

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

In the Matter of the Petition) D E T E R M I N A T I O N
For Correction of Assessment of)
) No. 89-112

)
 . . .) Registration No. . . .
) . . . /Audit No. . . .
)

- [1] **RULE 170:** USE TAX -- SUBCONTRACTORS -- CONSUMABLE SUPPLIES -- CONCRETE FORM COATING. Concrete form coating found to be consumed in the process of curing concrete after it was poured in the coated forms and not a component part of the finished structure.
- [2] **RULE 113:** USE TAX -- RCW 82.04.050(1)(b) -- INGREDIENTS AND COMPONENTS -- REAL PROPERTY. Concrete form coating must be traceable as an ingredient or component of the finished structure to be excludable from retail sales tax or use tax.

Headnotes are provided as a convenience for the reader and are not in any way part of the decision or in any way to be used in construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: February 22, 1989

NATURE OF ACTION

The taxpayer petitions for the correction of assessment of use tax on the purchases of form coating for concrete forms for which retail sales tax has not been paid.

FACTS AND ISSUES

Pre, A.L.J. -- The taxpayer is a California corporation which acts as a subcontractor to finish and install concrete forms

for the construction of large, multi-story, commercial buildings. During the audit period, the taxpayer purchased a form coating product, . . . , (hereinafter referred to as the "product") which was applied to the forms the taxpayer set up. The product's reaction with the concrete produces, as stated by the taxpayer, "a positive release agent for the form as well as minimizes surface voids, prevents staining and surface glaze and will not impair the natural bonding character of paints, plasters, epoxies, adhesives or other coatings intended for use on concrete." The product was, "a solution of fatty materials in a light clear petroleum base. It is free from the conventional form oil, diesel oil or kerosene."

The taxpayer paid sales tax on the forms which were not incorporated into the building. Retail sales tax was not paid on the product purchased. The auditor assessed use tax finding that the product was primarily for use by the contractor rather than for resale as part of the component structure.

The taxpayer appealed contending that the taxation of the product is not specifically addressed in any regulation. Unlike form oil which must be cleaned off the concrete after it cures, the residue (byproduct) from the product is an inert dust which is hardly detectible. The taxpayer argues the product should have similar tax treatment to products which the taxpayer believes are not subject to retail sales tax when purchased by contractors: bond breakers and curing compounds. Bond breakers are applied to a flat concrete slab (floor) before pouring fresh concrete to make concrete walls for tilt up construction. The bond breakers assure separation of the concrete floor and walls so the walls may be tipped into place. Curing compounds are sprayed on fresh concrete to prevent rapid hydration during the curing period of the concrete.

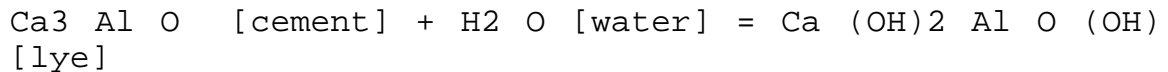
DISCUSSION:

[1] WAC 458-20-170 (Rule 170) states in part:

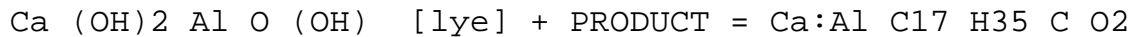
The retail sales tax applies on the sales and rentals to prime contractors and subcontractors of tools, machinery and equipment, and consumable supplies such as hand and machine tools, cranes, air compressors, bulldozers, lubricating oil, sandpaper and form lumber which are primarily for use by the contractor rather than for resale as a component part of the finished structure.

ETB 374.08.170 provides that form oil purchased by building contractors for use on forms is not made a component part of the finished structure, and is subject to sales and use tax. The taxpayer distinguishes the product from form oil indicating that form oil must be cleaned off the surface, while cleaning is not necessary to remove the byproduct after the reaction of the product with the cement.

In its brochure, the manufacturer of the product outlines the chemical reaction which takes place when cement is combined with water forming lye:



The product then reacts with the lye in the concrete in an instant chemical reaction process forming a concrete release agent:



The taxpayer states that the primary reason for using the product is to prevent adhesion of concrete to the form. That eliminates spalling (or the separating of concrete when the form is removed caused by the concrete sticking to the forms), thus producing the desired smooth concrete surface. The product manufacturer gives a written guarantee that the product,

will not stain concrete, and that its use on any type of form - whether wood, steel, fibre, fibreglass or concrete, will not impair the natural bonding character of any plaster, paint, or cementaceous coating intended for use on concrete.

The brochure also emphasizes the use of that product prevents the rusting of steel forms and prolongs the life of wood forms otherwise limited by, "continued use [which] wicks the alkali water into the form to rot the wood and raise the grain." The taxpayer indicates that the life of the specially treated plywood forms it uses is not prolonged since most of the forms are cut up for new jobs long before they rot. The product is only effective preventing steel forms from rusting from the time it is applied to the form until the concrete is poured (usually the next day). After the form is removed from the concrete, it can rust.

From the manufacturer's literature and the taxpayer's statements, it appears that after the product reacts with the concrete, its useful life is over and it does not become a desirable or intended component part of either the concrete or the forms. In other words, it is consumed in the process.

[2] In general terms, the use tax applies to the use of tangible personal property purchased at retail, if the user had not paid the retail sales tax. The use tax is imposed by RCW 82.12.020, which, in pertinent part, states as follows:

There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail. . .

Sale at retail is defined as:

(1) "Sale at retail" or "retail sale" means every sale of tangible personal property (including articles produced, fabricated, or imprinted) to all persons irrespective of the nature of their business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers other than a sale to a person who (b) installs, repairs, cleans, alters, imprints, improves, constructs, or decorates real or personal property of or for consumers, if such tangible personal property becomes an ingredient or component of such real or personal property without intervening use by such person. . . (Emphasis added.)

RCW 82.04.050(1). Such purchases are not subject to the retail sales tax imposed by RCW 82.08.020. RCW 82.12.010(5) incorporates the RCW 82.04.050(1) definition of "retail sale". Thus, the key question is whether or not the purchase of the product was a retail sale. If not, the sales and use taxes do not apply.

The taxpayer's product was not intended to add any desirable or necessary ingredient to the concrete. It is not traceable as an ingredient of the final product (concrete). We find that the product did not become a desirable or intended component part of the concrete. Therefore, it is not

excludable (exempt) from tax as an ingredient or component of real property.

Rule 170 states that consumable supplies are subject to retail sales tax. The use tax applies to the use by subcontractors of consumable supplies upon which the retail sales tax has not been paid. Since the retail sales tax has not been paid on these items, use tax was assessed appropriately.

The taxpayer's assertion that bond breakers and curing compounds are not subject to retail sales tax has no application here. Without analyzing the correct tax treatment for those substances (for which no specific legal authority could be found), their use can be distinguished since they are applied directly on the surface of the concrete and apparently left there. The product used by the taxpayer is applied to the surface of the forms, and although it reacts with the concrete, it does not adhere to the concrete's surface or become a desired or intended component thereof.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 28th day of February 1989.