BEFORE THE INTERPRETATION AND APPEALS DIVISION
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. 88-459
. . .	)	Registration No. . . .
) Tax Assessment No. . . .	)	

[1] **RULE 173:** B&O TAX--REPAIRS--PERFORMED OUT OF STATE. Charges made for repairs of property performed entirely out-of-state, when all parties knew that the repairs were to be done outside of Washington, are not subject to Washington's taxing authority. Accord: ETB 421.04.103.

[2] **RULE 170 AND RCW 82.04.050(2):** RETAIL SALES TAX--ENGINEERING SERVICES--SERVICES RENDERED IN RESPECT TO CONSTRUCTION--SUPERVISORY SERVICES. Engineering services rendered in Washington in respect to the installation of turbines, even though the services were only supervisory services, are sufficient to subject the entire contract charge to retailing B&O tax. Accord: Det. No. 88-239, __ WTD __, (1988).

[3] **RULE 100:** B&O TAX--EXEMPTION--MULTIPLE ACTIVITIES--UNCONSTITUTIONAL TAX--PROSPECTIVE APPLICATION--ASSESSMENTS ISSUED BUT NOT COLLECTED. The Washington Supreme Court in National Can Corporation v. Department of Revenue and Tyler Pipe Industries, Inc. v. Department of Revenue, 109 Wn.2d 878, cert. denied, 56 U.S.L.W. 3828, (1988), held that the U.S. Supreme Court decision in Tyler Pipe, which invalidated the multiple activities exemption of the B&O tax, applied to prospective taxes only.

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.

DATE OF HEARINGS: October 5, 1985, April 28, 1988

TAXPAYER REPRESENTED BY: . . .

FACTS AND ISSUES:

Hesselholt, A.L.J. -- (Successor to Chandler, A.L.J.) Taxpayer is a large corporation with a number of divisions doing business throughout the United States, including Washington. Its records were audited for the period July 1, 1978, to September 30, 1982. An assessment was issued on September 29, 1983, in the amount of $ . . . , additional taxes and interest due. By letter . . . , taxpayer appealed the assessments.

There are only a few things at issue in this appeal. The bulk of the assessment comes from contracts in taxpayer's hydro-turbine division. There are three large contracts and several smaller contracts. On two on the contracts, [A] and [B], taxpayer was required to furnish "erection engineers." On a third, [C], taxpayer was to furnish installation services. The auditor treated all of the contracts the same, and asserted retailing B&O tax on the full value of the contracts. The final issue in this appeal concerns the auditor's assessment of tax on the contract for repairs of [X] equipment. The contract was apparently signed in Washington, but the work was actually performed [out-of-state], and the contract specifies that "the Contractor will be responsible for the propellers from the time they are made available by [X] at dockside in Seattle, Washington and accepted by [taxpayer] for shipment to its plant [out-of-state] until they are returned to the [X] at a destination in the Seattle, Washington area."

The taxpayer has objections to three parts of the assessment: the assessment of retailing B&O tax on the [A] and [B] contracts, and the assessment of retailing B&O tax on the repairs for the [X].

According to the taxpayer, the presence of "erection engineers" on the [A] and [B] sites does not mean that the taxpayer was responsible for the installation of the turbines involved, and should not be subject to retailing tax on the

entire value of the contracts. Instead, it argues that it should only be subject to service B&O tax on that part of the contract price attributable to the presence of the engineers in Washington. In fact, taxpayer points out that when it was required to install the equipment the contract said so clearly. In the case of the [X] repairs, the taxpayer argues that since the repair work was done out of state, and since all parties knew that the repairs were done out of state, the repairs should not be subject to Washington's tax.

DISCUSSION:

I. [X] Repairs.

[1] WAC 458-20-173 (Rule 173), is the administrative rule dealing with the taxability of repairs. It provides that materials sent into Washington for repair for an out-of-state customer are not subject to Washington's retail sales tax, if the seller delivers the repaired goods to the seller out-of-state, but is silent as to whether repairs performed out-of-state for an in-state customer are subject to the state's B&O tax. WAC 458-20-103 (Rule 103), is the administrative rule dealing with the time and place of sale. It states, in part, that:

> With respect to the charge made for performing services [repairing] which constitute sales as defined in RCW 82.04.040 and 82.04.050, **a sale takes place in this state when the services are performed herein**. . . (Brackets and emphasis supplied.)

Excise Tax Bulletin 421.04.103, which was issued by the department of revenue to illustrate the provisions of Rule 103, states in part that:

> . . . for the sales tax exemption to apply (from retail sales), the fact that the cleaning/repair work is to be performed outside the state must be an integral part of the contract. . . Thus, where for example, brand name wrist watches, etc., are sent as a matter of course by the local repair shop to the out-of-state manufacturer for repair and return, the retail sales tax is charged on the entire transaction.

In a matter involving the out-of-state cleaning of chemical tanks, the department stated as follows:

> The question remains whether the amounts billed by the taxpayer to [corporation] are subject to Retailing B&O tax. . . The underlying premise for the exemption from retail sales tax in Rule 103 unitedly with RCW 82.08.020 is that the retail sale does not take place in this state.
>
> RCW 82.04.250 imposes the Retailing B&O upon persons: . . . engaging within this state in the business of making sales at retail. . . (emphasis supplied)
>
> With respect to the cleaning/repairing of [corporation's] totes performed out of state, the taxpayer was not engaged "within this state" in making a sale at retail. Accordingly, Retailing B&O tax does not apply.

