

Cite as Det. No. 14-0207, 35 WTD 90 (2016)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Refund of)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 14-0207
)	
. . .)	Registration No. . . .
)	

ETA 3185.2014; ETA 3186.2014; RCW 82.32.730: USE TAX – EQUIPMENT –
OUT-OF-STATE LESSOR. Use tax applies to leased property brought into
Washington if such property was not previously subject to retail sales tax.

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.

Sohng, A.L.J. – Out-of-state equipment lessee protests use tax imposed on lease payments on the grounds that the leased equipment is primarily located outside of Washington. The petition is denied.¹

ISSUE

Is an out-of-state lessee liable for use tax under RCW 82.32.730(10) when the leased property is primarily located outside of Washington?

FINDINGS OF FACT

[Taxpayer] is an [out-of-state] corporation that provides remote video and television production services for live events and taped programs throughout the western United States and Canada, including Washington. Taxpayer works primarily with national and regional sports networks, as well as professional sports teams. Taxpayer leases a fleet of mobile production units (the “Mobile Units”) from its parent corporation, [Lessor]. The Mobile Units are essentially television production studios housed inside of semi-trailer trucks for ease of mobility and portability. Taxpayer and the Department of Revenue (the “Department”) agree that the primary property locations for the Mobile Units used in Washington are [outside of Washington]. Delivery of the Mobile Units occurred outside of Washington.

Under the terms of a Mobile Rental Lease Agreement, Taxpayer must pay Lessor according to a pre-determined price schedule, depending on the specific type of Mobile Unit that is leased. Lessor invoices Taxpayer on a monthly basis detailing its usage of Mobile Units, and Taxpayer

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

must pay the invoice within 90 days. Taxpayer claims that Lessor, as its parent company, was well aware that Taxpayer would use the Mobile Units in Washington to televise events in this state during the lease term. According to Taxpayer, Lessor specifically contemplated and was aware that Taxpayer, as its wholly owned subsidiary, would use the Mobile Units in Washington.

Neither Taxpayer nor Lessor paid retail sales tax on the lease payments. Taxpayer did, however, pay use tax to the Department based on the daily rental rate charged for the Mobile Units while present in Washington. On November 13, 2012, Taxpayer requested a refund of use tax paid on the leased Mobile Units for the period January 1, 2011, through August 31, 2012 (the “Refund Period”), in the amount of \$. . . (not including interest). On April 23, 2013, the Department’s Audit Division denied the refund claim in full. Taxpayer appeals.

ANALYSIS

The renting or leasing of tangible personal property to consumers is defined as a retail sale and is subject to retail sales tax in Washington. RCW 82.04.050(4)(a), RCW 82.08.020(1). Washington imposes use tax “for the privilege of using within this state as a consumer any [a]rticle of tangible personal property acquired by the user in any manner. . . .” RCW 82.12.020(1)(a).

The Washington legislature signed the Streamlined Sales and Use Tax Agreement (“SSUTA”) into law on March 22, 2007.² Laws of 2007, ch. 6, §501; *see also North Central Washington Respiratory Care Services, Inc. v. Dep’t of Revenue*, 165 Wn. App. 616, 268 P.3d 972 (2011). Effective July 1, 2008, SSUTA changed the manner in which sales are sourced for purposes of paying sales or use taxes to the appropriate jurisdictions. *Id.* Sections 309, 310, and 311 of SSUTA contain the general sourcing regime. SSUTA § 309 explains the application of the general sourcing rules and provides:

- A. Each member state shall agree to require sellers to source the retail sale of a product in accordance with Section 310. The provisions of Section 310 apply regardless of the characterization of a product as tangible personal property, a digital good, or a service. The provisions of Section 310 only apply to determine a seller's obligation to pay or collect and remit a sales or use tax with respect to the seller's retail sale of a product. These provisions do not affect the obligation of a purchaser or lessee to remit tax on the use of the product to the taxing jurisdictions of that use.

(Emphasis added.)

