

Cite as Det. No. 13-0312, 34 WTD 006 (2015)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition for Correction of ) D E T E R M I N A T I O N  
Assessment of )  
 )  
... ) No. 13-0312  
 )  
 ) Registration No. . . .  
)

[1] RCW 82.32.050; RCW 82.12.0254; RCW 82.12.020: STATUTORY LIMITATION ON ASSESSMENTS: USE TAX – MOTOR CARRIER ROLLING STOCK. RCW 82.32.050(3) bars the assessment of use tax more than four years after the close of the tax year in which a truck and related trailer fail to qualify for a use tax exemption.

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.

Lewis, A.L.J. – A motor carrier protests the assessment of use tax on trucks and trailers (“rolling stock”) that no longer qualified for a use tax exemption and contends the assessment is barred by RCW 82.32.050(3), which provides a statutory limitation on the time period that the Department of Revenue (“Department”) can issue an assessment. Taxpayer’s petition is granted.<sup>1</sup>

**ISSUE:**

Does RCW 82.32.050(3), which provides for a statutory limitation on assessments, bar the assessment of use tax more than four years after the close of the tax year in which a truck and related trailers failed to qualify for a use tax exemption?

**FINDINGS OF FACT:**

[Taxpayer] is a motor carrier that hauls goods for hire. It maintains a fleet of vehicles within Washington. Income is derived from both intra- and interstate hauls. The Department’s Audit Division audited Taxpayer’s business records for the period January 1, 2008 through December 31, 2011. On December 3, 2012, the Department issued a \$ . . . assessment.<sup>2</sup> Subsequently, the Department issued a post assessment adjustment reducing the amount of the assessment based on

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

<sup>2</sup> The \$ . . . assessment consisted of \$ . . . tax, \$ . . . interest, and \$ . . . assessment penalty. It should be noted that on November 16, 2012, the Department issued \$ . . . assessment that represented use tax on consumable and equipment that was not protested.

the valuation of the transportation equipment taxed. The tax arose from use tax imposed on certain trucks and trailers.

Based on a review of records related to the use of rolling stock during the period of the assessment, the Department concluded that certain of the trucks and trailers had not met the substantial use test for the applicable use tax exemption. More specifically, the Audit narrative explained:

The area for discussion was the trucks which failed the 25 percent substantial use test in 2007 or prior [that were] used by the company in 2008 or after. [Taxpayer] does not want to pay use tax on trucks which failed the 25 percent substantial use test in 2007 even if the trucks were used during the audit period. The Department of Revenue's position is that the trucks failed the 25 percent substantial use test in 2007 or prior and were used during the audit period are subject to use tax.

Thus, the Audit Division's position is that the use tax exemption must be perfected for each year of use. Accordingly, the Department was not barred by the statute of limitations from assessing the use tax. Taxpayer counters that the statute of limitations prohibits the taxation of rolling stock that lost the use tax exemption prior to 2007.

#### ANALYSIS:

Washington's use tax is imposed by RCW 82.12.020(1), which reads in part:

- (1) There is levied and collected from every person in this state a tax or excise for the privilege of using within this state as a consumer any:
  - (a) Article of tangible personal property acquired by the user in any manner,  
....

WAC 458-20-178(2) (1986)<sup>3</sup> ("Rule 178") further explains that Washington's use tax complements the retail sales tax by imposing a tax equal to the retail sales tax on tangible personal property used in this state when the retail sales tax has not been paid the property is first put to non-exempt use in this state:

In general, the use tax applies upon the use of any tangible personal property, the sale or acquisition of which has not been subjected to the Washington retail sales tax. Conversely, it does not apply upon the use of any property if the sale to the present user or to the present user's donor or bailor has been subjected to the Washington retail sales tax, and such tax has been paid thereon. Thus, these two methods of taxation stand as complements to each other in the state revenue plan, and taken together, provide a uniform tax upon the sale or use of all tangible personal property, irrespective of where it may have been purchased or how acquired.

