Cite as 2 WTD 361 (1987)

BEFORE THE INTERPRETATION AND APPEALS SECTION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition) For Correction of Assessment of)	D E T E R M I N A T I O N
)	No. 87-71
)	Registration No. . . .
. . .)	

[1] **RULE 119:** RETAIL SALES TAX -- GRATUITIES. Gratuities paid under circumstances which are not clearly voluntary must be included in the selling price. Charges for gratuities are not voluntary, even though negotiated, when the amount is agreed upon and the contract document states they "will be added."

[2] **RULE 245 AND RULE 99:** RETAIL SALES TAX -- LONG DISTANCE TELEPHONE CALL MARK-UPS -- EVIDENCE -- TEST PERIOD. Tax assessed on unreported long distance telephone mark-ups will be reduced if taxpayer hotel provides evidence that its occupancy rate was lower during the period assessed than during the test periods used by the audits.

[3] **RULE 196:** RCW 82.08.037 -- RETAIL SALES TAX -- DEDUCTION -- BAD DEBTS -- RECOVERIES. A seller is entitled to a credit or refund for sales taxes previously paid on bad debts only if the seller can specifically identify the sales for which the credit is claimed.

[4] **RULE 170:** RETAIL SALES TAX -- CONSTRUCTION CONTRACT -- SETTLEMENT-AGREEMENT -- MEASURE OF TAX. Retail sales tax due on lump-sum settlement award paid to contractor in contract dispute. Taxable amount reduced by amount of sales tax separately stated on unpaid invoices.

[5] **RULE 170:** RETAIL SALES TAX -- CONSTRUCTION CONTRACT -- SETTLEMENT-AGREEMENT -- MEASURE OF TAX -- INTEREST. Interest paid to a contractor because of late payments is not included as part of the selling price subject to retail sales tax. Where settlement award did not show how much, if any, of an award was for interest, retail sales tax due on total amount as part of the contract costs.

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: . . .
. . .
. . .
. . .
Witness: . . .

DATE OF HEARING: September 19, 1986

NATURE OF ACTION:

The taxpayer petitioned for a correction of a tax assessment which was issued after a routine audit of the taxpayer's records. The primary issues concern the assessment of tax on unreported gratuity income and on the amount paid for a construction settlement award.

FACTS AND ISSUES:

Frankel, A.L.J--The taxpayer's records were examined for the period of January 1, 1982 through September 30, 1985. The audit disclosed $ . . . in taxes and interest due. Tax Assessment No. . . . was issued February 27, 1986. An amended assessment was issued on August 21, 1986 which reduced the amount owing to $ . . . .

The taxpayer protested the following assessments:

1) Schedule VI -- Unreported Gratuity Income

The auditor found the taxpayer added a 15 percent gratuity charge to each banquet/catering contract. Retailing and retail sales tax was computed on the "gratuity" income. The auditor relied on WAC 458-20-119, finding the charges were not clearly voluntary and were, therefore, taxable. The taxpayer

maintains that all forms of gratuities are clearly voluntary and at the discretion of the customer. It states it successfully argued the same issue previously before the Department and that decision should be controlling.

2) Schedule VII -- Telephone Charges

The auditor adjusted phone revenues to amounts reported on monthly recap sheets. The taxpayer contended the recap sheets do not reflect adjustments made at the time of check-out (as deleting wrong numbers). It contended the final charges in the general ledger were more accurate and that it should receive a credit of $ . . . per month.

3) Schedule VIII -- Staff Telephone Charges

The schedule disallowed the costs of staff calls from guest call income. The taxpayer agreed that the staff calls should not be deductible but contended that the cost of the staff calls was improperly calculated.

4) Schedule IX -- Long Distance Call Mark-Ups

Long distance call mark-ups have been allowed since January 1983 when the telephone industry was deregulated. The taxpayer did not report the long distance mark-ups until August 1983. Retailing and retail sales tax was assessed for the unreported mark-ups from January through July 1983. As the records for that period were not available, the auditor calculated the taxable amount by using a monthly average of telephone mark-ups from August 1983 through September 1985.

The taxpayer agrees that an assessment is proper for guest call mark-ups which were not reported. The taxpayer protests the amount of the assessment, however, contending the amount should be reduced because of the significantly lower occupancy rate during the period assessed.