²SSUTA is the “result of the cooperative effort of 44 states, the District of Columbia, local governments and the business community to simplify sales and use tax collection and administration by retailers and states. The Agreement minimizes costs and administrative burdens on retailers that collect sales tax, particularly retailers operating in multiple states.” *Frequently Asked Questions*, Streamlined Sales Tax Governing Board, Inc., http://www.streamlinedsalestax.org/index.php?page=gen_1 (last visited June 30, 2014); *see also Qualcomm, Inc. v. Dep’t of Revenue*, 171 Wn.2d 125, n.8, 249 P.3d 167 (2011); *Indiana Dep’t of Revenue v. Kitchin Hospitality, LLC*, 907 N.E.2d 997, 1000, n.2 (Ind. 2009). SSUTA seeks to accomplish its goal by providing uniform definitions and sourcing rules. *Id.* States that wish to participate must enact laws, rules, and regulations that conform to SSUTA’s provisions.

SSUTA § 310 provides the sourcing rules with respect to the sale or lease of various types of property. SSUTA § 310A provides general sourcing rules for most retail sales, excluding leases and rentals. SSUTA § 310B provides special sourcing rules for the lease or rental of tangible personal property that is not a motor vehicle, trailer, semi-trailer, aircraft or transportation equipment. For leases or rentals that require periodic payments, the first payment is sourced in accord with the general retail sale sourcing rules set forth in §310A; and each subsequent payment is sourced to the primary property location for each period covered by the payment. SSUTA § 310B. And finally, SSUTA § 311 provides the general sourcing definitions that apply to § 310A.

The legislature codified SSUTA §§ 309-311 in RCW 82.32.730. In particular, § 310B was codified in RCW 82.32.730(2), which governs the lease or rental of tangible personal property (other than motor vehicles, trailers, semitrailers, aircraft, or transportation equipment as defined in RCW 82.32.730(9)(g)). RCW 82.32.730(2)(a) provides:

For a lease or rental that requires recurring periodic payments, the first periodic payment is sourced the same as a retail sale in accordance with subsection (1) of this section. Periodic payments made subsequent to the first payment are sourced to the primary property location for each period covered by the payment. The primary property location shall be as indicated by an address for the property provided by the lessee that is available to the lessor from its records maintained in the ordinary course of business, when use of this address does not constitute bad faith. The property location is not altered by intermittent use at different locations, such as use of business property that accompanies employees on business trips and service calls.

(Emphasis added.)

SSUTA §310A, the general sourcing rule, was codified in RCW 82.32.730(1) and provides:

- (a) When tangible personal property . . . is received by the purchaser at a business location of the seller, the sale is sourced to that business location.
- (b) When the tangible personal property . . . is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser . . . occurs, including the location indicated by instructions for delivery to the purchaser . . . known to the seller.

(Emphasis added.) RCW 82.32.730(3)(a) provides special sourcing rules for motor vehicles, trailers, semitrailers, or aircraft:

For a lease or rental that requires recurring periodic payments, each periodic payment is sourced to the primary property location. The primary property location is as indicated by an address for the property provided by the lessee that is available to the lessor from its records maintained in the ordinary course of business, when use of this address does not constitute bad faith. This location is not altered by intermittent use at different locations.

(Emphasis added.) Although the Mobile Units are housed in semitrailer trucks, we conclude that they do not constitute “motor vehicles, trailers, or semitrailers” as those terms are used in RCW 82.32.730(3), or “transportation equipment” as defined in RCW 82.32.730(9)(g). The fact that the video production equipment is merely housed or stored inside semitrailer trucks does not convert such equipment into motor vehicles, trailers, semitrailers, or transportation equipment. The Mobile Units are tangible personal property “other than property identified in subsection (3) or (4) of this section,” as provided in RCW 82.32.730(2). Thus, the first lease payment received by Lessor would be sourced to where receipt of the Mobile Units occurred (outside of Washington) under RCW 82.32.730(1)(b); and subsequent lease payments would be sourced to the primary property location (outside of Washington) of the Mobile Units under RCW 82.32.730(2)(a).

In general, RCW 82.32.730(1) - (4) provides sourcing rules with respect to a *seller's* (or lessor's) responsibility to collect and remit retail sales or use tax on the periodic lease payments it receives for various types of tangible personal property. *See* SSUTA § 309A. In contrast, RCW 82.32.730(10) provides sourcing rules with respect to a *buyer's* (or lessee's) responsibility to pay use tax on use of such leased property in this state. RCW 82.32.730(10) is an exception to the general sourcing rules of RCW 82.32.730(1)-(4) and provides:

In those instances where there is no obligation on the part of a seller to collect or remit this state's sales or use tax, the use of tangible personal property . . . , subject to use tax, is sourced to the place of first use in this state.

