251's exemption for use while temporarily within the state?
3. If use of Yacht did not meet the requirements of the RCW 82.12.0251 exemption, when did use tax liability arise?
4. Is the value upon which the assessment is based, \$. . . , the correct value to use?
5. If use tax is properly assessed, should penalties and interest be canceled on the basis [Owner] detrimentally relied on erroneous instructions from the Department?
6. Did the Department's assessment fail to assess use tax against the correct person, and if so, does the statute of limitations now bar the Department from assessing [Owner] for the alleged taxable use of Yacht?

DISCUSSION:

The use tax is imposed on the use in this state as a consumer of any article of tangible personal property.⁴ The tax applies to all persons in this state whether a resident or nonresident, unless a statutory exemption or exception applies. Thus, use tax applies to use of watercraft in this state, whether for pleasure or for business, and whether by a resident or a nonresident, unless the use is statutorily excepted or exempt. *See*, Det. No. 87-105, 3 WTD 1 (1987).

The issue before us is whether a nonresident's [Owner] use of Yacht in Washington was exempt from the use tax.⁵

There are several exceptions or exemptions from use tax based on non-residency. The taxpayer must claim, as well as carry the burden of showing qualification for, a tax deduction, exception, or exemption. *Group Health Co-op. v. Tax Comm'n*, 72 Wn.2d 422, 433 P.2d 201 (1967).

[Owner] claims its use of Yacht is exempt under RCW 82.12.0251. That statute provides the following exemption for use by nonresidents:

The provisions of this chapter shall not apply in respect to the use of any article of tangible personal property brought into the state of Washington by a nonresident thereof for his or her use or enjoyment while temporarily within the state of Washington unless such property is used in conducting a non-transitory business activity within the state . . .

This nonresident exemption applies to temporary presence for personal use (including pleasure use), repair, and transitory business use. *See* Det. No. 87-105, 3 WTD 1 (1987). Thus, if a nonresident brings a vessel into Washington for repair or transitory business use, the nonresident

⁴ RCW 82.12.020(1) provides: "There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a consumer (a) Any article of tangible personal property purchased at retail, or acquired by lease, gift, repossession or bailment . . ."

The term "consumer" is defined in RCW 82.04.190. It means "[A]ny person who purchases, acquires, owns, holds, or uses any article of tangible personal property irrespective of the nature of the person's business . . ."

⁵ In its October 3, 2000 response, the Compliance Division argued that the use in the present case was by a Washington resident, [Individual], that [Individual] had the vessel moored at his dock in Washington and used it in Washington only for pleasure, and there are no exemptions for such use. The Compliance Division argued the facts show [Owner] is simply a corporate shell that exists only to own a yacht for [Individual's] use and pleasure, and [Owner] should be disregarded. In response, [Owner] argued at length that it is a bona fide entity that has followed corporate formalities, and it has legitimate business purposes involving the research and development of technology for use in the shipbuilding industry. [Owner] submitted numerous exhibits in support of its position. For purposes of this determination, we find [Owner] is a bona fide corporate entity. The evidence before us establishes that [Individual] was active in the Washington boat building industry during the 1990's, and [Owner] was one of several businesses he formed or bought into to pursue his business plans. [Owner] does not appear to be a sham. The foreign ownership and registration of Yacht appear to have legitimate business purposes. The evidence establishes Yacht is an experimental craft developed and modified in pursuance of [Individual's] business plans.

may also use the vessel for pleasure use or other personal use so long as the vessel is only “temporarily within the state.”

“Temporarily within the state”

Chapter 82.12 does not define the phrase “temporarily within the state.” Effective January 6, 1996, the Department amended WAC 458-20-238 (Rule 238) to include provisions that specifically address when use tax applies to the use of watercraft by a nonresident.⁶ Subsection 6 of the amended rule provided:⁷

(6) **Use tax.** Persons using watercraft on Washington waters are generally subject to the use tax if Washington retail sales tax has not been paid, unless such use is specifically exempted by law from the use tax.

...

(b) Watercraft brought into this state by nonresidents for their use and enjoyment while temporarily within this state are exempt from the use tax. However, it will be presumed that usage within Washington which exceeds more than sixty days in any twelve-month period is more than temporary usage and use tax is due.

