

Cite as Det. No. 16-0365, 36 WTD 425 (2017)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS 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. 16-0365
	)	
...	)	Registration No. . . .
	)	

RCW 82.12.010: USE TAX – DEFINITION OF CONSUMER – REGULAR COURSE OF BUSINESS. A taxpayer that sold a particular class of goods in the regular course of its business was still exempt from use tax when (1) the item at issue was substantially different than the other goods sold, but still part of the same class of goods regularly sold, and (2) there was no evidence of intervening use of the item at issue by the taxpayer.

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.

Yonker, T.R.O. – A seller of propane and propane accessories (Taxpayer) to residential and commercial customers protests the assessment of use tax on two propane tanks Taxpayer acquired from a third party. Taxpayer argues that it acquired the propane tanks at issue for the purpose of reselling them and, therefore, has not “used” the tanks [as a consumer]. We grant the petition and remand for appropriate adjustment.<sup>1</sup>

ISSUES

Has Taxpayer proven that certain industrial propane tanks it acquired from a third party are not subject to use tax under RCW 82.12.020(1)?

FINDINGS OF FACT

[Taxpayer] operates a business that provides, among other things, propane delivery and rental and/or sale of propane tanks to residential and some small commercial customers. According to Taxpayer’s website, “[g]enerally, 500-gallon tanks easily accommodate an average four-bedroom home.” While Taxpayer’s website also indicates larger residences with additional energy needs may use “1,000+ gallon tanks,” the largest tank size discussed on Taxpayer’s website is 1,000 gallons.<sup>2</sup>

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

<sup>2</sup> *Id.*

Sometime in 2013, Taxpayer was approached by [Third Party] for permission to store two large propane tanks on Taxpayer's land while Third Party relocated its business.<sup>3</sup> Taxpayer granted such permission. Taxpayer represented on review that Third Party agreed to pay rent to store the tanks on Taxpayer's land. Sometime in 2013, Third Party moved the tanks at issue to Taxpayer's land. One tank was a 10,000-gallon "bulk industrial tank," and the other tank was a 3,200-gallon "bulk industrial tank" (referred to jointly as the Tanks). Taxpayer represented that the Tanks were substantially different in nature than both (1) the smaller residential and commercial tanks that Taxpayer generally leases or sells to its customers, and (2) the larger propane tanks that Taxpayer uses to store propane and that are capable of being hooked up to a truck to transfer propane for delivery to Taxpayer's customers.

After Third Party placed the Tanks on Taxpayer's property, Taxpayer stated it sent a lease agreement to Third Party to memorialize their agreement. Third Party did not respond and the agreement was never executed. Around that time, Third Party ceased operations and failed to ever reclaim the Tanks or communicate further with Taxpayer. Taxpayer represented that sometime in 2014 it sent a letter to Third Party stating that Taxpayer intended to take ownership of the Tanks as compensation for unpaid rent under the unexecuted lease agreement. According to Taxpayer, Third Party never responded to that letter. Taxpayer has been unable to produce a copy of that letter. In 2013, Taxpayer recorded the tanks on its balance sheet to the account "other assets." Taxpayer recorded the value of the tanks as \$ . . . .

Taxpayer stated that between 2014 and 2016, it engaged in discussions with various other third parties to sell the Tanks. On review, Taxpayer submitted three email records, two from November and December of 2015, and one from June 2016, between Taxpayer and other third parties that appear to discuss the Tanks. While these emails do not explicitly discuss selling the Tanks to such third parties, Taxpayer represented that was the purpose of the discussions. However, Taxpayer also represented that, for various reasons, these discussions with third parties never developed into an actual sale of the Tanks.<sup>4</sup>

Taxpayer represented that during the relevant time period, it has never used the Tanks. Specifically, Taxpayer states that in order to use the Tanks, they would need to be hooked up to a power source, which Taxpayer does not have at its property. Therefore, the Tanks would have to be moved to another location in order to use them for storing propane. We find that Taxpayer's statements and representations on review were credible.

On May 10, 2016, as a result of the Audit Division's findings, the Department issued a tax assessment for \$ . . . , which included \$ . . . in use tax and/or deferred sales tax, \$ . . . in other taxes not relevant here, and \$ . . . in interest. Included in the amount of use tax and/or deferred sales tax assessed was \$ . . . in use tax on the Tanks, based on the combined value of \$ . . . that Taxpayer had booked in its records for the Tanks. Taxpayer subsequently sought review of the

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<sup>3</sup> Taxpayer is not the legal owner of the land at issue. Taxpayer leases the land from the Port of . . . .

