Cited as 1 WTD 309 (1986)

November 7, 1986

. . . FINAL DETERMINATION

No. 85-231A

Re: . . .
. . .

[1] RULE 224 (WAC 458-20-224) -- BUSINESS & OCCUPATION TAX -- SERVICES --AFFILIATES -- EMPLOYEES -- COMMON PAYMASTERS. Persons who carry employees on their payroll and perform all reporting of such employees to federal and state regulatory agencies are liable for Service business tax upon any amounts recovered from providing such employees for use by affiliated companies. Accord: Valley Cement Construction, Inc. v. Department of Revenue, BTA Docket 71-70 (1973), affirmed, Court of Appeals, Division 1, No. 3302-1 (1976), unpublished.

[2] RULE 170 (WAC 458-20-170) -- PRIME CONTRACTORS OR SPECULATIVE BUILDERS -- CONSTRUCTING ON OWN LAND -- ATTRIBUTES OF OWNERSHIP. The attributes of ownership of real estate upon which construction work is being performed will be examined, under the provisions of Rule 170, to determine who owns the land, notwithstanding title of record, and for determining the status of the construction work as prime contracting or speculative building. Riley Pleas v. State, 88 Wn.2d 933 (1977) distinguished.

[3] RULE 170 (WAC 458-20-170) -- BUSINESS AND OCCUPATION TAX -- RETAIL CONSTRUCTION -- GOVERNMENT CONTRACTING -- CONSUMERS -- CONSTRUCTION FOR HOUSING AUTHORITIES. Under Rule 170, persons who perform construction work upon land of or for others are making retail sales thereof except such construction performed upon land of or for housing authorities constitutes government contracting upon which the contractors and subcontractors are consumers of materials but not subcontract labor.

These 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.

We have now thoroughly reviewed the petition of the above referenced taxpayers submitted on October 16, 1985. It seeks review by the Acting Director of the Department of Revenue on appeal of specific findings and conclusions in Determination No. 85-231, which was issued on September 25, 1985. Our review of this petition and the Determination, as well as the entire excise tax file and the record of this case, reveals that no valuable purpose would be served the taxpayers or the state of Washington by engaging in any further oral hearing of these matters.

NATURE OF ACTION:

Business and occupation tax under various classifications was assessed in connection with construction labor payroll charges made by the taxpayer, . . . , against its various construction company affiliates.

Also, retail sales tax was assessed against . . . upon the value of labor and services rendered by the affiliate, . . . , in connection with the construction of turnkey projects (low income housing). The projects were constructed by . . . Company for various County and City Housing Authorities. This same tax was assessed against . . . Company under a separate assessment, also appealed.

Determination 85-231 sustained the aforementioned tax assessments based upon findings and conclusions that:

1) The payroll charges made by . . . were for its own construction employees provided to its construction subcontractor affiliates, and,

2) . . . Company constructed the turnkey projects upon its own land, as a speculative builder, so that its construction affiliates were performing retail construction work for . . . Company.

The taxpayers have further appealed these findings and conclusions.

FACTS AND ISSUES:

Faker, Sr. A.L.J.--The audit and tax assessment details of this case are fully and properly set forth in Determination 85-231 and are not restated here.

The factual findings of the Determination, upon which the taxability conclusions are based, are in serious dispute. First, the taxpayers reiterate their arguments that the construction worker employees are, in fact, employees of the affiliate construction companies and that . . . Company acted only as a common paymaster for the affiliates. Thus, the common paymaster should not be taxed as if it were the employer, providing employees to the affiliates for a charge, to wit, the reimbursed payroll.

Secondly, the taxpayers challenge the conclusory factual finding that, during the periods of construction, . . . Company owned the land upon which turnkey housing projects were constructed. The question of land ownership determines the proper tax classifications and measures for construction work performed on the land.

There are, therefore, two issues for our resolution. (These matters are presented here in the same order as they appear in Determination 85-231, but the reverse order in which they appear in the taxpayers' petition to the Acting Director.)

Issue No. 1.

Did amounts received by . . . Company from its construction company affiliates represent payment for providing construction employees to the affiliates or were they merely reimbursements of payroll and related payroll expenses advanced by . . . Company as a common paymaster for these affiliates?

Issue No. 2.

Did . . . Company construct turnkey projects upon land owned by it, as a speculative builder, or did it construct such projects as a prime contractor upon land of or for housing authorities?

The resolution of these two issues is dispositive of the various tax liabilities under the Revenue Act and the rules relating thereto.

