BEFORE THE INTERPRETATION AND 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. 88-367
)
. . .) Registration No. . . .
)
)

[1] **RULE 159 and RULE 160:** B&O TAX -- DOING BUSINESS -- PRESUMPTION -- AGRICULTURAL COMMISSION AGENTS. Persons conducting business as agents or on a consignment basis are presumed to be conducting business as sellers of tangible personal property unless they clearly segregate commission sales in their books and records. Where no such records evidencing segregation are produced, taxpayer is taxable under the wholesaling or retailing B&O classification.

[2] **RULE 210 and RCW 82.04.330:** B&O TAX -- EXEMPTION -- AGRICULTURE -- BURDEN OF PROOF. Persons growing agricultural products on land that they own or to which they have a present right of possession are not subject to B&O tax on their activities. Taxpayer claiming exemption from taxability based on status as a joint venturer-grower has the burden of submitting proof of joint venture status. Absent such proof, the law requires strict construction of statute in favor of application of the tax. Accord: Yakima Fruit Growers Ass'n. v. Henneford, 187 WA.252 (1936).

[3] **RULE 193A:** B&O TAX -- EXEMPTION -- INTERSTATE COMMERCE -- DELIVERY -- SALES TO OUT-OF-STATE PURCHASERS -- BURDEN OF PROOF. Sellers who deliver goods to purchasers at out-of-state points are required to prove entitlement to an exemption from B&O tax liability in order to avoid being taxable on

their activities. Where no such proof is submitted, taxpayer is liable for tax under either the Retailing or the Wholesaling B&O tax classification.

[4] **RULE 178:** USE TAX -- LIABILITY. Persons who use articles on which no sales tax has been paid are liable for payment of use tax of a like amount unless such persons prove that they are exempt from liability for tax. Accord: Det. No. 87-354, 4 WTD 293 (1987).

[5] **RCW 82.32.070:** RECORDS -- DOCUMENTATION -- RETENTION -- BARRED FROM QUESTIONING ASSESSMENT. Persons liable for assessment of tax must keep suitable records. Failure to do so will bar the taxpayer from questioning the correctness of any 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.

TAXPAYER REPRESENTED BY: . . .

DATE OF CONFERENCE: August 5, 1986

NATURE OF ACTION:

Taxpayer petitions for correction of assessment of tax on unreported wholesale sales and of assessment of use tax on personal property and equipment.

FACTS AND ISSUES:

Johnson, A.L.J. (successor to Dressel, A.L.J.) -- Taxpayer grows and sells agricultural items. During the audit period in question, tax was assessed on several items. Taxpayer protests the assessment of wholesaling B&O tax on a 1984 sale on the ground that such sale was on a commission basis on behalf of an unrelated third party. Taxpayer also contends that wholesaling B&O tax was incorrectly assessed on several sales because the potatoes were grown as a result of a joint venture agreement with unrelated parties; pursuant to an agreement, taxpayer states that it was obligated to dig and haul the potatoes and provide seed and a portion of chemicals used.

Additionally, taxpayer contends that tax was assessed on its purchase of seed in Montana which was sold to an Oregon party.

In that case, taxpayer claims that the sale is exempt from tax, because taxpayer's hired hauler picked up the seed in Montana and transported it directly to Oregon.

Finally, taxpayer protests assessment of use tax on four forklifts, a copier, a 1984 Cadillac and a 1965 travel trailer, contending that the assets were either purchased by its Oregon counterpart, . . . of Portland and used in Oregon prior to their transfer to Washington or that they were purchased for and used primarily by the Oregon . . . .

During a telephone conference in this matter, taxpayer's representative restated the above arguments and agreed to send documentation in support of its position; such documents have not been provided.

DISCUSSION:

[1] Sellers of property are taxable on that activity unless they meet their statutory burden of proving that their status was something other than that of seller. WAC 458-20-159 (Rule 159) lists the requirements for proof necessary to qualify a taxpayer as an agent rather than as the seller of property. That rule has the same force and effect of the law itself. RCW 82.32.300. Rule 159 provides that

> [a]ny person who claims to be acting merely as agent or broker in promoting sales for a principal or in making purchases for a buyer will have such claim recognized only when the contract or agreement between such persons clearly establishes the relationship of principal and agent and when the following conditions are complied with:
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> (1) The books and records of the broker or agent show the transactions were made in the name and for the account of the principal and show the name of the actual owner of the property for whom the sale was made or the actual buyer for whom the purchase was made.
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> (2) The books and records show the amount of gross sales, the amount of commissions and any other incidental income derived by the broker or agent from such sales.
> (Emphasis supplied.)

RCW 82.04.480 further states that

> [t]he burden shall be upon the taxpayer in every case to establish the fact that he is not engaged in the business of selling tangible personal property but is acting merely as a broker or agent in promoting sales for a principal. Such claim will be allowed only when the taxpayer's accounting records are kept in such manner as the department of revenue shall by general regulation provide. (Emphasis supplied.)

