

BEFORE THE DIRECTOR
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	
For Refund of Use Tax of)	<u>F I N A L</u>
)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 86-251A
)	
. . .)	Registration No. . . .
)	
)	
)	

[1] **RCW 82.12.010:** USE TAX -- CONSUMER -- DISPLAY OF TANGIBLE PERSONAL PROPERTY -- FACTUAL FINDINGS -- WEIGHT. Where the preponderance of factual findings establish that tangible personal property has been displayed for the purpose of promoting sales of similar products, the person displaying such property is a "consumer" and fully subject to use tax upon the value of the property displayed.

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:

Appeal has been taken from the findings and conclusions of Determination No. 86-251, issued on September 12, 1986. That Determination sustained the assessment of use tax upon the value of the taxpayers' 44-PH sailing vessel which was moored and displayed in this state.

FACTS AND ISSUE:

Faker, Sr. A.L.J. -- The facts surrounding the taxpayers' acquisition and display of the vessel are fully and correctly reported in Determination 86-251 and will not be restated here. The operative facts, all of which are not in dispute, are again referred to, as appropriate, below.

There is a single issue for our determination. Does the custom fitting of a sailing vessel in this state for purposes of displaying it in this state to promote commissioned sales of

similarly fitted vessels constitute "use as a consumer" in this state under Chapter 82.12 RCW (use tax)?

TAXPAYERS' EXCEPTIONS:

In response to the findings and conclusions of Determination No. 86-251, the Taxpayers' C.P.A. has submitted an appeal petition to the Director, received on October 1, 1986. It contains the following pertinent assertions and arguments:

The most basic element of misunderstanding is that the business of the . . . Company was not to demonstrate the boat, rather it was two complete purposes. One was to represent the model 44-PH to dealers world wide for the manufacturer. The second was to design and manufacture a particular version of the 44-PH with very specific intentions to sell that craft at a profit to either a dealer or end user. Contrary to the understanding of [administrative law judge]¹ the taxpayers were doing much more in the manufacture process than her impression of just adding interior. They not only designed everything except the shell, they received that boat without sails, rigging, equipment, electronics, and all domestic implements. Their task is very similar to a motorhome manufacturer receiving a chassis only from G.M., and constructing a "bodied vehicle". The very nature of this manufacture process is evident from the massive nature of this activity. If this particular craft had sold, another would have been designed and built, again for resale.

The only use that this craft has is for sailing the high seas (it has never left the harbor, and cannot since insurance prohibits such, allowing only short harbor sales [sic]). The only other purpose of the craft is to accomplish demonstration of that specific craft for sale, or demonstration for interested buyers from company dealers who wanted to see this particular design of the 44-PH. In either case, they were always a prospective buyer for this specific craft! Since most of the representation done for dealers was via correspondence, the primary purpose of this particular craft was the sale of this and future . . . Co. manufactured models, rather than for representation for the Hull manufacturer. The major benefit to their representation for the manufacturer was simply the fact that a new model (and market via the . . . company) of the 44-PH existed.

¹ Reference to the A.L.J. by name has been deleted.

As a practical matter, the contract to represent for the Hull manufacturer was not renewed after the first year because of new ownership and lack of sales success. However, if the first model of production sold, the company could still buy the hulls at effective pricing to continue their manufacturing activity. Contrary to the understanding of [administrative law judge], the . . . Company bought the units at dealer pricing because of its intent to "create" a new market which had never existed before based upon a revolutionary new design. This design was hoped by the Hull manufacturer to create a much wider market for their Hulls. The very fact that this model didn't sell doesn't change the nature of the manufacturing activity. Even today, the only use of the craft is to show that particular craft for sale. If it sold today, it would complete the cycle for which the department of the . . . Company was originally organized.

. . .

Page three of the determination states that the basis for asserting the use tax was personal use. This is an allegation which has not been proven, or even illustrated by the department. This craft is not a weekend pleasure craft to ski behind or go fishing. Its only purpose is to sail the high seas! Further, the . . . Company has kept a log in which all activity on the craft has been recorded. The only sails have been for testing of equipment and systems, and to show to prospective buyers, all of whom have been interested in that specific craft. Therefore, no pleasure use has occurred [sic] of any nature.

Page four states a disbelief that "the evidence clearly supports a finding that the taxpayers purchased the vessel for resale in the regular course [sic] of business." This is true! They purchased the craft for substantial additional manufacture, as stated above. The key, I believe, to the misunderstanding by [administrative law judge] is that she has consistently assumed that the representation for the Hull manufacturer and the construction of their manufactured model was a unified and single business activity. Although one activity aided the other, the two were separate and not fully dependant upon each other, as evidenced by the current fact that they are not representing the Hull, but are still able to manufacture additional models when this model sells. This activity could only continue as each one sells, since they can only afford to support one such craft at a time.

Page five states again that the vessel was used by the taxpayers as consumers as a display in a trade show of

less than thirty days, and since it has been two years, it is assumed to be automatically escalated to a demo item and taxable. I find no provision in the sales tax law which would trigger a tax on the manufacturer if a manufactured item is held for resale after completion, and it does not sell in a certain period of time. The only concession we make in our assertion of claim for exemption as a manufacturer for this model, the 44-PH, is that the . . . Company did not properly approach the sales tax exemption with the right awareness and understanding of the issue when it first arose. We believe that the facts solidly support an exemption to the . . . Company as a manufacturer from sales tax. The sales tax will still be triggered when ultimately sold via a dealer or a direct sale.

