Cite as 5 WTD 97 (1988)

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

In the Matter of the Petition For a Tax Liability Ruling Re	D E T E R M I N A T I O N
. . .	No. 88-35
	Unregistered

[1] **RCW 82.16.010, RCW 82.16.020 AND RULE 179:** PUBLIC UTILITY TAX -- ELECTRICAL ENERGY -- LAST DISTRIBUTION OF -- IRRIGATION DISTRICT. The sale of electrical energy by an irrigation district, the hydroelectric power generation facilities of which are operated by an agent hydroelectric authority, to Washington cities for distribution to consumers, does not result in gross income subject to the public utility tax. Such tax is imposed only on the last distribution of electrical energy within the state.

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: . . .

NATURE OF ACTION:

A . . . Washington irrigation district seeks a ruling as to the public utility tax consequences of contracting with a hydroelectric authority for the management and operation of the district's hydroelectric generating facilities.

FACTS AND ISSUES:

Dressel, A.L.J. -- . . . Irrigation District (the district) operates five hydroelectric power plants jointly with two other irrigation districts in . . . Washington. The districts established the . . . Hydroelectric Authority (the authority) in 1982. Now the districts are proposing an agreement under which the authority assumes the responsibility as an agent for operating and maintaining the power plants. Currently, the districts are subject to the state public utility tax as operators of the power plants but pay no tax because the only revenue received from the power plants is for the in-state wholesale distribution to Tacoma and Seattle municipally-owned electrical utilities. Under the proposed agreement, power will continue to be sold wholesale only to the cities.

Pursuant to WAC 458-20-100(18) the district has requested a written opinion on the state tax consequences of implementing the referenced agreement.

DISCUSSION:

The attorney who requested this ruling has written her own opinion on the subject and has provided the Department with a copy. Below, we are taking the liberty of quoting from pertinent parts of that letter.

> Public Utility Tax. Light and power businesses are subject to the public utility tax under RCW 82.16.020, which provides
>
> > (1) There is levied and there shall be collected from every person a tax for the act or privilege of engaging within this state in any one or more of the businesses herein mentioned. The tax shall be equal to the gross income of the business, multiplied by the rate set out after the business, as follows:
> >
> > (a) Railroad, express, railroad car, sewerage collection, light and power, and telegraph businesses: Three and six-tenths percent;
> >
> > . . .

> (2) An additional tax is imposed equal to the rate specified in RCW 82.02.030 multiplied by the tax payable under subsection (1) of this section. . . .

(Emphasis ours.)

RCW 82.16.010(5) defines a light and power business as follows:

> "Light and power business" means the business of operating a plant or system for the generation, production or distribution of electrical energy for hire or sale.

(Emphasis ours.)

RCW 82.16.010(12) excludes from gross income all but amounts accruing from the last taxable distribution of power within the state:

> "Gross income" means the value proceeding or accruing from the performance of the particular public service or transportation business involved, including operations incidental thereto, but without any deduction on account of the cost of the commodity furnished or sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses:
> Provided, That gross income of a light and power business means those amounts or value accruing to a taxpayer from the last distribution of electrical energy which is a taxable event without (sic) this state.

(Emphasis ours.)

Currently, though as an operator of a power plant the Districts are subject to the utility tax, they do not pay the utility tax because they are solely wholesalers to in-state electrical distributors, whose subsequent distribution of power is the last taxable event in the state.

The Authority will be subject to the utility tax if it is a "light and power business," i.e., it is "operating a plant or system for the generation, production or distribution of electrical energy for hire or sale." It appears that this is precisely what the Authority is to do under the proposed Agreement fo (sic) Administering the Developments between the Districts and the Authority. We note that the State Auditor has found "operation" of a plant in circumstances far less clear. The City of . . . was found to be an operator of [taxpayer]'s plant when it provided skilled labor and engineering services. The State Auditor said:

> RCW 82.16.010(5) defines the term "light and power business", which is an activity taxable under public utility tax, as, the business of operating a plant or system for the generation, production or distribution of electrical energy for hire or sale.
>
> The providing of skilled laborers and engineers for the operation of [taxpayer's] power plant constitutes operating a plant or system for the generation, production or distribution of electrical energy for hire.

