

Cite as Det. No. 93-090, 12 WTD 609 (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 The Prior Determination)	
of Tax Liability of)	No. 93-090
)	
. . .)	Registration No. . . .
)	
)	

[1] RULE 173 -- RPM 89-1 -- ETB 553 -- RETAILING OR SERVICE B&O TAX -- HAZARDOUS WASTE CLEANUP. Cleaning equipment or structures is a retail activity unless at a designated hazardous waste site. Removing hazardous wastes from bare land or water is taxable as a service. When a contract involves a combination of these activities, the receipts are taxed under the classification of the predominant activity.

[2] RULE 138 -- SERVICE B&O -- RECYCLE. Amounts received to take products to be recycled are subject to service business and occupation tax.

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: . . .

NATURE OF ACTION:

A chemical cleanup business requests a ruling on the taxability of its various activities.

FACTS AND ISSUES:

Pree, A.L.J. -- The taxpayer is involved in hazardous waste cleanup. It contracts to perform the following services:

- 1) Site Remediation - Under state or federal order, the taxpayer excavates and removes contaminated soil, treats groundwater, cleans contaminated

building interiors and pipes, ductwork, and structural components. This occurs both at officially designated waste sites as well as other areas not so designated.

- 2) Underground Storage Tank Removal - The taxpayer removes underground storage tanks which do not conform to new EPA requirements. Special safety procedures and special equipment are necessary to minimize chances of combustion. Also, contaminated soil treatment or removal may be necessary at the tank site.
- 3) Industrial Cleaning - The taxpayer removes hazardous waste materials and other products generated during industrial manufacturing. It cleans tanks, and flushes pipes using specially designed water hoses to remove industrial wastes.
- 4) Marine Tank and Barge Cleaning - The taxpayer removes petroleum products and other wastes from ship's bilges for treatment and recycling. These services are generally performed at dockside on ships used in interstate commerce.
- 5) Asbestos Abatement - The taxpayer is licensed by the Department of Ecology to remove asbestos from older buildings. The taxpayer is not involved other than with the removal of the asbestos; other companies demolish or remodel the buildings.
- 6) PCB Operations - PCBs, classified as toxic and hazardous chemicals under the Toxic Substance Control Act, are treated, cleaned and removed by the taxpayer from contaminated structures under both government and private contracts.
- 7) Emergency Response and Spill Services - The taxpayer provides teams of cleanup personnel who respond quickly to various chemical accidents and emergencies. The taxpayer treats and cleans a contaminated area, then removes the substance to an approved disposal site.
- 8) Other Related Services - In addition to the services outlined above, the taxpayer provides storage, treatment, and disposal services including storing hazardous substances and transporting them to an approved disposal facility. For a fee it recovers oil and other petroleum waste products recycles and resells the oil wholesale, retaining the proceeds.

The taxpayer has been previously classifying its activities in accordance with instructions given from this office. It requests more specific instructions following the issuance of ETB 553.04.172/224.

DISCUSSION AND DECISION:

[1] Sales at retail are subject to retail sales tax as well as business and occupation tax at the retailing rate. RCW 82.04.050 defines "sale at retail," "retail sale" 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

(2) The term "sale at retail" or "retail sale" shall include the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following:

(a) The installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers,

In Revenue Policy Memorandum No. 89-1, The Department of Revenue announced the service business and occupation tax classification was applicable for hazardous waste cleanup, but this was limited to:

. . . sites located in this state designated as "hazardous waste sites" under the federal Superfund law or the Model Toxics Control Act of this state, and for the restoration of lands and waters located at such sites.

ETB 553.04.172/224 issued July 31, 1991 distinguishes oil or other chemical spill cleanup from services taxable as retail sales:

Under RCW 82.04.050, "retail sale" includes services in respect to the cleaning of personal property and of existing buildings and structures. Oil or other chemical spill cleanup does not come within that definition since the cleanup is generally on bare land or water. Because this activity is not included within the definition of a retail sale, it is taxable under the service b&o tax classification under RCW 82.04.290, whether the activity is performed on land or

water. Contractors are not required or permitted to report partly under service and partly under retailing. The service taxable activities include skimming oil off the water, using absorbents to remove oil from land or water, pumping oily water from a vessel and disposing of the waste water, cleaning contaminated fowl or mammals, high pressure washing of the land, moving contaminated soil, and other related activities. These activities are all directly related to the primary activity of cleanup.

