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

In the Matter of the Petition For Refund of	D E T E R M I N A T I O N
	No. 89-482
. . .	Registration No. . . .
	. . . /Audit No. . . .

[1] RULE 172 -- RULE 211 -- B&O TAX -- SALES TAX -- LANDFILL -- MAINTENANCE OF -- CLASSIFICATION OF. The maintenance of a landfill wherein a person uses his own equipment to clear land and move earth is a retail sale.

[2] MISCELLANEOUS -- B&O TAX -- SALES TAX -- LIABILITY -- RELIANCE ON PRIOR AUDIT. Prior audit which missed the taxpayer's reporting of income under an incorrect classification does not entitle taxpayer to rely on error and escape sales and the proper B&O taxation in later years.

[3] MISCELLANEOUS, RCW 82.04.080, AND RCW 82.04.090: B&O TAX -- CONTRACT -- EXECUTORY -- DISPUTE -- MONEY SETTLEMENT. Money derived from the settlement of a disputed executory contract is B&O taxable under "other emoluments however designated", because it is "value proceeding or accruing" as a result of "the business engaged in". It, thus, qualifies as "gross income of the business" which is the measure of the B&O tax.

[4] RULE 106 -- RCW 82.08.050 -- SALES TAX -- CASUAL SALE -- SELLER'S DUTY TO COLLECT. The casual sale of a motor vehicle by a registered taxpayer is subject to retail sales tax. It is the seller's responsibility to collect such tax. If he or she fails to do so, the Department may pursue the seller

for the amount of the tax regardless of whether the seller can recover the tax from the buyer.

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: July 15, 1987

NATURE OF ACTION:

Protest of tax on landfill activities, money received from a legal dispute, and the casual sale of a truck.

FACTS AND ISSUES:

Dressel, A.L.J. -- . . . (taxpayer) is, for the most part, a hauler for hire. Its books and records were examined by the Department of Revenue (Department) for the period January 1, 1982 through March 31, 1986. As a result the above-captioned tax assessment was issued in the amount of $ . . . . A post assessment adjustment resulted in a refund for the taxpayer who is effectively requesting an additional refund in the present action.

In addition to its hauling activities, the taxpayer operated a landfill for . . . Inc. ([Acme]). In doing so its primary job was to move earth and gravel around and to cover refuse with the earth and gravel. To accomplish this the taxpayer used various items of its own equipment including a bulldozer, loader, and dump trucks. In its statements to [Acme], the taxpayer charged an hourly rate for each piece of equipment which rate included an operator furnished by the taxpayer.

The taxpayer reported the income from this arrangement under the Service and Other Activities classification of the B&O tax. The Department's auditor, however, reclassified the income to Retailing B&O and subjected it to retail sales tax. The taxpayer objects, primarily on the ground that it was performing the same business activity in a previous audited period and reporting it under Service B&O, and the previous auditor did not advise that was incorrect. Consequently, the taxpayer assumed it was reporting the income correctly and continued to report under the same classification.

The second disputed audit item also relates to money received from [Acme] but on a completely different basis. Another aspect of the taxpayer's business was a facility known by the parties as the . . . Sorting Yard. There logs were delivered by [Acme] and others who contracted with [Acme]. Pursuant to its own contract with [Acme], the taxpayer weighed, unloaded, sorted, "decked", and "loaded out" the logs for compensation at a certain rate per pound of logs handled. The same agreement also called for the taxpayer to haul logs for both domestic and export use. For domestic hauls the taxpayer was to be paid so much per hour. For hauls to an export location, the taxpayer was to be paid so much per load.

For reasons unknown and irrelevant, [Acme] informed the taxpayer that it no longer required the taxpayer's "log yard" services. Subsequently, the parties entered into a "Contract Termination and Release". Under its terms [Acme] paid the taxpayer a substantial sum in return for a release by the taxpayer of [Acme]'s obligations under the contract. The release agreement cited a long-standing relationship between the parties.

