Cite as Det. No. 01-077, 21 WTD 157 (2002)

BEFORE THE 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. 01-077[1]
	)	
. . .	)	Reg. No. . . .
	)	FY . . . /Audit No. . . .
	)	Docket No. . . .
	)	
. . .	)	Reg. No. . . .
	)	FY . . . /Audit No. . . .
	)	Docket No. . . .

[1] RULE 170; RCW 82.04.250, RCW 82.04.050, RCW 82.08.020: RETAIL SALES TAX – RETAILING B&O TAX – PRIME CONTRACTOR – CONSTRUCTION UPON LAND OWNED BY A CORPORATE OFFICER. Where a construction company performed construction services on land owned by its corporate office, it was deemed a prime contractor.

[2] RULE 170, RULE 223; RCW 82.04.250, RCW 82.04.050, RCW 82.08.020; ETA 276: RETAIL SALES TAX – RETAILING B&O TAX – MEASURE OF TAX -- PRIME CONTRACTOR. Payment by a consumer of a contractor's liability is includable in the contractor's tax measure. When a contractor rents certain equipment, the contractor is acting as a consumer and is personally liable for retail sales tax on the equipment rental. However, a prime contractor's purchase of labor and materials to construct a building for a consumer is a purchase for resale, and retail sales tax is not due on those purchases. Where retail sales tax was improperly paid on the contractor's purchases, it should not be included in the measure

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.

[1] The reconsideration determination, Det. No. 01-077R, is published at 21 WTD 169 (2002).

NATURE OF ACTION:

The taxpayers, a land owner and construction company, protest the Audit Division's characterization of their relationship as consumer and prime contractor, which resulted in the Audit Division's assessment of retail sales tax, retailing B&O tax, and "deferred sales" or use tax with respect to the construction. The taxpayers protest the inclusion of retail sales tax and other amounts in the amounts assessed. In addition, the construction company protests the assessment of retailing B&O tax, service B&O tax, and retail sales tax on amounts the Audit Division determined the construction company received from maintenance and management agreements. Finally, the construction company protests the assessment of use tax on consumables and capital assets.[2]

FACTS, ANALYSIS, AND CONCLUSIONS:

C. Pree, A.L.J. – The Department of Revenue Audit Division audited the records of both taxpayers, referenced above, for the period of January 1, 1995, through December 31, 1998. The audit of [Land Owner] resulted in the assessment of "deferred sales" or use tax of $ . . . and interest of $ . . . . The assessment totaled $ . . . .

[Land Owner] is the sole shareholder of [Construction Company]. The audit of [Construction Company] resulted in the assessment of retail sales tax of $ . . . , retailing B&O tax of $ . . . , service B&O tax of $ . . . , use tax of $ . . . , and interest of $ . . . . The assessment totaled $ . . . .

The taxpayers protest the assessments in their entirety. Each of the issues the taxpayers raised before the Appeals Division is addressed below. [3]

1. **Whether the Audit Division Properly Characterized [Construction Company] as a General Contractor and [Land Owner] as a Consumer of [Construction Company]'s Construction Services.**

The Audit Division's position. The Audit Division assessed retailing B&O tax and retail sales tax against [Construction Company] and deferred sales/use tax against [Land Owner] based on its determination that [Construction Company] was the general contractor in the construction of

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

[3] Before the Audit Division, the taxpayers raised several arguments that were not pursued on appeal. Specifically, the taxpayers argued that because [Land Owner] is the sole shareholder of [Construction Company], the entities are one business, and thus the transactions between [Land Owner] and [Construction Company] are not taxable. The Audit Division responded that each separately organized corporation is a "person" for Washington tax purposes. See WAC 458-20-203 (Rule 203).