(Emphasis added.)

The issue here is the interpretation of RCW 82.32.730(10) and whether Lessor had an obligation to collect or remit Washington sales or use tax under that provision. The Audit Division contends that Lessor (as the seller) had no obligation to collect or remit sales or use tax in this state because RCW 82.32.730(3) sources the lease payments to the primary property location outside of Washington. Taxpayer, on the other hand, argues that RCW 82.32.730(10) does not apply, claiming that Lessor *does* have an obligation to collect or remit Washington use tax because when the Taxpayer and Lessor negotiated and entered into the Lease, they intended the Mobile Units to be used in this state.

“When called on to interpret a statute, our fundamental obligation is to give effect to the Legislature’s intent.” *Skagit County Pub. Hosp. Dist. No. 1 v. Dep’t of Revenue*, 158 Wn. App. 426, 437, 242 P.3d 909 (2010). Washington courts employ a “plain language” approach to interpreting statutes, absent ambiguity. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720, 724 (2001). In interpreting the provision at issue, we must consider and harmonize the entire statute in which the provision is found, as well as related statutes or other provisions in the same act that disclose legislative intent. *See, e.g., City of Olympia v. Drebeck*, 156 Wn.2d 289, 295, 126 P.3d 802 (2006); *Stewart Carpet Serv., Inc. v. Contractors Bonding & Ins. Co.*, 105 Wn.2d 353, 715 P.2d 115 (1986); *Dep’t of Ecology v. Campbell & Gwinn L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). Additionally, a term or phrase in a statute cannot be read in isolation, but rather within the context of the statutory scheme as a whole. *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993).

The phrase “obligation on the part of a seller to collect or remit this state's sales or use tax” in RCW 82.32.730(10) must be considered in the context of the entire SSUTA statutory scheme. SSUTA § 309 specifically provides that the phrase in question is determined by the general sourcing rules of § 310.³ Thus, we must turn to the general sourcing provisions that apply to Lessor, namely, RCW 82.32.730(2), under which the Mobile Units are sourced to their primary property location outside of Washington. Because the Mobile Units are sourced outside of Washington, Lessor has no obligation to collect and remit sales or use tax under RCW 82.32.730(10). Accordingly, under the plain language of the statute, the use of the Mobile Units by Taxpayer is sourced to the place of first use in Washington. *Id.*

Our conclusion is supported by Excise Tax Advisories 3185.2014 (“ETA 3185”) and 3186.2014 (“ETA 3186”), issued by the Department on January 16, 2014. Pursuant to RCW 34.05.230, these advisories are interpretive statements that enunciate the Department’s position with respect to RCW 82.32.730. ETA 3185 addresses the B&O tax and retail sales tax obligations of *lessors* leasing tangible personal property to consumers, while ETA 3186 addresses the use tax obligations of *lessees* who use tangible personal property in Washington. ETA 3185 explains the general lease sourcing provisions of RCW 82.32.730, stating:

When a periodic lease payment is properly sourced to a primary property location outside of Washington, the lessor is not required to collect Washington’s retail sales tax or pay retailing B&O tax on the income. The lessee may, nonetheless, incur a use tax liability if the lessee uses the property in Washington. (See ETA 3186.2014)

(Emphasis added.) With respect to intermittent use of leased property in Washington, ETA 3185 further provides:

A lessor has no obligation to pay Washington’s retailing B&O tax, or collect Washington’s retail sales tax, if the primary property location of leased property is outside Washington. This is true even when the lessee intermittently uses the leased property in Washington. The lessee, however, is responsible for Washington’s use tax in these situations, unless a specific exemption applies. See ETA 3186.2014.

(Emphasis added.) Thus, ETA 3185 makes clear that under RCW 82.32.730 a lessor has no obligation to collect sales tax if the leased property’s primary location is outside Washington. Here, the primary property locations of the Mobile Units are [outside of Washington]. Thus, Lessor has no retail sales tax collection obligation, RCW 82.32.730(10) applies, and the lease payments are sourced to the place of first use in Washington.

