Cite as Det. No. 04-0093R, 24 WTD 297 (2005)

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. 04-0093R
. . .	)	Registration No. . . .
	)	Document No. . . .
	)	Audit No. . . .
	)	Docket No. . . .

RULE 171; RCW 82.12.020; ETA 004, ETA 365: RETAIL SALES TAX – USE TAX – PUBLIC ROAD CONSTRUCTION – TAILGATE SPREADING OF MATERIALS – CONSUMER. A public road contractor that incorporates road materials into the roadway by having its materials supplier deliver the materials by tailgate spreading, is the consumer of the materials, and retail sales tax applies to the sale of the materials to the contractor. The manner of delivery, by tailgate spreading, does not, by itself, make the materials supplier the consumer of the materials. Mere hauling and tailgate spreading of materials on public road jobs is not public road construction. The public road contractor who consumes the materials in the performance of its contract to build the road is the person liable for retail sales tax or use tax on the materials.

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.

Prusia, A.L.J. – . . . (Taxpayer), a public road construction contractor, requests reconsideration of Det. No. 04-0093, in which we concluded that Taxpayer consumed, in the performance of its contracts, the road materials (rock and aggregate) that its materials suppliers delivered by tailgate spreading, and was liable for retail sales tax or use tax on the materials. Taxpayer continues to argue that its materials suppliers were the "consumers" of materials delivered in that manner and therefore liable for the tax. We find no error in Det. No. 04-0093, and deny reconsideration.[1]

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

ISSUES

1. Were the materials suppliers that delivered the road materials by tailgate spreading public road construction contractors or merely materialmen?

2 Was Taxpayer the consumer of the road materials its suppliers delivered by tailgate spreading?

FINDINGS OF FACT

Taxpayer, . . . , seeks reconsideration of Det. No. 04-0093, in which we sustained the assessment of use tax and/or deferred retail sales tax on rock materials that were incorporated into public road projects on which Taxpayer was the principal contractor.

Taxpayer asserts there were mistakes of law in Det. No. 04-0093 that necessitate reconsideration. The facts presented below are drawn from Det. No. 04-0093.

Taxpayer . . . engages in public and private road construction. The public road construction activities . . . during the period January 1, 1999 through September 30, 2002 (audit period) are the subject of this appeal.

Taxpayer contracted with municipal corporations or political subdivisions of the state to build roads owned by those public bodies. Taxpayer purchased rock and aggregate for the road surface from suppliers of such materials. Taxpayer gave the suppliers resale certificates, and did not pay retail sales tax on the purchases.[2] Taxpayer orally instructed the suppliers to deliver the materials via "tail-gate spreading," *i.e.*, to spread the material onto the roadway through the dump truck's tailgate, rather than dumping it into a pile. Taxpayer asked the suppliers to tail-gate spread the materials to an approximate thickness. After the suppliers delivered the material in that manner, Taxpayer's employees followed behind them to blade and steamroll the material to the specifications required by the public road contract. . . .

The Audit Division of the Department of Revenue (DOR) examined Taxpayer's books and records concerning its road construction activities for the audit period. On August 21, 2003, the Audit Division issued a tax assessment, Document No. . . . . That document assessed use tax and/or deferred retail sales tax on materials Taxpayer purchased that were placed into public road projects on which Taxpayer was the contractor, on which Taxpayer had not reported or paid retail sales tax or use tax, *i.e.*, on purchases of materials delivered via tailgate spreading. The amount of the assessment, including interest and assessment penalty, was $ . . . .

Taxpayer protested the assessment in its entirety, contending the consumer of the materials was the seller/deliverer (materials supplier), not Taxpayer, and the materials supplier was the person

[2] The giving of resale certificates is a fact newly added by Taxpayer on reconsideration.

responsible for reporting and paying retail sales tax or use tax. Det. No. 04-0093 upheld the assessment.

ANALYSIS

Constructing roads owned by municipal corporations, political subdivisions of the state, or the United States is generally referred to as "public road construction." Such construction is treated differently, for excise tax purposes, than is construction of private roads or state roads. The latter is treated as a retail sale to a consumer; public road construction is not treated as a retail sale.[3]

WAC 458-20-171 (Rule 171) explains the taxation of public road contractors. It provides that "contractors" on public road construction projects are taxable under the public road construction B&O classification upon their total contract price. The retail sales tax applies to the sale to public road construction contractors of all materials used or consumed in the performance of their contracts. The use tax applies to the use by all contractors of all materials upon which the retail sales tax has not been paid.

