

Cite as Det. No. 93-022, 12 WTD 571 (1993).

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 Refund of)	
)	No. 93-022
)	
. . .)	Registration No. . . .
)	Audit No. . . .
)	

[1] RULE 170: SALES TAX -- USE TAX -- ASBESTOS ABATEMENT CONTRACTOR -- SUPPLIES USED BY. Bags used by an asbestos abatement contractor for the disposal of hazardous materials are supplies consumed by that contractor. They are not resold to the contractor's customer. The contractor is liable for sales tax on its purchase of such supplies. Partial Accord: Det. No. 89-112, 7 WTD 201 (1989).

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: . . .

NATURE OF ACTION:

Petition for refund of sales/use tax paid by contractor on asbestos abatement supplies.

FACTS AND ISSUES:

Dressel, A.L.J. -- [Taxpayer] is a contractor which specializes in removing asbestos materials from buildings or other structures. Its books and records were examined by the Department of Revenue (Department) for the period January 1, 1988 through June 30, 1991. As a result a tax credit was issued The taxpayer protests the Department's audit by claiming that it should have been granted a larger credit.

In its work of asbestos abatement, the taxpayer utilizes special plastic bags and "glove bags." Asbestos materials are placed in

these bags and then taken by the taxpayer to approved landfills where they are buried in the ground in designated areas. A record is kept by the landfill of the specific burial location. The identity of the party from whose premises the asbestos was removed is recorded as well, in accordance with environmental regulations.

Taxpayer purchases these plastic bags and glove bags (hereafter referred to collectively as "bags") from a supplier. Their cost is included in the price the taxpayer invoices to its customers. It is not itemized. Typically, taxpayer charges a lump sum amount for its total service, which includes labor and supplies.

The Department's Audit Section takes the position that the bags are consumable supplies used by the contractor in performing its work. Accordingly, Audit has found that taxpayer is liable for sales or use tax on the bags.

Taxpayer envisions itself as reselling the bags to its customer. It argues, in essence, that it acquires the bags for resale so should be eligible for the resale exemption of RCW 82.04.050. In support of this position, taxpayer states that the bags are clearly marked with the name of taxpayer's customer and, as noted, the landfill records the name of the customer. Taxpayer claims that both the bag and its contents remain the property of its customer after they are buried in the landfill. Additionally, taxpayer points out that the customer pays sales tax on a lump sum price which includes the bags. It implies that double taxation would occur if it were to be taxed as well on the price or value of the bags.

The issue is whether an asbestos abatement contractor is liable for sales/use tax on bags it purchases for disposal of hazardous asbestos materials.

DISCUSSION:

In the area of state excise taxation, the primary administrative regulation pertaining to contractors is WAC 458-20-170 (Rule 170). It reads, in part:

(c) Sales to prime contractors and subcontractors of materials such as concrete, tie rods, lumber, finish hardware, etc., which become part of the structure being built or improved are sales for resale and are not subject to the retail sales tax.

[1] The materials at issue here, asbestos bags, do not become part of the structure being improved. They are discarded.

In addition, Rule 170 reads, in part:

(d) The retail sales tax applies upon sales and rentals to prime contractors and subcontractors of tools, machinery and equipment, and consumable supplies, such as hand and machine tools, cranes, air compressors, bulldozers, lubricating oil, sandpaper and form lumber which are primarily for use by the contractor rather than for resale as a component part of the finished structure.

The glove bags in this case are consumable supplies used by this asbestos abatement contractor. In fact, because of environmental regulations, taxpayer would not be able to accomplish its job unless it used the bags. Further, they are "primarily for use by the contractor." Taxpayer's customer does nothing with the bags. It is also worthy of note that the resale exemption of RCW 82.04.050 is available only to those who do not submit the particular tangible personal property to "intervening use". This means use by the reselling party prior to delivery to the final purchaser. Even if we were to find that this is a resale situation, the reselling taxpayer has clearly subjected the bags to intervening use by filling them with asbestos materials prior to transferring title to the bags to its customer. Thus, the fact that the customer's name is on the bags or that the landfill notes the customer's identity in its records is irrelevant.

Lastly, the fact that sales/use tax is paid twice on the bags is not inconsistent with the law. Sales tax "shall apply to successive retail sales of the same property". RCW 82.08.020. In addition, there is no constitutional prohibition, either of this state or the United States, against double taxation as applied to excise taxes. Klickitat County v. Jenner, 15 Wn.2d 373 (1942).

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 26th day of January 1993.