The auditor subjected the settlement money received by the taxpayer to Service and Other Activities B&O tax. The taxpayer protests. It states it had hired an attorney and was contemplating litigation after it was advised that [Acme] no longer needed its sorting yard services. It accepted $120,000 as an out-of-court settlement. Although it was apparently on the verge of doing so, the taxpayer did not file an actual law suit. It maintains that this was money received from litigation and that such monies are like insurance reimbursements and do not qualify as "gross income of the business".

Lastly, the taxpayer contests the assessment of sales tax on its casual sale of a truck and trailer. After being advised by the auditor that it should have collected sales tax on several casual sales, the taxpayer contacted several buyers in order to get them to pay the tax belatedly. All did except for . . . Excavating which had gone bankrupt in the meantime.

Again, the taxpayer argues that it was not cited in a previous audit for its policy of not collecting sales tax on casual sales. It also points out that its bills of sale on these items contain plain language under which the purchasers agree to pay use tax directly to the state. It argues, in effect, that in light of these facts, it would not be fair to make it

pay the sales tax especially since it has no hope of collection from the purchaser who is the real party responsible.

The issues are: 1) Is income from the owner operation of earth-moving equipment at a landfill a retail sale? 2) Are proceeds from an out-of-court settlement on a contract B&O taxable? 3) Is the casual seller of a truck and trailer liable for retail sales tax?

DISCUSSION:

During the audit period WAC 458-20-211 (Rule 211) read in part as follows:

> **Leases or rentals of tangible personal property, bailments.** The terms "leasing" and "renting" are used interchangeably and refer generally to the act of granting to another the right of possession to and use of tangible personal property for a consideration.
>
> . . .
>
> Persons who rent equipment or other tangible personal property and, in addition, operate the equipment or supply an employee to operate the same, are subject to the business and occupation tax (or public utility tax) according to the classification of the activities performed by the equipment and operator.

[1] Rule 211 was amended August 11, 1987 in response to the Washington Court of Appeals decision in *Duncan Crane Service v. Dept. of Revenue*, 44 Wa.App. 684 (1986). In the amended version the rule provision vis-a-vis rentals with operator was retained for those situations where the lessor retained dominion and control of the equipment.

If the landfill activity conducted by the taxpayer is considered to be a rental at all, it is certainly one where the taxpayer retained dominion and control of the equipment. There has been no showing that the factors deemed decisive in establishing the relinquishment of control to the lessee have been met in this case. See Rule 211 (5), post-8/11/87. Thus, under both the recent and late versions of Rule 211, the taxpayer is taxable according to the classification of the activities performed by the equipment and operator.

To learn how those activities should be classified, we turn to WAC 458-20-172 (Rule 172) which states in part:

> **Clearing land, moving earth, cleaning, fumigating, razing or moving existing buildings, and janitorial services.** Persons engaged in performing well drilling, *contracts for the grading or clearing of land or the moving of earth* and which do not involve the building, repairing or improving of any streets, roads, etc. which are owned by a municipal corporation or political subdivision of the state or by the United States (see WAC 458-20-171); and persons engaged in performing contracts which involve the cleaning, fumigating, razing or moving of existing buildings or structures and persons performing janitorial services are taxable as follows:
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> . . .
>
> BUSINESS AND OCCUPATION TAX
>
> Taxable under the classification retailing upon gross income from contracts to perform such services for consumers. . .
>
> RETAIL SALES TAX
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> Persons engaged in performing contracts for the grading or clearing of land, the moving of earth or the cleaning, fumigating, razing or moving of existing buildings or structures must collect the retail sales tax upon the full contract price when the work is performed for consumers. . .
>
> The retail sales tax applies upon the sales to such contractors of equipment and supplies used or consumed in the performance of such contracts and which are not resold as a component part of the work.

Italics ours.

The landfill activity of moving earth and gravel around falls clearly within the italicized portion of the above-quoted rule. Presumably, there is also some clearing of land as well, which activity is also included in our italics. As

indicated later in the rule, income from such work is subject to Retailing B&O and retail sales taxes. See also Excise Tax Bulletin (ETB) 365.04.172, ...

