

Cite as Det. No. 06-0296, 26 WTD 188 (2007)

BEFORE THE APPEALS DIVISION
 DEPARTMENT OF REVENUE
 STATE OF WASHINGTON

In the Matter of the Petition For Correction of) Assessment of))) . . .))))	<u>D E T E R M I N A T I O N</u> No. 06-0296 Registration No. . . . FY. . . /Audit No. . . . Docket No. . . .
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- [1] RULE 250; RCW 82.18.010, RCW 82.18.020: SOLID WASTE COLLECTION TAX – COLLECTION FOR RECYCLING – CONSTRUCTION (CDL) DEBRIS – KNOWLEDGE AND INTENTION OF CUSTOMER. The knowledge and intention of the customer/taxpayer are material to the issue whether material is collected primarily for recycling or salvage. For construction debris to be considered “material collected primarily for recycling or salvage,” for purposes of Ch. 82.18 RCW, it is necessary that the customer of the collection service hand over the material for recycling.

- [2] RULE 250; RCW 82.18.010, RCW 82.18.020: SOLID WASTE COLLECTION TAX – COLLECTION FOR RECYCLING – CONSTRUCTION (CDL) DEBRIS – LACK OF VALUE TO CUSTOMER (DISCARDER) NOT DETERMINATIVE. Whether debris handed over to a collection service has value to the customer (discarder) is not the determinative factor with respect to whether the material is considered “solid waste” or “material collected primarily for recycling.” Whether the materials are delivered and collected primarily for recycling are the determinative factors.

- [3] RULE 250; RCW 82.18.010, RCW 82.18.020: SOLID WASTE COLLECTION TAX – CONSTRUCTION DEBRIS – COLLECTION OF MIXED CDL WASTE FOR RECYCLING AT CDL FACILITY – SEPARATELY IDENTIFYING CHARGES NOT REQUIRED. A collection service that collects mixed loads of commercial construction, demolition, and land-clearing debris (CDL) materials for recycling at certified CDL recycling facilities generally is not required to separately identify charges for collecting recyclables, and for collecting waste, in its customer billings. Det. No. 89-435, 8 WTD 167 (1989), distinguished.

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.

Prusia, A.L.J. – A company that holds itself out as a recycling service for construction debris, which collects unsorted debris from construction sites for a charge and delivers the debris to certified commercial construction, demolition, and land-clearing (CDL) materials facilities where recyclable materials are recovered and processed for reuse, protests the assessment of solid waste collection tax on its collection charges, contending its activities fall within the recycling exception in Ch. 82.18 RCW. We grant the petition and remand for cancellation of the assessment of solid waste collection tax.¹

ISSUES

- [1] For construction debris to be considered “material collected primarily for recycling or salvage,” for purposes of Ch. 82.18 RCW, is it necessary that the customer of the collector hand over the debris for recycling? If the collector in fact collects all construction debris for recycling and delivers its collections to a certified CDL facility for recycling, to what extent is the customer’s knowledge and intention a material consideration in determining whether the construction debris is “material collected primarily for recycling or salvage”?
- [2] If construction debris is worthless to the builder, must the collector of the debris pay solid waste collection tax even if the builder/customer knows the material is being collected for recycling, and the collector collects all construction debris for recycling and delivers its collections to a certified CDL facility for recycling? *I.e.*, is the lack of value of the debris to the person discarding it the determinative factor with respect to whether the material is considered “solid waste” or “material collected primarily for recycling or salvage”?
- [3] If a company’s business is collecting construction debris for recycling at a CDL facility, but the debris usually includes non-recyclable materials that the recovery facility disposes of, are the collector’s charges subject to solid waste collection tax unless the collector separately identifies charges for collecting recyclables, and for collecting waste, in its customer billings?

FINDINGS OF FACT

[Taxpayer] is a residential construction jobsite recycling service [in Washington].

[Taxpayer] holds itself out to the public as a recycler of CDL (Construction, Demolition, and Land-clearing) debris. It characterizes its activities as “recycling” [Taxpayer’s] contracts

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

with its construction customers to remove recyclable CDL materials, including mixed loads containing both recyclable CDL materials and non-recyclable debris. Its contracts do not expressly require actual recycling of the collected materials. [Taxpayer's] customers are mostly construction contractors, but it has a few residential customers who are doing remodels.² [Taxpayer] does not collect household waste. [Taxpayer] is a member of [an association that requires it] to have a recycling plan posted on site. The program awards certification to builders who achieve [a certain] recycling rate on their projects.