The taxpayers further argued that because [Land Owner] is the sole shareholder of [Construction Company], the amounts [Land Owner] paid to [Construction Company] are reimbursements, and not taxable income. The Audit Division responded that these payments do not meet the requirements for exclusion of WAC 458-20-111 (Rule 111) because [Construction Company] was liable for the payments. Because these arguments were not pursued before the Appeals Division, these arguments will not be addressed in this determination.

buildings for [Land Owner] on land owned by [Land Owner]. Specifically, the Audit Division noted, "[Construction Company] provided labor, architectural services, supervision and hiring of subcontractors and other functions a general contractor would normally perform." The Audit Division reasoned: "[Construction Company] did not collect the retail sales tax from [Land Owner]; therefore, [Land Owner] is liable for the use tax or deferred sales tax on the buildings [Construction Company] built for [Land Owner]."

The assessment included amounts the Audit Division determined [Land Owner] paid to [Construction Company] for construction labor, construction supervision, contractor expense reimbursement, promotional service reimbursement, wage fees, contractor fees, architectural fees, developer fees, and invoiced costs from material and service suppliers. The schedules to [Land Owner]'s assessment reflect that the majority of invoices were billed to [Construction Company] and the subcontract agreements were with [Construction Company]. However, it appears that [Land Owner] may have personally paid the majority of these invoices.

The Audit Division continued:

> [Construction Company] records all payments received from [Land Owner] as income on its accounting records and federal income tax returns. [Construction Company] does not report the construction income . . . on its Washington State Excise Tax Returns.

The taxpayers' position. The taxpayers explain [Land Owner] owned several parcels of real estate upon which he constructed apartment complexes or assisted living centers. According to the taxpayers, [Land Owner] developed his real estate, i.e., he acted as a speculative builder. In doing so, he used the credit and accounts [Construction Company] had established with suppliers and subcontractors, but [Construction Company] did not act as a general contractor. The taxpayers state:

> While contracts may have been executed between [Construction Company] and most subcontractors, and those subcontractors and suppliers may have invoiced [Construction Company] for their sales of labor, services and goods, [Construction Company] was not acting as a general contractor on the projects. Instead, the contracts were written and the billings were arranged in this manner for accounting and bookkeeping purposes only, i.e., merely for the convenience of [Land Owner]. At all times, [Land Owner] was acting solely in his own capacity as the contractor on the construction projects, and he was responsible for all costs and expenses of the projects. [Land Owner] did not intend to contract, and did not contract, with [Construction Company] for the construction of the improvements on the projects. Instead, [Land Owner] made the improvements as a speculative builder under WAC 458-20-170(2).
>
> [Land Owner]'s intent was further borne out by the tax returns filed with the state and federal governments by [Construction Company] – which returns were filed consistent with [Land Owner]'s intent to act as a speculative builder on these projects. If [Construction Company] was acting as a general contractor, it would have received

> revenues from these projects. But [Construction Company] did not receive nor report revenues from these projects on its federal and state tax returns. This was because [Construction Company] did not have revenues associated with these projects.
>
> Again, [Construction Company] was merely used as a contracting and billing agent for [Land Owner]'s building and construction activities. [Land Owner] neither intended or [sic] desired to have [Construction Company] act as a general construction contractor on any of the projects. The Department's assessment of B&O, sales and use tax on this basis was in error.

The Audit Division's response. In response to this portion of the taxpayers' petition, the Audit Division stated:

> [Construction Company] did include monies received from [Land Owner], an individual, on its income statement and federal tax returns as income. Examples include:
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> - Construction progress payments were made to [Construction Company] for labor, supervision, etc. on a regular (monthly) basis via a checking account from [Land Owner] . . . . [The check attached to the Audit Division's response was signed by [Land Owner], payable to [Construction Company], drawn on an account that appears to say " . . . construction account." (. . . is apparently the name of one of the construction projects.) An invoice from [Construction Company] to " . . . " reflects amounts due for supervision fees and misc. labor fees for April 1998 and contractor's overhead for May 1998.]
> - [Construction Company]'s income statement[s] for the years 1996, 1997, [and] 1998 . . . show the income earned from wage fees, developer fees, contractor fees, etc. [Except for the period of April through December 1998, the income statements the Audit Division provided do not reflect the name of the entity for which they were prepared. However, all of the statements do show the types of fees set forth above for the construction projects that were included in the assessments.]
> - [Construction Company]'s federal income tax returns for the years 1995, 1996 and 1997 . . . clearly report income each year from their construction activities. [Construction Company] did not work for any other individual during the audit period.
> - [Construction Company] signed a resale certificate indicating that they are a general contractor purchasing the materials for resale . . . .
>
> The above examples clearly illustrate that [Construction Company] and [Land Owner], an individual, were operating as two separate entities for tax purposes.

