

Cite as Det. No. 04-0088, 24 WTD 88 (2005)

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 and Refund of	)	
	)	No. 04-0088
	)	
...	)	Registration No. . . .
	)	Document No. . . .
	)	Audit No. . . .
	)	Docket No. . . .
	)	

RULE 193; RCW 82.08.0273; ETA 2014.08.193: RETAIL SALES TAX – INTERSTATE – FUEL. Washington dock sales of fuel pumped into the fuel tanks of nonresidents’ vessels motoring to destinations outside of Washington is not exempt from sales tax because the fuel is first substantially used to power the vessels in Washington waters.

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.

M. Pree, A.L.J. – A business that sells marine fuel from its dock seeks a refund of retail sales tax assessed on its sales of diesel fuel to nonresidents operating pleasure craft. The tax was properly assessed because the purchasers first consumed the fuel in Washington.<sup>1</sup>

ISSUE

Must a business that sells marine fuel from its dock, charge nonresidents retail sales tax on diesel fuel sold for pleasure craft headed toward international waters?

FINDINGS OF FACT

. . . (taxpayer) sells groceries, marine supplies, and fuel from its dock location in Washington. The taxpayer pumps unleaded gasoline and diesel fuel directly into vessels’ fuel tanks. The

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

taxpayer charged and collected retail sales on most of its fuel sales, which it remitted to the Department of Revenue (Department). This appeal concerns certain diesel fuel sales where the taxpayer did not charge retail sales tax.

When the taxpayer acquired the business nearly ten years ago, it checked with the prior owners, local competitors, and by phone with the Department regarding the taxability of fuel it sold to nonresident boat owners headed into international waters. According to the taxpayer, everyone said sales to residents of Alaska, Oregon, Montana, and Alberta, Canada who were headed north into international waters . . . miles from the taxpayer's dock were not subject to retail sales tax. Some of these customers requested exemption from the sales tax. The taxpayer inspected the driver's licenses of the customers, wrote down their names and addresses, and did not charge them retail sales tax.

The Department's Audit Division reviewed the taxpayer's records for the period from January 1, 1999 through March 31, 2003. The Audit Division identified fuel sales totaling \$ . . . upon which the taxpayer did not charge or remit sales tax. The Audit Division assessed \$ . . . retail sales tax, interest and penalties on the fuel sales, which the taxpayer paid under protest.<sup>2</sup> The taxpayer then petitioned for refund.

Other than a couple of boats that were towed in, most of the taxpayer's nonresident customers arrived at its dock with some fuel in their tanks. The taxpayer reasoned that these nonresident customers consumed the rest of that fuel on their way out of the state as they headed north into international waters rather than consuming the fuel they purchased at its dock. Based on this reasoning, the taxpayer did not charge retail sales tax on its sales to nonresident customers headed for international waters.

### ANALYSIS

RCW 82.08.020 imposes a tax on each retail sale in Washington. Thus, the presumption is that all retail sales in Washington are subject to sales tax unless an exemption is applicable. RCW 82.08.0273 provides for an exemption to the sales tax for certain nonresidents of this state who purchases tangible personal property in Washington for use outside this state. The taxpayer contends it complied with the requirements of RCW 82.08.0273. Therefore, it should not have been assessed retail sales on the diesel fuel sales.

RCW 82.08.0273(1) requires:

(1) The tax levied by RCW 82.08.020 shall not apply to sales to nonresidents of this state of tangible personal property **for use outside this state** when the purchaser (a) is a bona fide resident of a state or possession or Province of Canada other than the state of Washington and such state, possession, or Province of Canada does not impose a retail

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<sup>2</sup> Other items were included in the assessment, which were paid and are not in dispute. We are only considering the tax assessed on schedule 3, plus the interest and penalties on that amount.

sales tax or use tax of three percent or more or, if imposing such a tax, permits Washington residents exemption from otherwise taxable sales by reason of their residence, and (b) agrees, when requested, to grant the department of revenue access to such records and other forms of verification at his or her place of residence to assure that such purchases are **not first used substantially** in the state of Washington.

(Emphasis provided.)

The residency of the purchasers is not an issue. The taxpayer is only requesting a refund of the tax it paid in the assessment on sales of fuel to purchasers who had documented their nonresident status. To resolve our dispute, we must determine whether the fuel was purchased for use outside this state and not used substantially in Washington.

The taxpayer's customers necessarily burned fuel as they left the taxpayer's dock after purchasing fuel at the dock. Due to the fungible nature of fuel, once it entered the customers' fuel tanks, the new fuel commingled with the old. As the boats motored away in Washington waters, they consumed some of the fuel they had purchased from the taxpayer.

No one can be assured of the subsequent route taken by the vessels. While their ultimate destination may be ascertainable, neither the Department nor the taxpayer can verify that the nonresident customer immediately left Washington waters without substantially using the fuel purchased at the taxpayer's dock. For example, there is no towing to the edge of the international waters, where the taxpayer could be assured that the customer did not burn any of the fuel in Washington waters. At a minimum, they traveled through Washington for . . . miles.

We only know the taxpayer's customers started their engines and motored away in Washington waters burning the fuel the taxpayer had just sold them commingled with the fuel (if any) in their tanks when they arrived at the taxpayer's dock. RCW 82.08.0273 provides an exemption from the retail sales tax to certain nonresidents of Washington for purchases of tangible personal property **for use outside this state**. ETA 2014.08.193. The exemption does **not** apply to sales of articles substantially used or consumed within Washington. *Id.*

The fuel the taxpayer placed into the fuel tanks of vessels that left the taxpayer's dock under their own power, was first substantially used to power the vessels in Washington. Under these circumstances the taxpayer was required to charge retail sales tax. We conclude RCW 82.08.0273 does not apply to a fungible commodity such as fuel, which is immediately consumed in part in Washington following its purchase. Retail sales tax was properly imposed upon the taxpayer's sales of fuel pumped into vessels' tanks in Washington.

Finally, regarding the taxpayer's allegation that it relied upon oral advice provided by the Department, the former owners, and competitors, we lack authority to offer relief. While RCW 82.32A.020(2) affords taxpayers the right in some cases to rely on official written advice from the Department, with respect to oral misinformation, ETA 419 states, in part:

. . . the department has determined that it cannot authorize, nor does the law permit, the abatement of a tax or the cancellation of interest on the basis of a taxpayer's recollection of oral instructions by an agent of the department.

The department of Revenue gives consideration, to the extent of discretion vested in it by law, where it can be shown that failure of a taxpayer to report correctly was due to written instructions from the department or any of its authorized agents.

The department cannot give consideration to claimed misinformation resulting from telephone conversations or personal consultations with a department employee.

There are three reasons for this ruling:

(1) There is no record of the facts which might have been presented to the agent for his consideration.

(2) There is no record of instructions or information imparted by the agent, which may have been erroneous or incomplete.

(3) There is no evidence that such instructions were completely understood or followed by the taxpayer.

Based on this authority, we cannot relieve the taxpayer of its tax liability for the audit period, based on its claim that it was just following instructions.

#### DECISION AND DISPOSITION

The taxpayer's petition for refund is denied.

Dated this 8th day of April 2004.