[Taxpayer] collects the debris from collection bins at the construction sites, and from piles of construction debris using self-loading trucks. [Taxpayer] bills the customer for the collection service by the truck hour or by "yard" volume of the truck load. [Taxpayer] does not collect either solid waste collection tax or retail sales tax from its customers on the charges for construction debris removal. [Taxpayer] also rents dumpsters to its construction customers for their use [and] charges and collects retail sales tax on the dumpster rentals.

[Taxpayer] hauls the collected materials, in [Taxpayer's] trucks, to material recovery facilities . . . where recyclable materials are removed and processed to be reused or recycled. [The facilities where the materials are taken] are certified . . . as Commercial CDL materials handling facilities.

The CDL facilities have high-capacity recycling equipment. From loads of construction debris, the facilities recycle mixed metals, wood products, cardboard and packing, aggregates, and some asphalt roofing. Non-recyclable material that is separated out at the CDL facility is taken by the CDL operator to its waste disposal facility.

The CDL facilities charge a lower rate (tipping fee) for loads of clean wood and for "pure" loads of recyclable CDL waste, defined as those containing at least 90% recyclable materials by volume. They charge a higher tipping fee for loads of mixed CDL waste debris, defined as commingled loads of recyclable and non-recyclable material that contains more than 10 percent but less than 90 percent recyclable CDL waste by volume, and do not accept household garbage or loads that contain less than 10% recyclable materials. . . . The processor determines, by visual inspection, the purity of the load.

Overall recycling rates achieved [in the] certified CDL facilities are in the range of 25%, with rates increasing with the purity of the load. . . . The county and other agencies engage in extensive efforts to increase the recycling rates at the CDL facilities. . . . During the period that is the subject of this appeal, the CDL facilities did not provide [Taxpayer] with a breakdown of the recycling rates achieved on [Taxpayer's] loads. However, a breakdown . . . for the first six months of 2006 shows a 70% average diversion (for recycling) rate by tonnage of mixed CDL materials delivered by [Taxpayer]. . . .

² Taxpayer also picks up yard waste and debris from land clearing, which it converts into mulch; that activity is not the subject of this appeal.

During the period that is the subject of this appeal, 2000 through September 2004, . . . a commercial CDL-certified facility charged [Taxpayer] solid waste collection tax on loads of mixed construction debris that the facility operator determined, by visual examination, contained less than 50% recyclable materials. [Taxpayer] paid the tax without protest. An audit workpaper indicates that [Taxpayer] paid solid waste collection tax equal to the tax rate times 20% of [Taxpayer's] revenues.

In 2004, the Taxpayer Account Administration Division (TAA) of the Department of Revenue examined [Taxpayer's] tax returns and obtained information from [Taxpayer] regarding its business activities, for the period January 1, 2000, through September 2004 (audit period). As a result of that limited audit, . . . TAA issued a tax assessment against [Taxpayer], in the total amount of \$. . . . The bulk of the assessment was retail sales tax on [Taxpayer's] charges to its customers for removal of construction debris. . . . TAA issued an amended assessment which withdrew the assessment of retail sales tax on [Taxpayer's] charges for collection of construction debris, and assessed solid waste collection tax (formerly "refuse collection tax") on those charges. The amount of solid waste collection tax assessed was \$. . . . [Taxpayer] was given a credit for solid waste collection tax [Taxpayer] paid The total amount of the assessment was \$. . . .

[Taxpayer] appealed the assessment of solid waste collection tax, asserting it collected construction debris primarily for recycling or salvage and should not be subject to the solid waste collection tax.

ANALYSIS

RCW 82.18.020 imposes a solid waste collection tax "on each person using the solid waste services of a solid waste collection business." The company collecting the charges for using the solid waste collection services is responsible for collecting the tax. RCW 82.18.030. Thus, the customer is the person who owes the tax (the taxpayer), and the service provider is the collector of the tax. If the company responsible for collecting the tax fails to bill the taxpayer, the person responsible for collecting is itself personally liable to the state for the amount of the tax. *Ibid.*

"Solid waste collection business" means "every person who receives solid waste for transfer, storage, or disposal including but not limited to all collection services, public or private dumps, transfer stations, and similar operations." RCW 82.18.010(1). To prevent pyramiding, the tax does not apply to any solid waste collection business using the services of another solid waste collection business, but only if the former is certified by the Department as a solid waste collection business. RCW 82.18.060.³

"Solid waste" is defined as follows, in RCW 82.18.010(3) (emphasis added):

³ A Department rule, WAC 458-20-250 (Rule 250), provides that for a person who collects the tax to be exempt from paying the tax when it uses the further services of another solid waste collection business, the person must provide the other service with an exemption certificate in a specified form.