(Bracketed information added.)

The taxpayers' response. The taxpayers responded that only one resale certificate was signed. The taxpayers further argue that [Construction Company] did not report "reimbursements" of

materials expenses and subcontractor costs as part of its gross income on its federal tax returns; only "general overhead" was reported.

[1] Analysis. WAC 458-20-170 (Rule 170) defines a "prime contractor" (or general contractor) as including "a person engaged in the business of performing for consumers, the constructing . . . of new . . . buildings." Prime contractors are subject to retailing B&O tax upon the gross contract price and are required to collect from consumers the retail sales tax measured by the full contract price. See RCW 82.04.050 (RCW 82.04.050(2)(b) defines "retail sale" to include "the sale of or charge made for . . . labor and services rendered in respect to" the following: "constructing . . . of new . . . buildings . . . of or for consumers."); Rule 170. In contrast, Rule 170 defines a "speculative builder" as "one who constructs buildings for sale or rental upon real estate owned by him."

Rule 170 further provides:

> Persons, including corporations, partnerships, sole proprietorships, and joint ventures, among others, who perform construction upon land owned by their corporate officers, shareholders, partners, owners, co-venturers, etc., are constructing upon land owned by others and are taxable as sellers under this rule, not as "speculative builders."

There is no dispute that [Land Owner], not [Construction Company], owned the land on which the buildings were constructed. Thus, if [Construction Company] performed the construction services, it would be deemed a prime contractor, and not a speculative builder because it would be performing the construction services on land owned by its corporate officer.

Based on the evidence presented, we conclude that [Construction Company] acted as a prime contractor with respect to the construction at issue. Specifically, the taxpayers' records reflect that [Land Owner] paid [Construction Company] for construction labor, construction supervision, contractor expense reimbursement, promotional service reimbursement, wage fees, contractor fees, architectural fees, developer fees, and costs charged by material and service suppliers, which were invoiced to [Construction Company]. These are amounts consumers typically pay to their general contractors. We further note that [Construction Company]'s accounting records and federal income tax returns included construction payments from [Land Owner] and that [Land Owner] made regular payments to [Construction Company] for construction labor and supervision based on invoices from [Construction Company]. We do not find the fact that [Construction Company] may not have reported the "reimbursements" of materials expenses and subcontractor costs as part of its gross income on its federal tax returns to be persuasive that it was acting in a capacity other than that of a prime contractor.

Further, we find the fact that the majority of invoices were billed to [Construction Company] and the subcontract agreements were with [Construction Company], not with [Land Owner] individually, to be persuasive evidence that a prime contractor/consumer relationship existed between [Construction Company] and [Land Owner]. We are not persuaded by the taxpayers' argument that the contracts were written and the billings were arranged in this manner merely for

the convenience of [Land Owner]. It is well settled that taxpayers in Washington are generally bound by the form in which they choose to do business.[4] In summary, we find that the Audit Division properly characterized the relationship between [Land Owner] and [Construction Company] as prime contractor and consumer. As such, the Audit Division properly assessed retailing B&O tax and retail sales tax against [Construction Company] and use tax against [Land Owner]. See RCW 82.04.250; 82.08.020; 82.12.020; Rule 170; WAC 458-20-178 (Rule 178) ("The use tax supplements the retail sales tax by imposing a tax of like amount upon the use within this state as a consumer of any article of tangible personal property purchased at retail . . . where the user . . . has not paid retail sales tax under chapter 82.08 RCW with respect to the property used.") (The Audit Division properly recognized that the retail sales tax assessment against [Construction Company] and the use tax/deferred sales tax against [Land Owner] were duplicative. The Audit Division noted that, to the extent one of the taxpayers pays its assessment, the remaining assessment will be adjusted to reflect that payment.)

