Cite as Det. No. 97-032R, 20 WTD 261 (2001)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment	)	F I N A L D E T E R M I N A T I O N
	)	No. 97-032R
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

RULE 211; RULE 17001; RCW 82.04.050; cite RCW 82.04.190(6); RCW 82.04.280(7); ETB 321: B&O TAX -- RENTAL -- EQUIPMENT WITH OPERATOR -- FIREFIGHTING. Receipts from emergency equipment rental agreement with national forest are taxable under the retailing classification. The national forest's fire boss controls the equipment and operators clearing federal land for fire lanes and other tasks during and after fire emergencies.

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.

NATURE OF ACTION:

A logging road construction company protests the reclassification of income received from a national forest under emergency equipment rental agreements.[1]

FACTS:

Pree, A.L.J. -- . . . (the taxpayer) builds roads and clears land in Washington. During emergencies, the contracting officer from the . . . (national forest) rented equipment with operators from the taxpayer to build fire lanes and for other support services during a fire and, afterwards, for the rehabilitation, terracing, and replacement of brush for erosion control in burned areas. The taxpayer reported the receipts under the government contracting business & occupation (B&O) tax classification.

The Audit Division of the Department of Revenue reviewed the taxpayer's books and records for the period January 1, 1992 to June 30, 1995. As a result of this review, the Audit Division issued a tax

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

assessment, Document No. FY. . ., on March 13, 1996. The assessment totaled $. . ., including interest. The taxpayer protests $. . . from Schedule 3, which reclassified 1994 national forest emergency revenue to the service and other B&O tax classification with a higher tax rate.

The "Auditor's Detail of Differences and Instructions to Taxpayers" explains the Audit Division's position as follows:

> Upon examination of your records, it was disclosed that in the year 1994, you earned gross revenues from the performance of firefighting activities for the United States Forest Service. This activity would include the use of your heavy construction equipment in cutting firelines etc. You provided your own personnel to operate your equipment. Please note, per attached WAC 458-20-224, the Department of Revenue has determined that firefighting gross revenues are reportable under the Service and other tax [classification].

The Audit Division also provided the taxpayer with a copy of Excise Tax Bulletin 321.179.224 (ETB 321), which explained that receipts from aerial firefighting were taxable under the service and other activities classification.

On appeal, the taxpayer asserted that the receipts should have been taxed as government contracting. In the initial determination, we granted the taxpayer's petition regarding most pieces of equipment on the theory that most of the equipment was used for activities such as moving of earth and clearing of land, normally classified as retailing, but because they were performed for the government were taxable under the government contracting classification. The service and other activities classification applied to the receipts for the water trucks used for dust abatement and water delivery. The retailing classification applied to receipts for pumps rented without operators.

The taxpayer appealed the determination. We granted reconsideration.

The taxpayer stated that its personnel were not directly involved with fighting fires or extinguishing flames. The national forest designated a "Fire Boss" who had charge of the equipment as well as the operators. The fire boss directed the taxpayer's equipment operators to move dirt, terrace land, build fire lanes, and clear land with the equipment both during and after fires. This work prevented the fires from spreading and rehabilitated the land afterwards.

Most of the taxpayer's receipts were derived from its primary activity, building and maintaining roads. Those receipts are not at issue. The taxpayer entered into preseason fire agreements entitled "EMERGENCY EQUIPMENT RENTAL AGREEMENT" with a national forest. Those agreements provided that in the case of a forest fire, the taxpayer would make available specified pieces of equipment with operators to assist in fighting the fire. The national forest agreed to pay the taxpayer a stated hourly rate for each piece. The equipment included dozers, loaders, graders, transports, pumps,[2] and water trucks.[3] The taxpayer states there was no connection between the emergency equipment contract and any other contract it bid.

[2] The pumps were rented without operators at a daily (24 hour) rate.

In the case of a fire, the national forest resource boss would direct the taxpayer's equipment operators in the fire suppression activities including building fire lines and clearing landings. The water trucks were used for dust abatement on the roads and to fill holding tanks where helicopters could load the water that they would dump on the fire. After the fire, the national forest would use the dozers, loaders, and graders for erosion control. The taxpayer's personnel operated the equipment.

ISSUE:

Under what classification were receipts from the emergency equipment rental agreements with the national forest taxed?

