

Cite as Det. No. 98-226, 18 WTD 316 (1999)

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. 98-226
)	
...)	Registration No. . . .
)	FY. . . /Audit No. . . .
)	REQUEST FOR REFUND
)	

- [1] RULE 229; RCW 82.32.060: TIMELINESS OF REFUND REQUEST. When a taxpayer pays taxes assessed by the Department and subsequently requests a refund of taxes for the period covered by the tax assessment, the taxpayer will receive a refund of taxes overpaid during the audit period and beyond the normal four-year refund period to the extent that the tax assessment over-assessed the “amount properly due” and the refund request is made within the statutory period following the payment of the tax assessment.
- [2] RULE 176; RCW 82.08.0262: RETAIL SALES TAX – DEEP SEA FISHING EXEMPTION. The exemption from the retail sales tax for watercraft used in commercial deep sea fishing operations, as well as for component parts, repairs, cleaning, etc. of such watercraft, applies to fishing operations outside of Washington’s territorial waters. There is no requirement that the fishing operations occur in international waters.
- [3] RCW 82.08.0273; ETA 316: CORPORATE NONRESIDENT PERMIT. Nonresidents, including nonresident corporations, of certain states are allowed to purchase items of tangible personal property in Washington without payment of retail sales tax. Prior to July 25, 1993, to qualify for the exemption, the nonresident purchaser was required to have a nonresident permit. After July 24, 1993, nonresident individuals are not required to have a nonresident permit, but nonresident corporations are.

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.¹

NATURE OF ACTION:

An Alaskan fishing corporation, whose principal offices are located in Washington, protests the Audit Division's denial of its refund claim.²

FACTS:

Coffman, A.L.J. -- The taxpayer is an Alaskan corporation engaged in commercial fishing operations. The taxpayer's principal offices are located in Seattle. The Audit Division of the Department of Revenue (Department) reviewed the taxpayer's books and records for the period January 1, 1990 through June 30, 1993. As a result of this review, the Department issued the above-referenced tax assessment, which the taxpayer paid in full on May 10, 1994.³ The taxpayer filed a timely request for refund, which was denied by the Audit Division, and then timely appealed to the Appeals Division.

The taxpayer operates two fishing vessels. These vessels are the [A] and the [N]. The [A] is a fishing vessel used for fishing purposes exclusively in Alaskan and international waters. The [N] is a processing barge that is moored in sheltered Alaskan bays or next to the shore. When not involved in fishing operations, the vessels are moored in Washington where repairs, maintenance, and improvements are performed by Washington businesses. The taxpayer claims it is entitled to a refund of retail sales tax paid to the Department and to the companies performing the services.

Additionally, the taxpayer purchased supplies and materials it claims were for use in Alaska. These items were delivered to the taxpayer either at shipside or at the taxpayer's offices in Washington. The Audit Division allowed the taxpayer a refund for deliveries at shipside because RCW 82.08.0269 exempts from the retail sales tax sales of tangible personal property for use in noncontiguous states, possessions, and territories when it is "reasonably certain" the goods will be shipped directly to a contiguous state, possession, or territory. The Audit Division, however, did not allow the deduction for goods delivered to the taxpayer's offices in Washington because the goods were not delivered to the taxpayer's vessels or the taxpayer's "designated agent at the usual receiving terminal of the carrier selected to transport the goods" (another requirement of RCW 82.08.0269). Thus, the Audit Division did not allow the claimed refund for items delivered to the taxpayer's offices in Washington.

The taxpayer concedes the RCW 82.08.0269 exemption does not apply to items delivered to the taxpayer's offices. However, it argues entitlement to the nonresident exemption under RCW

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

³ The taxpayer paid \$. . . in tax and \$. . . in interest.

82.08.0273 for these purchases. During the audit period, the taxpayer did not have a nonresident permit as allowed by RCW 82.08.0273. The nonresident permit allows certain nonresidents (including nonresident corporations) to purchase tangible personal property in Washington without the payment of retail sales tax. RCW 82.08.0273

Finally, the taxpayer sold two engines in 1990 to a Washington business. The taxpayer did not charge the purchaser retail sales tax on the transaction and did not receive from the buyer a resale certificate until 1997. The purchaser of the engines is not and has never been registered with the Department to engage in business in Washington.

ISSUES:

1. Is the taxpayer's refund request for retail sales tax paid to vendors timely?
2. Is the taxpayer engaged in "commercial deep sea fishing", thus entitling it to the RCW 82.08.0262 exemption from the retail sales tax for purchases of repair, cleaning, and improvement services of watercraft used in its fishing operations?"
3. Is the taxpayer entitled to a refund of the retail sales tax per RCW 82.08.0273, when it did not provide vendors with a corporate nonresident permit and it paid to its vendors the retail sales tax?
4. Was the taxpayer required to collect retail sales tax on its sale of two engines to a Washington business, when it did not have a resale certificate from the purchaser until six years after the completion of the sale?

DISCUSSION:

Timeliness of Refund Request.