2. **Whether the Audit Division Erred in Calculating the Measure of the Tax.**

As determined above, the Audit Division properly assessed retailing B&O tax and retail sales tax against [Construction Company] and use tax against [Land Owner]. However, the taxpayers next argue that the Audit Division overstated the measure of the taxes assessed. According to [Land Owner], there was no written contract price for the construction of the buildings. As such, the Audit Division used total construction costs as the measure of the assessment. See WAC 458-20-170 (Rule 170). Regarding the measure of the retailing B&O and retail sales tax, Rule 170 provides:

> Where no gross contract price is stated in any contract or agreement between the builder and the property owner, then the measure of business and occupation tax is the total amount of construction costs, including any charges for licenses, fees, permits, etc., required for the construction and paid by the builder.

The Audit Division's position. The Audit Division noted that it reviewed job files and cost breakdown and inspection reports in calculating the contract amounts. The Audit Division cited WAC 458-20-223 (Rule 223) in support of its position that if a cost is paid directly by a customer to the contractor's vendor and the contractor was liable for the cost, the cost is to be included in the amount subject to retailing B&O and retail sales tax.

Citing Rule 223, the Audit Division reasoned:

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[4] See, e.g., Det. No. 90-108, 9 WTD 231 (1990) ("With respect to the taxpayer's assertion that it could have set up its records and operated differently to comply with the Department's requirements, it must be recognized that the Department consistently assesses taxes according to what was done, not on the basis of what could have been done."); Det. No. 00-045, 19 WTD 965 (2000) ("The Department has long limited a taxpayer's ability to elevate substance over form."); Det. No. 89-331, 8 WTD 53 (1989) ("The taxpayers in this case were free to choose the form of business which they desired, and there is no reason now, other than to escape the clutches of the Washington tax collector, to disregard that form."); see also, Det. No. 85-112A, 1 WTD 343 (1985); Det. No. 92-166, 12 WTD 211 (1992); Det. No. 98-172E, 18 WTD 387 (1999).

> [W]hen a contractor performs a contract on a time and material or cost-plus fixed fee basis, the measure of tax is the amount of profit or fixed fee plus all costs incurred as a result of the contract. Costs include materials, supplies, labor, taxes, subcontracts, and any other cost or expense incurred by a contractor.

Thus, because the amounts invoiced from the materials suppliers and subcontractors to [Construction Company] included retail sales tax, the Audit Division included the amount of retail sales tax paid to the materials suppliers and subcontractors in the gross selling price upon which the deferred sales/use tax assessment against [Land Owner] and the retail sales tax and retailing B&O tax assessments against [Construction Company] were based. The Audit Division also cited ETA 276.08.170 (ETA 276) in support of its position.

The taxpayers' position. The taxpayers argue that [Land Owner], not [Construction Company], paid the majority of the costs. As such, these amounts were not "paid by the builder," as required by Rule 170 for inclusion in the measure. The taxpayers further argue that even if these costs can be included in the measure, the Audit Division erred in including the amount of retail sales tax paid on the costs in the measure.

[2] Analysis. The taxpayers first argue that because [Land Owner], not [Construction Company], paid the majority of the invoices, the amounts were not "paid by the builder" and cannot be included in the measure. We disagree. Rule 223 provides that where there is no stated contract price, prime contractors are taxed as follows:

> The measure of the tax . . . is the amount of profit or fixed fee received, plus the amount of reimbursements or prepayments received on account of sales of materials and supplies, on account of labor costs, on account of taxes paid, on account of payments made to subcontractors, and on account of all other costs and expenses incurred by the contractor, **plus all payments made by his principal direct to a creditor of the contractor in payment of a liability incurred by the latter.**

(Emphasis added.) Thus, Rule 223 makes it clear that a payment by a consumer [Land Owner])of a contractor's [Construction Company]'s liability is includable in the measure. As noted above, most of the invoices for materials and labor were in [Construction Company]'s name, and [Land Owner] apparently paid the majority of these invoices. Under Rules 170 and 223, these amounts were properly included in the measure. As such, the taxpayer's petition is denied with respect to this argument.