We are mindful that the taxpayer has objected, in particular, to the classification of dump truck activities at the landfill as retail sales. It is true that hauling for hire is generally taxed under either the Motor or Urban Transportation classifications of the public utility tax. Where hauling and excavating activities are combined, however, ETB 365.04.172 comes into play. It reads in pertinent part:

DUMP TRUCK OPERATORS

. . .

2. Contracts for trenching, excavating or back filling are taxable under Retailing business and occupation tax and retail sales tax (or Wholesaling business and occupation tax when done as a subcontract).

In this situation, the operator contracts to perform such earth moving activities as excavating and dumping earth according to specific requirements of the agreement. He is responsible for special work and the contract has as its purpose the removal or placement of earth as distinct from the performance of mere transportation services.

3. Hauling for hire is taxed under either the Motor or Urban Transportation classifications of the public utility tax.

Where the agreement calls for the performance of mere transportation services including loading and dumping, the operator is subject to the public utility tax (Motor or Urban Transportation classification).

4. Activities which combine those included in number 2 (earth moving) and number 3 (hauling for hire) are taxed under the Retailing business and occupation tax and retail sales tax (or Wholesaling business and occupation tax when performed as a subcontract).

It is our impression here that the dump trucks facilitate the main purpose of the taxpayer's landfill activity which is the movement of earth for the purpose of burying refuse. The taxpayer was not hired to haul dirt from point A to point B. The dump trucks are utilized to move earth around as needed within the landfill site. Presumably, loaders are used where earth or gravel has to be moved only a short distance and dump trucks are used for longer transfers. The primary activity is the movement of earth and even though there may be a hauling component to it, it is considered a retail sale under the authority of the ETB.

But the taxpayer's most serious quarrel with this aspect of the subject audit is what it sees as a change of position in that in a previous audit the Department did not disturb the reporting by the taxpayer of income from the same activity under Service B&O tax. By leaving that as is, the Department implicitly indicated Service B&O was correct. To change horses in the middle of the stream, so to speak, is inequitable. That, in essence, is the argument of the taxpayer.

[2] Actually, the Department has faced this position many times. The Washington Supreme Court faced it also in *Kitsap-Mason Dairymen v. Tax Commission*, 77 Wa.2d 812 (1970) in which it said in part at 818 and 819:

> This is not a case in which auditors changed their interpretation of a statute or rule. It is one in which they overlooked through ignorance, neglect or inadvertence (sic) Kitsap's error in computing the tax. The fact that the oversight only recently has been discovered does not relieve Kitsap of its liability for the correct tax during the audit period now under consideration.
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> [5] The doctrine of estoppel will not be lightly invoked against the state to deprive it of the power to collect taxes. The state cannot be estopped by unauthorized acts, admissions or conduct of its officers. (Citations omitted.)

In the case before us, the taxpayer acknowledges that the previous auditor did not make a specific statement to the effect that Service B&O tax was applicable nor does the written record of the previous audit contain such a statement.

Such circumstance puts this case squarely within the controlling rationale of *Kitsap-Mason Dairymen, supra*.

As to the first item under appeal, landfill activities and the Department's alleged change of position, the taxpayer's petition is denied.

Next is the issue of "income" from the settlement agreement. As a result of this agreement, the taxpayer was paid $120,000 which the auditor taxed at the Service B&O rate. The agreement was made because of [Acme]'s failure to fulfill its obligations under a one year contract by which the taxpayer was to operate a log yard for the benefit of [Acme]. Sometime after the contract period began to run, [Acme] backed out. At that point the contract was executory[1] in that it had not yet been executed or performed. From the recitation in the settlement agreement the $120,000 appears to be primarily for the money the taxpayer would have earned had it been allowed to complete the remaining months of the log yard contract. Other considerations mentioned were the taxpayer's expenses in liquidating the log yard equipment and the parties' long-standing relationship. At the hearing of this matter, the taxpayer emphasized that it had incurred considerable equipment expense in anticipation of its working relationship with [Acme] and that a primary purpose of the settlement was to compensate the taxpayer for that expense.