“Solid waste” means garbage, trash, rubbish, or other material discarded as worthless or not economically viable for further use. The term does not include hazardous or toxic waste **nor does it include material collected primarily for recycling or salvage.**

The Department’s rule explaining the taxation of refuse-solid waste collection repeats this definition. WAC 458-20-250(3)(c)(Rule 250(3)(c)).

Because the definition of “solid waste” creates an exception for activity that otherwise would be subject to solid waste collection tax, the burden of establishing the exception rests upon the person who is claiming the benefit of the exception, in this case [Taxpayer]. [Taxpayer] is responsible for collecting and remitting the solid waste collection tax if it cannot establish that the collection fits the exception.

[1] [Taxpayer] argues it is predominantly a recycler, and therefore should not be subject to the solid waste collection tax under the definition in RCW 82.18.010(3) and Rule 250(3)(c). It argues it holds itself out as a recycler, it collects only for recycling, it delivers all collections to facilities for recycling, and the majority of the materials it collects are recycled.

TAA argues [Taxpayer] is simply a waste collector/transporter under the applicable statutes, and the facility receiving the debris is the actual recycler. TAA states its analysis as follows:

TAA examination of the taxpayer looked at the interaction with its customers in order to answer the following: (1) “Is the taxpayer a business that contracts with customers, primarily to recycle their waste material, as intended in statute?” If true, the business activity would not be taxable under the solid waste tax. Or, (2) “Is the taxpayer in the business of collecting waste, which is transported to a local waste facility that, by chance, recycles a portion of the materials?” If (2) is true, then the taxpayer is simply a waste collector/transporter and the county waste facility is the actual recycler, with the taxpayer as its customer.

The RCW and WAC provide definitions of “solid waste collection business” and “solid waste.” Of particular note, the RCW definition of “solid waste” states, “...material discarded as worthless or not economically viable for further use.” Discarded by whom? In the transaction between the taxpayer and its customers, the clear answer is, “the customer.”

The definition also states that solid waste does not include, “...material collected primarily for recycling or salvage.” How can we determine that material is primarily collected for recycling (as opposed to recycled by happenstance later in the process)? 8 WTD 167 looked at this in reference to yard waste. However, TAA feels it is equally applicable to any similar waste situation, including the current combination of yard waste and construction waste. The WTD’s ruling required a specific identification (in the form of a separate billing), and a unique handling of materials for recycling (separate delivery

of the materials, specifically for recycling). The taxpayer does not meet this standard with its customers with any of its waste operation, including the yard waste converted into mulch by the taxpayer.

The taxpayer indicated to TAA that its contract with its customers does not require actual recycling of the materials collected. Dumpsters are sometimes used by the customer, but the taxpayer describes these as “for waste materials,” indicating they are combination containers and are not uniquely recycling. Despite the use of “recycling” in the taxpayer’s business name, the taxpayer’s customers don’t actually know what portion of their materials may or may not ultimately be recycled, if any, and it is not a part of their contractual arrangement with the taxpayer.

There is no separate billing by the taxpayer for the potentially recyclable material. The taxpayer charges the same amount to remove materials that are suitable for recycling as it does for the rest of the waste. Other than a potential benefit to the community overall, customers see no discount or benefit from the recycling opportunities which the taxpayer later takes advantage of, if they are even aware it takes place. To the customer the potentially recyclable materials have no more value than the rest of the waste, which is to say, no value.

We agree with TAA’s focus on the knowledge and intention of the customer/taxpayer, but disagree with portions of its analysis and its conclusion.

The taxpayer of the solid waste collection tax is the person from whom the waste is collected, *i.e.*, the customer of the collection service. For that reason, the customer/taxpayer’s knowledge and intention are material facts. If the customer/taxpayer is hiring a waste disposal service, the customer-taxpayer owes solid waste collection tax. If only the knowledge and intention of the collector controlled whether the customer/taxpayer owed the tax, then a customer/taxpayer hiring someone to collect for recycling would end up owing solid waste collection tax if the collector really intended to dispose of the material as waste, because the customer/taxpayer would actually be purchasing waste disposal services.