Finally, Rule 160 contains similarly-strong language about the documentation required to support a claim of agricultural commission agent status:

> [a]ny person whose business consists in selling agricultural products both as a dealer and upon a commission-consignment basis is presumed to be conducting business as a seller of tangible personal property either at wholesale or at retail, unless such person segregates upon his books and records between sales of products purchased and sold as a dealer and those handled strictly upon a commission basis.
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> WHOLESALING. Dealers are taxable under the wholesaling classification upon gross proceeds derived from wholesale sales. Persons selling upon a commission-consignment basis who do not segregate upon their books and records between wholesale sales made as a dealer and those handled on a commission basis are taxable upon gross proceeds of all sales.

In this case, taxpayer provided Invoice # . . . , dated April 1984 in the amount of $ . . . and listing the purchaser's name. The auditor was not shown anything on the invoice itself indicating an agency arrangement or a commission amount. Additionally, the auditor was not shown the required documentation that would support taxpayer's claim that it was acting as an agent, such as proof that the potatoes were carried in its inventory under the name of another party or a signed agency agreement. During the telephone conference, taxpayer's representative stated that other evidence sufficient to meet the stringent requirements of rules 159 and 160 would be forthcoming; none has been provided. Taxpayer's claim that it should be treated as an agent is denied. This conclusion is reached because taxpayer has failed to meet the stringent accounting requirements of the rule.

[2] Taxpayer next protests assessment of tax on invoices in the amounts of $ . . . in 1984 and $ . . . in 1985, stating that such sales were of potatoes grown pursuant to a joint venture arrangement; the petition says that the agreement was "with unrelated parties." During the telephone conference, taxpayer's representative provided two names but was uncertain as to whether any of the parties owned or leased the land on which the potatoes were grown. The auditor was shown no proof of a joint venture agreement. Taxpayer's representative stated that a joint venture growing agreement would be provided in support of its position, but no such documentation has been delivered.

RCW 82.04.330 exempts persons who grow agricultural products on land that they own or to which they have a present right of possession. However, the law must be strictly construed in favor of application of the tax. Yakima Fruit Growers Association v. Henneford, 187 Wn. 252 (1936). To qualify for an exemption, a taxpayer must meet the exemption-granting statute's requirements. Rule 210, the administrative regulation implementing the statute, requires that the land be owned by or leased to the taxpayer. In this case, no proof of ownership or right to possession of the land, either directly or by virtue of a valid joint venture growing agreement, has been provided to support the taxpayer's contention that it should be exempted from taxation. As a result, we must conclude that, because insufficient records or proof have been provided, taxpayer's petition must be denied on this issue also.

[3] Taxpayer next contends that three 1985 invoices, totaling $ . . . for seed purchases, should be exempt from tax because the seed was purchased in Montana and delivered to Oregon by a hauler hired by taxpayer. During the telephone conference, taxpayer's representative was uncertain whether the seed entered Washington or where in Oregon the purchaser was located. Taxpayer agreed to send proof of the out-of-state delivery, but no such proof has been provided.

Rule 193A, which grants an exemption from tax for local vendors who sell and deliver goods to purchasers at points outside this state, must also be strictly construed in favor of application of the tax. Yakima Fruit Growers Association v. Henneford, *supra*. The rule states that

> [w]here the seller agrees to and does deliver the goods to the purchaser at a point outside the state, neither Retailing nor Wholesaling business tax is

> applicable. Such delivery may be by the seller's own transportation equipment or by a carrier for hire. In either case, for proof of entitlement to exemption, the seller is required to retain in his records documentary proof (1) that there was such an agreement and (2) that delivery was in fact made outside the state. Acceptable proof will be:
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> a. the contract or agreement AND
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> b. if shipped by a for hire carrier, a waybill, bill of lading or other contract of carriage by which the carrier agrees to transport the goods sold, as agent of the seller, to the buyer at a point outside the state; or
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> c. if sent by the seller's own transportation equipment, a tripsheet signed by the person making delivery for the seller and showing the (1) buyer's name and address, (2) time of delivery to the buyer, together with (3) signature of the buyer or his representative acknowledging receipt of the goods at the place designated outside the State of Washington. (Emphasis supplied.)

In this case, no such contract and tripsheet have been provided either to the auditor or to the hearing examiner. Again, we can only conclude that the taxpayer's records which have been made available to the Department of Revenue fail to meet the taxpayer's burden to establish the validity of its claim that the sales in question are exempt under Rule 193A from the wholesaling B&O tax. Taxpayer's petition in this respect is denied.

[4] Taxpayer protests assessment of use tax on four forklifts, a copier, a 1984 Cadillac and a 1965 travel trailer. Alternatively, taxpayer contends that, pursuant to RCW 82.12.020, the amount of tax due should be levied on a value different from that used by the auditor in his calculations. Taxpayer states that the auditor used a new-purchase valuation figure and should have calculated the value based on the goods' status as used items.