(c) Watercraft temporarily brought into this state by nonresidents for repair are exempt from the use tax if removed from this state within sixty days. If repair cannot be made within this period, the exemption may be extended by completing and filing with this department an affidavit verifying the vessel is located upon the waters of this state exclusively for repair, reconstruction or testing. This affidavit, titled "Nonresident Out-of-State Vessel Repair Affidavit," is effective for sixty days. If additional extensions of the exemption period are needed, additional affidavits may be completed. The affidavit should be sent to the department of revenue - compliance division. This affidavit is the affidavit which is required under RCW 88.02.030, and failure to complete this affidavit can result in requiring that the vessel be registered in Washington.

Thus, effective January 6, 1996, the Department has presumed that usage within Washington by a nonresident which exceeds 60 days in any 12-month period is more than temporary usage and use tax is due, unless the vessel is present for repair and is exempt from the state’s vessel registration requirements under RCW 88.02.030(5), which exempts vessels present more than 60 days if they are covered by a nonresident repair affidavit.⁸

⁶ Prior to January 6, 1996, Rule 238 contained only the following provision addressing use tax: “The use tax will be applicable to the use by a nonresident of watercraft registered or documented with the Coast Guard or with the state of principal use when the watercraft was purchased from a Washington vendor and is first used within this state for more than forty-five days.”

⁷ Rule 238 was again amended effective December 2, 2000.

⁸ RCW 88.02.030(5) exempts from Washington vessel registration requirements:

The Compliance Division asserts use tax became due on June 28, 1995, the day after [Owner] 60-day nonresident repair affidavit expired. It relies upon the repair affidavit requirement in the version of Rule 238(6) cited above. We do not believe liability can be based on failure to comply with that rule provision. That version of Rule 238(6) did not become effective until January 1996. The prior version of Rule 238 did not include a nonresident repair affidavit requirement. The presumption, and the exception to the presumption, set out in the 1996 version of Rule 238(6)(b) and (c), do not apply to [Owner] usage in 1995.⁹ If we conclude that Yacht was not “temporarily within the state” prior to January 6, 1996, such conclusion must be based on an analysis other than the 1996 version of Rule 238. Of course, whether Yacht was in the state for “non-transitory business use” in 1995 also remains an issue.

Liability for Use Tax Under Pre-1996 Statutes and Rules

Was Yacht only “temporarily within the state” in 1995, under law in effect in 1995? In Det. No. 87-105, the Department held that where a nonresident foreign corporation owned a yacht that was based in Washington for three years and used as a residence by its two sole stockholders, a married couple, and used by one of them as president of the corporation to manage the corporate business affairs, the corporate owner of the yacht was subject to use tax liability because the yacht was never “temporarily” in Washington. Det. No. 87-105 examined the uses made of the vessel during a lengthy period after the vessel first arrived in Washington to determine the character of the use for the entire period.

[1] A similar lengthy period and use is present here. In the present case, between April 28, 1995 and December 17, 1997, a period of more than two and one-half years, Yacht was in Washington waters the greater part of the time. We find that during the entire period, Yacht was based at . . . Washington. The [Moorage] dock is where most maintenance and repair work was performed, and where Yacht was moored when not undergoing repair and maintenance. When the vessel went to other repair facilities, went on sea trials, went on short cruises in [Washington] or to [Canada], and went on extended cruises, it departed from the [Moorage] dock, and returned to the [Moorage] dock.

(5) Vessels owned by a nonresident if the vessel is located upon the waters of this state exclusively for repairs, alteration, or reconstruction, or any testing related to the repair, alteration, or reconstruction conducted in this state if an employee of the repair, alteration, or construction facility is on board the vessel during any testing: PROVIDED, That any vessel owned by a nonresident is located upon the waters of this state exclusively for repairs, alteration, reconstruction, or testing for a period longer than sixty days, that the nonresident shall file an affidavit with the department of revenue verifying the vessel is located upon the waters of this state for repair, alteration, reconstruction, or testing and shall continue to file such affidavit every sixty days thereafter, while the vessel is located upon the waters of this state exclusively for repairs, alteration, reconstruction, or testing . . .

⁹ We note the Department’s practice even before the amendment of Rule 238 was to regard vessels of nonresidents that were in the state, ostensibly for repair, for a continuous period longer than 60 days without complying with the requirements of RCW 88.02.030(5), as subject to use tax. See Appendix C attached hereto.