Rule 178(3) further explains when the tax arises:

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<sup>3</sup> Rule 178 was amended, effective May 11, 2014. All citations in this determination are to the version of Rule 178 in existence during the audit period.

When tax liability arises. Tax liability imposed under the use tax arises at the time the property purchased, received as a gift, acquired by bailment, or extracted or produced or manufactured by the person using the same is first put to use in this state. The terms "use," "used," "using," or "put to use" include any act by which a person takes or assumes dominion or control over the article and shall include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within the state. Tax liability arises as to that use only which first occurs within the state and no additional liability arises with respect to any subsequent use of the same article by the same person. As to lessees of tangible personal property who have not paid the retail sales tax to their lessors, liability for use tax arises as of the time rental payments fall due and is measured by the amount of such rental payments.

Thus, Washington law provides, in certain circumstances, an exemption from use tax. Here, Taxpayer took advantage of both an exemption from the retail sales tax (RCW 82.08.0263) and use tax (RCW 82.12.0254) when it purchased its rolling stock. Most specifically, RCW 82.12.0254 provides a use tax exemption for motor carriers whose trucks are "used in substantial part in the normal and ordinary course of the user's business for transporting therein persons or property for hire across the boundaries of this state."<sup>4</sup> WAC 458-20-17401 ("Rule 17401") further explains the statute and provides in relevant part:

The motor carrier must continue to substantially use the motor vehicle or trailer in interstate for hire hauls during each calendar year to retain the exemption from use tax. This requires that at the start of each calendar year the carrier review the usage of each vehicle and trailer for a "view period" consisting of the previous calendar year.

Under Rule 17401(5), use tax becomes due on previously exempt vehicles based on the fair market value of the vehicle at the start of the calendar year of the "view period" for which the exemption cannot be maintained. The use tax that becomes due is then reported in the last quarter of the view period year. For example, for a vehicle that lost its exempt status during 2007, use tax would be based on the fair market value as of January 1, 2007, and the tax would be due for payment on the last return filed for 2007. Thus, on audit, the Audit Division assessed use tax on certain rolling stock after it discovered that Taxpayer had not been doing the required review of the use of the rolling stock and reporting use tax on that equipment that no longer qualified for the use tax exemption.

Taxpayer filed its appeal based on a claim that the use tax assessments were time barred by the [statutory assessment period] . . . because use occurred outside the time period allowed by law to issue an assessment. RCW 82.32.050(4) provides:

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<sup>4</sup> The Washington Supreme Court in *United Parcel Service, Inc. v. Dep't. of Revenue.*, 102 Wn.2d 355, 687 P.2d 186 (1984) interpreted the substantial use requirement. In UPS, the Court found that "substantial part in the normal and ordinary course of the user's business for transporting therein persons or property for hire" meant that vehicles or trailers must be involved in actually transporting goods for hire across state lines on 25% or more of the total trips made by any particular vehicle in any single calendar year to be exempt. The Department has chosen among several methods to determine whether a vehicle is used in substantial part in interstate commerce. The methods have included the number of trips across state lines, interstate mileage, amount of interstate hauling revenue and ton-miles traveled in interstate commerce. The method to be used depends on the type of business records retained and the nature of transportation services being performed. See Det. No. 93-240, 13 WTD 369 (1994).

No assessment or correction of an assessment for additional taxes, penalties, or interest due may be made by the department more than four years after the close of the tax year, except (a) against a taxpayer who has not registered as required by this chapter, (b) upon a showing of fraud or of misrepresentation of a material fact by the taxpayer, or (c) where a taxpayer has executed a written waiver of such limitation. The execution of a written waiver shall also extend the period for making a refund or credit as provided in RCW 82.32.060(2).

