

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 Refund of)
) No. 89-480
)
 . . .) Registration No. . . .
) . . . /Audit No. . . .
)

[1] RULE 17001: RCW 82.04.190 -- GOVERNMENT CONTRACTING
--CONSUMER -- RETAIL SALES TAX. A prime contractor
working on government contracts is required to pay
retail sales tax on all items of tangible personal
property it purchases for incorporation into such
projects. Accord: Determination No. 88-286, 6 WTD
223, (1988).

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 CONFERENCE: June 28, 1989

NATURE OF ACTION:

Taxpayer protests deferred sales and use tax asserted in an
audit.

FACTS AND ISSUES:

Hesselholt, A.L.J. -- Taxpayer is a general contractor which
does primarily government contracting work. Its records were
audited for the period January 1, 1985 through September 30,
1988. As a result, an assessment was issued in the amount of
\$. . . , which includes both tax and interest. Taxpayer
protested certain items.

Taxpayer's protests are mainly on deferred sales and use tax asserted on contracts for a project on It had a number of "subcontracts" with firms for the provision of certain items such as "floor and roof decking" [#1] and "reinforcing steel and wire mesh" [#2]. Taxpayer also argues that a clause in its contracts with the subs insulates it from tax liability.

Taxpayer also protests other miscellaneous use tax items.

DISCUSSION:

RCW 82.04.190 provides, in relevant part, as follows

"Consumer" means the following:

(6) Any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation; also, any person engaged in the business of clearing land and moving earth of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW. Any such person shall be a consumer within the meaning of this subsection in respect to tangible personal property incorporated into, installed in, or attached to such building or other structure by such person.

Under the above statute and Rule 17001, persons performing government contracts are required to pay retail sales or use tax as follows:

(5) The retail sales tax does not apply to the gross contract price, or any part thereof, for any business activities taxable under the government contracting classification. Prime and subcontractors who perform such activities are themselves included within the statutory definition of "consumer" under RCW 82.04.190 and are required to pay retail sales tax upon all purchases of materials, including prefabricated and precast

items, equipment, and other tangible personal property which is installed, applied, attached, or otherwise incorporated in their government contracting work. This applies for all such purchases of tangible personal property for installation, etc., even though the full purchase price of such property will be reimbursed by the government or housing authority in the gross contract price. It also applies notwithstanding that the contract may contain an immediate title vesting clause which provides that the title to the property vests in the government or housing authority immediately upon its acquisition by the contractor.

(6) Also, the retail sales tax must be paid by government contractors upon their purchases and leases or rentals of tools, consumables, and other tangible personal property used by them as consumers in performing government contracting.

USE TAX

(7) The use tax applies upon the value of all materials, equipment, and other tangible personal property purchased at retail, acquired as a bailee or donee, or manufactured or produced by the contractor for commercial or industrial use in performing government contracting and upon which no retail sales tax has been paid by the contractor, its bailor or donor.

(8) Thus the use tax applies to all property provided by the federal government to the contractor for installation or inclusion in the contract work as well as to all government provided tooling.

(9) The use tax is to be reported and paid by the government contractor who actually installs or applies the property to the contract. Where the actual installing contractor pays the tax, no further use tax is due upon such property by any other contractor.

(10) Note to contractors: The United States Supreme Court has sustained the government contracting tax applications for this state, even though the ultimate economic burden of the tax is borne by the

United States Government (Washington v. US, 75 L.Ed
2d 264, 1983).

Emphasis added.

- A. Deferred Sales tax on contract with [#1]. Taxpayer has argued that [#1] should be liable for all taxes, under its standard contract clause. Taxpayer also argues that the installing contractor, a different entity, may be responsible for the use tax under Rule 17001(9).
- B. Deferred sales tax on item purchased from [#2], subcontractor.
- C. Deferred sales tax on item paid by taxpayer for subcontractor. The taxpayer paid an item for one of its subcontractors. It subsequently deducted that amount from its payment to the subcontractor.

Firstly, the taxpayer refers to the tax assessed on these items as use tax; it was assessed as deferred sales tax, rather than use tax. The terms are often used interchangeably, as the rates are the same, but they are not identical concepts. Sales taxes are generally a liability of the buyer; they are imposed on the transaction, which is the purchase of tangible personal property in Washington. Use taxes are generally the liability of the person using the property, and are imposed on the use of the property in Washington, rather than the purchase, when sales tax was not paid at the time of purchase.