5) Schedule X -- Unreported Guest Local Calls

Tax was assessed on the taxpayer's charges for local phone calls to motel guests in 1982. As with the assessment in Schedule IX, the taxpayer agrees an assessment is proper but contests the amount. The taxpayer states this assessment should be reduced because of the lower occupancy during 1982 than during the test period used by the auditor.

6) Schedule XI -- Disallowance of Bad Debts

The auditor disallowed deductions from retail sales tax for bad debts the taxpayer accrued by using the reserve method. The taxpayer contends it should be entitled to a credit for its actual write-offs for bad debts during the audit period.

7) Schedule XII -- Use Tax on Motel Construction

Use tax or deferred sales tax was assessed on purchases of tangible personal property or on repairs or improvements made on which retail sales or use taxes had not been paid. The taxpayer believed that amounts paid for installation only should not be subject to a use tax.

8) Schedule XIII -- Use Tax on Construction Settlement

Use tax was assessed on the total amount paid by the taxpayer as part of a settlement agreement reached after a contract dispute. The taxpayer paid the contractor $ . . . , but contends that only $ . . . should be subject to deferred sales or use tax. The taxpayer contends that amount represents the tangible personal property and services performed by the contractor pursuant to the contract that remained unpaid. The taxpayer contends the balance of the settlement amount was for interest, legal and arbitration expenses, consequential damages, and the balance of the contract price on which it had already paid sales tax.

9) Schedule XVI -- Convention Tax on Unreported Telephone Charges

The auditor found the telephone charges to guests were part of the gross receipts of lodging sales as telephones are physically inside the guests' rooms. The taxpayer disagreed with the assessment, contending that RCW 67.28.180 provides that the convention tax shall be imposed on "the sale of or charge made for the furnishing of lodging by a hotel. . . ." The taxpayer states the tax is not imposed on the "gross receipts of lodging" and is meant to be imposed only on the actual room rate charged the guest for lodging.

A post-audit adjustment was made to delete the convention tax assessed on the telephone charges. The Department now agrees that the convention tax should be reported only on lodging charges.

At the hearing, the taxpayer stated it would agree to the assessments in Schedules VII, VIII and XII (numbers 2, 3 and 7 above). The assessments that remain at issue, therefore, are

those identified as Schedules VI, IX, X, XI and XIII (numbers 1, 4, 5, 6 and 8 above).

DISCUSSION:

[1] Unreported Gratuity Income. The retail sales tax and retailing business and occupation (B&O) tax is imposed on the selling price of articles sold at retail. The selling price includes the total consideration paid or delivered by a buyer to a seller. RCW 82.08.010(1). WAC 458-20-119 (Rule 119) is the Department's duly adopted rule dealing with the taxation of the sales of meals. Sales of meals by hotels and other eating places are subject to the retail sales tax and all persons making such sales are required to pay retailing B&O. Rule 119 clearly provides that gratuities paid under circumstances which are not clearly voluntary must be included in the selling price:

> Tips or gratuities representing donations or gifts by customers under circumstances which are clearly voluntary are not part of the selling price subject to tax. However, mandatory additions to the price by the seller, whether labeled service charges, tips, gratuities or otherwise must be included in the selling price and are subject to both the retailing classification of the business and occupation tax and the retail sales tax.

In the present case, the taxpayer's catering manager testified as to the standard procedure used in arranging for banquets and group functions. She stated the customers are provided a banquet brochure and price list. The brochure states only the prices for food. At the bottom of each page it states, "the above prices do not include applicable state sales tax and recommended 15% gratuity."

The catering manager or another employee then discusses the price of food and beverages and other services requested by the customer. She stated that the taxpayer's policy is to suggest to the customer that they pay the industry standard 15 percent gratuity. She testified that in most cases, the customer does agree to the standard amount.

After someone in the catering department and the customer have discussed the set-up, meeting times, menu, gratuity charges, etc., the customer is sent a contract which states the terms

of the agreement. Examples of the two contract forms used by the taxpayer during the audit period are attached as attachments A and B. The contracts clearly state that the applicable rate of Washington State sales tax and the agreed amount of gratuity will be added (Emphasis supplied.) When preparing the agreements, the taxpayer's standard policy was to type in the recommended gratuity of 15 percent. In a random sampling of approximately ten percent of 1,000 contracts in the taxpayer's file, the auditor found the customers had not changed the 15 percent figure.

