

retail sales tax rate on the monthly lease payment. The residual value of the vehicle at the end of the lease term, if purchased by the customer, is handled as a retail sale.

In limited situations, the taxpayer brings together a lessor (financial institution) and a lessee who wants to lease a vehicle not in the taxpayer's fleet. In such cases, the lessor (financial institution) collects the lease payment and sales tax, and pays retailing business and occupation tax. The taxpayer collects a "brokerage fee" and pays service business and occupation tax on that amount.

In reviewing these latter arrangements, however, the auditor determined that the taxpayer had not served just as a broker, however, but had actually taken ownership of the vehicle - by virtue of a Manufacturer's Statement of Origin (MSO) - and "sold" it to the lessor (financial institution) before the lessee began leasing it. The auditor therefore determined the taxpayer to be liable for wholesaling business and occupation tax on the entire value of the vehicles, instead of service tax on the "brokerage fee."

The normal sequence of events in such a "brokered lease" transaction is as follows:

1. The lessee, lessor (financial institution), and automobile (in another dealership lot) are all identified by the taxpayer. The taxpayer does not take possession of the car, but leaves it at the dealership.
2. The parties all agree on the terms of the vehicle lease (cost, etc.). The lessee's credit history is approved by the lessor (financial institution).
4. The taxpayer writes a check for the vehicle at the dealership, but does not take possession of it. It does not receive a title, but an MSO (similar to what a dealer receives).
5. After receiving the MSO from the dealership, the taxpayer endorses it over to the lessor (financial institution), takes it to the license bureau, and arranges for title, registration, and license to be issued in the appropriate lessor (financial institution) and lessee names.
6. The lessee pays the taxpayer the first lease payment (including retail sales tax) plus the vehicle license/registration fee. The first lease payment is then remitted to the lessor (financial institution) by the taxpayer. The lessor is responsible for reporting the first and all subsequent lease payments as retail sales. The lessee remits all lease subsequent payments to the lessor.

7. The lessor (financial institution) then writes a check to the taxpayer to reimburse it for the amount of the vehicle plus the prearranged brokerage fee.

The taxpayer contends that it has the MSO signed over to it merely as an accommodation to the lessor/lessee, so that it can then accomplish the title, registration, and licensing functions as part of its service to the lessor/lessee, and that title does not vest in it.

The taxpayer further contends the transactions at issue do not have the incidents of wholesale sales, since it does not take on any of the risks (buying and maintaining inventory, finding customers, etc.) normally associated with such business activity.

DISCUSSION:

WAC 458-20-159 provides as follows:

A consignee, bailee, factor, agent or auctioneer, as used in this ruling, refers to one who has either actual or constructive possession of tangible personal property, the actual ownership of such property being in another, or one calling for bids on such property. The term "constructive possession" means possession of the power to pass title to tangible personal property of others.

BUSINESS AND OCCUPATION TAX

RETAILING AND WHOLESALING. Every consignee, bailee, factor, agent or auctioneer having either actual or constructive possession of tangible personal property, or having possession of the documents of title thereto, with power to sell such tangible personal property in his or its own name and, actually so selling, shall be deemed the seller of such tangible personal property and taxable under the retailing or wholesaling classification of the business and occupation tax, depending upon the nature of the transactions. In such case the consignor, bailor, principal or owner shall be deemed a seller of such property to the consignee, bailee, factor or auctioneer and taxable as a wholesaler with respect to such sales.

The mere fact that consignee, bailee or factor makes a sale raises a presumption that such consignee, bailee or factor actually sold in his or its own name. This presumption is controlling unless rebutted by proof satisfactory to the department of revenue.

AGENTS AND BROKERS. Any person who claims to be acting merely as agent or broker in promoting sales for a principal or in making purchases for a buyer, will have such claim recognized only when the contract or agreement between such persons clearly establishes the relationship of principal and agent and when the following conditions are complied with:

(1) The books and records of the broker or agent show the transactions were made in the name and for the account of the principal, and show the name of the actual owner of the property for whom the sale was made, or the actual buyer for whom the purchase was made.

(2) The books and records show the amount of gross sales, the amount of commissions and any other incidental income derived by the broker or agent from such sales.

SERVICE AND OTHER BUSINESS ACTIVITIES. Every consignee, bailee, factor, agent or auctioneer who makes a sale in the name of the actual owner, as agent of the actual owner, or who purchases as agent of the actual buyer, is taxable under the service and other business activities classification upon the gross income derived from such business.

[Emphasis added.]

WAC 308-56A-110 discusses MSO's as follows:

(1) Application for a certificate of title to a new vehicle never before licensed or titled and sold by an in-state or out-of-state dealer or manufacturer must be accompanied by a Manufacturers Statement of Origin (MSO) or other document certifying the first conveyance of said vehicle after its manufacture.

(2) The statement of origin or other similar document or the factory invoice of the dealer shall reflect the year, make, model, body style, and vehicle identification number and additionally, in the case of motorcycles, the motor number and frame number.

(3) No statement of origin or other similar document can be accepted for the issuance of a title unless all persons name on said statement have released or assigned their interest thereon, or on a department release of interest form. If the selling dealer is the only interest named, a dealer's report of sale on a title

application shall have the effect of a release.

(4) Dealer to dealer transfers may be accomplished either by appropriate endorsement of the statement of origin or other similar document, or by a department release of interest form. A complete chain of ownership must be reflected from the original dealer named on the MSO to the retail selling dealer making the application.

(5) If the statement of origin or other similar documentation is not available and obtaining a replacement from the manufacturer would cause an undue amount of delay in titling the vehicle, a photocopy of the factory invoice to the dealer can be substituted. A clear chain of ownership must be reflected from the original dealer named on the invoice to the retail selling dealer making application.

(6) This rule shall be applied to all new vehicles commencing with the 1974 model year.

[Emphasis added.]

The language of WAC 308-56A-110 makes it clear that an MSO is a document reflecting legal ownership of a vehicle. Further, the taxpayer has not carried its burden under the rule to prove it was acting merely as an agent for the bank in purchasing the vehicles in the transactions at issue. We must conclude that the taxpayer purchased and resold the vehicles in its own name.

[1] Thus, absent an agency relationship, a taxpayer listed on a vehicle's Manufacturers Statement of Origin (MSO) will be deemed its owner, and a further transfer (by way of either MSO or title) will be deemed a sale by that taxpayer, even if such intermediate ownership is effected in a "brokered lease" transaction only as an accommodation to other parties in order to accomplish necessary paperwork such as registration and titling.

The Department, however, recognizes that the taxpayer - and other vehicle leasing companies conducting similar "brokered lease" transactions - meant to do so on a commissioned fee basis. Accordingly, the Department will recognize these as brokeraged transactions until March 1, 1990, on and after which date they will be considered to be sales and will be taxed accordingly.

DECISION AND DISPOSITION:

The taxpayer's petition is granted, subject to prospective reporting as set forth in this determination.

DATED this 14th day of March 1990.

