Cite as Det. No. 01-145R, 24 WTD 11 (2005)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 01-145R
. . .	)	
	)	Registration No. . . .
	)	FY . . . /Audit No. . . .
	)	Docket No. . . .

RULE 102; RCW 82.08.130: RETAIL SALES TAX – DEFERRED SALES TAX – PURCHASES FOR DUAL PURPOSES. When a taxpayer that normally both consumes and sells tangible personal property issues a resale certificate for the entire purchase, as allowed by RCW 82.08.130 and WAC 458-20-102(11), retail sales tax liability is deferred until such time as the taxpayer withdraws the goods from inventory for its own use.

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.

Mahan, A.L.J. – Company that sells fasteners and related tools, and which also loans the tools to certain purchasers of the fasteners, seeks reconsideration of a determination sustaining the assessment of deferred sales or use tax on tools loaned to out-of-state customers.[1]

ISSUES

1. When a taxpayer that normally both consumes and sells tangible personal property issues a resale certificate for the entire purchase, is the retail sales tax liability on the goods it consumes deferred until such time as the goods are withdrawn from the taxpayer's inventory in Washington?

2. Do use tax exemption statutes regarding donations dictate against a finding of sales tax liability on goods withdrawn from inventory for bailment purposes? . . .

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

FACTS

The taxpayer sells staples, nails, and other fasteners. It also sells air tools for applying the fasteners. It has retail outlets in [and outside] Washington, ... Its customers include manufacturers and contractors that use large volumes of fasteners.

In negotiating and promoting sales of its fasteners to its customers, the taxpayer may loan air tools under the terms of an Equipment Loan Agreement. The loans are for indefinite periods of time and the customers are not charged a fee. The customers being loaned tools are located both inside Washington and outside Washington. In making a loan of tools, the taxpayer ordinarily either provides new tools out of its inventory in Washington or provides used tools that had been previously loaned to other customers.[2] On its records, the taxpayer would remove the new loaned tools from its inventory accounts and treat them as capital assets. Although not verified by the Department, the taxpayer contends that approximately 10% of its tool inventory ended up being loaned free of charge to its customers rather than being sold to its customers. The taxpayer issued resale certificates for all of the tools it purchased.

The Department of Revenue (Department) audited the taxpayer's records for the January 1, 1996 through September 30, 1999 period and issued a deficiency assessment for "use tax" in the amount of $ . . . . As set forth in the Auditor's Detail of Differences and Instructions to the Taxpayer, under Schedule 5, the Department assessed $ . . . in "use tax and/or deferred sales tax" on "loaner tools bailed" to the taxpayer's customers. No tax was assessed on tools that were not delivered to the taxpayer in Washington, but were drop shipped from vendors to out-of-state customers.

In its petition, the taxpayer states it does not dispute an assessment of use tax on tools loaned to its Washington customers. It contends no use tax is due on tools loaned to customers located outside Washington. It argues use tax was not due because the tax is "triggered only when the Taxpayer, acting as a bailor, withdraws property from inventory and actually transfers the goods to the bailee. . . . The point at which tax liability is created (either for the bailor or the bailee) occurs only after the *transfer* is accomplished." (Emphasis in original.) The taxpayer discounts the Department's reference to deferred sales tax because the term "per statute is unknown, however, it is largely irrelevant since the tax assessed the Taxpayer was in fact 'Use Tax.'"

In response to the taxpayer's petition, the Department stated: "The issue is whether deferred sales tax is due on loaner tools purchased from out-of-state registered vendors and delivered to [taxpayer] . . . . Use tax is not the issue." . . .

[2] Information and records concerning the final disposition of bailed tools, whether resold, discarded, or rebailed, were not provided.

ANALYSIS

In general, all sales in the state of Washington of tangible personal property to consumers are subject to retail sales tax unless the sales are otherwise exempt from taxation. RCW 82.08.020; RCW 82.04.050. The term "consumer" is defined, through RCW 82.12.010(5), at RCW 82.04.190. There, a consumer is any "person who purchases, acquires, owns, holds or uses any article of tangible personal property irrespective of the nature of the person's business . . .other than for the purpose of resale in the regular course of business . . . ." Under RCW 82.04.040, to be considered a "sale" a transfer must involve "valuable consideration." In contrast, the temporary transfer of possession without consideration is considered a bailment for tax purposes. *See* WAC 458-20-211(2)(b). Accordingly, the sale of tangible personal property to a bailor in Washington would be subject to retail sales tax, unless otherwise exempt, because the property is purchased, acquired, owned, held, or used other than for the purpose of resale in the regular course of business.

In the present case, the taxpayer is normally engaged in both consuming tools as a bailor and in reselling tangible personal property. When it purchased the tools it was not able to identify which tools would be resold and which tools would be bailed to customers. RCW 82.08.130 allows a purchaser that principally resells tangible personal property to issue a resale certificate for the entire purchase, as follows:

> If a buyer normally is engaged in both consuming and reselling certain types of articles of tangible personal property and is not able to determine at the time of purchase whether the particular property acquired will be consumed or resold, the buyer may use a resale certificate for the entire purchase if the buyer principally resells the articles according to the general nature of the buyer's business. The buyer shall account for the value of any articles purchased with a resale certificate that are used by the buyer and remit the sales tax on the articles to the department.

