

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. 98-115
)	
...)	Registration No. ...
)	FY... /Audit No. ...
)	

[1] RCW 82.05.020; RCW 82.42.020; RCW 82.42.040; WAC 458-20-195: DEDUCTABILITY OF AIRCRAFT FUEL TAX. A fuel distributor may deduct from its gross income, for B&O tax purposes, the amounts it collected from customers for the state aircraft fuel taxes, similar to how retailers deduct collected retail sales taxes.¹

[2] ...

[3] WAC 458-20-145: RETAIL SALES TAX RATE -- LOCATION OF DELIVERY. When a fuel distributor picks up fuel from a wholesaler, and delivers it to a customer, the local retail sales tax rate shall be that of the location of the customer, not the wholesaler.

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:

Oregon based fuel distributor appeals assessment of various sales taxes²

FACTS:

Munger, (successor to Breen) A.L.J. -- The taxpayer, . . . , is an Oregon based fuel distributor. It is registered in Washington and regularly files Washington excise tax returns. The taxpayer was audited by the Department of Revenue (the Department) for the period of January 1, 1992 through December 31, 1994. As a result of the audit, additional assessments were made for sales

¹ Nonprecedential portions of this determination have been deleted.

² Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

tax During the audit period the taxpayer made sales of various fuels to Washington State customers. The taxpayer appeals only three parts of the assessment. For ease of discussion, the facts relating to each issue on appeal will be set forth in their corresponding issues section

ISSUES:

1. Whether state aircraft fuel tax collected by the taxpayer was properly excluded from gross income for B&O tax and retail sales tax purposes.
2. . . .
3. Whether the local retail sales tax collected was correctly calculated based on the location of the taxpayer's customer, when delivery was not made from an in-state facility or fuel stock maintained by the taxpayer.

DISCUSSION:

[1] In its excise tax returns the taxpayer had deducted from its gross income, for tax calculation purposes, the amounts it paid to the state of Washington for aircraft fuel taxes collected and paid under RCW 82.05.020. The audit assessment disallowed these deductions. WAC 458-20-195 (Rule 195) is the administrative rule setting forth the circumstances under which a taxpayer may exclude from gross income certain taxes it has paid.

(A) DEDUCTIBILITY, GENERALLY. In computing tax liability, the amount of certain taxes may be excluded or deducted from the gross amount reported as the measure of tax under the business and occupation tax, the retail sales tax and the public utility tax. Such taxes may be deducted provided they (1) have been included in the gross amount reported under the classification with respect to which the deduction is sought, and (2) have not been otherwise deducted through inclusion in the amount of an allowable deduction taken under such classification for another reason, i.e., interstate commerce, etc.

The amount of taxes which are not allowable as deductions or exclusions must in every case be included in the gross amount reported.

(B) MOTOR VEHICLE FUEL TAXES. So much of the sale price of motor vehicle fuel as constitutes the amount of tax imposed by the state of Washington or the United States government upon the sale thereof may be deducted by every seller thereof from the gross proceeds of sales reported under the business and occupation tax.

(C) OTHER TAXES. The amount of taxes collected by a taxpayer, as agent for the state of Washington or its political subdivisions, or for the federal government, may be deducted from the gross amount reported. Such taxes are deductible under each tax classification of the Revenue Act under which the gross amount from such sales or services must be reported.

This deduction applies only where the amount of such taxes is received by the taxpayer as collecting agent and is paid by the agent directly to the state, its political

subdivisions, or to the federal government. When the taxpayer is the person upon whom a tax is primarily imposed, no deduction or exclusion is allowed, since in such case the tax is a part of the cost of doing business. The mere fact that the amount of tax is added by the taxpayer as a separate item to the price of goods he sells, or to the charge for services he renders, does not in itself, make such taxpayer a collecting agent for the purpose of this deduction.

SPECIFIC TAXES, DEDUCTIBLE. The deductions under paragraphs B and C above apply to the following excise taxes among others:

Federal—

Tax on gasoline.

26 U.S.C.A. Sec. 4081;

...

Motor vehicle fuel tax, chapter 82.36 RCW;

Retail sales tax collected from buyers, chapter 82.08 RCW;

The versions of RCW 82.42.020 and RCW 82.42.040 regarding the imposition and collection of the aircraft fuel tax in effect during the audit period state as follows:

RCW 82.42.020 Aircraft fuel tax imposed--Exception--Rate to be computed. There is hereby levied, and there shall be collected by every distributor of aircraft fuel, an excise tax at the rate computed under RCW 82.42.025 on each gallon of aircraft fuel sold, delivered or used in this state: **PROVIDED HOWEVER,** That such aircraft fuel excise tax shall not apply to fuel for aircraft that both operate from a private, non-state-funded airfield during at least ninety-five percent of the aircraft's normal use and are used principally for the application of pesticides, herbicides, or other agricultural chemicals: **PROVIDED FURTHER,** That there shall be collected from every consumer or user of aircraft fuel either the use tax imposed by RCW 82.12.020, as amended, or the retail sales tax imposed by RCW 82.08.020, as amended, collection procedure to be as prescribed by law and/or rule or regulation of the department of revenue. The taxes imposed by this chapter shall be collected and paid to the state but once in respect to any aircraft fuel.

RCW 82.42.040 Collection of tax--Procedure--Licensing--Surety bond or other security--Records, reports, statements. The director shall by rule and regulation adopted as provided in chapter 34.05 RCW (Administrative Procedure Act) set up the necessary administrative procedure for collection by the department of the aircraft fuel excise tax as provided for in RCW 82.42.020, placing the responsibility of collection of said tax upon every distributor of aircraft fuel within the state;...