DISCUSSION:

B&O tax is imposed at various rates upon receipts from engaging in business activities. RCW 82.04.220. The rate of tax depends upon the classification of the activity. Receipts by persons engaged in different activities are taxable at different rates depending upon the particular classification of the applicable activity. RCW 82.04.440. For example, Excise Tax Bulletin 394.04.136 (ETB 394) provides that a company primarily engaged in the sale of lumber was also taxable upon receipts from firefighting. RCW 82.04.050(4)[4] includes in the definition of retail sale (normally taxable under the retailing classification) rental of equipment with an operator.

After reviewing the relevant documents, particular to this taxpayer's relationship with the national forest, we find that the taxpayer is not fighting fires. Rather, the national forest fights them using the taxpayer's equipment with operators.

WAC 458-20-211 (Rule 211) provides that equipment is considered rented when:

> (1)(a) The agreement between the parties is designated as an outright lease or rental, without reservations; and (b) The lessee acquires the right of possession, dominion, and control of the equipment, even to the exclusion of the lessor.

[3] The U.S. Department of Agriculture, Forest Service, through its Portland, Oregon office, enters into agreements for fire engines and tenders. Those agreements require that personnel be provided with various fire-fighting certifications. Generally, they would go to the fire line to lay hose and directly fight the fire. The taxpayer did not rent that type of equipment or provide personnel necessarily certified in fighting fires. The taxpayer's agreement was with a contracting officer on behalf of a particular national forest. Other national forests may have had different agreements and requirements.

[4] This portion of RCW 82.04.050 was amended effective July 1, 1993. Audit schedule 3 indicates the receipts at issue were received in 1994. Therefore, the amended version of the statute is applicable. Likewise, Rule 211 effective February 24, 1996 specifically refers to this statutory amendment and reflects the Department's position regarding rental of equipment with an operator from the effective date of the statute.

The "EMERGENCY EQUIPMENT RENTAL AGREEMENT" is designated as an outright rental without reservations. When the agreement takes effect, the national forest's fire boss takes control of the equipment and operators.

The national forest did not hire the taxpayer to perform specific tasks. The agreement does not direct the taxpayer to build a fire lane in any location, or a road between point "a" and point "b". Rather, the national forest rented the taxpayer's equipment with operators to perform tasks as directed by the fire boss during emergencies. Subsection (2)(d) of Rule 211 provides:

> The term "rental of equipment with operator" means the provision of equipment with an operator to a lessee to perform work under the specific direction of the lessee. In such cases the lessor is generally not responsible for performing work to contract specification and does not determine how the work will be performed. Though not controlling, persons who rent equipment with an operator typically bill on the basis of the amount of time the equipment was used.

The taxpayer bills the national forest on an hourly basis for the equipment. There is no additional charge for the operators. The national forest's "true object" of the agreement was to rent equipment. Subsection (2)(e) of Rule 211 provides:

> (e) The term "true object test" as it relates to this section means the analysis of a transaction involving equipment and an operator to determine if the lessee is simply purchasing the use of the equipment or purchasing the knowledge, skills, and expertise of the operator beyond those needed to operate the equipment. Even if it is determined that the customer is purchasing the knowledge, skills, and expertise of the operator, the transaction may still be a retail sale if the activity is specifically included by statute within the definition of a retail sale. This test can also be applied to rentals of tangible personal property when the seller performs some service in connection with the rental.

During the Audit period, the national forest did not require special training by the operators or certification in firefighting. The operators did not extinguish flames. Nothing in the agreement or elsewhere, indicates the national forest was purchasing the knowledge skills or expertise of the operator beyond those needed to operate the equipment. In this situation, based on the information available, the operators had no special firefighting skills. Obviously, they had the skills needed to operate the equipment.

The document evidencing the agreement, bills the lessee on the basis of the amount of time the equipment was used. There is no reference to specifications of work done. The work was directed and under the control of the fire boss.

We find the national forest pays the taxpayer for the use of the equipment with operators, rather than services such as clearing land or building roads. Receipts from the rental equipment with operators are taxable under the retailing classification. RCW 82.04.050(4). This includes receipts from not only the dozers, loaders, graders, transports rented by the taxpayer to the national forests, but also

the water trucks and pumps. Because the equipment is rented to an agency of the United States (Forest Service), retail sales tax does not apply.

DECISION AND DISPOSITION:

The taxpayer's petition is granted as explained. We remand the assessment to the Audit Division to adjust Schedule 3 of the assessment using the retailing B&O classification. The amended assessment will be due for payment by the date stated thereon.

DATED this 30th day of April, 1998.