Rule 171 defines a public road "contractor" as follows:

> The word "contractor" means a person engaged in the business of building, repairing or improving any street, place, road, highway, easement, right of way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle which is owned by a municipal corporation or political subdivision of the state or by the United States and which is used or to be used primarily for foot or vehicular traffic, either as a prime contractor or as a subcontractor. It does not include persons who merely sell or deliver road materials to such contractors or to the public authority whose property is being

[3] Statutes applicable to private and state road construction include the following. RCW 82.08.020 imposes the retail sales tax "on each retail sale in this state." RCW 82.04.050(2)(b) defines "retail sale" as including the "constructing, repairing, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers . . . ." RCW 82.04.190(4) defines "consumer" as including "[a]ny person who is an owner, lessee or has the right of possession to or an easement in real property which is being constructed, repaired, decorated, improved, or otherwise altered by a person engaged in business, excluding only (a) municipal corporations or political subdivisions of the state in respect to labor and services rendered to their real property which is used or held for public road purposes . . . ." RCW 82.04.250 imposes B&O tax on persons engaging in retail activity.

Statutes applicable to public road construction include the following. RCW 82.04.050(7) expressly excludes from the definition of "retail sale" the "sale of or charge made for labor and services rendered in respect to the building, repairing, or improving of any street, place, road, highway, easement . . . which is owned by a municipal corporation or political subdivision of the state or by the United States. . . ." RCW 82.04.190(4) expressly excludes from the definition of "consumer" municipal corporations or political subdivisions of the state in respect to labor and services rendered to their real property which is used or held for public road purposes. RCW 82.04.190(3) expressly includes in the definition of "consumer," "[a]ny person engaged in the business of contracting for the building, repairing or improving of any street, place, road, highway . . . which is owned by a municipal corporation or political subdivision of the state of Washington or by the United States . . . in respect to tangible personal property when such persons incorporates such property as an ingredient or component of such publicly owned street . . . by placing or spreading the property in or upon the right of way of such street . . . ." RCW 82.04.280 is the B&O tax statute that applies to persons engaging in the business of public road construction.

> improved. It also does not include persons who construct streets, roads, etc. owned by the state of Washington.

Excise Tax Advisory 004.08.12.171 (ETA 004) specifically explains the retail sales and use tax responsibilities of public road construction contractors relating to the sand, gravel, and similar materials they apply in the performance of a road construction project. It states:

> A person who applies sand, gravel, rock and similar materials in the performance of a contract to construct or repair streets, roads, highways, bridges, etc. which are owned by a municipal corporation or political subdivision of the state of Washington or by the United States is the consumer of such materials as a public road contractor. Sales of sand, gravel, rock and similar materials to such persons are subject to the retail sales tax.

Excise Tax Advisory 365.04.172 (ETA 365) explains as follows, regarding dump truck operators:

> 5. Excavating, filling, hauling and tailgate spreading to specification on public road jobs (except state owned roads) is taxed under the Public Road Construction classification of the business and occupation tax. When these activities are performed in connection with state owned roads, tax is due under the Retailing classification and retail sales tax (or Wholesaling classification if done as a subcontract.) . . . .
>
> 6. Mere hauling and tailgate spreading is taxed under the Motor or Urban Transportation classifications of the public utility tax unless the activity constitutes public road construction under Rule 171.

At issue in this appeal is whether Taxpayer, or the person who sold and delivered road materials via tail-gate spreading, was the "contractor" who consumed the materials in the performance of a public road construction contract. . . .

On reconsideration, Taxpayer asks us to focus on the definition of "consumer" in RCW 82.04.190, rather than on who did the construction. Taxpayer argues as follows. The reason a public road construction contractor is liable for retail sales tax or use tax on materials it uses or consumes in the performance of its contract is because it, rather than its public customer, is defined as the "consumer" of the materials. RCW 82.04.190(3) expressly includes a public road construction contractor in the definition of "consumer," as follows:

> Any person engaged in the business of contracting for the building, repairing or improving of any street, place, road, highway . . . which is owned by a municipal corporation or political subdivision of the state of Washington or by the United States and which is used primarily for foot or vehicular traffic . . . in respect to tangible personal property when such person incorporates such property as an ingredient or component of such publicly owned street, place, road, highway . . . by installing, placing or spreading the property in or upon the right of way of such street, place, road, highway . . . .