The uses of Yacht during that lengthy period were consistent with our finding Yacht was based in [Washington], and not here temporarily. The uses clearly are incompatible with [Owner] assertion Yacht was here only temporarily for repairs, warranty work, and maintenance. During the April 28, 1995 to December 17, 1997 period, Yacht was extensively used for business and personal purposes by [Owner] and its president, in Washington. [Owner]'s use of Yacht as a prototype for possible future mass production was carried out during this period, in Washington. Entire systems were removed, redesigned, tested, and evaluated in Washington. [Owner] demonstrated Yacht's prototype features (innovations) to at least two Washington boat manufacturers that [Owner] subsequently allowed to use those concepts (manufacturers in which [Owner] owner invested). [Owner] used Yacht to travel to . . . , Canada, to consult with Yacht's designer regarding modifications to the prototype systems. This business use is further discussed within, in considering whether Yacht was "used in conducting a non-transitory business activity within the state."

[Owner] also allowed extensive pleasure use of Yacht over the entire period. We believe the use of Yacht [on the 1996 trip within Washington] must be considered a pleasure use, not merely a "sea trial" to test repairs. Several guests of [Owner]'s owner, including married couples, were on board during the [trip]. . . . Owner entertained lunch guests, two married couples. The length of layovers at state parks and resorts during alleged sea trials, when [Owner's] owner was aboard, also indicates that the voyages had a pleasure purpose, and were not simply for testing repairs and vessel systems. This pleasure component goes beyond the incidental pleasure aspect discussed in Det. No. 92-144ER, 13 WTD 68 (1993). Of course, a nonresident can bring a yacht into Washington temporarily for pleasure use without incurring use tax liability. However, how a vessel is used in the state is relevant to determining whether it is here temporarily. When a vessel ostensibly in the state for repair remains based in the state for years, extensive use for pleasure purposes by Washington residents is not consistent with the claim the vessel is only temporarily present.

Based on the fact Yacht was based in Washington during the period April 28, 1995 to December 17, 1997, and was throughout that period used in Washington for business purposes and pleasure purposes, we conclude Yacht was not "temporarily" in Washington between April 28, 1995 and December 17, 1997.

Used in conducting a non-transitory business activity

[2] Moreover, we conclude the business use during that period was a disqualifying use under the "used in conducting a non-transitory business activity within the state of Washington" provision in RCW 82.12.0251. Rule 178(7) defines the term "non-transitory business activity" as follows:

The term "non-transitory business activity" means and includes the business of extracting, manufacturing, selling tangible and intangible property, printing, publishing, and performing contracts for the constructing or improving of real or personal property. It does not include the business of conducting a circus or other form of amusement when the personnel and property of such business regularly moves from one state to another,

nor does it include casual or incidental business done by a nonresident lawyer, doctor or accountant.

[Owner] asserts, and the evidence shows, that [Individual] is a well-known international builder, designer, and operator in the boating industry. [Individual] formed [Owner], and [Owner] built Yacht, for business reasons. [Individual] intended to get back into the yacht building business after he sold . . . , and formed [Owner] to develop a prototype large ocean-going yacht and eventually go into the commercial manufacture of such yachts, either itself or in partnership with other builders. Yacht is the prototype vessel. The new designs and construction techniques developed using Yacht have not been put into production by [Owner], but have been put into production by other . . . boat builders that are affiliated with [Owner] by common ownership.¹⁰

Yacht was in Washington in 1995 through 1997 for continued modification as a prototype and to be demonstrated to and evaluated by affiliated manufacturers and potential affiliates located in Washington.¹¹ The period beginning September 25, 1995 was a period in which extensive redesign and evaluation and demonstration of redesigned systems in Washington is shown in the exhibits provided by [Owner]. That prototype and demonstration activity within Washington was business activity,¹² and was not transitory. It was continuous over a long period of time.

