

Cite as 5 WTD 147 (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 Correction of Assessment of)	
)	No. 88-147
)	
)	Registration No. . . .
. . . )	Tax Assessment No. . . .
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)	
)	

[1] **RULE 171:** B&O/RETAIL SALES TAX -- PUBLIC ROAD CONSTRUCTION -- STORM SEWERS. Construction of storm sewers that serve a public road or street is taxable under the B&O category, Public Road Construction, even though portions of such construction extend outside the boundaries of the street right-of-way and even though the drain fields may also accommodate some sewage on an incidental basis.

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: . . .

DATE OF HEARING: December 16, 1987

NATURE OF ACTION:

Taxpayer protests Department's reclassification from Public Road Construction to Retailing of income derived by contractor for the installation of a storm drainage system.

FACTS AND ISSUES:

Dressel, A.L.J. -- . . . (taxpayer) does bulldozing, excavating and contracting work. His books and records were examined by the Department of Revenue (Department) for the period January 1, 1983 through December 31, 1986. As a result the above-captioned tax assessment was issued for excise tax and interest totaling \$. . .

In this action the taxpayer protests Schedule IV of the assessment in which storm sewer work done outside of a road right-of-way was reclassified from the Public Road Construction classification of the business and occupation (B&O) tax to the Retailing classification with the income at the same time being subjected to retail sales tax. The taxpayer contends that this is in error. In his petition he states:

Our objection is based on the fact that all portions of the storm drainage systems, whether located in the public streets or roads right-of-way or over easements and on public or community owned property, are an integral part of a drainage system designed primarily to carry off and dispose of normal water run-off of public streets and roads.

At the hearing in this matter the taxpayer provided a more complete factual explanation. The work that was reclassified consisted of the construction of pipes and drain fields to accommodate the runoff of water from public streets and roads, although some house drainage goes into the fields on an incidental basis. The pipes usually run to the nearest natural drainage and usually don't extend more than 200 feet from the side of the street. For storm sewer work done both within and without public street right of ways, he paid sales tax on materials used.

The Department's auditor has recognized that storm sewers constructed within a public street right of way are taxable under the Public Road Construction classification. He claims, however, that those portions of a storm sewer system which extend outside of the street right of way do not qualify as Public Road Construction and must be taxed as Retailing. The project(s) at issue has, accordingly, been prorated such that some of the income is classed as Public Road Construction and some as Retailing even though a single project or contract is involved. On public road construction a contractor is not supposed to charge sales tax on the contract price but is supposed to pay sales tax on the materials that are utilized to complete the project. On construction that does not

qualify as Public Road, the reverse is true. The contractor charges sales tax on the contract price but the materials utilized are considered to be purchased for resale. The audit supervisor pointed out that city and county code provisions require the construction of a drain field or retention pond which will facilitate storm drain and lot runoff. The pond is dedicated to the city or county for future upkeep and they have easement rights for access.

Whether pro ration of the income from storm sewer construction as outlined above is appropriate is the sole issue to be decided herein.

#### DISCUSSION:

WAC 458-20-171 (Rule 171) reads in part:

**Building, repairing or improving streets, roads, etc., which are owned by a municipal corporation or political subdivision of the state or by the United States and which are used primarily for foot or vehicular traffic.**

#### DEFINITIONS

As used herein:

The word "contractor" means a person engaged in the business of building, repairing or improving any street, place, road, highway, easement, right of way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle which is owned by a municipal corporation or political subdivision of the state or by the United States and which is used or to be used primarily for foot or vehicular traffic, either as a prime contractor or as a subcontractor. . . .

The term "street, place, road, highway, etc." is used in the ordinary sense that the combination of such words implies. . . .

The term "building, repairing or improving of a publicly owned street, place, road, etc.," includes . . . the construction of . . . drainage facilities . . .; also the constructing of a drainage system in streets and roads, even though such system is also used for the carrying of sewage: Provided, That the

drainage facilities are sufficient for disposal of the normal runoff of surface waters from the particular streets and roads in which the system is constructed or an ordinance authorizing the construction of a combined sewer system is incorporated by reference in the contract and the contract or specifications clearly indicate that the system is designed and intended for the disposal of the normal runoff of surface waters from the streets and roads in which the system is constructed.

. . .

#### BUSINESS AND OCCUPATION TAX

Such contractors are taxable under the public road construction classification upon their total contract price.

#### RETAIL SALES TAX

The retail sales tax applies upon the sale to such contractors of all materials including prefabricated and precast items, equipment and supplies used or consumed in the performance of such contracts.

The retail sales tax does not apply upon any portion of the charge made by such contractors.

Rule 171 implements section (6) of RCW 82.04.050 which states in part, "The term [retail sale] shall not include the sale of or charge made for labor and services rendered in respect to the building, repairing, or improving of any street, place, road, highway, easement, right of way . . ." (Brackets ours.)

[1] We believe that the construction of the storm sewers is "rendered in respect to" the "improving" of a street in that such construction renders the street better able to serve the purpose for which it was intended, viz. the movement of "foot or vehicular traffic" in an orderly and efficient manner. Were it not for the storm sewers and their extensions including the pipes and drain fields located outside of the street right-of-way, the street would be less usable and desirable as such in that cars and pedestrians would have to plow through small bodies of water. We, therefore, conclude that construction of drainage facilities which extend beyond the borders of a street right-of-way are taxable for B&O

purposes under the Public Road Construction classification just as such construction within street right-of-ways is.

Inasmuch as certain unspecified drainage from nearby houses goes into the drain fields on an "incidental" basis, the caveat to Rule 171, to the effect that the drainage facilities must be designed to and capable of disposing of the normal run-off of surface water from the street(s) it serves, may come into play. If this is, in fact, a combined system in that sewage from the nearby houses is accommodated as well as the street run-off, then that condition must be met. Here, based on the descriptions furnished by both the taxpayer and the auditor, we assume that it is met and, therefore, the taxability of the subject project does not change even if the drainage system is used for sewage on an "incidental" basis.

Finally, we wish to note that it would be both impractical and illogical to divide a storm sewer project for taxation purposes. If we followed the auditor's assessment, a contractor would be required to collect sales tax on that part of a storm sewer project built outside of a street right-of-way but not on that part of the project within the street right-of-way. He or she would have to report income from construction without the right-of-way under the Retailing B&O classification but report income within under Public Road Construction. The contractor would not have to pay sales tax on materials used without but would on materials used within. We do not think that either the statute or the rule mandate subjecting the contractor to such a logistical nightmare.

#### DECISION AND DISPOSITION:

The taxpayer's petition is granted. The audit section will issue an amended assessment consistent with this determination.

DATED this 9th day of March 1988.