[3] The B&O tax is measured by "value of products, gross proceeds of sales, or gross income of the business, as the case may be". RCW 82.04.220. A service activity not otherwise specially classified is subject to Service B&O tax. The measure of such tax is "gross income of the business" multiplied by 1.5 percent. RCW 82.04.290. "Gross income of the business" is defined at RCW 82.04.080 as:

> "Gross income of the business" means *the value proceeding or accruing* by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, *and other emoluments however designated*, all without any deduction on account of the cost of tangible property sold, the cost of materials used,

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[1] See "Executory", Black's Law Dictionary, Third Edition.

> labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses. (Italics ours.)

"'Value proceeding or accruing' means the consideration, whether money, credits, rights, or other property expressed in terms of money, actually received or accrued." RCW 82.04.090.

The $120,000 settlement at issue here was consideration or money actually received as a result of the "business engaged in". The contract which was settled would never have been made in the first place had the taxpayer not been engaged in business and capable of performing the log yard tasks which [Acme] required. While the settlement amount may not fit the more precise items that RCW 82.04.080 says are included in "gross income of the business", it certainly qualifies as "other emoluments however designated". It is, therefore, gross income of the business and is subject to business and occupation tax per RCW 82.04.220.

As to the second issue, the contract settlement, the taxpayer's petition is denied.

The third issue has to do with retail sales tax on the casual sale by the taxpayer of a truck and trailer. Part of the taxpayer's argument, as it was on the first issue, is that the previous auditor did not advise it that its policy of not collecting sales tax on casual sales was erroneous. That argument fails for the same reason given above in our discussion of the first issue.

As to what is a casual sale and the applicability of the sales tax to such sales, we cite WAC 458-20-106 (Rule 106) which reads in part:

> CASUAL OR ISOLATED SALES--BUSINESS REORGANIZATIONS.
>
> A casual or isolated sale is defined by RCW 82.04.040 as a sale made by a person who is not engaged in the business of selling the type of property involved. Any sales which are routine and continuous must be considered to be an integral part of the business operation and are not casual or isolated sales.
>
> . . .

RETAIL SALES TAX

> The retail sales tax applies to all casual or isolated retail sales made by a person who is engaged in the business activity; that is, a person required to be registered under WAC 458-20-101. Persons not engaged in any business activity, that is, persons not required to be registered under WAC 458-20-101, are not required to collect the retail sales tax upon casual or isolated sales.

[4] This taxpayer is not generally engaged in the business of selling trucks. Thus, the particular sale at issue qualifies as a casual sale. Because the taxpayer is registered as conducting business in Washington state, a casual sale by it is retail sales taxable.

RCW 82.08.050 reads in part:

> BUYER TO PAY, SELLER TO COLLECT TAX-- STATEMENT OF TAX--EXCEPTION--PENALTIES.
>
> The tax hereby imposed shall be paid by the buyer to the seller, and each seller shall collect from the buyer the full amount of the tax payable in respect to each taxable sale in accordance with the schedule of collections adopted by the department pursuant to the provisions of RCW 82.08.060.
>
> In case any seller fails to collect the tax herein imposed or having collected the tax, fails to pay it to the department in the manner prescribed by this chapter, whether such failure is the result of his own acts or the result of acts or conditions beyond his control, he shall, nevertheless, be personally liable to the state for the amount of the tax.

The taxpayer here was the seller of the truck and trailer and failed to collect sales tax. It is, therefore, personally liable to the state for the tax. It is unfortunate that the taxpayer's attempts to collect the tax from the bankrupt buyer have been fruitless. Nevertheless, the Department's claim for same against the seller/taxpayer directly, is plainly within the letter of the cited statute.

As to the third issue, sales tax on a casual sale, the taxpayer's petition is denied.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 6th day of October 1989.