¹⁰ [Owner's] March 26, 1993 interpretation request to TI&E stated [Owner's] business was developing new designs and construction techniques for building motor yachts, stated [Owner] anticipated that part of the development process would include a joint venture with a Washington company to develop and sell products, and stated part of the research and development stage of the joint venture would include the building of a vessel to evaluate and help refine the design techniques. . . . He stated the principles, design and testing that [Owner] provided using Yacht are now being used by two Washington boat builders, [Builder A], and [Builder B], the former a manufacturer in which [Individual] owned an interest . . . [Owner's] March 9, 2001 response states that [Owner] was formed to research and develop light-weight construction techniques [pp. 37, 50], that Yacht has been used as a prototype by [Builder B], for two production vessels. The response states that [Individual] acquired an interest in [Builder A] in 1994 [pg. 100] and acquired an ownership interest and active role in [Builder B] in 1996 [pg. 101].

¹¹ Yacht was used to transport [Owner's] owner and other personnel to Canada to consult with Yacht's designer in early May 1995. Significant and comprehensive changes were made in several of Yacht's systems during the fall of 1995 and also in later periods. [Individual] was frequently on board Yacht during sea trials conducted in Washington during 1995 and 1996, to evaluate performance, new systems, and repairs. When [Individual] ran sea trials in [Washington] during the period May 26 through May 29, 1995, he already owned an interest in [Builder A], which subsequently put into production the concepts developed using Yacht. Ex. 120, pp. 22-23, states that the extensive sea trials conducted in Washington from December 28, 1995 to January 4, 1996, were to evaluate overhauled systems and redesigned power plants, and that meetings were held with the designers for comments regarding system alterations during the sea trials. The March 9, 2001 response states that another owner of [Builder B] was on board during the May 1996 voyage . . . , "to evaluate performance." Ex. 120, pp. 23-24 and 34-35, shows that the voyage occurred toward the end of a period in which several of Yacht's systems were redesigned and altered. At about that time, [Individual] purchased an interest in [Builder B], and [Builder B] also put into production the concepts developed using Yacht.

¹² Use tax applies to use by persons who manufacture boats as prototypes for the development of a new or improved product. See RCW 82.12.010(e) and WAC 458-20-178(14) (Rule 178), which define the measure of the tax on such use. The tax is no less applicable to persons who have others manufacture prototypes for them.

Liability for Use Tax Under Version of Rule 238 Effective 1-6-96 to 12-1-2000

As discussed above, effective January 6, 1996, Rule 238 stated the Department would presume that usage within Washington that exceeded 60 days in any 12-month period was more than temporary usage and use tax was due. The rule specifically provided an exception to that presumption for vessels brought into the state for repair by nonresidents, if presence after 60 days was covered by the nonresident repair affidavit required under RCW 88.02.030(5). Examples (a) and (d) in the current Rule 238 make it clear that the presumption is avoided for more than 60 days if either subsection (5) or subsection (3) of RCW 88.02.030 is complied with. Subsection (3) exempts from registration foreign-registered vessels present longer than 60 days if they have obtained a specified identification document from the Department of Licensing.

[Owner] claims Yacht was in Washington exclusively for repairs, yet Yacht's presence after 60 days was not continuously under a nonresident repair affidavit. Therefore, [Owner] cannot claim the benefit of the exception to the Rule 238 presumption available to nonresidents who comply with RCW 88.02.030(5). [Owner] argues that a vessel owner can cure the defect by late-filing affidavits. We disagree. RCW 88.02.030(5) expressly requires the affidavits to be filed every sixty days "while" the vessel is in Washington for repair.¹³ [Owner] has argued subsection (3), rather than subsection (5), of RCW 88.02.030 applies to it, but has never demonstrated it complied with the requirements of subsection (3).¹⁴

Applying the 1996 version of Rule 238 to [Owner]'s use of Yacht, usage in Washington exceeded 60 days in the 12-month period beginning April 28, 1995, that usage is presumed to be more than temporary, and use tax is due.

[3] As [Owner] argues, presence for more than 60 days during any 12-month period without complying with RCW 88.02.030's registration requirements merely creates a presumption that the usage is "more than temporary usage." The presumption can be rebutted. We agree.

¹³ Another reason [Owner] cannot claim the benefit of subsection (5) is that there was not always an employee of the repair facility on board during testing.