(Emphasis supplied.)

The key to distinguishing between retail cleaning activities and hazardous cleanup taxable as services may be found by focusing not on what the taxpayer is doing - cleaning, but on what the taxpayer is cleaning and where it is being done. If a building or equipment is being cleaned, the activity is retail under RCW 82.04.050. If the taxpayer is removing oil or chemicals from bare land or water, the activity is taxable as a service. If both types of activities are taking place, the primary activity controls the taxability of all the receipts under the contract. Cleanup contractors are not required or permitted to report partly under service and partly under retailing according to the ETB. All cleanup at designated hazardous waste sites is taxable under the service category per RPM 89-1.

Under this analysis, the taxpayer's various activities (1-7) are classified as shown:

- 1) Site Remediation - Removing contaminated soil and treating groundwater are taxable under the service classification. Cleaning contaminated building interiors and pipes, ductwork, and structural components is taxable as a retail sale unless at officially designated waste sites.
- 2) Underground Storage Tank Removal - Removing underground storage tanks which do not conform to new EPA requirements are taxable as retail sales. Contaminated soil treatment or removal is taxable as a service.
- 3) Industrial Cleaning - Cleaning tanks, and flushing pipes using specially designed water hoses to remove industrial wastes is taxable as a retail sale.
- 4) Marine Tank and Barge Cleaning - Removing petroleum products and other wastes from ship's bilges for treatment and recycling is taxable under the service classification.

- 5) Asbestos Abatement - Removing asbestos from older buildings is a retail activity.
- 6) PCB Operations - PCBs treatment, cleaning and removal by the taxpayer from contaminated structures is a retail activity.
- 7) Emergency Response and Spill Services - Cleanup of oil and other chemical accidents and emergencies performed on bare land or water is taxable under the service category. Cleaning contaminated building interiors and equipment is taxable as a retail sale unless at officially designated waste sites.

Often a single contract may call for different activities with some classified as retailing and some as service. In such cases, the predominant activity performed under the contract controls. For instance under #2, Underground Storage Tank Removal, removing underground storage tanks are taxable under the retailing classification while the contract may also call for contaminated soil treatment or removal. In that case a determination must be made based on all the facts and circumstances of each contract whether the contract is primarily for removing the tank or cleaning the soil. That determination of the primary activity will control the taxability of all the proceeds received under the contract. Under ETB 553, taxpayers are not permitted to report partly under service and partly under retailing.

[2] Regarding the other related services, amounts received for removing the hazardous substances from the site should be classified under the service classification of business and occupation tax as waste disposal fees. Amounts received for the waste oil and other products sold in Washington are subject to the wholesaling or retailing business and occupation tax. If the products are sold and delivered outside this state but not manufactured here, the tax on their sale would not be incurred.

The manufacturing business and occupation tax would apply to sales of new and different products recycled in Washington from the contaminated materials subject to the multiple activities tax credit.

This legal opinion may be relied upon for reporting purposes and as support of the reporting method in the event of an audit. This ruling is issued pursuant to WAC 458-20-100(9) and is based upon only the facts that were disclosed by the taxpayer. In this regard the department has no obligation to ascertain whether the taxpayer has revealed all of the relevant facts or whether the facts disclosed were actually true. This legal opinion shall bind this taxpayer and the department upon those facts. However,

it shall not be binding if there are relevant facts which are in existence but not disclosed at the time this opinion was issued; if, subsequently, the disclosed facts are ultimately determined to be false; or if the facts as disclosed subsequently change and no new opinion has been issued which takes into consideration those changes. This opinion may be rescinded or revoked in the future, however, any such rescission or revocation shall not affect prior liability and shall have a prospective application only.

DATED this 17th day of March, 1993.