If the Department of Revenue intends to assert further its claim for sales tax, the issue must be recognized that the company did in fact manufacture this craft and has, in fact, been trying to fulfill the intent of sale of this particular craft, both during and since completion of the unit. Further, we believe that once the Department has a clear understanding of the nature of the manufacturing task, the issue (of demonstration for the primary purpose of sale of that particular craft) will clearly fall within acceptable activity without triggering sales tax liability. Therefore, the . . . Company as a value added manufacturer, not a retailer, should be able to continue to purchase Hulls for unique design and manufacture of completed craft without the penalty of double taxation.

Other than rearguing the nature of the taxpayers' use of the vessel, as set forth above, the petition contains no new or additional arguments not fully treated in Determination No. 86-251.

DISCUSSION:

We have thoroughly reviewed the taxpayers' petition, the use tax assessment files in this case, and Determination 86-251. We find that this Determination fully and properly represents the position of the Department, under the law, with respect to use tax liability upon the value of items used and displayed for the purpose of promoting sales of similar items. The taxpayers' petition to the Director is, itself, supportive of the finding that such use occurred in this state. It is further supported by numerous statements contained in the taxpayers' original petition in this matter and the lengthy narrative which explained the entire background of the taxpayers' acquisition and development of the vessel at issue. Dispositive of the taxpayers' use of the vessel in this state, as a consumer, and thereby incurring use tax liability are the following statements:

1) ". . . the business of . . . was two complete purposes. One was to represent the model 44-PH to dealers world wide for the manufacturer." (page 1 of the taxpayers' petition set forth in full earlier herein.)

2) "The major benefit to their representation for the manufacturer was simply the fact that a new model (and market via the . . . company) of the 44-PH existed." (Petition at page 2, supra.)

3) ". . . the . . . Company bought the units at dealer pricing because of its intent to 'create' a new market which had never existed before based upon a revolutionary new design. This design was hoped by the Hull manufacturer to create a much wider market for their Hulls." (Petition, supra.)

4) ". . . an association with HC [Hans Christian Yachts-the designer/dealer] would profit buyers, builders, and ourselves." (page 4, paragraph 5 of taxpayers' narrative dated May 23, 1985.)

5) "We discussed our changes in design of the 44-PH and the ways in which we [the taxpayers and the designer/dealer] might both profit the most in marketing. (page 9 of taxpayers' narrative, supra.)

6) ". . . we purchased a VCR that could be used on 12V (boat battery power) as well as 110V. We could use it as a sales tool to motivate potential customers to spend the time and money to come to Shelter Bay and inspect . . . the 44-PH." (page 9, last paragraph of taxpayers' narrative, supra.)

7) "Our weak point is marketing/advertising with the worldwide Hans Christian dealers which we hope to upgrade." (page 13, paragraph 4 of narrative.)

8) "This boat has been used for business reasons only. The engine hour meter is presently 125 hours. If results do not appear potentially profitable within a year, we will put her up for sale and abandon our project." [Emphasis added.] (page 13, last paragraph of narrative.) (The bracketed inclusions above have been provided.)

All of the foregoing statements, together with other similar references in the taxpayers' respective narrative and petition lead to the inescapable factual conclusion that the taxpayers displayed the 44-PH as a means of promoting sales of other hulls of that design. The taxpayers' business and personal purpose was to

realize commissions from such sales. The use of the vessel, as explained herein and in Determination 86-251, clearly constitutes taxable use as a consumer as defined in RCW 82.12.010. In addition to the ordinary meaning of the term "use" in this statute, it also extends the meaning of the term "consumer" for use tax purposes, to include:

. . . any person who distributes or displays, or causes to be distributed or displayed, any article of tangible personal property . . . the primary purpose of which is to promote the sale of products or services. (Emphasis supplied.)

Though the taxpayers claim they had dual purposes in displaying the vessel, it is clear that the primary and sole purpose of such display was to profit from sales of similar designed hulls and modified watercraft on a commission basis. According to the taxpayers' written statement, only if this purpose did not succeed would the taxpayers, "put her up for sale and abandon our project." The "project" was clearly to promote product sales by displaying the 44-PH and showing sailors worldwide what could be done with such a craft.

To cite a homely example, if a dealer puts bags of landscaping beauty bark on display for sale, there is no "display" in the statutory taxable sense; but if the beauty bark is spread around in a display of its qualities, features, adaptability, visual attractiveness, etc., then the spread bark has been put to intervening, personal business use by the seller. The seller is the "consumer" of that bag of bark which has been submitted to intervening use. It is subject to use tax even though it might be later rebagged and sold.

Determination 86-251 succinctly and properly explains the workings of the appropriate use tax statutes and rule. We fully ascribe to its findings and conclusions. We have added to them here, only by way of further emphasizing the distinctions between showing or displaying something primarily for the purpose of selling that thing and showing or displaying something primarily for the purpose of selling other things. The taxpayers here did the latter.

The taxpayers' petition to the Director stresses several points about which the taxpayers feel the Administrative Law Judge misunderstood the taxpayers' statements and positions. However, none of these points are at all dispositive of the issue before us. Whether the taxpayers were "retired" or "semi-retired" and what their motives may have been for reentering a business undertaking are immaterial to the tax law applications in issue. Likewise, whether the display of the 44-PH was properly designated a "personal" use or a "business" use does not affect the resulting tax liability. As earlier explained, either can be "use as a consumer." We are satisfied that the operative and dispositive

factual findings and legal conclusions contained in Determination 86-251 are thorough and correct.

DECISION AND DISPOSITION:

Determination 86-251 is sustained in full and the taxpayers' petition for refund is denied.

DATED this 17th day of July 1987.