In Washington v. United States, 460 US 536,(1983) the United States Supreme Court quoted the Court of Appeals' explanation the workings of the tax on government contractors as follows:

These statutes [RCW 82.04.190's definition of consumer, quoted above] further expressly excluded from the definition of "consumer," "the United States, instrumentalities thereof, and county and city housing authorities created pursuant to chapter 35.82 RCW in respect to labor and services rendered to their real property." [citations omitted] Wash Rev Code § 82.04.050 was also amended so as to redefine "retail sale" and "sale at retail" to exclude expressly from their scope contracts calling for the improvement, repair or construction of real property owned by the United States or any of its instrumentalities and to include sales of materials

to prime contractors engaged in construction work on federally owned property. As with the sales tax, the liability of federal prime construction contractors for the State's use tax arose basically from the inclusion of such contractors within the meaning of the term "consumer" and the use of that term in Wash Rev Code § 82.12.020, under which the use tax is levied.

Id., pages 268, 269, n.3.

[1] Standard language in a contract will not alter the state's ability to collect taxes from any responsible party. By statute, a government contractor is the consumer of the tangible personal property it purchases for government construction, and should pay retail sales tax on it. In a non-government contract, the sales from a material subcontractor and a prime contractor are wholesale sales. However, in a government contract, sales of materials to the prime contractor are retail sales, and the prime contractor should pay retail sales tax on contracts¹ for materials or fabricated items. (See WAC 458-20-170, and Rule 17001) [#1] and [#2] as suppliers, are making a retail sale to taxpayer, and as sellers, are not primarily liable for sales taxes on items sold to the taxpayer; the taxpayer is liable for the sales tax. (See RCW 82.08.050 regarding the liabilities of buyer and seller for retail sales tax.) The taxpayer purchased the items from [#1] and that purchase is subject to sales tax. The measure of tax is the cost for the materials taxpayer purchased; that cost is not simply the cost of the materials used by [#1] in making the items, but is the price charged to taxpayer.

Taxpayer next argued that the installing contractor is liable under Rule 17001(9). The installing contractor is liable for use tax on items it installs if no other contractor has paid sales or use tax on the item. If the installing contractor paid use tax on the materials, and the taxpayer can provide proof of this, it can apply for a refund of the tax it has paid on the items. However, the installing contractor will not be forced to pay a tax obligation that is properly that of the taxpayer. In Determination No. 88-286, 6 WTD 223 (1988), the Department of Revenue stated that the "prime contractor

¹The taxpayer has referred to these contracts as "subcontracts," but they are actually contracts for materials, and not subcontracts for labor.

who actually had the contract to install" transformers was the party responsible for the use tax. In this case, the taxpayer had a contract to build a facility at . . . and subcontracted parts of the job to other contractors. Taxpayer is still the "installing contractor" under the rule.

2. Use tax on plans and specs. Taxpayer states that

the amounts were for bid documents for projects we were either unable to bid or were not awarded. The amounts should be a direct loss to our company. Product was not consumed in referenced project, therefore no tax due per paragraph #6 of the retail sales tax provision.

Taxpayer is referring to RCW 82.04.190(6), which defines a government contractor as a consumer, and subject to use or retail sales tax on all tangible personal property incorporated into a government contracting job. For these items, the tax was imposed under RCW 82.12.020, which provides that the use tax is imposed on the use of any item of tangible personal property on which sales tax was not paid. The tax liability here is not incurred only if the taxpayer uses the items in a government contract; the tax liability is that of the taxpayer, because the documents are used by the taxpayer in preparing bids for potential jobs. These items are in the nature of consumable supplies. Their purchase is subject to retail sales tax, and if that has not been paid, their use is subject to use tax.

3. Taxpayer protests the inclusion, in Schedule 2 of the amounts in government contracts which represented taxes they paid, arguing that such taxation represents double taxation.

There is no constitutional inhibition, either of Washington or of the United States, against double taxation as applied to excise taxes. Klickitat County v. Jenner, 15 Wn.2d 373 (1942). The business and occupation tax is an excise tax, and it is imposed on the gross income of the business, which 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, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

RCW 82.04.080.

Thus, taxes paid by this taxpayer are "gross income" of its business, and properly subject to tax.

Finally, taxpayer made several statements regarding its attempts to pay its taxes in a prompt and correct manner and has apologized for its errors. Taxpayer has been extremely cooperative and there is no suggestion that taxpayer has done anything but act in good faith to meet its state tax obligations, and we commend taxpayer on its attitude and attempts to conform to the tax requirements of this state.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 6th day of October 1989.