Cite as Det. No. 15 WTD 1 (1995).

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

In the Matter of the Petition for Correction of Notice of Use Tax Due	)	D E T E R M I N A T I O N
	)	No. 94-095
. . .	)	Real Estate Excise Tax Notice of Use Tax Due

[1] RULE 19301 AND RCW 82.04.440: MULTIPLE ACTIVITIES. The B&O tax is imposed on the privilege of engaging in virtually all business activities in Washington.

[2] RULE 135 AND RCW 82.04.100: EXTRACTORS -- EXTRACTORS FOR HIRE -- TIMBER -- LOGGING -- DISTINGUISHED. A person is an extractor if he has title to standing timber before the timber is severed from the land, regardless of who actually cuts the timber. A person is an "extractor for hire" where that person (or another person engaged on his behalf) cuts timber and does not take title to the logs until after the timber is severed from the land.

[3] RULE 19301 AND RCW 82.04.440: MULTIPLE ACTIVITIES TAX CREDIT -- EXTRACTING -- WHOLESALING. A taxpayer may take a credit against his wholesaling tax obligations to the extent that he has paid extracting taxes with respect to the extracting of products sold in this state. A taxpayer may not take a credit against his wholesaling tax obligations to the extent that he has paid extracting for hire taxes with respect to the extracting of products sold in this state.

[4] ETB 419.32.99: ESTOPPEL -- FULL DISCLOSURE OF FACTS -- REQUIREMENT OF A WRITING. The Department of Revenue is estopped from assessing a tax only if the taxpayer has made full disclosure of all relevant facts and the Department's position is stated in writing. Oral advice does not bind the Department.

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:

A Washington corporation protests the assessment of B&O tax under the extracting classification and the disallowance of foreign commerce deductions, and asserts a claim of estoppel against the Department of Revenue (Department).[1]

FACTS AND ISSUES:

Gray, A.L.J. -- The taxpayer is a Washington corporation whose business consists of obtaining contracts for cutting timber and selling the cut logs. The Department audited the taxpayer for the period January 1, 1989 through December 31, 1992. The Department assessed business and occupation (B&O) tax under the wholesaling classification. A use tax assessment on a computer was resolved in a post audit adjustment before the appeal to Interpretations & Appeals (I&A).

The Audit Division examined three sets of contracts between the taxpayer and (1) a Washington State agency (Agency), (2) a large timber company (Company) and (3) a number of other timber companies. On the basis of the contracts with Agency and the smaller timber companies, the Audit Division said that the taxpayer was an extractor because the taxpayer owned the logs or had a right by contract to the logs "at the time of harvest." With reference to the Company contracts, the Audit Division said that the taxpayer was an extractor for hire.

In the Detail of Differences and Instructions to Taxpayer ("detail"), the Audit Division said:

> Due to the lack of tax differences, all of the income has been adjusted under the wholesaling classification because it was reported under this category. Also, due to the lack of tax differences, the MATC [multiple activities tax credits] system was not employed in the audit.

The Audit Division decided that the taxpayer should have reported the export log sales and paid B&O tax on those sales because "extracted products are subject to the extracting B&O tax if sold outside the state." The Audit Division treated receipts from the Company contracts differently because the taxpayer was an "extractor for hire," since the taxpayer did not own the logs at the time of severance from the land. The Audit Division noted that, in all cases, the taxpayer was directly involved in cutting the timber because the taxpayer hired the loggers, paid the loggers, prepared the forest practice applications and paid the

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

forest excise tax. The Audit Division credited the taxpayer for amounts paid in its tax returns.

The taxpayer argued three points against the tax assessment. First, the taxpayer claimed the Department was estopped from taking its position because Department employees had been closely involved in advising the taxpayer as to its tax liability since the taxpayer's creation in 1984. Second, the taxpayer vigorously opposed the Department's conclusion that the taxpayer was an extractor. Third, the taxpayer maintained that it had reported its tax obligations correctly because it was not required to report and pay tax on foreign sales when it placed the logs into the "export stream."

