Cite as Det. No. 04-0113, 24 WTD 181 (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. 04-0113
. . .	)	Registration No. . . .
	)	Notices of Balance Due -- . . .
	)	Docket No. . . .

[1] RULE 102; RCW 82.08.130: RETAIL SALES TAX – PAID AT SOURCE DEDUCTION – PURCHASES FOR DUAL PURPOSES. The deduction allowed by RCW 82.08.130 and WAC 458-20-102(11)(b) only applies to Washington retail sales tax paid on the original purchase. An out-of-state manufacturer/retailer that paid retail sales tax to another state on materials it purchased in that state and consumed in the manufacture of its products, is not entitled to claim a paid at source deduction when reporting Washington sales of the products on its Washington excise tax return.

[2] RCW 82.12.035: USE TAX – CREDIT FOR SALES OR USE TAX PAID TO OTHER JURISDICTIONS – NOT APPLICABLE TO MANUFACTURER THAT PAID SALES TAX IN ERROR. The use tax credit for sales tax or use tax paid to another jurisdiction applies only to situations where the tax paid to the other jurisdiction was due. An out-of-state manufacturer that paid sales tax to another jurisdiction in error, on materials it consumed in manufacturing, is not entitled to a credit against Washington retail sales tax for the sales tax erroneously paid to the other jurisdiction.

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.

Prusia, A.L.J. – A [State A] manufacturer of modular structures appeals the denial of a Washington "paid at source" deduction for the cost of materials on which it paid [State A] retail sales tax. . . . . The taxpayer purchased the materials in [State A] for consumption in

manufacturing the structures in [State A], and paid [State A] retail sales tax on the purchases. It subsequently sold some of the structures in Washington. It charged and collected Washington retail sales tax, but took a Washington "paid at source" deduction for the cost of materials on which it had paid [State A] retail sales tax. We conclude the "paid at source" deduction applies only when the retail sales tax paid was Washington retail sales tax, and Taxpayer therefore may not take the deduction[1]. . . .

ISSUES[2]

[1] Is an out-of-state manufacturer/retailer that paid retail sales or use tax to another state on materials it purchased in that state for consumption in the manufacture of its products entitled to claim a "paid at source deduction" when reporting retail sales tax due on its sale of the products in Washington?

. . .

FINDINGS OF FACT

[Taxpayer] is a [State A] corporation. It manufactures commercial modular structures at a central location in [State A], then sells and installs them at construction sites in many states.[3] Since 1995, it has sold such structures to Washington customers, installing some of the structures in Washington. Taxpayer registered with the Washington Department of Revenue ("the Department") in June 1995, and began filing excise tax returns.

Before 1997, Taxpayer did not possess a [State A] sales and use tax exemption number, because differences in the laws of the states where it sold its structures made Taxpayer uncertain whether its sales of structures would be viewed as sales of tangible personal property or sales of realty. Taxpayer paid [State A] retail sales tax or use tax when it bought materials for use in the manufacture of its modular structures. When Taxpayer sold buildings to Washington customers, it collected the proper amount of Washington retail sales tax from the Washington customers, but when reporting the sales income to Washington, reported and paid use tax reduced by the amount of sales and use taxes already remitted to [State A].[4]

This appeal relates to six notices of balance due that the Department's Taxpayer Account Administration Division (TAA) issued to Taxpayer for tax periods in 1995 and 1996. All six remain unpaid. . . . .

The reason given Taxpayer by TAA for each of the first three invoices was that payment of local use tax had been omitted. . . .

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

[2] Nonprecedential portions of this determination have been redacted.

[3] The buildings are completed and operational at the [State A] plant, other than for utility hookups. On the customer's site, Taxpayer lifts the module(s) off the truck, sets them on a foundation, connects modules together at the seams, and makes utility connections.

[4] Taxpayer states it reported under use tax, because in most states the sale and installation of the structures is a sale of real property and the seller owes use tax on the value of what it installs.

ANALYSIS

All sales of tangible personal property to consumers in the state of Washington are subject to retail sales tax, unless the state is prohibited from taxing the sale under the constitution of this state or the federal constitution or laws, or there is some other specific statutory exemption from the tax. RCW 82.08.020; RCW 82.04.050; RCW 82.08.0254. Installing or attaching modular structures to realty is a "retail sale" subject to retail sales tax. RCW 82.04.050(2)(b). The retail sales tax is required to be collected by the seller, and remitted by the seller to DOR. RCW 82.08.050.