The taxpayers next argue that even if these costs are includable in the measure, the Audit Division erred in including the amount of retail sales tax paid on those costs in the measure.

Sales to prime contractors of materials which become part of the structure being built are sales for resale and are not subject to the retail sales tax. Rule 170. In contrast, speculative builders must pay sales tax upon all materials purchased by them and on all charges made by their

subcontractors. Rule 170. As discussed above, the taxpayers believed [Land Owner] was acting as a speculative builder in constructing the buildings. As such, [Land Owner] apparently paid retail sales tax on the majority of the invoices for materials and labor. However, as we concluded above, the Audit Division properly determined that [Land Owner] was not a speculative builder. Instead, [Construction Company] was acting as a prime contractor in constructing the buildings for [Land Owner], a consumer. Thus, under Rule 170, [Construction Company] should not have paid retail sales tax on the invoices for labor and materials because it purchased the labor and materials for resale.

We find ETA 276, upon which the Audit Division relied in including retail sales tax in the measure, to be distinguishable. The ETA states:

> Where Sales Tax is computed on a contract price which includes Sales Tax paid by the contractor, is there a duplication of Sales Tax allowing the contractor's customer a deduction from the measure of the Sales Tax for the Sales Tax paid by the contractor?
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> The taxpayer received from a contractor a billing on a time and materials basis which included Sales Tax on the full contract price. The contractor also included as a part of the contract price the amount of Sales Tax paid by the contractor on rentals of equipment. The taxpayer claimed that the Sales Tax was duplicated in that he paid Sales Tax twice on the same item.
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> Rule 170 requires prime contractors to collect from consumers the Sales Tax measured by the full contract price. RCW 82.04.050 includes within the definition of "retail sale" the renting or leasing of tangible personal property to consumers. The contractor was a consumer with respect to the equipment leased by him and was, therefore, liable for Sales Tax on the amount of the rentals paid. Thus the Sales Tax paid by the contractor was an expense which he recovered in his billing. The taxpayer, the contractor's customer, was required to pay Sales Tax on the gross contract price, irrespective of how the price was computed. The ultimate burden of the Sales Tax paid by the contractor was passed on to the taxpayer, but this normally happens in excise taxation and is not a grounds for relief from Sales Tax.

As discussed in the ETA, when a contractor rents certain equipment, the contractor is acting as a consumer and is personally liable for retail sales tax on the equipment rental. See RCW 82.04.050; 82.08.020. In contrast, as discussed in Rule 170, a prime contractor's purchase of labor and materials to construct a building for a consumer is a purchase for resale, and retail sales tax is not due on those purchases. Because retail sales tax was improperly paid, it should not be included in the measure, i.e., it was not an expense "incurred as a result of the contract" under Rule 170. This is similar to a situation in which the contractor purchases lumber for the construction of a home. If the contractor purchases too much lumber, returns the excess amount, and receives a credit for the amount returned, the credited amount is not included in the measure of the tax. As will be discussed below, the retail sales tax paid in error on the materials and labor will be credited, and the credited amount should not be included in the measure. The taxpayers'

petition is granted with respect to this issue. This issue is remanded to the Audit Division to recompute the measure of the tax to exclude the retail sales tax that was improperly paid on the invoices.

3. Whether the Audit Division Erred in Failing to Allow a Credit for Retail Sales Tax Paid to Materials Suppliers and Subcontractors in its assessment of Use Tax/Deferred Sales Tax against [Land Owner].