[1] The Department may refund taxes paid by a taxpayer "in excess of the amount properly due" subject to the limitation that only taxes paid during the previous four years and the current year are eligible. RCW 82.32.060. The taxpayer's refund request was filed with the Audit Division in 1997; thus, only taxes paid between January 1, 1993 and the date of the refund request could be refunded. The taxpayer's refund request includes amounts paid to vendors between January 1, 1990 and December 31, 1992.

In Paccar, Inc. v. Department of Rev., 135 Wn.2d 301, 957 P.2d 669 (June 4, 1998), the court faced a similar situation. In Paccar the taxpayer overpaid B&O taxes during the period 1977 through 1981 by over \$300,000. However, the Department issued a tax assessment against the taxpayer for the same period in the approximate amount of \$175,000⁴ [in 1982]. Paccar paid the

⁴ The overpayment consisted of service and other activities business and occupation (B&O) tax on interest income. The assessment was based on sales, use, and retailing B&O taxes.

tax assessment in 1983. In 1985, Paccar filed a petition for refund in the Thurston County Superior Court. “Paccar claimed it was entitled to satisfy the ... 1982 deficiency assessment by a credit for or offset against the B&O tax overpayments it made during the years 1977 through 1981.” Ibid at 305.

The court granted Paccar’s refund request, ruling the term “amount properly due” means the total taxes due for the tax period. Thus, the court found Paccar’s payment in 1983 of \$175,000 for the period 1977 through 1981 was an amount “in excess of the amount properly due”. Further, the court ruled that any refund was limited to the amount actually paid during the statutory refund period.

The court’s ruling was based on the 1979 version of RCW 82.32.060. Although RCW 82.32.060 was amended in 1989, 1990, and 1992, the amendments did not affect the term “in excess of the amount properly due” or the four year period. Thus, the taxpayer’s petition for refund of retail sales taxes allegedly overpaid in 1990, 1991, and 1992 is timely up to the amount of tax paid in 1994. Like the taxpayer in PACCAR who paid in 1983 an assessment for years 1977-81, the taxpayer here paid an assessment in 1994 relating to years 1990-2. Because the court in PACCAR found the refund claim filed in 1985 was timely as to the 1977-81 assessment paid in 1983 as an amount “in excess of amount properly due”, we find the refund claim filed in 1997 was timely as to the 1994 payment of taxes assessed for years 1990-2.

Deep Sea Fishing Exemption:

The taxpayer relies on RCW 82.08.0262 to claim the retail sales tax it paid on repairs, cleaning, and improvements to its watercraft was not properly due. RCW 82.08.0262 states, in relation to deep sea fishing, the retail sales tax:

shall not apply to sales of ... watercraft ... for use in conducting commercial deep sea fishing operations outside the territorial waters of the state ...; also sales of tangible personal property which becomes a component part of such ... watercraft, ... in the course of constructing, repairing, cleaning, altering, or improving the same; also sales of or charges made for labor and services rendered in respect to such constructing, repairing, cleaning, altering, or improving.

(Emphasis added.) The taxpayer claims the exemption is available if the vessels are used primarily outside of Washington. The taxpayer cites the Department’s administrative rule implementing RCW 82.08.0262: WAC 458-20-176 (Rule 176). Rule 176(1)(a) defines “commercial deep sea fishing” as:

fishing done for profit outside the territorial waters of the state of Washington. It does not include sport fishing or the operation of charter boats for sport fishing. (See WAC 458-20-183 for tax liability of such persons.) Nor does the phrase include the operation or purchase of watercraft for kelping, purse seining, or gill netting, because such fishing

methods can be legally performed in Washington only within the territorial waters of the state (the three-mile limit).

(Emphasis added.)

The Audit Division claims only fishing done in international waters qualifies as “commercial deep sea fishing”. Specifically, the Audit Division claims the vessels were used in Alaskan territorial waters, thus the taxpayer was not engaged in “commercial deep sea fishing”. The Audit Division denied the taxpayer’s refund claim because the taxpayer was not able to document the use of the two vessels in international waters. In support of this position, the Audit Division cites Trident Seafoods Corp. v. State of Washington, Dept. of Rev., Board of Tax Appeals Docket No. 25662 (1984) in which the BTA, sustained the Department’s conclusion that there was “lack of documentation to support the delivery of the goods and the contention that the items were used in ‘international waters’.”

The Audit Division’s reliance on Trident Seafoods is misplaced. The ultimate issue in Trident Seafoods was whether the items purchased were component parts of the watercraft. The first sentence in the BTA’s decision said: “Trident Seafoods Corp. is engaged in the business of commercial deep sea fishing, processing and sale of seafood products.” Thus, there was no issue or discussion about whether Trident was in the business of commercial deep sea fishing.