Taxpayer properly collected retail sales tax on its sales to Washington customers, but remitted only an amount net of the taxes it paid [State A] on the materials that went into the structures. Taxpayer continues to believe it remitted the proper amount to Washington, and now argues it was entitled to deduct the taxes paid [State A] under Washington's "paid at source" deduction.

Taxpayer contends that Washington law clearly states that retail sales tax or use tax paid, even to another state, is allowed as a credit against retail sales tax owed to Washington. Taxpayer cites RCW 82.08.130, WAC 458-20-102(11)(b), and RCW 82.12.035, as supporting its argument. The Audit Division, whose analysis is adopted by TAA and the Compliance Division, contends that the "paid at source" deduction applies only when **Washington** retail sales tax has been paid on the original purchases. It contends that Taxpayer's only remedy for recouping the [State A] taxes it paid at source is to obtain a refund from [State A].

RCW 82.08.130 and Rule 102(11)(b), upon which Taxpayer relies, provide that a Washington taxpayer who normally purchases articles for both resale and consumption, and is unable to determine at the time of purchase whether particular property acquired will be resold or consumed, may use a resale certificate for the entire purchase if the buyer principally resells the articles. If the buyer pays retail sales tax on all purchases, and later resells an article at retail, without intervening use, the buyer is entitled to a "paid at source" deduction on its tax return equal to the cost to the buyer of the property sold upon which retail sales tax has been paid.[5]

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[5] RCW 82.08.130 states:

> 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.
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> A buyer who pays a tax on all purchases and subsequently resells an article at retail, without intervening use by the buyer, shall collect the tax from the purchaser as otherwise provided by law and is entitled to a deduction on the buyer's tax return equal to the cost to the buyer of the property resold upon which retail sales tax has been paid. The deduction is allowed only if the taxpayer keeps and preserves records that show the names of the persons from whom the articles were purchased, the date of the purchase, the type of articles, the amount of the purchase, and the tax that was paid. The department shall provide by rule for the

[1] Based upon Taxpayer's explanation of why it paid retail sales tax on the purchases of materials in [State A], Taxpayer's situation arguably was a purchase for dual purposes situation. However, neither RCW 82.08.130 nor Rule 102(11) applies to Taxpayer's purchases in [State A]. The statute and rule clearly intend only to address Washington purchases for dual purposes. Note the statute authorizes a buyer to use a resale certificate when the buyer is uncertain whether all the items purchased will be resold. A Washington statute could not authorize such use of another state's resale certificate. Note the statute directs the Department to provide by rule for

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refund or credit of retail sales tax paid by a buyer for purchases that are later sold at wholesale without intervening use by the buyer.

Rule 102(11)(b) states:

(11) **Purchases for dual purposes.** A buyer normally engaged in both consuming and reselling certain types of tangible personal property, and not able to determine at the time of purchase whether the particular property purchased will be consumed or resold, must purchase according to the general nature of his or her business. RCW 82.08.130. If the buyer principally consumes the articles in question, the buyer should not give a resale certificate for any part of the purchase. If the buyer principally resells the articles, the buyer may issue a resale certificate for the entire purchase. For the purposes of this subsection, the term "principally" means greater than fifty percent.

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(b) **Tax paid at source deduction.** If the buyer has not given a resale certificate, but has paid tax on all purchases of such articles and subsequently resells a portion thereof, the buyer must collect the retail sales tax from its retail customers as provided by law. When reporting these sales on the excise tax return, the buyer may then claim a deduction in the amount the buyer paid for the property thus resold.

(i) This deduction may be claimed under the retail sales tax classification only. It must be identified as a "taxable amount for tax paid at source" deduction on the deduction detail worksheet, which must be filed with the excise tax return. Failure to properly identify the deduction may result in the disallowance of the deduction. When completing the local sales tax portion of the tax return, the deduction must be computed at the local sales tax rate paid to the seller, and credited to the seller's tax location code.

(ii) Example. Seller A is located in Spokane, Washington and purchases equipment parts for dual purposes from a supplier located in Seattle, Washington. Seller A does not issue a resale certificate for the purchase, and remits retail sales tax to the supplier at the Seattle tax rate. A portion of these parts are sold to Customer B, with retail sales tax collected at the Spokane tax rate. Seller A must report the amount of the sale to Customer B on its excise tax return, compute the local sales tax liability at the Spokane rate, and code this liability to the location code for Spokane (3210). Seller A would claim the tax paid at source deduction for the cost of the parts resold to Customer B, compute the local sales tax credit at the Seattle rate, and code this deduction amount to the location code for Seattle (1726).