¹⁴ [Owner] has asserted Yacht was exempt from vessel registration requirements under subsection (3) because it is registered and numbered under the laws of a country other than the United States. Subsection (3) requires more than that. It requires that if a foreign-registered vessel is in this state beyond 60 days, it must obtain an identification document from the Department of Licensing in order to remain exempt from registration requirements. [In Det. No. 01-198R, the Department corrected this footnote, as follows: The petition for reconsideration correctly points out an error in [this] footnote of the Determination. However, the error does not benefit the taxpayer. [This] footnote is part of dictum that discusses whether the taxpayer would have been liable for use tax even under the standards in the version of Rule 238 effective January 6, 1996. Unfortunately, both the body of the Determination and [this] footnote looked at the current versions of RCW 88.02.030 and Rule 238, rather than the versions in effect in 1996-97, in discussing when the Department presumes that usage of watercraft brought into the state by nonresidents is more than temporary. To be correct, the Determination should simply have stated that the presumption was avoided only if a nonresident brought the watercraft into the state for repair, and presence beyond 60 days was under a "Nonresident Out-of-State Vessel Repair Affidavit" required by RCW 88.02.030(5). The Determination's conclusion that the taxpayer would have been liable for use tax even under the 1996 version of Rule 238 remains correct.]

However, [Owner] has not rebutted the presumption. As we discussed in the previous section, the evidence establishes that Yacht was not in Washington temporarily between April 28, 1995 and December 1997. The evidence also establishes that [Owner] was using Yacht “in conducting a non-transitory business activity within the state of Washington” beginning at least as early as May 1995. This business use incurred use tax liability.

Thus, regardless of whether we apply pre-1996 standards or the interpretation embodied in the 1996 version of Rule 238, [Owner’s] use of Yacht in 1995 was taxable.

When did use tax liability arise?

Use tax liability arises when the property is first put to non-exempt use in this state. Rule 178(3). Fixing a precise date is necessary, because the value upon which the use tax is levied is the value at the time of first use. *See*, Det. No. 90-298, 11 WTD 67 (1990). A precise date also is necessary, because interest on the taxes due does not begin to accrue until the due date of the tax, which generally is the 15th of the month following the date liability arises.

The use tax assessment designated June 28, 1995, as the date use tax became due. That date is incorrect even under the basis the Compliance Division’s used (that Yacht’s 60-day nonresident repair affidavit had expired, and Yacht was still here). [Owner] has shown Yacht was not in Washington on June 28, 1995; it had left for Canada on June 18, 1995, and remained outside Washington for several months (See Appendix A).

We find use tax liability arose on April 28, 1995. Events subsequent to that date show that beginning that date [Owner] based Yacht in Washington, and had Yacht in Washington for business and pleasure purposes, not just for warranty work and repairs. We disagree with Taxpayer’s contention that the Department cannot look at events after the date of alleged first taxable use in determining whether the use was taxable. Unless the nonresident owner admits it is bringing the property into the state for more than a temporary period, it is not possible to determine whether the property is in the state only temporarily without considering events subsequent to the date the article is first brought into the state. Similarly, it is not possible to determine the purposes for which the property will be used without considering actual use after arrival.

[4] It is not necessary that the Department prove a first taxable use occurred on the specific date specified in the assessment, and an assessment of use tax is valid so long as the evidence establishes the date of first use was within the statute of limitations. A different date might affect the taxable value of the item. If correcting the date results in a lower value, the assessment must be reduced to reflect the lower value.

...

Is the value upon which the assessment is based, \$. . . , the correct value?

RCW 82.12.010(1)(a) provides, in pertinent part:

“Value of the article used” shall mean the consideration . . . paid or given or contracted to be paid or given by the purchaser to the seller In case the article used is . . . sold under conditions wherein the purchase price does not represent the true value thereof, the value of the article used shall be determined as nearly as possible according to the retail selling price at place of use of similar products of like quality and character

In addressing the measure of the use tax when there is a significant gap in time between purchase and first use, the Department stated, in Det. No. 90-298, 11 WTD 67 (1990):

When equipment is acquired and used outside the state for an extended period of time and is then subsequently brought into and used inside the state of Washington . . . the statute provides that the value upon which use tax is to be computed is the retail selling price at place of use of similar products of like quality and character. The Department has consistently interpreted this as meaning the fair market value of the article at the time and location of first use within the state.