Also, the following language appears above the signature line for the customer's approval of the contract:

> The contents of the above meet with my approval. I consider our agreement definite and confirmed. The catering policy as appears on the reverse of this contract is understood.

The taxpayer did provide four examples of situations in which a customer did not agree to or did not pay the recommended 15 percent gratuity. These were attached to a memorandum regarding the banquet gratuity income as Exhibits C, D, E and F.

In Exhibit C, both contract forms attached to this Determination were used to formalize the terms of the agreement. The contract states the menu to be provided: coffee, tea, sanka and soft drinks at 85+ per person and 58 dozen cookies at $4.50 per dozen. The recommended 15 percent gratuity was marked out and ten percent written in. The room rental charge had also been reduced. The room charge had "$850 + tax" typed in. That amount had been crossed out and $425 written above it. The $425 was also crossed out and $375 written next to that figure.

As the contract had provided would be done, the customer was billed $375 for the room, $161.50 for the beverages at 85+ per person, and $261 for the 58 dozen cookies. The applicable tax and agreed ten percent gratuity of $42.25 were added. Both the percent of gratuity and the charge for the room had been negotiated and reduced. Both charges were agreed upon and considered "definite and confirmed." We do not believe that the taxpayer and the customer would consider the agreed charge for the room as voluntary even though negotiated. Likewise, we find the gratuity was also agreed to and not paid under a situation that was clearly voluntary simply because it had been negotiated and reduced.

Furthermore, because the ten percent charge was labeled a "gratuity" does not mean it must be a voluntary charge. Rule 119 provides that the fact the additions to the contract are labeled gratuities is not controlling if made under a circumstance which is not clearly voluntary. Accordingly, the charges for gratuities paid under circumstances similar to the situation in Exhibit C must be included as part of the selling price.

In Exhibit D, the customer had sent a preliminary arrangements memo regarding the requirements for the group's convention. Regarding gratuities, the memo stated:

> It is understood that gratuities are a monetary consideration by the client in appreciation of services rendered. Gratuities are not to be considered by the hotel as an automatic add-on charge for function costs. The decision of whether to provide a gratuity and the amount of same, is solely a decision of the Association and will be based upon the quality of the service rendered.

The contract also left the amount of the gratuity blank, stating that the amount was "to be determined." The customer had obligated itself to pay for 350 lunches at $10.50 per person and 370 dinners at $17 per person. Understandably, such a customer might not want to obligate itself to pay an additional 15 percent gratuity of almost $1,500 until it knew the quality of the service provided. It might also believe the service would be better if it did not agree to an automatic add-on of 15 percent. We agree that in this example, if the customer paid a gratuity, the payment was voluntary. Unlike the previous example, the taxpayer did not add an amount for the gratuity on the customer's invoice and the customer had clearly indicated that any payment for gratuities would be based upon the quality of the service rendered. We believe, however, that this example supports the auditor's conclusion that customers who agreed in advance to the 15 percent did consider the amount mandatory rather than discretionary.

In Exhibit E, the customer had agreed to pay for 14 breakfasts and beverage service at 85+ per person. The agreement was unsigned but stated that the gratuity of 15 percent would be added. The customer was billed for the food and sales tax as agreed, but nothing was added for gratuities. The taxpayer cites this as an example of a case that a banquet function was

booked even though the customer decided to pay less than the customary 15 percent. (Memo, page 5.)

No additional facts were provided, though, as to why this customer was not billed for the 15 percent gratuity. If individuals left voluntary gratuities on the table, these amounts would not be considered part of the selling price. If none were paid because the customer objected to the service, this would be because of an alleged breach of contract but would not show no agreement had existed. If the taxpayer does not charge a customer for gratuities and the customer does not pay the agreed amount of a gratuity, no gratuity charge is included as part of the selling price. We do not find, however, that this example provides support for the taxpayer's position that gratuities are not part of the selling price if they are negotiated, agreed to, billed, and paid.

Exhibit F--The last example provided by the taxpayer was a contract for 60 breakfasts at $6.25 per person. The contract stated the customer would be charged for a minimum of 60 breakfasts and that the applicable sales tax and 15 percent gratuity would be added. Only 38 persons were actually served breakfast, though. The customer was invoiced for the 60 breakfasts as stated in the contract, and sales tax was calculated on that amount. The gratuity was reduced to 10 percent.