WAC 458-20-102(11) (Rule 102(11)) similarly provides: "If the buyer gives a resale certificate for all purchases and thereafter consumes some of the articles purchased, the buyer must set up in his or her books of account the value of the article used and remit to the department of revenue the applicable deferred sales tax." At that time, the tax liability "should be reported under the use tax classification . . . ." *Id.*[3]

In the present case, at the time of purchase, the taxpayer was not able to identify whether the particular property would be consumed or sold. RCW 82.08.130 and Rule 102(11) allowed the taxpayer to defer payment of the retail sales tax until the taxpayer "consumed" the tangible personal property in question. The taxpayer elected to defer payment of sales tax when it issued

[3] This method of reporting has been explained as follows: "Because the Combined Excise Tax Return does not have a special line for reporting deferred or unpaid sales taxes on purchases, taxpayers should be instructed to report these amounts on the use tax line of the return." Interim Audit Guideline 01.01 (2001).

a resale certificate for the entire purchase. It later consumed the property when it withdrew the tools from inventory for bailment purposes. At that time, the sales tax that had been deferred was due and had to be reported under the use tax classification. Accordingly, we sustain the Department's assessment of deferred sales tax.

Since issuance of the initial determination in this case, the Department has published Det. No. 00-150R, 20 WTD 442 (2001), which further supports the holding in this case. In Det. No. 00-150R, the Department affirmed a deferred sales tax liability on educational publications withdrawn from inventory, for which a resale certificate had been previously given, and distributed out-of-state as free samples. In a similar manner, deferred sales tax was due on tools withdrawn from inventory, for which a resale certificate had been previously given, and bailed out-of-state.

The taxpayer's contention on reconsideration that the deferral of sales tax is contrary to various use tax exemptions does not alter the outcome in this case. As the taxpayer correctly points out, RCW 82.12.800, 82.12.801, and 82.12.801 provide for exemptions from use tax in situations involving donated goods, but there are no corresponding sales tax exemptions for such donated goods. The taxpayer then asks: "Why would the Legislature have granted a Use Tax exemption but failed to consider or enact a similar sales tax exemption, thus possibly exposing these same manufacturers and dealers" to deferred sales tax?

In response, we first note that not all items withdrawn from inventory necessarily result in sales tax becoming due. The statute regarding the deferral of sales tax in connection with using resale certificates only applies to a taxpayer who "normally is engaged in both consuming and reselling" goods. RCW 82.08.130. Should an issue involving donated goods come before the Department, a taxpayer simply donating goods from inventory would probably not be "normally" engaged in both consuming and selling such goods when the goods were initially purchased from a vendor. But this is not an issue in this case, and it is not necessary for us to identify a potential conflict between use tax exemption statutes and RCW 82.08.130 and, if one exists, to harmonize conflicting statutes. *See International Paper Co. v. Department of Rev.*, 92 Wn. 2d 277, 595 P.2d 1310 (1979) (courts will try to avoid any conflict between the statutes by harmonizing them, giving effect and meaning to both). Accordingly, this argument does not lead to any change on reconsideration.

The taxpayer's exception based on the Department's use of the term "deferred sales tax" is also without merit. The tax at issue is nothing more than retail sales tax, the payment of which was deferred at the taxpayer's election when it issued a resale certificate. There is nothing exceptional in the use of the term. As explained in Det. No. 88-311A, 9 WTD 293 (1990):

> Referring to the tax assessed as "deferred sales tax [in Rule 102]," simply means the payment of the sales tax is "deferred" until it can be determined whether the property is resold. The sales tax is a transaction tax and does not depend on use in Washington.

See also Det. No. 00-150R. The fact the assessment referred in a summary manner to "use tax" also does not alter the outcome in this case. The audit instructions more fully explained the nature of the tax being assessed as being either use tax or deferred sales tax. More importantly, even assuming the reference to use tax in the assessment was not as precise as it might have been, the taxpayer has not presented any authority for the proposition that this provides a basis to avoid the payment of tax validly due and owing.

In other situations, use tax may be at issue with respect to tangible personal property withdrawn from inventory. For example, where the law does not require the seller to be registered with the Department, use tax, rather than deferred sales tax, would be at issue. *See, e.g.*, Interim Audit Guideline 01.01 (2001).[4] . . . Hence, the Department's reference to "use tax and/or deferred sales tax" in its instructions to the taxpayer. In the present case, the facts show the taxpayer purchased the loaner tools solely from registered vendors, and it issued resale certificates to the vendors. Accordingly, use tax is not at issue in the present case; we do not need to decide if the taxpayer made intervening use of bailed property in this state, giving rise to a use tax liability with respect to the tools bailed to out-of-state bailees. . . .

DECISION AND DISPOSITION:

The Department's imposition of sales tax that had been deferred is sustained.

Dated this 10th day of June 2002.

[4] [Interim Audit Guideline 01.01 (2001) has been replaced with ETA 2008. 08.12.178.]