The determination went on to state that the out-of-state cleaning work was an integral part of the previous sale to the corporation and therefore subject to wholesaling B&O tax.

The above-cited determination is particularly apt when, as here, the repairs were clearly contemplated to be performed outside of Washington, as evidenced by the contract between the parties. Taxpayer simply picked up the propellers in Washington; no repair services were performed in Washington, and in fact the contract was performed by a division of taxpayer that is headquartered [out-of-state].

II. Engineering Services.

The issue as to whether the presence of "erection engineers" within Washington makes the full contract charge during the audit period subject to Washington's tax is more difficult. RCW 82.04.050 defines a "sale at retail," in part, as:

> (2) The term "sale at retail. . . shall include the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following: (b) The constructing, repairing, decorating or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto. . . .

The auditor believed that the presence of the "erection engineers" was sufficient to subject the taxpayer to tax liability because the services were rendered in respect to the construction and/or reassembly of the turbines. Taxpayer argues that it was not responsible for the installation of the property; another entity had that responsibility. Taxpayer was there only to give advice and help solve problems as they arose--it did no installation on the two contracts itself. Taxpayer acknowledges a previous department determination on this same issue, but argues that the previous determination is factually flawed, in that the two contracts, [A] and [B], do not involve any installation by it, but merely the provision of services to another entity who was actually responsible for the installation. Taxpayer has provided us with a copy of a contract where it concedes that it was responsible for the installation ([C]). That contract clearly states that the taxpayer will provide installation services.

[2] WAC 458-20-170 (Rule 170), is the administrative rule regarding construction and repairing activities. It states, in part,

> The term [constructing, repairing, decorating or improving of new or existing buildings or other structures] includes the installing or attaching of any article of tangible personal property in or to real property, regardless of whether or not such services are otherwise defined as "sale" by RCW 82.04.040 or "sales at retail" by RCW 82.04.050. Hence, 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 construction of a building or structure.

If the "erection engineers" merely supervised and advised the installing contractor, taxpayer argues, then the two contracts are not subject to retailing B&O tax. We have examined the contracts in question and we agree that the installation and erection contracts are clearly separate. In the [C] contract, it clearly specifies that taxpayer is responsible for installing the turbines. In the other two contracts, taxpayer is not responsible for the installation/reassembly of the turbines.

In Washington Water Power Co. v. Department of Revenue, the Board of Tax Appeals upheld the assessment of retail sales tax on design engineering services performed by Morrison

Knudsen Company in connection with the construction of a wood burning plant. (BTA Docket No. 85-169, issued July 25, 1986). The Board relied on RCW 82.04.050(2) and WAC 458-20-170. The board also quoted language from Chicago Bridge & Iron Company v. Department of Revenue, 98 Wn. 2d 814 (1983). In that case, the Washington Supreme Court upheld the assessment of retail sales tax on six contracts which bifurcated the design and manufacturing of three products from their installation. Three of the contracts were with the purchases for the design and manufacturing and three with the purchaser's affiliate for the installation of the products. The court did not recognize the bifurcation, stating:

> CBI generally performs all aspects of design, manufacture, delivery and installation of its products, and customers negotiate a single, lump-sum price for a finished, installed product. CBI's engineering, manufacturing, and installation operations are functionally integrated and coordinated from the first proposal to a customer through each phase of the design, manufacturing and installation process.

Taxpayer designed, built, and supervised the installation of various turbines on all three of the contracts involved. Taxpayer asserts that the contracts for which it merely provided erection engineers are distinguishable from those in which it provided installation services. While we agree that there are differences in the contracts, we cannot agree that the differences are sufficient to merit different tax treatment. In a previous departmental determination (Det. No. 88-239, __ WTD ___, (1988)), on facts very similar to those here, the Department held that the entire contract, which called for the design, testing, furnishing, and the supervision of the installation of turbines for another entity, was a retail sale and subject to those taxes. The facts of this transaction are essentially identical to that earlier case, and the same tax treatment must apply.

[3] Taxpayer also argued, at the hearing, that since it was one of the litigants in the National Can case, it should not be forced to pay a tax now that has been declared unconstitutional. That issue was decided against the taxpayer in National Can Co. v. Department of Revenue, 109 Wn.2d 878, cert denied, 56 U.S.L.W. 3828, (1988). The Washington Supreme Court in National Can directly addressed the issue of a tax assessed but not paid at the time the tax was declared unconstitutional:

> . . . Whether the taxes had been collected or still remained to be collected is not relevant to the issue of retroactive application. The Ashland[1] court explained that it was irrelevant whether the disputed taxes had been paid or were simply assessed. . . . Both taxes collected and those assessed and unpaid fall within the prospective application of Armco and could be retained or collected by the State.

Thus, the Court adopted the Ashland rationale that it made no difference whether the taxes had been paid or simply assessed, and that assessed taxes could be collected prospectively. Therefore the taxpayer is clearly subject to the taxes in question and involved in this assessment.

DECISION AND DISPOSITION:

Taxpayer's petition is granted in part and denied in part. The file will be returned to the Audit Section with instructions to delete the tax on the [X] contract. All other claims by taxpayer are denied.

DATED this 7th day of December 1988.

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[1] Ashland Oil, Inc. V. Rose, 350 S.E. 2d 531, 535 (W. Va. 1986), dealt with the question of whether the ruling in Armco, Inc. v. Hardesty, 467 U.S. 638 (1984), which had similarly declared a portion of the West Virginia gross receipts tax unconstitutional, should be retroactive or prospective.