The Audit Division's position. The Audit Division allowed a credit for sales tax it determined [Construction Company] paid on the purchase of materials and subcontractor services for the construction of the buildings. The Audit Division noted that sales of materials which become part of the structure being built for resale are not subject to retail sales tax. See Rule 170. However, the Audit Division did not allow similar credits in the assessment against [Land Owner]. The Audit Division reasoned: "Based on the Department's position that [Construction Company] acted as a general contractor, the sales tax paid by the contractor is not an allowable deduction to the end consumer."

The taxpayers' position. The taxpayers argue that [Land Owner] made these payments, and he should receive credit for the sales tax he paid:

> If sales tax was paid to subcontractors and suppliers on the various projects, a fact that appears undisputed by the Department's auditor, credit for the sales tax paid should be allowed in the audit of [Land Owner], as well. (Total sales tax credits of $ . . . were allowed in the audit of [Construction Company].) The auditor has offered no explanation in the audit of [Land Owner] why credit for sales taxes previously paid has not been allowed.
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> Therefore, if the Department finds that [Construction Company] was acting as a general contractor, credit should be allowed in the audit and assessment of [Land Owner] for the sales taxes paid to subcontractors and suppliers by [Land Owner].

The taxpayers argue that the invoices were all paid from [Land Owner]'s personal checking accounts, and each of these accounts bore the project name.

Analysis. As discussed above, retail sales tax was not due on the invoices for materials and labor because the purchases were for resale from [Construction Company] to [Land Owner]. To the extent [Land Owner] paid these invoices, it did so on [Construction Company]'s behalf, and such payment did not change the character of the purchases from sales for resale. See Rule 223; WAC 458-20-102 (Rule 102).[5] Thus, the taxpayer's petition is granted with respect to this issue.

[5] Rule 102 provides:

> If the buyer [Construction Company] has not given a resale certificate, but has paid tax on all purchases of such articles and subsequently resells a portion thereof, the buyer must collect the retail sales tax from its retail customers [Land Owner] as provided by law. When reporting these sales on the excise tax return, the

This issue is remanded to the Audit Division to exclude from the deferred sales/use tax assessment against [Land Owner] the amount of retail sales tax [Land Owner] erroneously paid on invoices to [Construction Company] for labor and materials used in constructing the buildings for sale to [Land Owner].

We note that the Audit Division properly concluded that, to the extent [Construction Company] paid its own retail sales tax liabilities (as opposed to amounts it collected from [Land Owner] and remitted to the state), neither [Land Owner] nor [Construction Company] is entitled to credit for these amounts. See Det. No. 88-373, 6 WTD 427 (1988) (A contractor's payment of its own retail sales tax does not inure to the benefit of the customer, even though the customer may have actually "covered" or paid those costs in nonitemized payments. Any retail sales tax burden which was properly payable by the contractor in the course of the project would likewise not apply towards the taxpayer's burden.); ETA 276.

4. Whether the Audit Division Erred in Assessing against [Construction Company] Service B&O Tax with Respect to its Receipt of Management Fees and Retail Sales Tax and Retailing B&O Tax with Respect to its Receipt of Maintenance Income.

The Audit Division's position. The Audit Division assessed service B&O tax with respect to amounts it determined [Construction Company] received from management fees, but failed to report. The Audit Division determined that [Construction Company] earned this income from management fees for renting apartments and providing accounting services for [Land Owner]. The Audit Division stated:

> Like construction income, [Construction Company] posted and reported the income earned from the management fees on the income statement. . . . [Construction Company] and [Land Owner], an individual, operate as separate entities; management fees are taxable under the service & other B&O tax.

The Audit Division cited RCW 82.04.290 and WAC 458-20-224 (Rule 224) in support of this portion of the assessment.

The Audit Division also assessed retailing B&O tax and retail sales tax with respect to income "posted on [Construction Company]'s income statement" for repairs, yard maintenance, and other miscellaneous jobs at the buildings. Like the management fee income, [Construction Company] reported none of this income for Washington tax purposes. The Audit Division cited WAC 458-20-173 (Rule 173) in support of this portion of the assessment.[6]

> buyer [Construction Company] may then claim a deduction in the amount the buyer paid for the property thus resold.