TAXPAYERS' EXCEPTIONS:

The taxpayers' petition reiterates the arguments made at the original hearing and challenges the Department's conclusory factual findings. The taxpayers' positions with respect to both issues set forth earlier are contained in Determination 85-231. The "TAXPAYERS' EXCEPTIONS" portion of that Determination is incorporated herein, at this point, by this reference. In addition, the taxpayers disagree with the rationale of the

Determination in several specific respects. In regard to the first issue the petition contains the following pertinent comments:

> In its Petition for Correction of Assessment with respect to Assessment No. . . . , . . . C requested the elimination of business and occupation and retail sales taxes totaling $6,767 as detailed in Schedules II, III and VII of the auditor's report. . . . C appeals this holding of the Determination as incorrect, based on the Administrative Law Judge's failure to consider the factual distinctions between the Valley Cement case and that of . . . C.
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> . . . C is affiliated with four other entities: . . . Inc. ("DF"); . . . . Inc. ("DA"); . . . Inc. ("DW"); and . . . Inc. ("DPM"). Both DF and DA are construction companies which do no speculative work. DW only does single family development work in Kitsap County. DPM manages apartments for numerous partnerships where FHA contracts require on-site managers which, under Washington law, must be supervised by a licensed broker. . . . C does some single family development work. In addition, it provides the affiliates with credit and bookkeeping services for which it receives no fees. Sometimes employees of DA and DF, which conduct similar businesses, are exchanged by those two affiliates, but no employees are exchanged among the other affiliates. Each affiliate separately charges its customers for labor on each job.
>
> For purposes of economy and administrative efficiency, . . . C serves as common paymaster for the affiliates without fee. As an incident to this service, . . . C advances funds to cover each affiliate's payroll expense, and is reimbursed by that affiliate for such advances. At all times the affiliate remains ultimately liable to the employee. These reimbursements are excluded from business income by WAC 458-20-111 ("Rule 111").
>
> The auditor characterized these transactions as sales of the labor and services of its employees by . . .C to its affiliates. In the Determination the Administrative Law Judge, relying on Valley Construction, Inc. v. Department of Revenue, State of Washington Board of Tax Appeals, Docket No. 71-70 (1973), held that reimbursement of payroll advances by affiliates to . . . C is subject to the business and

occupation tax under the Service and Other Activities classification. The Administrative Law Judge erred by failing to distinguish Valley Cement on the basis of the facts presented.

The advances and reimbursements at issue in relation to . . . C are distinguishable from those involved in Valley Cement in several ways that are dispositive.

First, the affiliates carry the employees on their books and records and charge their payroll as an expense to each job. Second, payments to federal and state agencies with respect to withholding tax, industrial insurance, unemployment compensation and social security were made on behalf of the respective affiliates. Third, there is no formal contract, as in Valley Cement, stipulating that . . . C is the employer. The understanding of the parties is that each employee works for the respective affiliate whose job the employee is assigned to. Fourth, the affiliates always remained ultimately liable to the employees for all payroll expenses. And fifth, the employees were hired, fired and supervised by foremen of the respective affiliates.

The Board of Tax Appeals, in Valley Cement based its holding on the specific facts presented, including the intent of the parties. The facts in . . . 's operation clearly indicate that . . . C was in the business of providing administrative services, not the business of selling the labor of any employees of its own. Funds advanced by . . . C to pay the employees of its affiliates were expenses, for which each affiliate remained ultimately liable to its employees. These expenses were booked by the affiliates as expenses to each respective job. As such, reimbursement of such advances to . . . C are excluded from business income by virtue of Rule 111.

To be deemed the employer of the workers whose payroll it advanced, . . . C would have to come under the common law definition of employer. It does not. The laborers are hired, fired and supervised by foremen of each respective affiliate and . . . C is never liable to a laborer for his or her payroll. The Internal Revenue Code (the "Code") requirement that . . . C list itself as the employer of those whose salaries it is paying, for purposes of the federal withholding tax, is in derogation of the common law definition of employer and of no consequence. Under the Code the "employer"

> is not the one who controls the employee but simply the one who pays because only the payor can withhold income tax. Code § 3401(d)(1). Compare Rev. Rul. 66-162, 1966-1 C.B. 234 and Rev. Rul 69-316, 1969-1 C.B. 263. The fact that the . . . C listed itself as employer for FICA and FUTA purposes is also similarly meaningless since, although the common law employer is supposed to file for FICA and FUTA, if someone other than the common law employer reports withholding tax, that person may file FICA and FUTA returns as well.

The taxpayers asserts that it would not provide employees for others on a nonprofit basis. Thus, because the amounts received covered only the exact payroll and payroll costs, it is obvious that they were merely reimbursements of advances.