ETA 3186, which explains a lessee’s use tax liability, provides additional guidance. It reiterates that use tax generally applies to leased property brought into Washington if such property was not previously subject to retail sales tax:

³As previously discussed, SSUTA § 309A specifically provides that the general sourcing rules of SSUTA § 310 “apply to determine a seller’s obligation to pay or collect and remit a sales or use tax with respect to the seller’s retail sale of a product.”

Use tax is a tax imposed on the use of tangible personal property (property) and other products in Washington when retail sales tax has not previously been paid. Use tax applies to the use of leased property brought into the state, if the lessee's purchase or use of the leased property was not previously subject to Washington's retail sales or use tax. A person is subject to either Washington's retail sales or use tax, but not both with respect to the same leased property. A lessee is responsible for paying Washington's use tax unless a specific exemption applies.

ETA 3186 also provides the following specific example:

ThomCorp leases an airplane from an Oregon LLC for 3 years, with payments of \$10,000 per month. Delivery of the airplane occurs in Salem, Oregon. The primary property location of the airplane is Salem, Oregon. ThomCorp routinely (once per month) uses the aircraft to shuttle executives and guests between its Salem, Oregon, and Spokane, Washington, business locations.

No retail sales or use tax is imposed with respect to the lease in Oregon. ThomCorp incurs a use tax liability in Washington each month it uses the aircraft in the state with use tax being due on the full value of each monthly lease payment. The fact that the primary property location during the 24-month period is located outside Washington does not affect the lessee's liability for use tax. The measure of the use tax for each monthly period is the \$10,000 lease payment, regardless of the amount of time each month that the airplane is within Washington. Because no retail sales or use tax is legally imposed or has been paid, there is no credit available to ThomCorp under RCW 82.12.035 for taxes paid to another taxing jurisdiction.

This example makes clear that the lessee is liable for use tax on its use of the leased property in Washington when no retail sales tax has been paid on such property. We find the facts of this example to be substantially similar to the facts before us. Applying the above example to the instant case, we hold that Taxpayer, as lessee, is liable for use tax on the Mobile Units during the Refund Period.

Taxpayer relies on two published determinations for its position: Det. No. 87-171A, 5 WTD 281 (1988) and Det. No. 05-0020R, 25 WTD 25 (2006). In 5 WTD 281, the Department considered whether an out-of-state lessor was liable for Washington business and occupation ("B&O") tax and retail sales tax solely by virtue of the mere presence of the leased property in this state. The lessee, who had sole discretion over the entry of the barges into Washington, operated the barges along the Columbia River to transport goods from Oregon to Washington. The out-of-state lessor had no knowledge of or control over the barges' whereabouts. We announced a bright line test under which Washington has jurisdiction to tax lease receipts where the property is leased to a consumer for use in this state during any of the lease period, and where the parties contemplate use in this state. *Id.* We held that former WAC 458-20-193B, required more than the mere presence of leased property in Washington to be subject to tax in this state. 5 WTD at 289-90. We emphasized that Washington cannot assert taxing jurisdiction over an out-of-state lessor where the out-of-state lessee has sole discretion over the movement of mobile property into Washington. *Id.*

Taxpayer also cites Det. No. 05-0020R, 25 WTD 25 (2006) as authority for its position. That determination involved an out-of-state corporation that leased a motor home to its sole shareholders, a married couple who resided in Washington. The Department assessed use tax against both the corporation and the individuals. The corporation argued that it was not liable for use tax because it did not bring the motor home into Washington; rather, the married couple did. We distinguished the facts of that determination from 5 WTD 281 and held that Washington had jurisdiction to tax the out-of-state lessor corporation on the rental income because the corporation “knowingly and purposefully entered the state for the purpose of deriving income here. . . .” 25 WTD at 32-33.

While we do not question of continuing validity of these WTDs with respect to whether an out-of-state lessor has nexus in Washington, we conclude that they are inapplicable in determining whether a lessor has an obligation to collect and remit sales or use tax under RCW 82.32.730(10). Rather, we hold that a lessor’s obligation is determined under the general sourcing provisions of RCW 82.32.730(1)-(4), which source the lease payments at issue here outside of Washington, and hence, create no obligation on the part of a lessor to collect and remit sales or use tax. Thus, Taxpayer’s use of the Mobile Units is sourced to the place of first use in Washington under RCW 82.32.730(10).

DECISION AND DISPOSITION

We deny Taxpayer’s petition.

Dated this 1st day of July 2014.