<sup>4</sup> Taxpayer also provided on review a copy of a draft "Liquid Petroleum Sales Agreement" between Taxpayer and another third party that appears to contemplate that Taxpayer will provide propane to the third party. While it is not clear that the Tanks are to be rented or sold as part of this draft agreement, that is apparently why Taxpayer provided this draft document on review. Because it is an unexecuted agreement, and does not specifically mention the Tanks, we find the probative value of this document to be minimal.

Audit Division's assessment of use tax on the Tanks.<sup>5</sup> On review, Taxpayer provided additional documentation regarding other findings unrelated to the Tanks.

The Audit Division considered the additional documentation submitted by Taxpayer and, on August 17, 2016, issued a post assessment adjustment (PAA). The PAA adjusted the original amount of use tax and/or deferred sales tax down to \$ . . . and the interest down to \$ . . . . The total amount due on the tax assessment was adjusted down to \$ . . . , after applying a \$ . . . credit for payments Taxpayer made toward the original tax assessment. The balance of the PAA remains unpaid.

### ANALYSIS

RCW 82.12.020(1) provides that use tax is imposed "for the privilege of using within this state as a consumer" any article of tangible personal property "acquired by the user in any manner." RCW 82.12.010(6), in turn, states the following:

"Use," "used," "using," or "put to use" shall have their ordinary meaning, and mean:

(a) With respect to tangible personal property . . . **the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include[s] installation, storage, withdrawal from storage, distribution, or any other act preparatory to subsequent actual use or consumption within this state . . . .**

(Emphasis added.) Thus, to constitute "use," there must be some act by which a taxpayer "takes or assumes dominion or control over" an item and such act is done "as a consumer." Here, Taxpayer concedes that it had "dominion and control" over the Tanks when it asserted ownership of the Tanks in 2014 as compensation for Third Party's failure to pay rent to Taxpayer for the storage of the Tanks. Thus, we need only determine whether Taxpayer's act was "as a consumer."

RCW 82.04.190(1) defines "consumer" as follows:

Any person who purchases, acquires, owns, holds, or uses any article of tangible personal property irrespective of the nature of the person's business . . . other than for purpose (a) of resale as tangible personal property in the regular course of business . . . .

Thus, a person is a "consumer" *unless* that person acquired the property at issue "for purpose . . . of resale" and such resale would be "in the regular course of business." RCW 82.04.190(1)(a). [The Court of Appeals has held that to be exempt from retail sales or use tax, a person must prove it is not a "consumer" and also must prove that such person has not subjected the property at issue to intervening use.] *Activate, Inc. v. Dep't of Revenue*, 150 Wn. App. 807, 817, 209 P.3d 524 (2009) (citing *Glen Park Associates, LLC v. Dep't of Revenue*, 119 Wn. App. 481, 493, 82 P.3d 664 (2003)). [We conclude there is no evidence that Taxpayer subjected the Tanks to

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<sup>5</sup> While Taxpayer's petition indicated it was seeking review of the full amount of the tax assessment, Taxpayer only advanced arguments regarding the assessment of use tax on the Tanks. As such, we treat all of the Audit Division's findings as outside the scope of this review.

intervening use.] Based on the record before us, we also conclude Taxpayer has proven that it is not a “consumer” of the Tanks.

First, we are satisfied that Taxpayer has proven that it acquired the Tanks “for resale.” We have already found that Taxpayer’s explanation of how it acquired the tanks to recover unpaid rent is credible. Further, we have also found that Taxpayer’s explanation of how the Tanks are not suitable for Taxpayer to use to store its own supply of propane is likewise credible. As such, the only other reasonable purpose for acquiring the tanks would be for resale. Our conclusion here is supported by the email correspondence with various other third parties that appear to discuss the possibility of selling the Tanks to such third parties. While those emails are of limited probative value, they are, nonetheless, consistent with Taxpayer’s credible statements. Thus, based on the record before us, we conclude that Taxpayer has proven that it acquired the Tanks “for resale.”

Second, we likewise conclude that Taxpayer has proven that its anticipated sale of the Tanks would be made in Taxpayer’s “regular course of business.” . . . . [T]here is no dispute that Taxpayer regularly engages in selling or leasing propane tanks for residential and small commercial customers. . . . [W]hile we recognize that the Tanks are substantially different than those tanks that Taxpayer generally sells or leases to its residential and commercial customers, there is no dispute that the Tanks are propane tanks nonetheless. . . .

As such, we conclude Taxpayer has proven that it is not a “consumer,” in relation to the Tanks, and, therefore, qualifies for the “resale exemption” from both retail sales tax and use tax on the Tanks. Accordingly, we remand to the Audit Division to adjust the tax assessment so that there is no deferred sales tax or use tax assessed on Taxpayer’s acquisition of the Tanks.

#### DECISION AND DISPOSITION

We are remanding this case to the Operating Division for adjustment to the PAA consistent with our holding above.

Dated this 16th day of November 2016.