

Cite as Det. No. 93-187, 13 WTD 341 (1994).

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. 93-187
	)	
	)	Registration No. . . .
) FY. . . /Audit No. . . .		

[1] RULE 135, RULE 172: RETAIL SALES TAX -- EXTRACTOR FOR HIRE -- MOVING OF EARTH -- OPEN-PIT MINE -- REMOVAL OF ORE, WASTE AND OVERBURDEN. The "moving of earth" is a sales taxable activity. However, where a person contracts with the owner to remove ore, waste, and overburden in connection with an open-pit mining operation, the person is performing as an extractor for hire and does not charge sales tax on its charges for performing the extractive services.

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.

. . .

NATURE OF ACTION:

Petition protesting the assessment of sales tax liability on charges for the moving of earth by an extractor for hire.

FACTS AND ISSUES:

Krebs, A.L.J. -- [The taxpayer] is engaged in the business of mining lead and zinc, and in operating a concentrator plant.

The Department of Revenue (Department) examined the taxpayer's business records for the period from April 1, 1990 through June 30, 1991. As a result of this audit, the Department issued [a] tax assessment [in June 1992] asserting tax liability and interest due . . . , which remains due.

The taxpayer's protest involves Schedule II and Exhibit III of the audit report where use tax and/or sales tax liability was asserted on amounts paid by the taxpayer to an extracting contractor for removal of waste and overburden which were not sold. The auditor deemed this "removal activity" to be "moving of earth" subject to sales tax per WAC 458-20-172 (Rule 172). The taxpayer reports the following concerning the "removal activity." The taxpayer owns an open-pit lead and zinc mine in Washington. The taxpayer does not itself remove ore from the mine, but instead engages an extracting contractor . . . to remove the ore from the open-pit mine. As in nearly all mining, when the ore is removed, dirt and other materials are taken from the mine as part of the mining process.

Citing WAC 458-20-135 (Rule 135) as applying to the facts in this case, the taxpayer asserts that it is the extractor, while [the contractor] is the extractor for hire, subject to the Extractor for Hire classification of the B&O tax. The taxpayer further asserts that Rule 135 does not require it to pay sales tax on the services rendered by an extractor for hire.

The taxpayer contends that the auditor's reliance on Rule 172's "moving of earth" as sales taxable in this case conflicts with Rule 135 which is more specific in holding that extractors for hire do not charge and collect sales tax when performing their services.

#### ISSUE:

The issue is whether the charges for the moving of earth by an extractor for hire are subject to sales tax.

#### DISCUSSION:

Under the Washington Revenue Act, a person who mines, quarries, takes or produces ore, stone, sand, gravel, clay, mineral or other natural resource product is an "extractor." RCW 82.04.100 and Rule 135. Similarly, persons performing under contract, either as prime or subcontractors, the necessary labor or services for others who are engaged in business as "extractors," are classified as "extractors for hire" and are taxable under the Extracting for Hire classification of the B&O tax.

Persons engaged in performing contracts for the "moving of earth" must collect the retail sales tax upon the full contract price when the work is performed for consumers. Rule 172.

In this case, the taxpayer contracted with [the contractor] to remove the ore, waste and overburden resulting from the open-pit mine operation. In our opinion, the removal of the waste and

overburden was necessary for the continuation of further mining/extraction of the minerals. Thus, the "movement of earth" is so intertwined with the extracting activity that it must be deemed part and parcel of the extractive activity and taxable as such. [The contractor] as an "extractor for hire" is thus subject to the Extracting for Hire B&O tax. Extracting services are not included within the definition of "retail sale" (RCW 82.04.050) and, thus, the charges for extracting services are not subject to sales tax. And, though Rule 135 does not so specifically state that an "extractor for hire" is not required to charge, collect and remit sales tax on charges for extracting services, the Rule does not specifically require it either. Accordingly, we conclude that the assessment of sales tax liability against the taxpayer on [the contractor's] charges for removing earth cannot be sustained.

Juxtaposing the "removal of earth" activity, intertwined with the extractive activity of mining in this case, with the extractive activity of logging, we find that the Department has recognized various activities such as stream cleaning, cleanup, and logging road construction (which involves moving of earth), which if done separately from a logging contract would be sales taxable, to be taxable as an extractive activity without sales tax consequences when done pursuant to the terms of a logging contract. See WAC 458-20-135(1). We believe that the rationale applied to logging-related extractive activities is similarly applicable to the peripheral mining-related activity in this case of the "removal of earth."

#### DECISION AND DISPOSITION:

The taxpayer's petition is granted. This matter is remanded to the Department's Audit Division for correction of the tax assessment in conformance with this Determination. The Audit Division will authorize the issuance of a refund or credit as warranted.

Dated this 29th day of June, 1993.