Estoppel. The taxpayer said that it had not merely one or two encounters with the Department but instead had regular visits from Department employees, particularly from one employee (who has since retired from the Department). The employee assisted the taxpayer with reporting the timber tax and the B&O tax. It is worth quoting the taxpayer's statements in its brief:

> During all times relevant to this audit, [the taxpayer] has regularly and consistently sought the advice of personnel from the State Department of Revenue relative to their status and classification for tax reporting purposes for Business and Occupation tax. [The taxpayer] has consistently been directed by the Olympia office of the Department of Revenue, and specifically the Harvest Tax Division [forest tax section], that they are not required to pay B&O tax provided the logs being shipped are placed directly into the export stream such as all logs subject of his audit were shipped.

The taxpayer also wrote:

> [The taxpayer], over the course of these contracts, made several inquiries with the Department of Revenue personnel in the Olympia office in an attempt to regularly update their clerical staff on the reporting requirements for B&O tax for these particular sales. On more than one occasion, personnel from the Department of Revenue, and specifically the Harvest Tax Division [forest tax section], would personally meet with the staff of [the taxpayer] at its office . . . . At these meetings, there would be conversation concerning the requirement to pay and/or report sales such as [those] described in the state timber sales [contracts] which [logs] were entering the export stream and, consistently, the B&O tax issue was stated [by the Department] to be that no tax was owing so long as the logs were properly placed in the export stream by [the taxpayer].

The taxpayer reported wholesaling B&O on logs it sold domestically and did not report or pay B&O tax on its foreign sales of logs. The taxpayer said that it confirmed the Department's position on foreign sales on a number of occasions. On one occasion, an audit supervisor was present and able to hear, on a speaker phone, the taxpayer's question and the Department's answer regarding foreign sales. The Audit Division told the taxpayer that the taxpayer did not ask enough questions, and did not disclose the facts that led to the extractor or extractor for hire classification.

The taxpayer provided photocopies of notes to substantiate its estoppel claim. The Vice-President or the comptroller prepared the notes. The notes are short, but consistently indicate the Department's response was "no B&O tax on logs for export." One notation, in particular, said "I have checked with Harvest Tax & B&O tax no changes We will use chart & B&O under wholesale."

Extractor. The taxpayer expressly denied being an "extractor for hire." It said that it did not possess title to the logs at the time the timber was cut, that ownership did not pass until the logs were removed from the woods and scaled, and that it did not engage in the labor of removing the logs or the mechanical services for others in extracting the timber. The taxpayer argued that those companies that cut timber on behalf of the taxpayer, in order that the taxpayer could fulfil its contracts with Company, Agency, and the other timber companies, were extractors for hire.

The taxpayer emphasized that it owned no logging equipment or trucking equipment and that it employed no personnel to perform logging operations. It said that all logging activity was performed by independent contractors hired under separate contract by the taxpayer. One of the auditors apparently said that he believed the taxpayer was "engaged in contract logging" for Company, based on his review of the contracts. The taxpayer produced a letter from Company, stating that the taxpayer was not a "service logging contractor for [Company]." Part of the taxpayer's argument against being classified as an extractor is that none of the logs were "extracted" by the taxpayer.

The taxpayer provided sample contracts with Company and Agency. In those contracts, title to the logs was provided for in these ways:

Company:

> Title to and possession of Covered Products shall pass to Purchaser after severance and removal from the Contract Area.

Agency:

> Title to the forest products conveyed passes at confirmation of the sale. [Paragraph G-10 of the contract stated that "the sale was confirmed on February 12, 1990]. Purchaser bears the risk of loss of or damage to and has an insurable interest in the forest products in this contract from the time of confirmation of the sale of forest products. In the event any such forest products are destroyed, damaged, or stolen after passage of title, whether the cause is foreseeable or unforeseeable, the forest products shall be paid by Purchaser. Breach of this contract shall have no effect on this provision. Title to the forest products not removed from the sale area within the period specified in this contract shall revert to the State as provided in RCW 79.01.132.

Contracts for the other timber companies were neither submitted nor reviewed at the conference or subsequent to the conference.

With reference to the Company sales, the taxpayer described the activity after the timber was cut: the logs were loaded onto a truck, and the logs were identified with a Company ticket. The truck carried the logs away from the cutting site to a point identified with a Company office or "shack." There, a Company employee scaled (measured and graded) the logs, which were also identified with the Company brand. After the Company employee had completed these activities, the truck was free to leave and carry the logs to the taxpayer's intended destination. At the point the truck left the Company shack, title passed to the taxpayer.