Taxpayer argues its activity with respect to the materials delivered by tailgate spreading did not fit that statutory definition. Taxpayer did not incorporate such property as a component of the roadway "by installing, placing or spreading the property in or upon the right of way." Rather, the suppliers of the materials were the ones who spread the materials upon the right of way. Once the material was already spread on the right of way, the next party who dealt with the material, Taxpayer, could not have been the consumer, under the definition. If Taxpayer was not the "consumer," it was not liable for retail sales tax or use tax on the property.

Taxpayer argues that since someone surely had to be liable for retail sales tax or use tax on the rock and aggregate which were incorporated into the roadway, a reasonable reading of RCW 82.04.190(3) and Rule 171 is that whoever installs, places, or spreads tangible personal property upon such a roadway is "engaged in the business of contracting for the building, repairing or improving of any street" *i.e*, is a public road construction "contractor," and therefore is the person liable for retail sales tax or use tax. Taxpayer argues the statute puts liability on the person who actually places the material in the right of way. Taxpayer argues this interpretation makes sense, because the party who physically places or spreads the property upon the roadway is in fact one of the parties building the roadway. It is in the business of building the roadway.

Taxpayer's interpretation is backward. RCW 82.04.190(3) does not define who is a public road construction contractor. RCW 82.04.190(3) merely states that a person who is engaged in the business of contracting for building a public roadway is the consumer of the tangible personal property it incorporates into the roadway.

The determinative questions are who were the public road construction contractors on the projects, and what property did the contractors consume in the performance of their public road construction contracts. There is no dispute that Taxpayer was the primary contractor. It contracted with the public owners to build the roadways. Taxpayer asserts that its materials suppliers were subcontractors on the projects, but has submitted no evidence that its suppliers agreed to anything beyond delivering the materials as requested by Taxpayer. There is no evidence they took on the responsibility to spread the materials to the construction contract specifications. Mere tailgate spreading is not taxed as public road construction. ETA 365.

The courts have clearly marked and enforced a distinction between subcontractors and materialmen. *Neary v. Puget Sound Engineering Co.,* 114 Wash. 1, 194 P. 830 (1921); *Finlay v. Tagholm,* 69 Wash. 341, 113 P. 1083 (1911); *Baker v. Yakima Canal Co.,* 77 Wash. 70, 137 P. 342 (1913). A "subcontractor" is defined as "one who takes from the principal contractor a specific part of the work." *Neary,* 114 Wash. at 8; *YMCA of North Yakima v. Gibson,* 58 Wash. 307, 108 Pac. 766 (1910); *Baker,* 77 Wash. at 76; *Farmers' Loan & Trust Co. v. Canada & St. L. Ry .Co.,* 127 Ind. 250, 26 N.E. 784 (1891). Rule 171's definition of public road "contractor" incorporates this distinction. To conclude that when a materials vendor delivers materials by spreading them onto the roadway out the back of the dump truck, at a road contractor's request, rather than dumping them in a pile, the vendor has taken from the road contractor a specific part

of the work the road contractor has undertaken to build, would eviscerate the distinction between subcontractors and materialmen.

We disagree with Taxpayer's assertion that, as a factual matter, Taxpayer did not place or spread the road materials that were delivered by tailgate spreading. We find that Taxpayer placed and spread the materials by having its vendors deliver the materials in a certain manner and then itself completing the placement and spreading to the contract specifications. Taxpayer was a person engaged in the business of contracting for public road construction that incorporated the road materials as an ingredient of the roadway by placing or spreading the materials in or upon the roadway, and therefore was the "consumer" of the materials under RCW 82.04.190(3).

The retail sales tax applied upon the sale to Taxpayer of the road materials that were delivered by tailgate spreading, and the use tax applied to Taxpayer's use of materials upon which the retail sales tax had not been paid. Rule 171.

We find no mistake of fact or law that necessitates reconsideration of Det. No. 04-0093, and therefore deny Taxpayer's petition for reconsideration.

DECISION AND DISPOSITION

Taxpayer's petition for reconsideration is denied.

Dated this 24th day of November 2004