First nonexempt use in Washington occurred nearly two years after [Owner] purchased Yacht, and Yacht had been used on a long cruise before arriving in Washington in April 1995. The gap in time and substantial use invoke the principle set out in Det. No. 90-298, 11 WTD 67 (1990). It is not apparent from the assessment how the Compliance Division arrived at a value of \$ The file will be remanded to the Compliance Division to give [Owner] an opportunity to establish that the fair market value of Yacht at the time and location of first taxable use within the state was less than \$¹⁵

A second valuation issue is [Owner]'s assertion that the assessment is in error in including aircraft as an appurtenance of Yacht. The petition states [Owner] leases a helicopter which typically accompanies Yacht, but [Owner] does not own the helicopter or any other aircraft. It is not apparent whether the Compliance Division had an opportunity to investigate this assertion prior to issuing the assessment. This issue is remanded to the Compliance Division to give [Owner] an opportunity to verify that Yacht had no appurtenant aircraft on April 28, 1995.

Should the penalty and interest be canceled on the basis [Owner] detrimentally relied on erroneous Department instructions?

[Owner's] petition asserts the Department should cancel the assessed penalties and interest because the delinquency, if there was a delinquency, was due to erroneous written information or instructions given [Owner] by a Department employee. [Owner] argues the TI&E letter of April 14, 1993 (. . .) advised it that vessels in Washington waters for repairs are not considered in use

¹⁵ Even if the Compliance Division based the \$. . . figure on fair market value, the correction of the date of first use from June 28 to April 28, 1995, requires that [Owner] have an opportunity to show that the value of Yacht on April 28, 1995, was less than the \$. . . value specified in the assessment notice.

during that period, and failed to say that it is the filing of nonresident repair affidavits which determines whether vessels are in Washington for repairs. [Owner] states it would not have had the extensive warranty work, repairs, refit, and sea trials done in Washington if it had been instructed repair periods would not be excluded from use if repair affidavits were not on file.

We find no merit in the assertion and argument that penalties and interest should be canceled. First, the 1993 TI&E letter did advise [Owner] that it must file nonresident repair affidavits (. . .). Second, this determination's basis for sustaining the assessment is not the failure to have nonresident repair affidavits on file, but rather the fact Yacht was not "temporarily" in Washington beginning April 28, 1995, and was used in conducting a nontransitory business activity within the state beginning at least as early as May 1995.

Did the Department assess the use tax against some other person, not [Owner], and is the Department now barred by the statute of limitations from assessing [Owner] on the taxable use?

[Owner] contends the assessment identified " . . . " and " . . . " as the taxpayer, rather than [Owner], and the statute of limitations bars reissuing the assessment against [Owner].

[5] We find no merit in the argument. Both the assessment notice and the letter from the Compliance Division that accompanied the assessment set out names that were the same as [Owner]'s except for the omission of one letter, both were addressed to [Owner]'s post office box, and both reference Yacht by name. We do not believe the typographical errors could have caused [Owner] to reasonably believe the assessment and letter were not directed to it, and it is obvious from [Owner]'s response to the assessment that it assumed they were directed to it. If an assessment reasonably provides notice to the correct taxpayer, an error in the spelling of the taxpayer's name does not invalidate the assessment. *See, Grannis v. Ordean, Grannis v. Whiteside*, 234 U.S. 385, 395 (1914); *In re Cipriano Esparza*, 118 Wn.2d 251, 821 P.2d 1216 (1992) (misspelling a debtors name in a claim of lien did not invalidate the lien).

In sum, [Owner] is liable for use tax on its use of Yacht in Washington. The use tax liability arose on April 28, 1995. Yacht was not temporarily in Washington beginning on that date. The assessment issued against [Owner] on December 28, 1999 may have to be modified to reflect a lower value than \$. . . , if [Owner] can demonstrate the fair market value on April 28, 1995, including any appurtenant aircraft, watercraft, electronics, and gear, was less than \$ The file will be remanded to the Compliance Division to allow [Owner] an opportunity to demonstrate a lower value, and, provided the evidence establishes a value lower than \$. . . , for issuance of a corrected assessment which states a value consistent with the fair market value on April 28, 1995.

DECISION AND DISPOSITION:

The petition for correction is denied, except as follows. This matter is remanded to the Compliance Division for possible adjustment to the assessment based on records the taxpayer must provide by January 30, 2002, or such additional time as the Compliance Division, in its

sole discretion, may allow. The purpose of this remand is to give the taxpayer an opportunity to show that the fair market value of Yacht on April 28, 1995, including appurtenant aircraft, watercraft, electronics, and gear, was less than \$

Dated this 31st day of December, 2001.