In Exhibit C, the 15 percent standard gratuity charge was reduced to 10 percent before the function. In that case the taxpayer only provided beverages and platters of cookies, and the taxpayer apparently agreed with the customer that 10 percent was a reasonable amount to add for that service. In Exhibit F, the amount of the gratuity was reduced after the function when 22 fewer people were actually served than had been billed. Perhaps the taxpayer agreed to the reduction because of the smaller number served and because the customer was billed almost ten dollars for each breakfast served. Whatever the reason, we find neither example is a situation where the gratuity that was paid was paid under a situation that was clearly voluntary.

The auditor included examples of agreements which indicated that some of the contracts required prepayment--thus the "gratuity" was paid even before any service had been provided. One contract for an anniversary stated the price and added that applicable sales tax and a gratuity of 15 percent would be added. The contract states that the taxpayer received a

deposit and that payment was "guaranteed" to a specified Visa account.

The auditor found only one contract in which the customer had agreed to the 15 percent gratuity but paid less. (. . . .) In that case, the taxpayer had billed the customer for the amount of the gratuity which had been agreed to but which had not been paid ($41.97). The customer responded as follows:

> I have reduced the 15% Gratuity to 10% for the following reasons.
>
> 1. In order to pay 15%, I would expect good service, this I did not receive according to the following.
>
> 2. The function was to begin at 12 noon. I arrived at 11:30 and the room had not been set up.
>
> 3. We could not get any forks or toothpicks to eat the hot food.
>
> 4. We could not get enough tables or chairs as requested, when I set up the arrangements.
>
> 5. We could not get saucers for hot coffee.
>
> 6. We could not get dishes for the cake to be served.
>
> I finally managed to get most of the above, but not after I had complained and got very upset. Therefore, I do not feel 15% is justified.

This evidence indicates that both the taxpayer and customer felt the agreed 15 percent gratuity was binding, but that the customer reduced the agreed amount on grounds the taxpayer breached its contract obligation to provide good service. The evidence submitted by the auditor supports the Department's position that the gratuities were not paid under circumstances that were clearly voluntary.

The taxpayer also relied heavily on a previous Determination by the Department which found gratuities were not part of the

selling price. The taxpayer relies on the following language from that Determination:

> If gratuities were discussed and agreed to, we consider them voluntary and not subject to tax. If not discussed but subsequently added to the bill, the gratuities are part of the selling price of the meal and taxed. Mandatory additions of gratuities would be payable under any circumstances. They are not mandatory where they are merely recommended or suggested.

We find, however, that the previous Determination is distinguishable based on the facts in that case. In the previous case, the auditor had relied on a sample contract provided by that taxpayer which was the same form as the one attached to this Determination as Attachment B. As in the present case, the auditor had relied on the language in the contract which stated that sales tax and gratuity "will be added."

At the hearing, the taxpayer protested the assessment, asserting that the contract used by the auditor was an old form given to him when the taxpayer was out of the forms regularly used. During the hearing, the taxpayer presented the Administrative Law Judge with forms it stated it regularly used and which bore dates within the audit period. Those forms had no printed reference to gratuities. The taxpayer also submitted a sample of the new contract form (attached to the Determination as Exhibit E) which contained the following language below the price for the food service: "The Above Price Does Not Include 6% Tax And Recommended 15% Gratuity."

Although we agree that the language in the previous Determination could be misleading if taken out of context, that Determination is not controlling because the facts are distinguishable. We do not find that simply because gratuities are discussed and agreed to, the Department considers them voluntary and not subject to tax. If gratuities are discussed and the customer agrees that a gratuity of a certain amount will be added, the payment of the gratuity is not clearly voluntary. On the other hand, if the gratuities are discussed and it is agreed that the customer only will pay an amount based upon the actual quality of the service rendered (as in Exhibit D discussed above), the gratuity is considered voluntary.

Common synonyms for voluntary include spontaneous, discretionary, unsolicited, optional, of one's own choice, given freely, etc. Roget's International Thesaurus, at 479 (4th Ed. 1977) Charges do not meet the common understanding of the word "voluntary" when they are agreed upon and the contract document states that they "will be added." Accordingly, the assessment in Schedule VI is affirmed. The taxpayer may present evidence to the auditor of any gratuities which were paid under circumstances described in its Exhibit D and receive a deduction for those amounts.