RCW 82.12.020 subjects taxpayers to liability for use tax on items which have escaped taxation by this state at the time of purchase. In such cases, taxpayers are liable for an amount of tax matching the sales tax which would have been due. The value used in calculating the use tax due is the purchase

price or a comparable value for like items if a purchase price figure is unavailable. "Use" is defined by Rule 178, which implements the statute, as "any act by which the person takes or assumes dominion or control over the article."

Using depreciation schedules, purchase invoices, and a capital addition file, the auditor found sufficient evidence to support an assessment of use tax on the items protested by the taxpayer. The values used for assessment purposes indicate that either invoices were produced for his examination reflecting that amount, that such amounts were the ones used on taxpayer's depreciation schedules for federal tax purposes or that taxpayer provided no evidence of a lesser purchase price paid, which would have justified assessment of a lower tax amount. With regard to the four forklifts and the copier, no information other than taxpayer's contention that a different value should have been used has been submitted to support taxpayer's claim that the items should have been valued differently; consequently, we are without authority to adjust such values.

Taxpayer contends that use tax was paid on the 1965 travel trailer when it was licensed in Washington. Again, no proof of such payment has been offered. A check with the state Department of Licensing showed that, if taxpayer paid the tax to the department directly, such information would still be on file and could be submitted in proof of its claim. Absent such documentation, taxpayer's petition with respect to the travel trailer is denied.

Persons using an automobile temporarily in this state for business purposes are not liable for use tax thereon unless used in conducting nontransitory business activities in this state. RCW 82.12.0251 and Rule 178. In this case, taxpayer contends that the 1984 Cadillac, which was licensed in Oregon during the audit period, was purchased and used primarily in Portland. The auditor, however, using depreciation schedules, found sufficient evidence to link the taxpayer's treatment of the vehicle for book and tax purposes and taxpayer's use of the vehicle in this state to support the assessment of use tax. At the telephone conference in the matter, taxpayer provided no showing of proof that the automobile had not been used extensively in Washington and commingled with its possessions in this state. Again, absent a showing that the automobile is owned, and that the tax benefits were received, by the Oregon corporation, we are unable to cancel the auditor's assessment of tax thereon.

The Department's position has been that taxpayers must treat events or items consistently for federal and state tax purposes. Should taxpayer submit proof of values different from those used by the auditor, such consistency will be required before adjustments will be made. In Determination No. 87-354, 4 WTD 293, 296 (1987), the Administrative Law Judge representing this Department wrote:

> [t]he taxpayer, in essence, argues that the auditor should disregard accounting procedures followed by the taxpayer when recording this transaction for federal tax purposes. . . By Department of Revenue precedent, a taxpayer may not treat a transaction one way for federal purposes and yet another way for state tax purposes.

Additionally, [the Department has] noted that the use tax is based on the value of the goods at the time of first delivery to the taxpayer. In that case, the taxpayer used a certain value on its federal tax return for depreciation purposes. Upholding the Department's policy of consistent tax treatment, that figure, in the absence of submission of a professional appraisal or other supporting evidence, was accepted as representing the true value of the equipment for use tax purposes. The Administrative Law Judge also stated that

> [b]efore a refund shall be issued, however, the taxpayers shall furnish the Excise Tax Division of the Department an amended federal tax return reflecting the change in valuation of the property. . .and a sworn statement from one of the taxpayers or their accountant that the amended return was actually filed. In the alternative to filing an amended return, the taxpayers may submit a sworn statement from their accountant to the effect that changing the valuation of the property will result in no increase or decrease in the amount of federal income tax owed by the taxpayers.

[5] RCW 82.32.070 provides that

> [e]very person liable for any fee or tax imposed by chapters 82.04 through 82.28 RCW shall keep and preserve, for a period of five years, suitable records as may be necessary to determine the amount of any tax for which he may be liable, which records shall include copies of all federal income tax and state tax returns and reports made by him. All his

> books, records, and invoices shall be open for examination at any time by the department of revenue.
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> . . .
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> Any person who fails to comply with the requirements of this section shall be forever barred from questioning, in any court action or proceedings, the correctness of any assessment of taxes made by the department of revenue based upon any period for which such books, records, and invoices have not been so kept and preserved. (Emphasis supplied.)

In the case of all items protested, the auditor assessed tax based on the records supplied by the taxpayer. During the telephone conference in the matter, taxpayer's representative agreed, upon being informed that statements made in the petition were not evidence sufficient to support cancellation of any part of the assessment, to send documentation of the claims made by the taxpayer. No documentation which clearly demonstrates that the taxpayer should not be held liable for the amounts assessed has been received. Rules 193A, 159 and 160 contain clear language as to what documentation is necessary to support a claim of right to the statutory exemptions which they address. Additionally, RCW 82.32.070 requires that a taxpayer keep adequate records for five years to support its tax position. In the case at hand, no documentation has been offered, and the assessment cannot be altered or cancelled without such proof.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 21st day of September 1988.