Foreign Sales. The taxpayer argued that it sold the majority of its logs to Japan and that the taxpayer placed the logs directly into the export stream. There does not appear to be any contention by the Department that the taxpayer did not effectively place the logs into the export stream. The logs were transported, at the taxpayer's direction, from the logging site directly to a Washington port where the logs were placed in the water to await loading on board ships.

DISCUSSION:

[1,2] The taxpayer was engaged in two separate business activities in this state. "The legislative purpose behind the B&O tax scheme is to tax virtually all business activity in the state." Impecoven v. Department of Rev., 120 Wn.2d 357, 841 P.2d 752 (1992). The first activity engaged in by the taxpayer in Washington was when it contracted to log certain areas of land owned by Company, Agency, and others. RCW 82.04.100 defines extractor:

> "Extractor" means every person who . . . from the land of another under a right or license granted by lease or contract, . . . by contracting with others for the necessary labor or mechanical services, for sale . . ., fells, cuts or takes timber . . . .

RCW 82.04.230 imposes the B&O tax upon extractors. It says:

> Upon every person engaging within this state in business as an extractor; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including byproducts, extracted for sale or for commercial or industrial use, multiplied by the rate of 0.484 percent.
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> The measure of the tax is the value of the products, including byproducts, so extracted, regardless of the place of sale or the fact that deliveries may be made to points outside the state.

WAC 458-20-135 (Rule 135) discusses extractors for hire:

> Persons performing under contract, either as prime or subcontractors, the necessary labor or mechanical services for others who are engaged in the business as extractors, are taxable under the extracting for hire classification of the business and occupation tax upon their gross income from such service.

RCW 82.04.280 imposes the B&O tax on extractors for hire. It says:

> Upon every person engaging within this state in the business of: . . . (3) extracting for hire or processing for hire; as to such persons, the amount of tax on such business shall be equal to the gross income of the business multiplied by the rate of 0.484 percent.

In Det. No. 91-142, 11 WTD 177 (1992), a taxpayer sought a prior tax ruling regarding its liability as a landowner who sold standing timber to a logger with title passing at the time of scaling. Det. No. 91-142 says:

> TI&E's [Taxpayer Information & Education] analysis of the transaction was correct; as owner of the logs, the landowner is in fact the harvester of the logs. . . . The landowner is selling the timber to the logger at the time of scaling. Here, the landowner is taxable on the amount it received from the logger for the logs ($70/MBF). With respect to the logging activity performed by the logger for the landowner, the logger is taxable as an extractor for hire. . . .

Using the analysis in Det. No. 91-142, we begin by noting that under the Company contract provided by the taxpayer for our review, Company retained title until after severance and removal from the contract area. Under the Agency contract, title passed upon "confirmation of the sale," and confirmation of the sale occurred before the timber was cut. The paragraph on "title and risk of loss" also said that "[t]itle to the forest products not removed from the sale area within the period specified in this contract shall revert to the State as provided in RCW 79.01.132."

We conclude that the taxpayer's business activities with Agency should be classified as extracting because title to the timber passed to the taxpayer before the trees were cut. Consequently, the taxpayer is subject to extracting B&O under RCW 82.04.230 on the Agency contract, and is also responsible for the timber tax (ch. 84.33 RCW). We also conclude that the taxpayer's business activities with Company and the other timber companies should be classified as extracting for hire because title to the logs did not pass to the taxpayer until after severance from the land and removal from the area. Consequently, the taxpayer is subject to B&O tax under the extracting for hire classification in RCW 82.04.280(3). (We have not seen the other timber contracts and will assume that the Audit Division correctly classified the taxpayer as an extractor for hire.) These conclusions are based upon RCW 82.04.100, Rule 135, and Det. No. 91-142. We believe this analysis is also consistent with ETB 541.04\45\33.135\259, which discusses the tax liabilities of forest landowners and harvesters, and the sale of standing timber as opposed to the sale of logs.

