

Cite as 8 WTD 451 (1989)

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. 89-548
)	
)	Registration No. . . .
. . .)	. . . /Audit No. . . .
)	
)	

[1] RULE 170 AND RULE 102: RETAIL SALES TAX -- TANGIBLE PERSONAL PROPERTY -- SPECULATIVE BUILDER -- PURCHASE FOR RESALE -- TURN KEY PROJECT. Retail sales or use tax does not apply to the purchases of tangible personal property, as furniture, equipment, etc., purchased by a speculative builder as part of a "turn key" project, if the property was purchased solely for resale in the regular course of business without intervening use by the builder.

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: April 27, 1989

NATURE OF ACTION:

The taxpayer protests the assessment of retail sales/use tax on purchases of furnishings incorporated into a "turn key" hotel project.

FACTS AND ISSUES:

Roys, Sr. A.L.J.--The taxpayer's records were examined for the period January 1, 1984 through December 31, 1985. As a result, the above assessment was issued for \$

. . . , hereinafter referred to as the taxpayer, was previously known as . . . Development Company. At issue is the disallowance of a deduction for sales tax paid at source, and the assessment of use tax, on certain personal property purchased as part of the . . . Hotel.

The personal property at issue included furniture, kitchen, pool, and laundry equipment, fire extinguishers, and fireplace accessories. In some cases, the taxpayer provided resale certificates to its vendors and paid no retail sales tax at source. In other cases, the taxpayer paid the sales tax and claimed a deduction for such payments on its excise tax return filed in May 1984. In connection with the construction, the taxpayer paid retail sales tax on labor furnished under its construction contracts and on materials and property incorporated into the hotel.

The taxpayer stated that it developed and sold the hotel to . . . Partnership pursuant to a Real Estate Purchase and Sale Agreement in April of 1984. The Agreement contemplated a "turn key" project, in which the taxpayer would complete construction, fully outfit the hotel, and deliver it to the partnership in a condition ready for operation. The purchase price for the project was allocated among land, improvements, personal property, and certain other items.

The parties made a detailed allocation of the price between the real estate improvements and the tangible personal property following closing. Real estate excise tax was paid on the value of the land and real estate improvements, and sales tax was remitted on the amount allocated to personal property.

The assessment was based on the position that all tangible personal property purchased by the taxpayer for the hotel project was part of the speculative construction and subject to sales or use tax when purchased. The auditor relied, in part, on the definition of "consumer" in RCW 82.04.190(4) and the definition of "retail sale" in RCW 82.04.050.

The taxpayer contends it is not liable for \$. . . of the use tax assessed, and that it is entitled to a credit of \$. . . for sales tax paid at source on the property which was purchased solely for resale. Accordingly, the taxpayer argues

the assessment should be reduced by \$. . . , plus applicable interest.

DISCUSSION:

[1] RCW 82.04.050 defines a "retail sale" as "every sale of tangible personal property . . . to all persons . . . including . . . persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers An exception is provided for sales to a person who "purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person." Subsection (2)(b) adds that a retail sale includes the charge made for tangible personal property "consumed" in respect to the construction of a building, "including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such property becomes a part of the realty by virtue of installation."

WAC 458-20-170 is the administrative rule which implements RCW 82.04.050. Rule 170 provides that

the retail sales tax applies upon sales to speculative builders of all tangible personal property, including building materials, tools, equipment and consumable supplies and upon sales of labor, services and materials to speculative builders by independent contractors.

A "consumer" is defined in RCW 82.04.190(4) as the owner or person with the right of possession to property being constructed. Clearly a speculative builder is the "consumer" of property purchased for incorporation into the project being built. The issue is whether the retail sales tax applies to all purchases of tangible personal property to speculative builders.

The taxpayer argues that Rule 170 cannot be read to subject a speculative builder to retail sales or use tax with respect to purchases of tangible personal property that is not "consumed" in the construction of a building but is instead resold separately as personal property. We agree, as that intent is stated in RCW 82.04.050. A rule which taxes more broadly than the statute it purports to implement is invalid. Duncan Crane v. Department of Rev., 44 Wn.App. 684, 688 (1986).

The statute provides that property which is "consumed" in construction includes property which is installed or attached to the property. Accordingly, tangible personal property that was installed or attached to the hotel property was "consumed" by the taxpayer. This includes the bulk of the tangible personal property purchased as part of the hotel project: the plumbing fixtures, fire protection system, light fixtures, fire alarm system, electrical connections, decorative rails, elevator system, exhaust systems, lockers, safes, security system, etc. Sales tax was due at source on the purchase of these items, even if they did not become "part of the realty" for all purposes. For example, some items may be personal property for purposes of the federal investment tax credit even though considered a fixture for state tax purposes.

Also, property such as "building materials, tools, equipment and consumable supplies" listed in Rule 170, if used by a builder in the construction, would be considered used or "consumed" by the builder. The items at issue, however, as beds, linens, kitchen and laundry equipment, were not installed or attached to the property and were unrelated to the construction of the building. Such property is not "consumed" by the builder in the construction.

We agree that such purchases fall within the "resale exception" contained in RCW 82.04.050, provided that the purchase was for resale in the regular course of business and not subject to intervening use by the builder. In this case, the auditor noted that at least one newspaper article inferred that the taxpayer's original intent was not to sell the hotel but to operate it. Purchases by one constructing a hotel with the intent to operate the hotel would not be purchases for resale.

The taxpayer's representatives testified that it was never its intent to operate the hotel. The taxpayer is a development company. It stated that the resale was in the regular course of its business of developing and selling major commercial real estate developments on a "turn key" basis. The taxpayer contends the fact that in most cases it gave resale certificates to vendors of the tangible personal property also supports its assertion that the property was purchased for resale--not for use in operating a hotel. The taxpayer stated the discussions with the [hotel operator] began in 1983 and discussions with the syndicators occurred in the latter part of 1983. The purchases of the hotel furnishings were made after that time.

Furthermore, the taxpayer noted that the agreement between itself and the partnership contemplated that the hotel and related tangible personal property were to be delivered to the partnership/purchaser without any intervening use by the taxpayer. The partnership intended to qualify for federal investment tax credits. To do so, the partnership needed to place the property in service as the "first user."

We find the evidence supports the taxpayer's assertion that its purchases of the tangible personal property at issue were purchases for resale and exempt from retail sales tax.

DECISION AND DISPOSITION:

The taxpayer's petition is granted. An amended assessment shall be issued and due on the date provided thereon. Deferred sales/use tax shall be deleted on purchases of tangible personal property that was not "consumed" in the construction, and the taxpayer shall receive a credit for sales tax paid at source on property purchased solely for resale.

DATED this 19th day of December 1989.