(iii) Claim for deduction will be allowed only if the taxpayer keeps and preserves records in support thereof which show the names of the persons from whom such articles were purchased, the date of the purchase, the type of articles, the amount of the purchase and the amount of tax which was paid.

(iv) Should the buyer resell the articles at wholesale, or under other situations where retail sales tax is not to be collected, the claim for the tax paid at source deduction on a particular excise tax return may result in a credit? In such cases, the department will issue a credit notice which may be used against future tax liabilities. However, a refund will be issued upon written request.

the "refund or credit" of retail sales tax paid on items purchased for dual purposes which are subsequently resold. This direction can only be in reference to Washington retail sales tax paid, because the Washington Department of Revenue has no authority to refund retail sales tax paid to another state. It can only refund retail sales tax paid to Washington.

The statute and rule are simply a practical and administratively convenient procedure for addressing payment and refund of Washington retail sales tax in the situation where the taxpayer cannot be certain which articles it is purchasing are ones it will use as a consumer and which are ones it will resell. By allowing a deduction, Rule 102(11) avoids the burdensome procedure of requiring the taxpayer to cure its failure to give a resale certificate and apply for a refund or credit of taxes paid. Our conclusion that the statute and rule only apply to Washington retail sales tax is supported by the fact that, in the absence of the statute and rule, Washington could give a Washington purchaser for dual purposes the same relief, but could not give a person who purchased in another state the same relief. That is, Washington would not have the ability to allow a person who purchased in another state to cure a failure to give a resale certificate at the time of purchase, and would not have the ability to refund the taxes paid in error to the other state.[6]

The third statute Taxpayer cites, RCW 82.12.035, is a use tax statute. It states:

> A credit shall be allowed against the taxes imposed by this chapter upon the use of tangible personal property, or services taxable under RCW 82.04.050 (2)(a) or (3)(a), in the state of Washington in the amount that the present user thereof or his or her bailor or donor has paid a retail sales or use tax with respect to such property to any other state of the United States, any political subdivision thereof, the District of Columbia, and any foreign country or political subdivision thereof, prior to the use of such property in Washington.

[2] Taxpayer is correct that this statute allows a credit against use tax liability for taxes paid to another state. However, the use tax situation concerns a tax that is properly imposed twice, subjecting an interstate business to the risk of multiple taxation not borne by an intrastate competitor. The use tax situation thereby raises potential federal Commerce Clause problems, which states avoid by providing a credit for sales or use tax paid to other states.[7] The purchases for dual purposes situation, on the other hand, is not one in which the business risks liability for tax twice on the same transaction. Its purchase is only taxable by one state. Rather than a situation of potential double tax liability, it is a situation of payment of a tax in error. The taxpayer has the remedy of requesting refund from the state to which it paid tax in error, and can only blame itself if it fails to avail itself of that remedy.

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[6] It also would seem to defy common sense to interpret the statute as effectively not taxing a transaction that Washington clearly intends to tax while another state retains taxes paid on a transaction that other state did not intend to tax.

[7] The Supreme Court's opinion in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), appears to indicate that a state is constitutionally required to provide a credit against its own use tax for sales or use taxes paid by the same taxpayer to other states.

Moreover, there is no expression of Legislative intent with respect to the retail sales tax that corresponds to RCW 82.12.035. It is true that the retail sales tax and the use tax are complementary taxes, and have many parallel exemptions and deductions. But that is all the more reason to adhere to the principle that we should not assume the Legislature had in mind exceptions it did not express when we have before us an act in which some exceptions are clearly and concisely set forth. *State v. Roadhs*, 71 Wn.2d 705, 430 P.2d 586 (1967).

Also, the situations are not parallel. Different persons are paying the tax on the two sales tax transactions. If the Washington purchaser's use tax liability were at issue on the purchase/use, he or she would not have paid tax twice or be entitled to a use tax credit under the plain meaning of the use tax provision.

In sum, Taxpayer is not entitled to a "paid at source" deduction from its Washington revenues for the cost of the materials on which it paid retail sales tax or use tax to [State A]. Its petition for cancellation of the additional retail sales tax assessed on the six invoices must be denied. . . .

DECISION AND DISPOSITION

Taxpayer's petition is . . . denied.

Dated this 20th day of May 2004.