We find that [Taxpayer’s] customers delivered their construction debris for recycling, and [Taxpayer] collected the debris for recycling. [Taxpayer] contracted with its construction customers to remove recyclable CDL materials, including mixed loads. [Taxpayer] participated in [a] program [that required Taxpayer to have a recycling plan posted on site and awarded certification to builders who achieve a certain recycling rate on their projects]. [Taxpayer] made contact with customers through that program. [Taxpayer’s] customers may not have known what portion of the collected materials would ultimately be recycled, but to suggest they did not intend or know that the collection activity is “primarily for recycling” is inconsistent with this evidence. The evidence further shows [Taxpayer] actually was collecting the debris for recycling. It delivered its collections to specialized recycling facilities. All of the collections were processed by the facilities to separate out recyclable materials.

The evidence is contrary to TAA's suggestion that it was only by chance that some of the materials [Taxpayer] delivers got recycled. [Taxpayer] only collected construction debris for recycling, and delivered the debris it collected only to specialized material recovery facilities which recovered some portion of all loads.

[2] We disagree with the emphasis on the further value of the discarded material to the customer. Recyclable material usually is discarded by the owner because it has no further economic value to the owner. The purpose of recycling programs is to collect recyclable material that is being discarded, and send it into channels where it will be recycled into useful material. It is the existence of recycling programs and facilities that makes the discards of potential value for further use, and the collection for recycling that makes them an exception to the definition of solid waste. It is not the further value of the materials to the possessor that controls whether they constitute "solid waste," but rather whether the materials are delivered and collected primarily for recycling. Det. No. 92-035, 12 WTD 85 (1993), held that a person that removed sewage sludge for a charge, and distributed it over land as a soil amendment, was collecting primarily for recycling and was not required to collect the refuse collection tax. The Department's auditor in that case had argued, unsuccessfully, that the wastewater sludge the taxpayer collected was discarded as worthless and, since the taxpayer was paid to dispose of the sludge, the taxpayer should be taxed as a refuse collection business.

[3] We also disagree with TAA's use of a test previously applied in the context of curbside recycling to determine whether [Taxpayer] was collecting primarily for recycling, specifically the requirement that there be a separate billing for the potentially recyclable material. Differences between CDL recycling and traditional curbside recycling limit the usefulness of that test. Unlike usual curbside recycling, there is no requirement for source separation of CDL recyclables from non-recyclable debris. Construction debris will go through the recycling process even when it contains a substantial amount of non-recyclable material. Construction debris generally cannot be 100% recycled even with source separation.⁴ The CDL facility determines what materials will be sent forward in the recycling chain and which will be discarded as waste. Because collections from different customers are often mixed before delivery to the CDL facility, it is often impossible to know how a particular customer/taxpayer's debris ends up. Thus, in CDL recycling, there often is no source separating activity, and no basis for determining what portion of a particular customer's debris could be separately billed as waste.

Because [Taxpayer] collected CDL materials for recycling, and was not providing a range of garbage collection and recycling collection services, the fact that it did not separately bill for recyclable material is immaterial. It had a single collection activity, collection for recycling, for which it billed. Det. No. 89-435, which is cited in the above TAA analysis, does not require that

⁴ The Commercial CDL facilities do not require that loads of construction or demolition debris be "clean," and have high-capacity equipment for removing recyclable materials. See, e.g., <http://www.wmnorthwest.com/wmcdl3.html>; <http://www.ciwmb.ca.gov/LGLibrary/Innovations/CnDProcess/Analysis.htm>; <http://www.metrokc.gov/dnrp/swd/construction-recycling/documents/cdlguide.pdf>.

all persons collecting for recycling must separately bill for potentially recyclable and potentially non-recyclable material. It stands for the principle that when a contract solid waste collection business also provides yard waste collection and/or collection for recycling for its solid waste collection customers, a portion of the charges are excludable from the solid waste collection tax only when the recycling services are actually performed and charges for providing the recycling services are clearly separate from charges for waste collection. [Taxpayer] was not a contract solid waste collection business that also provided recycling services, but rather a business that collected only for recycling.

DECISION AND DISPOSITION

The taxpayer's petition is granted.

Dated this 8th day of December 2006.