"Auditor's Detail of Differences and Instructions to Taxpayers" to the City of . . . , Light Department for the period January 1, 1982 through March 31, 1986. If . . . activities were "operation" of the plant, then surely the Authority's activities will be.

No tax will be owed, however, because, as now, the Authority will receive no revenues for distribution of power which is a last taxable event within the state. As before, the power will be distributed only wholesale in-state to the Cities of Tacoma and Seattle.

Nor will the business and occupation tax apply. Because, as a light and power business, the Authority, [taxpayer] and its customers are <u>subject to</u> the utility tax (even if not all entities pay the utility tax), they are exempt from the business and occupation tax under RCW 82.04.310.

> We also believe that the Districts would continue to be "operators" of the Developments, even though this task has been assigned to an agent (which agent is a creation of the Districts). Under FERC law, the Districts are the licensees of the Developments and delegation to the Authority does not relieve them of any responsibilities under their licenses. Also, under state law, RCW 87.03.825-.837, RCW 87.03.018 and RCW 39.34.030(5), assignment and delegation to an agent of operation of the Developments does not relieve the Districts of liability for operation of the plants.
>
> . . .
>
> We conclude that the agreement establishing the Authority will not alter the state tax liability of [taxpayer] or its customers. We have discussed this informally with the State department of Revenue. We recommend that you authorize us to send a letter to the Department (draft enclosed) confirming that opinion.

[1] With some minor corrections, we confirm the analysis of the taxpayer's attorney. The first correction relates to her quote of RCW 82.16.010(12). The last line of that quote should read "energy which is a taxable event <u>within</u> this state." Secondly, the quotation attributed to the "State Auditor" was, instead, undoubtedly made by an auditor employee of the Department of Revenue.

The taxpayer's analysis, incidentally, is corroborated by WAC 458-20-179 (Rule 179) which states in part:

> The term "gross income" of a light and power business means those amounts or value accruing to a taxpayer from the "last distribution" of electrical energy which is a taxable event within this state. RCW 82.16.010(13).
>
> (7) Light and power business - special provisions. RCW 82.16.010(5) defines "light and power business" to mean the business of operating a plant or system for the generation, production, or distribution of electrical energy for hire or sale. It is the intent of the law that, except as provided below, all electrical energy generated, or produced, or

> distributed within this state shall be subject to the uniform tax rate for light and power business, but only at the time of its "last distribution" within this state.
>
> (8) The term "last distribution" means the final transmission or transfer of electrical energy before it is consumed in this state or before it is transmitted or transferred for sale to any point outside of this state. Thus, the taxable last distribution of electrical energy consumed within this state is the transmission or transfer of such energy to the consumer. The taxable last distribution of electrical energy for sale outside of this state is the transmission or transfer of such energy to the transmission system from which it will be directly further transmitted or transferred to points outside this state whether under any wheeling arrangement or through the distributor's own transmission system or the transmission system of any out-of-state person. . . .
>
> (11) The taxpayer liable for the payment of public utility tax under the light and power business classification is the "person" (as defined by RCW 82.04.030) who last distributes electrical energy within this state as explained above.

A minor correction, however, is also needed in the above quotation of Rule 179. The statutory reference vis a vis "last distribution" should be RCW 82.16.010(12), not RCW 82.16.010(13).

DECISION AND DISPOSITION:

The inquiring irrigation district, their partner districts and the hydroelectric authority are all technically subject to the public utility tax, but such tax is measured by gross income which does not include that realized from the wholesale distribution of electrical power to the cities of Tacoma and Seattle as described above.[1]

---

[1] 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

DATED this 26th day of February 1988.

---

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.