[2] Long Distance Call Mark-Ups and Unreported Guest Local Calls. The taxpayer contends the amounts assessed in Schedules IX and X should be reduced because of the lower occupancy during the period assessed than during the test periods used by the auditor. The taxpayer contends that its records show a direct relationship between the occupancy rate and the total amount of phone calls made. We have no reason to doubt that this correlation exists.

These assessments are remanded back to the auditor to allow the taxpayer to present its evidence of the lower occupancy rate during the audit period. A reduction will be made based on the evidence of the lower occupancy.

[3] Bad Debt Deductions. RCW 82.08.037 provides a credit or refund for sales taxes previously paid on debts which are deductible as worthless for federal income tax purposes. See also WAC 458-20-196. In order for a bad debt to qualify as a deduction, the Department requires the following:

1. date of the original sale,

2. the amount written off exclusive of sales tax, and

3. the amount of sales written off with an identification of the local tax.

The taxpayer must be able to specifically identify the sale or sales for which the credit is claimed. Use of percentages will not be acceptable for sales tax purposes.[1]

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[1]The Department requires every taxpayer who seeks credit for sales taxes paid on bad debts to complete and file Schedule B. Schedule B requires the above information.

The auditor disallowed deductions from retail income for bad debts the taxpayer contended it had accrued by using the reserve method. The taxpayer states it has now identified its actual write-offs for bad debts during the audit period. It may present that evidence to the auditor and receive a deduction for bad debts if it meets the above requirements.

[4] Use Tax On Construction Settlement. The underlying facts regarding the settlement amount at issue are as follows:

In [date *], the taxpayer entered into an agreement for the construction of its motor inn. The contract was a standard AIA cost-plus owner-contractor agreement. The maximum guaranteed cost of the work was $17,953,000. The taxpayer/owner was to pay a contractor's fee of four percent of the cost of the work and the applicable sales and B&O taxes. The contract called for the motor inn to be substantially completed in 15 months (. . .).

The motor inn was not completed on schedule. In . . . , disputes arose between the taxpayer and the contractor. The taxpayer contended the contractor owed it over three million dollars, primarily for loss of profits and interest because the project was not completed on schedule. (. . .). The contractor alleged he was due over six million dollars as a result of the owner's actions causing delays and disruptions. The parties submitted their claims to arbitration. In the contractor's "Claim for Equitable Adjustment" submitted to the arbitrator, the contractor submitted calculations of his alleged damages. He alleged the following extra costs:

Labor plus 4% fee	$4,454,417
B&O tax	109,148
Home office overhead	445,244
Interest	649,881
Claim costs	95,797
Sales tax	401,088
	$6,155,575

The parties spent approximately two weeks in arbitration. The claims were ultimately settled, however, by an agreement between the parties. They executed a mutual release on . . . . According to the settlement, the taxpayer paid the contractor $2,625,000. The agreement provided that the payment was exclusive of any amount due this state for sales taxes. Sales taxes were to be computed separately and paid by the taxpayer "in accordance with the laws of the State of

Washington." The auditor assessed use tax[2] on the full amount of the payment.

The settlement agreement only states a lump sum amount. In a letter of understanding submitted to the contractor by the taxpayer, the taxpayer broke down its understanding of the terms of the settlement. (. . . .) The contractor had indicated that sales tax would be calculated on the full settlement amount; the taxpayer contended this method would be incorrect. The taxpayer's breakdown of the amount owing the contractor was as follows:

Remainder of contract		$ 592,437.34
Proposed change orders (exclusive of PCO's included in C/O 1 - 8)		
Amount to which sales tax is due		1,152,009.20
Interest (from claim)		626,138.00
Legal, arbitration and consequential damages		449,118.27
		2,819,702.81
Taxes		97,356.30
		2,917,059.11
Less: Settlement payments		
H. A. Andersen Co.	$2,625,000.00	
McKinstry	194,702.81	2,819,702.81
Amount due		$ 97,356.30

The taxpayer contends that only the $1,152,009.20 should be subject to sales or use tax. At the hearing, the taxpayer submitted a 24-page document listing every item for which it stated payment was claimed. The document describes the work, names the subcontractor, and states the total claimed amount due.

Under Washington law the term "sale at retail" includes the sale or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the

[2] Although technically the assessment is for deferred sales tax, the Department routinely list such an assessment as use tax and/or deferred sales tax.

constructing of new buildings upon real property for consumers. RCW 82.04.050(2)(b).