[2] The Audit Division’s restrictive analysis of RCW 82.08.0262 is understandable when we consider the maxim that exemptions and deductions are strictly construed against the taxpayer. Budget Rent-a-Car, Inc. v. Department of Rev., 81 Wn.2d 171, 500 P.2d 794 (1972). However, neither RCW 82.08.0262 nor Rule 176 state the exemption applies only if the vessels are used in international waters. Rather, they both state the location of the fishing operations must be “outside the territorial waters of the state”. Because the taxpayer does not conduct any fishing operations in Washington territorial waters, and the taxpayer is engaged in fishing operations, the exemption is available to the taxpayer.

The taxpayer’s petition is granted as to repairs, cleaning, and improving its watercraft. The file is remanded to the Audit Division for the purpose of determining which purchases qualify as either component parts of the watercraft or as “labor and services rendered in respect ... repairing, cleaning, altering, or improving” the watercraft.

Nonresident Permit

[3] Many of the items of personal property purchased by the taxpayer were delivered to it in Washington. The taxpayer did not pay retail sales tax or use tax on these items, claiming exemptions under RCW 82.08.0262 and WAC 458-20-193 (Rule 193). When the Audit Division reviewed the taxpayer’s records, it allowed the exemptions for purchases for use in noncontiguous states (RCW 82.08.0269), including those purchases that were delivered directly to taxpayer’s vessels. However, the Audit Division did not allow the exemption for items

delivered to the taxpayer's Washington offices. Det. No. 86-35A, 7 WTD 57 (1988) supports the Audit Division's position.

In the taxpayer's request for a refund, it raised a basis for its claim of exemption not mentioned during the audit. Specifically, the taxpayer argues that it is entitled to the nonresident exemption provided by RCW 82.08.0273. This statute allows Washington sellers to make sales to residents of certain states (including Alaska) without charging retail sales tax if the items are purchased for use outside of the state.

RCW 82.08.0273 was amended in 1993. Prior to the amendment, the statute specifically required the nonresident to have a nonresident permit at the time of the purchase. Det. No. 92-15, 12 WTD 57 (1993). The taxpayer did not have a nonresident permit during the audit period. It first obtained a nonresident permit in 1997. Thus, the taxpayer's purchases prior to the 1993 amendment do not qualify for the exemption.

The effective date of the 1993 amendment was July 25, 1993. The taxpayer's refund claim concerns periods prior to July 1, 1993, therefore we do not need to address purchases made by the taxpayer after July 24, 1993.

The 1993 amendment eliminated the requirement for a nonresident permit and replaced it with the requirement that the purchaser "must display proof of his or her current nonresident status as herein provided." (Emphasis added.) RCW 82.08.0273(2)(a). Because corporations act only through their representatives, the Department updated Excise Tax Advisory⁵ 316.08.193 (ETA 316) to explain how a foreign corporation may make purchases in Washington and qualify for the exemption. ETA 316 states:

Nonresident corporations may also qualify to make purchases without payment of retail sales tax. The Department of Revenue issues "nonresident permits" upon request to qualifying corporations. Vendors making sales to nonresident corporations should examine the nonresident permit to make certain that it is valid during the period of the sale and that it is issued to the purchaser. The vendor must record the permit number within its records. Nonresident corporations which qualify to obtain a permit are those incorporated in one of [Alaska, Oregon, Montana, Delaware, New Hampshire, Virgin Islands, Guam, Yukon, Alberta, Puerto Rico, or The Commonwealth of Northern Mariana Islands].

(Bracketed material added.) The Audit Division argues the exemption is available only if the taxpayer had a nonresident permit at the time of the purchase. The taxpayer argues the exemption is available to all qualifying nonresidents regardless of the presence of the "nonresident permit". We agree with the Audit Division.

⁵ Formerly referred to as Excise Tax Bulletins.

RCW 82.08.0273 requires display of current proof of nonresidency. RCW 82.08.0273(2)(a). Further, the seller must “examine the proof of nonresidence [to] determine whether the proof is acceptable under subsection (2)(b)”. RCW 82.08.0273(3). Together, these subsections show that the corporate nonresident permit must have been present at the time of the purchase.

The taxpayer’s petition is denied as to the nonresident permit issue.

To summarize, the taxpayer’s purchases of component parts, repairs, improvements, cleaning, and altering vessels used in commercial deep sea fishing operations are exempt from the retail sales tax. RCW 82.08.0262. Purchases of tangible personal property for use in Alaska are exempt from the retail sales tax when delivered to the purchaser’s vessel or to taxpayer’s designated agent at the usual receiving terminal of the carrier. RCW 82.08.0269. Purchases of tangible personal property may be made by a nonresident corporation without the payment of retail sales tax only if it is incorporated in a qualifying state, it presents a corporate nonresident permit to the seller, and the seller agrees to make the sale without charging retail sales tax. RCW 82.08.0273.

DECISION AND DISPOSITION:

The taxpayer’s petition for refund is granted as to repairs, cleaning, and improvements to its watercraft, subject to Audit Division verification. This matter is remanded to the Audit Division for action consistent with our determination. The taxpayer’s petition is denied as to the “nonresident permit” and resale certificate issues.

Dated this 30th day of December 1998.