

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment and for Refund of)	
)	No. 97-227
)	
...)	Registration No. . . .
)	Notice of Balance Due No. . . .
)	
)	

- [1] RULE 170; RCW 82.04.050(2)(b): SERVICES RELATED TO CONSTRUCTION -- EXAMPLE IN RULE. An example or illustration in an administrative rule is a model to help taxpayers understand the application of a rule. Rule 170 does not require services to be contained in a construction contract in order for those services to be “retail sales.”
- [2] RULE 170; RCW 82.04.050(2)(b): CONSTRUCTION MANAGEMENT SERVICES -- CLASSIFIED AS RETAIL SALES. Construction management services are classified as retail when those services are provided in respect to construction, which means that construction of new or existing buildings or other structures either has begun or the consumer has obligated itself to build them or to have them built.

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 sole proprietor seeks a refund or credit of retail sales tax paid on services which he contends were not retail sales, and asks that the refund or credit be applied to a notice of balance due issued because the taxpayer no longer treats those services as retail sales.¹

FACTS:

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

Gray, A.L.J. -- The taxpayer is a sole proprietor who provides construction services to consumers. One customer in particular is a non-profit corporation that asked the taxpayer to guide it through the acquisition and remodeling of offices in two Washington counties.

The taxpayer argues that the non-profit corporation acted as its own general contractor and that he provided only advice to the non-profit corporation. He helped write requests for grants, etc., related to their operation. He billed the non-profit corporation on an hourly basis.

He said that he provided the following services:

1. Design assistance for wood frame commercial structures;
2. Assisted in preparing job cost estimates for projects;
3. Consulting services for navigating the permit process;
4. Acted as job supervisor and manager of selected construction activities as requested;
5. Acted as liaison between the non-profit corporation/developer and various contractors.

The taxpayer relies upon WAC 458-20-170 (Rule 170), subsection (1)(e), which defines the term "constructing, repairing, decorating or improving of new or existing buildings or other structures," as the authority for his conclusion that his services were not retail sales and therefore not subject to retail sales tax.

ISSUE:

Whether the taxpayer's services to the non-profit corporation were rendered in respect to construction so as to be within the scope of the definition of retail sale in RCW 82.04.050(2)(b)?

DISCUSSION:

The starting point for questions regarding state tax law is the Revised Code of Washington; i.e., the statutes. RCW 82.04.050(2)(b) states:

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:

. . .

(b) The constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, . . .

The Department of Revenue (Department) adopted Rule 170 to provide guidance to consumers and contractors regarding state tax liabilities for construction. Rule 170 includes five subsections: (1) definitions, (2) speculative builders, (3) business and occupation (B&O) tax, (4) retail sales tax, and (5) use tax. The taxpayer relies upon language in Rule 170(1)(e), which defines "constructing, repairing, decorating, or improving" real property:

The term "constructing, repairing, decorating or improving of new or existing buildings or other structures," in addition to its ordinary meaning, includes: The installing or attaching of any article of tangible personal property in or to real property, whether or not such personal property becomes a part of the realty by virtue of installation; the clearing of land and the moving of earth; and the construction of streets, roads, highways, etc., owned by the state of Washington. The term includes the sale of or charge made for all service activities rendered in respect to such constructing, repairing, etc., regardless of whether or not such services are otherwise defined as "sale" by RCW 82.04.040 or "sales at retail" by RCW 82.04.050. Hence, for example, such service charges as engineering fees, architectural fees or supervisory fees are within the term when the services are included within a contract for the construction of a building or structure. The fact that the charge for such services may be shown separately in bid, contract or specifications does not establish the charge as a separate item in computing tax liability.

(Emphasis supplied.) The taxpayer is not arguing that Rule 170 provides him an exemption from sales tax, but that his services are not within the scope of the definition of "retail sale" in the first place. If the taxpayer is correct, then the construction management services that he provides are not subject to retail sales tax because those services are not included within any contract between the non-profit corporation and its various contractors.

However, the taxpayer's argument ignores the language in RCW 82.04.050(2)(b) which defines "retail sale," and broadly includes services rendered in respect to construction. If there were a conflict between the statute and the rule (which there is not, as explained below), then the statute would control, because rules may not change or amend legislative enactments. Kitsap-Mason Dairymen's Ass'n. v. Washington Tax Comm'n., 77 Wn.2d 812, 467 P.2d 312 (1970). Second, as just noted, there is no conflict because Rule 170(1)(e) does not require services to be included within a construction contract as a condition to being defined as a retail sale. The actual language in Rule 170(1)(e) that the taxpayer relies upon is an illustration or example of the type of services that are retail sales when they are provided in respect to construction or repair of a new or existing building or structure.

[1] An illustration is not the rule itself. In Det. No. 89-248, 10 WTD 282 (1990), we said that RCW 82.04.050 does not require that services be within a written contract for construction in order to be taxable as retail sales; the statute requires only that the services be rendered in respect to construction. Similarly, Rule 170 requires only that the services be rendered in respect to construction; not that they be included in a contract. The reference in Rule 170 to services included in a contract means that bifurcating a contract will not change the tax consequences. Whether certain services are specified in a written contract is not the factor that determines their tax consequences.

Further, the Board of Tax Appeals (BTA) has also held that construction management services are a retail sale. Steele v. Department of Rev., BTA Docket No. 47590. The Steeles provided construction management services to homeowners who chose to build their own homes. The BTA found the Steele's activities were directly related to the actual construction of buildings. The BTA

considered the Steele's argument that Rule 170 requires services to be part of a construction contract, but decided "the better reading of the Rule would recognize that the language dealing with architectural, engineering and supervisory fees is only an example, and is not meant to infer that in all cases such services are not subject to sales tax when they are not included within an overall contract for the actual construction of a building." The BTA held that "the evidence shows that the Steeles' construction management services are directly related to the actual construction of buildings for consumers. There is no other characterization which is possible."

[2] We conclude that the taxpayer's services to the non-profit corporation fit the definition of a retail sale because they were rendered in respect to construction or repair of new or existing buildings or structures. All of the work the taxpayer performed are defined by him as "construction management" services. Those services, as discussed earlier in this determination, were rendered in respect to the actual construction undertaken by the non-profit corporation. The taxpayer's petition is denied.

DECISION AND DISPOSITION:

The petition is denied. The request for refund is denied.

Dated this 25th day of November, 1997.