

Cite as Det. No. 91-321, 11 WTD 515 (1992).

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u> <u>N</u>
For Correction of Assessment of)	
)	No. 91-321
)	
. . .)	Registration No. . . .
)	. . ./Audit No. . . .
)	

[1] RULE 170 -- RCW 82.04.050 -- SALES TAX -- USE TAX -- CONSTRUCTION CONTRACTOR -- SUPPLIES CONSUMED. Items such as drill bits and blades used by a contractor in a construction project are considered consumed by the contractor, not resold to the contractor's customer. Sales tax is owed by the contractor on such consumables, notwithstanding the fact that the project owner pays sales tax on the total contract price which includes the consumable supplies. ACCORD: ETB 276, Det. No. 89-248, 10 WTD 282 (1991), Det. No. 89-112, 7 WTD 201 (1989).

[2] RULE 198, RCW 82.08.050, RCW 82.08.090, & RCW 82.12.060: -- SALES TAX -- USE TAX -- INSTALLMENT PURCHASES -- WHEN TAX DUE. The Department may proceed directly against a buyer for the full sales/use tax on an installment purchase at any time. This is true even though the seller may opt to allow the purchaser to pay sales/use tax on the installments as they fall due. Any tax paid in installments may be credited toward the full amount of tax owed.

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.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: September 27, 1991

NATURE OF ACTION:

Protest of sales/use tax by construction contractor on consumable supplies.

FACTS AND ISSUES:

Dressel, A.L.J. -- . . . (taxpayer) is a construction contractor. Its books and records were examined by the Department of Revenue (Department) for the period January 1, 1987 through September 30, 1990. As a result a tax assessment, identified by the above-captioned numbers, was issued for \$ The taxpayer appeals parts of the assessment.

More specifically, the taxpayer is a contractor who saws, drills, and removes concrete and asphalt. In conducting its business, the taxpayer purchased certain supplies and capital assets. These include such things as "parts", the repair of parts, bolts, aluminum, rotohammer bits, concrete splitters, "supplies", shafts, bushings, generators, engines, computers, a "rammer hammer", saws, drills, blades, and bits. The Department's auditor has assessed use or deferred sales tax on these items, contending that they were consumed by the taxpayer in the course of conducting its business and are, therefore, subject to tax.

In disagreeing with the auditor, the taxpayer explains that when it bids a job, it includes in its bid amounts to cover the various supplies that it will consume in performing its service. The compensation it receives from its customers includes amounts for those costs, though they are not separately itemized. Its Washington retail customers pay sales tax on the total contract price which includes the supplies. Even in those cases where its services are performed at wholesale, the project owner pays sales tax on the total contract price which includes the disputed supplies. The taxpayer takes the position that because sales tax is paid by its customer or that customer's customer on these supplies, the taxpayer should not be taxed on them as well. It says that the Department is entitled to collect the sales/use tax on these items only once. This is its argument vis-a-vis consumables.

With respect to capital assets, the taxpayer "admits that certain of these assets are subject to the Washington Use Tax". It says, though, that many of them were purchased on installment contracts and that the use tax should be assessed on only the installments as they come due, not on the total purchase price.

The issues are: 1) If the price charged by a contractor includes amounts for consumable supplies and (s)he collects sales tax on that price or it is otherwise paid by the project owner, is the contractor also liable for sales tax on its acquisition of those consumables? 2) When a contractor pays for capital assets

in installments, is sales tax due on the installments as they come due or on the total purchase price?

DISCUSSION:

Retail sales tax must be paid on retail sales. RCW 82.08.020. "Retail sale" is defined, in part, at RCW 82.04.050 as:

(1) "Sale at retail" or "retail sale" means every sale of tangible personal property (including articles produced, fabricated, or imprinted) to all persons irrespective of the nature of their business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers other than a sale to a person who (a) purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person, or (b) installs, repairs, cleans, alters, imprints, improves, constructs, or decorates real or personal property of or for consumers, if such tangible personal property becomes an ingredient or component of such real or personal property without intervening use by such person . . .

[1] The consumable items at issue such as drill bits and blades were not resold to the taxpayer's customers. They were consumed or used up by the taxpayer in the course of performing its services for its customers. In the case of blades and bits, they were, in whole or part, reduced to dust. Some were even used on subsequent jobs. Either way, the taxpayer's customer didn't get them for his or her own use nor did (s)he get the other consumable items subjected to use tax. They were, thus, not resold to the taxpayer's customers. Nor did they become an ingredient or component of real or personal property constructed or altered by the taxpayer.¹ Therefore, these consumable items were purchased at retail by the taxpayer and subject to retail sales tax.²

¹This is in contrast to expandable anchors which were not taxed by the Department for the apparent reason that they were left, imbedded in concrete, with the taxpayer's customers. [Protective plastic covering] and duct tape were not taxed, apparently, because they were considered resold by the taxpayer in that they, too, were left at the job site in more or less their original form.

²See also WAC 458-20-170 (4)(d) and (5).

So, too, was the contract price paid by the construction project owners, notwithstanding the fact that a component of that purchase price was the consumable supplies. In this regard WAC 458-20-170 (Rule 170) states in part: "(a) Prime contractors are required to collect from consumers the retail sales tax measured by the full contract price".

The taxpayer's statement that the Department is entitled to the sales or use tax only once is mistaken. The sales tax applies to each retail transaction. "The tax imposed under this chapter shall apply to successive retail sales of the same property." RCW 82.08.020 (2). It should be noted, though, that it is not the same party that is twice liable. The taxpayer is liable as buyer when it purchases the supplies. The project owner is liable as buyer when (s)he pays the prime contractor. See also ETB 276.08.170.

On the first issue, sales/use tax liability on consumable supplies, the taxpayer's petition is denied.

The second issue is whether sales tax is owed on installment purchases only as the installments fall due. In RCWs 82.08.090 and 82.12.060 reference is made to installment sales. The former statute reads as follows:

INSTALLMENT SALES AND LEASES.

In the case of installment sales and leases of personal property, the department of revenue, by regulation, may provide for the collection of taxes upon the installments of the purchase price, or amount of rental, as of the time the same fall due.

[2] RCW 82.12.060 contains similar language. In the case of rentals or leases, the Department has provided for the collection of sales/use taxes as the periodic payments fall due. See WAC 458-20-211 (Rule 211). We have not found that it has done so in the case of installment sales. It is reasonable to presume that had the Department intended to permit the payment of sales/use tax as the payments fall due in installment purchase or sale situations, it would have promulgated a regulation analogous to Rule 211.³ It has not done so.

³As per WAC 458-20-198 (Rule 198), a seller may allow an installment buyer to pay sales/use tax as the periodic payments fall due. If it does so, however, the seller must advance the full amount of the tax to the Department in the tax reporting period in which the sale is made. If the seller has not advanced the tax, this regulatory provision does not restrict the

"Where a buyer has failed to pay to the seller the tax imposed by this chapter and the seller has not paid the amount of the tax to the department, the department may, in its discretion, proceed directly against the buyer for collection of the tax . . ." RCW 82.08.050. We find no regulatory or statutory authority which limits this discretion in the case of installment sales. The purchaser, of course, is entitled to credit for any sales/use tax it can show it paid with its monthly installments, but, otherwise, the Department may proceed, as it has done, to collect the full amount of the tax at any point after the time of sale.

On the second issue, installment sales, the taxpayer's petition is denied.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 26th day of November 1991.

Department's authority, as given in RCW 82.08.050, to pursue the purchaser for the full amount of the tax prior to the running of the installments. The Department is so restricted in lease situations because of Rule 211.