[3] The taxpayer's second business activity was selling logs to others for resale. It was a wholesaler as defined in RCW 82.04.270. It made both domestic and foreign sales. The taxpayer is correct when it said the Department's position is that logs placed into the export stream are exempt from taxation on the sale of the logs. WAC 458-20-193C (Rule 193C). As stated above, the taxpayer was either an extractor or an extractor for hire, depending on when title to the logs passed under the contracts. Both business activities -- extracting and sales -- are subject to the B&O tax, as the first subsection of the multiple activities tax credit statute makes clear (although sales of goods to persons in foreign countries are exempt if the requirements in WAC 458-20-193C are met). RCW 82.04.440(1) provides:

> Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in.

The foreign sales exemption applies only to the taxpayer's sales of the logs. It has no application to the taxpayer's tax

liability for extracting. But the taxpayer is not required to pay both extracting and wholesaling B&O because of the other provisions of the multiple activities tax credit statute. RCW 82.04.440(2) provides:

> Persons taxable under RCW 82.04.250 [retailing] or 82.04.270 [wholesaling] shall be allowed a credit against those taxes for any (a) manufacturing taxes paid with respect to the manufacturing of products so sold in this state, and/or (b) extracting taxes paid with respect to the extracting of products so sold in this state or ingredients of products so sold in this state. . . . The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the sale of those products.

(Emphasis supplied.)

WAC 458-20-19301 (Rule 19301) administers RCW 82.04.440. Rule 19301(3) says, in part:

> Internal tax credits arise from multiple business activities performed entirely within this state, all of which are now subject to tax, but with the integrated credits offsetting the liabilities so that tax is only paid once on gross receipts. Under this system Washington extractors and manufacturers who sell their products in this state at wholesale and/or retail must report the value of products or gross receipts under each applicable tax classification. Credits may then be taken in the amount of the extracting and/or manufacturing tax paid to offset the selling taxes due. There are three ways in which credits may arise because of taxes paid exclusively in this state.
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> (f) Products are extracted in Washington and directly sold in Washington. Extracting business and occupation tax and selling business and occupation tax must both be reported but the payment of the former is a credit against the latter.

In this case, RCW 82.04.440(2) allows the taxpayer to claim a credit against its wholesaling B&O liabilities for any extracting taxes paid under subsection (b). The taxpayer did not pay extracting B&O but did pay wholesaling B&O on its domestic (intrastate) sales of logs. The tax rate for both wholesalers and for extractors is the same. Although the taxpayer reported its taxes under the incorrect classification and failed to take the multiple activities tax credit, the taxpayer's extracting B&O liability is partially satisfied where the taxpayer paid wholesaling B&O on domestic log sales when the taxpayer was an extractor; i.e., on the Agency contract. Conversely, the taxpayer's B&O liability is not satisfied, even where the taxpayer paid wholesaling B&O on domestic log sales, when the taxpayer was an extractor for hire; i.e., on the Company and the

other timber sales. This is because the MATC allows credit against wholesaling taxes only for extracting taxes, not extracting for hire taxes.

With respect to its international sales, the taxpayer cannot claim a credit against its extracting B&O liability because the taxpayer did not pay wholesaling B&O tax on those sales.

In the future, the taxpayer should report and pay its extracting or extracting for hire tax liability, and it will be allowed a credit against its wholesaling tax obligation to the extent that it pays the extracting tax.

[4] The taxpayer argued that the Department should be estopped from assessing taxes for the audit period because the taxpayer relied upon advice from the Department during the audit period. ETB 419.32.99 deals with the issue of oral advice from the Department.

After considering the facts and arguments as presented by the taxpayer, and also considering the Department's response, we do not believe that the Department is estopped. The Department did not disallow the taxpayer's tax deductions of amounts received from the international sales of the logs. The Department does not contend that the taxpayer did not place the logs into the export stream. It also appears that the taxpayer's inquiries to the Department, including the call made in the presence of the audit supervisor, were limited to export sales and did not involve any factual presentation or discussion by the taxpayer concerning its method of acquiring the logs. We also note that the frequent visits and discussions between members of the forest tax section and the taxpayer probably focussed on the taxpayer's timber tax obligations. The absence of a discussion, in addition, the taxpayer's business and occupation tax obligations cannot estop the Department from assessing B&O tax, for the reasons noted in ETB 419.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 19th day of May, 1994.