

Cite as 5 WTD 311 (1988)

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 Ruling of Tax Liability of)	
)	No. 88-183
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. . .)	Registration No. . . .
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[1] **RULE 170:** SUBCONTRACTOR -- "IN RESPECT TO" -- "EJUSDEM GENERIS" -- "PILOT CAR" AND "FLAGGING". Using the "ejusdem generis" canon of construction, where general words follow specific enumerations, the general words will be construed as applying only to things of the same general class. Thus, taxpayer's activities of "flagging" and "pilot car" are not included in Rule 170 as services rendered in respect to construction.

[2] **RULE 171:** PUBLIC ROAD CONSTRUCTION -- CONTRACTOR -- "PILOT CAR" AND "FLAGGING". "Pilot car" and "flagging" activities do not fall within the Rule 171 definition of contractor.

[3] **RULE 224:** SERVICES -- "PILOT CAR" AND "FLAGGING". Persons engaged in rendering services other than sales at retail and sales at wholesale, unless another statutory category exists, are taxed under the category "Service and Other Business Activities." Pilot car and flagging activities are properly taxed under this category.

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:

Taxpayer requests a determination of the correct tax classification for its business, "pilot car" and "flagging."

FACTS AND ISSUES:

Hesselholt, A.L.J. -- Taxpayer filed amended tax returns in 1987 for tax periods Quarter 2, 1984 to Quarter 2, 1987. On these amended tax returns, taxpayer changed its reporting classification from "service and other" to "wholesaling," and requested a refund of \$ These amended returns were rejected by the Department and taxpayer's request for a refund was denied. Taxpayer by letter then requested an interpretation of the rules as applied to it, arguing that its business activities fit under Rule 170 and Rule 171, rather than Rule 224.

Taxpayer describes its business activities as follows:

Taxpayers business consists primarily of two activities, "flagging" and "pilot car". Both activities are in conjunction with street and road maintenance or construction. The street and roads are owned by either Federal, State of Washington, county, or city governmental units. Substantially all of the business activities are performed as a subcontractor to the general contractor. All road projects are performed on a bid basis and are included within the general contractors contract for the construction. Work performed is subject to the directions given by the general contractor.

"Flagging" is the activity of individuals controlling traffic at road construction sites. Taxpayer may provide barricades, traffic cones and signs. The flaggers control traffic through use of "slow" or "stop" signs and directional arrows.

"Pilot car" is the activity of providing a vehicle and driver at road construction sites to escort traffic through the construction site. Traffic is halted by a flagger until the pilot car is available to lead the vehicles through the site and assuring that vehicles do not interrupt construction activities.

DISCUSSION:

WAC 458-20-170 (Rule 170) provides, in relevant part, that the word "subcontractor" means a:

person engaged in the business of performing a similar service [the constructing, repairing, decorating or improving of new or existing buildings in structures under, upon or above real property] for persons other than consumers . . . the terms . . . include persons performing labor and services in respect to the moving of earth or clearing of land . . . The term 'constructing, repairing, decorating or improving of new or existing structures,' in addition to its ordinary meaning includes the installing or attaching of any article of tangible personal property in or to real property . . . The term includes the sale of or change made for all service activities rendered in respect to such constructing, repairing, etc. . . . 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.

[1] Under the "ejusdem generis" canon of construction, where general words follow the enumeration of particular classes of things, the general words will be constructed as applying only to things of the same general class as those enumerated. Black's Law Dictionary. Applying that principle to Rule 170, we interpret the phrase "service activities rendered in respect to such construction" to mean only those service activities directly related to the actual construction. Thus, engineering fees and architectural fees are services performed that are directly connected with actual construction, and when they are included within a single contract encompassing both design and construction phases of a contract, they are taxed as a retail sale to the consumer. Taxpayer's "flagging" and "pilot car" activities are not directly related to construction, but instead are a service provided to the contractors. Taxpayer is not "constructing, repairing, decorating or improving" structures.

[2] Rule 171 defines a contractor as:

A person engaged in the business of building, repairing or improving any street, place, road, highway . . . owned [by a public entity other than the state of Washington] . . . The term "building,

repairing, or improving of a publicly owned street .
 . . . " includes clearing, grading, graveling,
oiling, paving . . . the construction of tunnels,
guard rails, fences . . . planting of trees,
shrubs

Taxpayer's "flagging" and "pilot car" activities clearly do not fit within the definition of a contractor under this rule, and its activities are not included in this rule.

[3] Rule 224(4) provides that persons engaged in a business activity not taxed at specific rate under RCW 82.04 are taxed under the Service and Other Business Activities classification. This rule is based on RCW 82.04.290, which provides, in part:

This section includes . . . persons engaged in the business of rendering any type of service which does not constitute a "sale at retail" or a "sale at wholesale."

Taxpayer's activities do not fit under the definition of a sale at retail under RCW 82.04.050: "every sale of tangible personal property . . . to all persons . . . including . . . persons who install, repair, clear, alter, improve, construct or decorate real or personal property of or for consumers . . . constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property . . . the sale of or charge made for labor and services rendered in respect to the clearing, fumigating, razing, or moving of existing structures but shall not include the charge made for janitorial services" "Sale at wholesale" is defined as a "sale of tangible personal property which is not a sale at retail" RCW 82.04.060. Taxpayer's activities do not fit within these definitions.

Although taxpayer phrased its request as a request for an "interpretation of the rules as they relate to their business activities," taxpayer has actually appealed a denial of a request for a refund of taxes paid. Therefore, this Determination services both as an interpretation of the rules as they apply to taxpayer and a denial of taxpayer's petition for refund.

DECISION AND DISPOSITION:

Taxpayer is to report its activities under the "service and other" category for B&O tax purposes. Taxpayer's petition for refund is denied.

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(18) 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 are actually true. This legal opinion shall bind this taxpayer and the department upon these facts. However, it shall not be binding if there are relevant facts which are in existence but have not been 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 13th day of April 1988.