

Intervening Use

The Department has addressed the question of the application of use tax when an article of tangible personal property is acquired for a purpose that is exempt from use tax but subsequently put to use by the owner as a consumer (“intervening use”) through the issuance of several excise tax advisories (ETA). In an effort to simplify the information available to taxpayers, the Department is consolidating these ETAs into a single document.

The purchase of tangible personal property is generally subject to retail sales tax or use tax if no retail sales tax was paid at the time of the sale. RCW 82.04.050 and 82.08.020. There are several exemptions from the retail sales tax that are dependent on the subsequent use of the tangible personal property. For example, the purchase of an item of tangible personal property for resale (RCW 82.04.050(1)(a)) and the purchase of motor vehicles for transporting persons and property in interstate commerce (RCW 82.08.0263) are not subject to retail sales tax. This ETA addresses the situation where the original intent is to comply with the later acts that qualify for an exemption from retail sales tax, but due to unforeseen circumstances, the owner uses the item in a manner that is not exempt from either retail sales or use tax.

The use tax applies whenever a person uses an item of tangible personal property (or certain services, which are not the subject of this ETA) as a consumer. RCW 82.12.020. The measure of the use tax is the value of the article used. RCW 82.12.020 and 82.12.010. The most common example of an intervening use is the use of inventory as a consumer. The following examples address the situation in which an item of tangible personal property was purchased without paying retail sales tax and subsequently used by the purchaser as a consumer:

1. M, an airplane rental company, purchases airplanes that it will rent to third parties. The rental of the airplane is a retail sale. Because M’s purchase of the airplane is a wholesale transaction (i.e. “sale for resale”), it should provide the seller with a resale certificate for purchases made before January 1, 2010, or a reseller permit for purchases made on or after January 1, 2010, to document the wholesale nature of any purchase as provided in WAC 458-20-102A (Resale certificates) and WAC 458-20-102 (Reseller permits). Assume M gives flying lessons using the plane it had purchased without paying retail sales tax. The income from providing flying lessons is subject to business and occupation tax under the service and other activities classification. RCW

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82.04.290(2). Accordingly, M would be using the airplane as a consumer under RCW 82.04.190(2)(a) and it is liable for the use tax on the full value of the airplane when it is first used for providing flying lessons.

Note: Even though resale certificates are no longer used after December 31, 2009, they must be kept on file by the seller for five years from the date of last use or December 31, 2014.

2. N is a heavy equipment retailer and also engages in construction. N purchases equipment for resale. N enters into a contract to sell the equipment to B. B is not able to obtain the necessary financing and defaults on the contract. While N is trying to find another buyer, N uses the equipment in its construction activity. Because the heavy equipment is used in performing the construction activity, N is the consumer of the equipment and owes use tax based on the value of the equipment at the time of first such use.
3. P is an equipment sales business and provides its salespersons with equipment to sell. As part of the sales effort, the salesperson will demonstrate the equipment to the potential customer. The equipment being demonstrated is the equipment that is being sold. The use of the equipment in this manner is not an intervening use and P does not owe use tax on the use of the equipment being demonstrated. On the other hand, if P were to have demonstrator models and the customer purchases equipment that was not used (in the demonstration or otherwise), then P's use of the demonstrator would be as a consumer and subject to use tax. When P sells the demonstrator, retail sales tax will apply (unless another exemption applies), and there will be no deduction available for tax paid at the source. RCW 82.08.130.

However, the use of an item for display purposes at trade shows not exceeding 30 days is not considered an intervening use and no use tax will be due. RCW 82.12.0272. Further, the use or act of wearing apparel only as a sample for display purposes to aid in making sales is not subject to use tax. RCW 82.12.0271.

4. L establishes new locations for coin operated laundry facilities and operates them until a suitable buyer can be found. Despite the fact that the laundry facilities were for sale during the period of operation and that the use was to promote the sale of the facilities, use tax is due on the laundry equipment that is placed into use because L used the equipment in the operation of regular laundry facilities. Thus, the equipment was not held merely for resale. The legislative intent is that the retail sales tax shall apply to successive retail sales of the same property (RCW 82.08.020) and that the use tax shall apply to successive users of the same property (RCW 82.12.020).
5. S is a shipbuilding corporation that is engaged in the manufacture and sale of ships and dry-docks. S substantially used a charter boat and floating dry-dock for demonstration and testing purposes prior to its sale. It recorded these items as capital assets and depreciated them for federal tax purposes. Capitalization and depreciation of the equipment constitute evidence of substantial intervening use of the equipment as a consumer prior to sale. Such intervening use subjects the equipment to use tax.

6. F, a photography studio, makes photographic film exposures, processes the negatives, and produces finished portraits for clients. The negatives and proofs, though sold to the client, are stored by F. RCW 82.12.020 imposes use tax upon the privilege of using tangible personal property purchased at retail or acquired by bailment where the retail sales tax has not been paid.

In this instance, use tax is due upon film used in producing finished portraits and upon which no retail sales tax has been paid. Purchases for resale are exempt only when there is not an intervening use prior to the resale. Ownership of the film is not a determinative issue where the taxpayer enjoys intervening use thereof. Negatives are not a component or ingredient of the completed portrait inasmuch as the negative is in no way a physical part of the portrait.

7. D sells office furniture to a doctor. This is not a sale for resale, even if the doctor subsequently resells the furniture, because the doctor is not regularly engaged in the business of selling office furniture. RCW 82.04.050 provides that a retail sale is every sale of tangible personal property to all persons irrespective of the nature of their business other than a sale to a person who purchases for the purpose of resale as tangible personal property in the regular course of business. Because this constitutes a retail sale, the doctor must pay either retail sales tax on the purchase of the furniture or use tax on its use.
8. Edward purchases a commercial deep sea fishing vessel and provides the seller with an exemption certificate. Edward claimed the exemption from retail sales tax under RCW 82.08.262 for commercial deep sea fishing operations outside the territorial waters of the state. After purchasing the vessel Edward decided use the boat for charter sport fishing. Because the use of the boat in charter sport fishing is not exempt from use tax, use tax is due on the boat. The fact the boat could be used in an exempt manner does not entitle Edward to an exemption from the use tax, rather he must actually use it in the exempt manner.