(Emphasis added.)

These statutes, read as a whole, clearly impose the aircraft fuel tax on the consumer, not the seller. The taxpayer's role as a seller is that of a collector of the tax as on behalf of the state,

similar to the state retail sales tax under RCW 82.08.³ Consequently, the taxpayer should be allowed to deduct these taxes paid from its income per Rule 195 for tax calculation purposes.

...

[3] The taxpayer does not have any retail outlets in Washington, and any fuel storage racks it has in Washington are unrelated to the sales in question for the third issue under appeal. In a number of sales, the taxpayer would take a fuel order from a Washington State customer. It would then go to a fuel wholesaler's racks, such as in Seattle, for example, pick up the fuel and deliver it to the customer in an area with a local sales tax rate lower than Seattle's. The taxpayer collected and remitted the tax based on the rate applicable to the location where the customer was. The Department's assessment was based on calculating the tax on where the third party wholesaler was located. WAC 458-20-145 (Rule 145) is the regulation dealing with the collection of local sales taxes.

RCW 82.14.030 authorizes counties and cities to levy local sales and use taxes, such local taxes to be collected along with the state tax. By RCW 82.14.045 cities and counties, after voter approval, are authorized to levy an additional tax to finance public transportation, which tax is also to be collected along with the state tax. (See WAC 458-20-237.)

...

"Place of sale" for purposes of local sales tax:

RULE I. Retailers of goods and merchandise: The sale occurs at the retail outlet at which or from which delivery is made to the consumer.

...

RULE IV. Whenever the state use tax is due, the local use tax will also apply where the property is first used in a county or city levying the local tax.

The following illustrates the application of these rules in various situations:

RULE I.

(A) This rule applies to retail sales consisting solely of tangible personal property (i.e., goods or merchandise). If retail labor and services are also involved Rule II applies to the entire sale. Secondly, the total tax is determined by the place at which or from which delivery is made. For most retailers the location of his place of business governs the local tax application. He collects the tax if his place of business is in a jurisdiction levying the local tax, even though he may deliver the goods sold to his customer to a location in the state not levying the tax. On the other hand a merchant whose place of business is in a jurisdiction not levying the local tax collects only the state tax, irrespective of whether delivery is made into a jurisdiction levying the local tax.

³ Subsequent 1996 amendments to RCW 82.42.020 have added enforcement and criminal penalties nearly identical to those found in RCW 82.08 regarding retail sales taxes.

To sum up this part of the rule: The origin of the goods determines the local tax and destination or fact of delivery elsewhere in the state are immaterial.

(B) Special applications of the rules for goods located outside the state:

(1) When the state business and occupation tax applies to a sale in which the goods are delivered into Washington from a point outside the state this means a local in-state facility, office, outlet, agent or other representative even though not formally characterized as a "salesman" of the seller participated in the transaction in some way, such as by taking the order, then the location of the local facility, etc., will determine the place of sale for purposes of the local sales tax. However, if the seller, his agent or representative maintains no local in-state facility, office, outlet or residence from which business in some manner is conducted, the local tax shall be determined by the location of the customer.

(2) If the state business and occupation tax does not apply because there was no in-state activity in connection with the sale (e.g., an order was sent by a Washington consumer directly to a seller's out-of-state branch) the state tax due is use tax and the destination- address of the consumer-determines the applicable local use tax.

Rule I examples:

(1) A resident of Everett purchases a sofa from a furniture dealer in Seattle. The dealer delivers the sofa to the customer's home in Everett. The Seattle local sales tax applies, being the place from which the goods were delivered.

(2) A resident of Olympia purchases a refrigerator from a merchant in Tekoa. If Tekoa has not levied the local sales tax, the merchant will collect only the state sales tax. Olympia's use tax is not due even though the property will be used there. Reason: The law makes the local tax collectible at time of the taxable event for the state tax.

...

RULE IV.

This rule applies only to transactions which are not subject to sales tax under Rule I, and intends that the local use tax shall be payable at the time and place the state use tax is due.

Examples:

(1) A Spokane resident purchases an automobile from a private individual in Seattle. He transfers title at the King County auditor's office and makes payment of the state use tax. The King County auditor will collect Spokane's local use tax at the same time.

(2) A Sumner resident places an order with a catalog mail order outlet in Tacoma. The Tacoma local sales tax is due since the transaction falls under Rule I, not Rule IV.

(3) Same as example 2 except the Sumner resident sends a catalog mail order directly to the Portland warehouse rather than going through the Tacoma catalog store. The vendor will collect Sumner's local use tax along with the state use tax.

The above explanation is intended to cover only the most frequently encountered situations. For more intricate or complicated transactions, call the nearest district office of the department of revenue for assistance.

(Emphasis added.)

Although the taxpayer has cited Rule I within Rule 145, this section is not controlling because the taxpayer does not have a retail outlet within the state and because the goods did not originate from outside the state. The problem presented in this case is that the exact circumstances of the taxpayer's fact pattern are not addressed by the various examples in Rule 145, i.e. an out-of-state seller making deliveries of goods from an in-state source that is not its own retail outlet. The closest examples are the ones described in part 3 of Rule IV where the seller collects the local use tax imposed where the customer resides when the delivery is made from out of state and the underlined section of Rule I where the tax is also determined by the location of the customer.

In the present case, no taxable retail sale or delivery to the taxpayer's customer takes place at the location of the third party wholesaler. Consequently, the only possible correct retail sales tax rate is the one imposed where the taxpayer's customer took delivery.

DECISION AND DISPOSITION:

The taxpayer's petition is granted.

Dated this 30th day of June, 1998.