(Bracketed information added.)

[6] We note that Rule 173 addresses repairs, etc. to personal property, not real property. However, the repair of structures is properly subject to retail sales tax and retailing B&O tax, when such work is performed for consumers. See Rule 170. Janitorial services, on the other hand, are not subject to the retail sales tax and retailing B&O tax.

The taxpayers' position. With respect to the management income, the taxpayers explain:

> [Land Owner] owned various facilities as an individual and he managed these facilities as well. [Land Owner] did not contract with [Construction Company] for the management services and any so-called management fees allegedly paid to [Construction Company] were, instead, merely reimbursements for moneys paid to [Land Owner] for his own management services, and were not services rendered by [Construction Company].

With respect to the maintenance income, the taxpayers explain: "[T]he maintenance was incurred by [Land Owner] himself and he was reimbursing [Construction Company] for these costs."

Analysis. [Construction Company] reported the management and maintenance income on its income statements. The taxpayers' explanation of the inclusion of the management income on the statements as "reimbursements for moneys paid to [Land Owner] for his own management services" is questionable, at best. Similarly, we find the explanation that [Land Owner] was reimbursing [Construction Company] for maintenance costs to be questionable.

The Audit Division asserts that this income was reported on [Construction Company]'s income statements, and the taxpayers do not refute that assertion. Further, the taxpayers have provided no credible evidence as to why this income, which was included on [Construction Company]'s income statements, should be excluded from [Construction Company]'s income for Washington tax purposes. "[T]he Department consistently assesses taxes according to what was done, not on the basis of what could have been done." Det. No. 90-108, 9 WTD 231 (1990). Because the taxpayers have failed to meet their burden of proving that this income was properly excluded from tax, the taxpayers' petition is denied with respect to this issue. However, if the taxpayers have evidence supporting their argument that this income is excludable, or was never earned by [Construction Company], the taxpayers may present this evidence to the Audit Division within 60 days of this decision.

5. Whether the Audit Division Erred in Assessing Use Tax on [Construction Company]'s Purchases of Consumable Supplies and Capital Assets.

The Audit Division's position. The Audit Division assessed use tax on [Construction Company]'s purchases of consumable supplies, capital assets and "other acquisitions which were not made on a routine or recurring basis" on which retail sales tax was not paid. The Audit Division stated that it reviewed all purchases by [Construction Company] for the audit period, and the purchase invoices for the items at issue did not reflect retail sales tax being charged and [Construction Company] did not report use tax on its Washington State Excise Tax Returns during the period at issue. Further, according to the Audit Division, when it gave the assessment

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See Rule 170; RCW 82.04.050. WAC 458-20-172 (Rule 172) provides that charges for janitorial services are taxed under the service classification (RCW 82.04.290).

schedules to [Construction Company] for review, [Construction Company] provided no proof that sales or use tax was paid on any item listed on the schedules.

The taxpayers' position. The taxpayers argue that tax has been paid on these items.

Analysis. The use tax applies to a consumer's use of tangible personal property within this state where the consumer has not paid retail sales tax under chapter 82.08 RCW with respect to the property used. See RCW 82.12.020; Rule 178. The taxpayers failed to provide any proof or substantive argument that [Construction Company] paid retail sales tax or use tax with respect to the property at issue or that [Construction Company] did not use the property as a consumer. As such, the taxpayers' petition is denied with respect to this issue. However, if the taxpayers have evidence supporting their argument that tax was paid with respect to the items at issue or that [Construction Company] did not use the property as a consumer, the taxpayers may present this evidence to the Audit Division within 60 days of this decision.

DECISION AND DISPOSITION:

The taxpayers' petitions are granted in part and denied in part, as set forth above. The taxpayers' assessments are remanded to the Audit Division for adjustment consistent with this decision.

Dated this 31st day of May 2001.