WAC 458-20-170 (Rule 170) and WAC 458-20-223 (Rule 223) are the Department's published rules dealing with the construction of buildings. In general, Rule 170 provides that the term constructing new buildings 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 . . . 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.
>
> . . .
>
> Prime contractors are required to collect from consumers the retail sales tax measured by the full contract price. Where no gross contract price is stated, the measure of sales tax is the total amount of construction costs including any charges for licenses, fees, permits, etc., required for construction and paid by the builder.

The mutual release agreement stated that it constituted a settlement, "in full accord and satisfaction of claims over a doubtful and disputed contract balance, and for all those things alleged or which could have been alleged by way of Complaint and/or Counterclaim." In submitting the proposed breakdown, the taxpayer stated that it was the preferable format for the final invoice, as it allowed the taxpayer "the most favorable sales tax impact." We do not find the evidence, though, supports the taxpayer's breakdown.

The taxpayer has submitted a copy of the contractor's billing No. 24 and its records showing that the amount that remained to be paid for the contract through change order eight was $592,437.34. This figure does include an amount for sales tax. The taxpayer argued that the full amount, $592,437.34, should be deducted from the settlement amount, contending sales tax had already been "paid" to the contractor on this amount. (. . . .) Obviously, though, if the invoices had been paid, they would not remain owing; thus we do not agree the full amount should be deducted from the settlement amount.

We do agree that the taxable amount should be reduced by the amount of sales tax invoiced. Progress Billing No. 24 indicates that it included sales tax of $19,108.80 on $293,981.62 owing. The additional amount was the balance due of $279,346.92, for Progress Billing No. 22. If that invoice also included a separate amount for retail sales tax, that amount may also be subtracted from the settlement to reduce the taxable amount. The taxpayer may present such evidence to the auditor.

[5] The taxpayer also contended an amount for interest should be excludable. When interest paid by a contractor on a construction loan is included in the contract, to be paid to the contractor by the owner, the interest is part of the contractor's cost of doing business and subject to the retailing B&O and retail sales tax. ETB 490.04.170.111. In this case, though, the taxpayer contends a portion of the settlement amount included an amount for interest due the contractor because of its late payments. We agree that when interest is charged and paid because of late payments, such interest is not included as part of the taxable selling price. The problem in this case, however, is that it is not clear how much, <u>if any</u>, of the settlement amount was for interest.

During the hearing, the taxpayer argued that $626,138 should be deemed to be payment of interest because that amount was alleged due in the contractor's claim. The contractor computed its damage calculations on an alternative basis: first on a total cost calculation plus fee and second on an itemized calculation tying costs to the alleged delay and disruption caused by the taxpayer/owner. (. . . .) Using the first method, the contractor claimed $649,881 for interest and under the second method, $626,138 in interest. The interest, however, was computed on the contractor's claimed unpaid contract amount of over four million dollars. We note the taxpayer wants to use the contractor's figures for the amount of interest owing, but not the contractor's figures for the amount remaining unpaid on the sales tax owing. We agree that breakdown is most favorable for the taxpayer, but do not agree it is warranted by the facts.

Subsequent to the hearing, the taxpayer submitted another breakdown of the settlement amount which alleged $254,214 in interest. That amount was computed on the progress payments and additional invoices. Because the release agreement itself states the contract balance was "doubted and disputed,"

though, we do not find that the award clearly included any interest.

Accordingly, we find the remaining amount subject to retail sales tax as compensation for the contractor's costs. Article 8 of the contract clearly provided that the contractor's losses and expenses sustained in connection with the project would be reimbursable contract costs:

> 8.1.12 Losses and expenses, not compensated by insurance or otherwise, sustained by the Contractor in connection with the Work, provided they have resulted from causes other than the fault or neglect of the Contractor. Such losses shall include settlements made with the written consent and approval of the Owner. No such losses and expenses shall be included in the Cost of the Work for the purpose of determining the Contractor's Fee. If, however, such loss requires reconstruction and the Contractor is placed in charge thereof, he shall be paid for his services a Fee proportionate to that stated in Paragraph 6.1. (Emphasis added.)

As part of the contract costs, the settlement amount is subject to the retail sales tax.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part. [As provided herein.]

DATED this 11th day of March 1987.