As we have noted, for trucks and trailers that lost their exempt status during 2007, use tax would be due on the final return for 2007. The assessment was issued more than four years after the close of that tax year, and thus cannot include use tax on these vehicles. *Id.*

The Audit Division argues that taxes due for years prior to 2008 may be included in the assessment because Taxpayer engaged in a misrepresentation of a material fact by failing to report use tax on trucks that did not meet the substantial use tax test in those years. The Audit Division relied on RCW 82.32.050(4)(b) and WAC 458-20-230(2) (“Rule 230”) to disregard the [statutory assessment period] . . . . Rule 230 provides:

Tax assessments must be made within four years after the close of the tax (calendar) year in which the tax was incurred with the following exceptions:

...

- (b) Upon a showing of fraud or of misrepresentation of a material fact by the taxpayer.

We disagree. Here, Taxpayer made no representations. The court of Appeals in *Crisman v. Crisman*, 85 Wn. App. 15, 931 P.2d 163 (1997) wrote:

Absent an affirmative duty to disclose material facts, a defendant’s silence does not constitute fraudulent concealment or misrepresentation. *Favors v. Matzke*, 53 Wn. App. 789, 796, 770 P.2d 686, *review denied*, 113 Wn.2d 1033 (1989). When a duty to disclose does exist, however, the suppression of a material fact is tantamount to an affirmative misrepresentation. *Wash. Mut. Sav. Bank v. Hedreen*, 125 Wn.2d 521, 526, 886 P.2d 1121 (1994); *Oates*, 31 Wn.2d at 902.

Washington has a self-assessing tax system. Among other tax reported responsibilities, Taxpayers, under RCW 82.32A.030, have the responsibility to:

...

- (2) Know their tax reporting obligations, and when they are uncertain about their obligations, seek instructions from the department of revenue;
- (3) Keep accurate and complete business records;
- (4) File accurate returns and pay taxes in a timely manner;

RCW 82.32A.030. [Under this statute, Taxpayer had an affirmative duty to report and pay use tax on vehicles that failed to meet the use tax exemption. Furthermore, Rule 17401 placed an affirmative duty on Taxpayer to perform a yearly review of the use of its vehicles “in substantial

part" as an interstate motor carrier and to pay use tax if the taxpayer no longer qualified for the exemption.]

[Taxpayer was obligated to perform a yearly review and report its findings to the Department. However, RCW 82.32.050(4) limits the Department's authority to assess tax on unpaid amounts, absent a showing of fraud or misrepresentation of a material fact by Taxpayer.] We do not agree with the Audit Division's conclusion that Taxpayer's failure to monitor the use of its rolling stock and report tax on rolling stock that failed to meet the use tax exemption amounted to material misrepresentation. If the Audit Division's theory was applied uniformly every time tax was assessed, the Department could say a taxpayer's failure to report and pay the correct amount of tax was a material misrepresentation, such that the Department could go back to periods more than four years previous to assess tax. Such an application would all but render [RCW 82.32.050(4)] valueless. We find no authority to support the Audit Division's position that any tax reporting omission is a material misrepresentation. Here, Taxpayer stated that its new employee was unaware of the need to monitor the activities of the rolling stock for purposes of reporting use tax. [Despite Taxpayer's affirmative duty to review its rolling stock and report use tax when that stock no longer qualified for the exemption, there is no allegation or evidence in this case that Taxpayer's failure to do so rises to the level of "suppression" of a material fact. See *Crisman*, 85 Wn. App. at 22, 931 P.2d at 166-67; *Oates v. Taylor*, 31 Wn.2d 898, 902-03 (1948).] Nothing has been presented that Taxpayer ever made any affirmative representation to the Department that tax was not due on its rolling stock [and nothing has been presented that Taxpayer intentionally suppressed a material fact it was under an affirmative duty to disclose]. It merely failed to report the tax.

The legislature has enacted both penalties for both a failure to follow specific reporting instructions and evasion. RCW 82.32.090. Here, neither of those penalties was proposed by the Audit Division or assessed by the Department. Thus, we conclude that the Audit Division erred when it looked past the . . . [statutory assessment period] based on what it believed to be a misrepresentation by Taxpayer.

#### DECISION AND DISPOSITION:

Taxpayer's petition is granted.

Dated this 16th day of October 2013.