Regarding the second issue, the taxpayers assert that Determination 85-231 fails to apply the specific provisions of WAC 458-20-170 (Rule 170). The taxpayers stress that ownership of the land in this case was determined by simple reference to how "title" was held during the construction period. Though the taxpayer held title, it asserts that it did not possess the attributes of ownership of the land which are set forth in Rule 170 as being determinative of ownership for excise tax purposes. Rather, Determination 85-231 relies almost exclusively upon the decision in Riley Pleas v. State, 88 Wn.2d 933 (1977). The taxpayers assert that the Pleas case is highly distinguishable from the taxpayers' case here. In the Pleas case the question of ownership of the land was not before the Court. It was never questioned that the contractor owned the land. Here, however, that question is precisely the pivotal issue. Moreover, Rule 170 clearly contemplates that that question should not be resolved, for excise tax purposes, simply by looking at the title holder. In fact, the rule sets forth four other criteria, ignored in the Determination, which will determine the ownership of land being developed in cases where it is argued that ownership is in some person other than the title holder. The rule did not contain these criteria at the time of the Riley Pleas tax assessment.

The taxpayers' petition includes the following:

> WAC 458-20-170 ("Rule 170") defines the term "speculative builder" as follows:
>
> > As used herein the term "speculative builder" means one who constructs buildings for sale or rental upon real estate owned by him. The attributes of ownership of real estate for purposes of this rule include but are not limited to the following: (1) The intentions

> of the parties in the transaction under which the land was acquired; (2) the person who paid for the land; (3) the person who paid for improvements to the land; (4) the manner in which all parties, including financiers, dealt with the land.

The Taxpayers' position is that . . .C did not "own" the real estate for purposes of Rule 170 and therefore . . . C is not a "speculative builder." The mere fact that . . . C held legal title to the real property and the right of occupancy until settlement of the turnkey contract is clearly not dispositive of ownership under Rule 170. Rule 170 quite clearly demands a more rigorous analysis that balances various factors and seeks a determination of equitable ownership, taking into account the economic relationships involved. If legal title and possession were adequate to determine ownership, there would be no need for Rule 170.

The first element listed in Rule 170 is the intention of the parties in the transaction under which the land was acquired. . . .C never sought or acquired a site until the invitation for bids was published by the housing authority. The sites acquired to perform turnkey contracts were of no use to . . .C for any other purpose. A comprehensive plan promulgated by the U.S. Department of Housing and Urban Development (HUD) specifies the precise areas where the housing authorities must target their projects. The persons who sold the property to DDC did so with the express understanding that they were, in fact, selling the land to the housing authority for construction of low income housing. The earnest money agreements entered into by the sellers and . . .C were made expressly contingent upon the award of the housing authority turnkey contract to . . .C. If the turnkey contract wasn't awarded to . . .C, the land reverted to the seller. Further, the slow track turnkey contracts provided that DDC was obligated to sell the land to the housing authority in the event that the rest of the turnkey contract was not performed. In all cases the housing authority, not . . .C, enjoyed the benefit of any appreciation in the land since . . .C had contracted to sell the land to the housing authority for an amount equal to . . . C's cost. The intent of each party involved in the land acquisitions was that the sale to . . . C was a sale to the housing authority through the agency of . . . C. The seller did not release the land unless it was assured the land would be used for the

housing project. In some turnkey contracts . . . C was bound to turn over possession to the housing authority even if the project was not built. And in each case the land was passed through at cost, the housing authority enjoying the benefit of appreciation rather than . . . C.

The second and third elements of the test require identification of who actually paid for the land and improvements. In each case credit was not made available by the interim lender for acquisition of the land until the turnkey contract was awarded to . . . C and assigned by . . . C to the interim lender. Upon assignment, the interim lender required that the housing authority agree to accept performance of the turnkey contract by the lender if . . . C should go into default. The land was therefore purchased with the credit of the housing authority. . . . C did not actually pay for the land. The funds for purchasing materials, labor and services for constructing improvements on the land were also purchased with the credit of the housing authority. The only item of value pledged in the entire transaction was the obligation of the housing authority on the turnkey contract itself. Turnkey projects make no economic sense without subsidization by the housing authority and HUD. The housing authorities own the land and improvements because the contractor cannot obtain financing for such a project unless it is acting as the agent of the housing authority. The interim lenders know they are lending money to the housing authorities. It is for this reason that the lenders offer rates that are considerably more favorable than a speculative builder could obtain. The interim financing is usually offered at only one point over prime, rather than three points over prime. Rule 170 does not attribute ownership to a fee title holder who did not actually pay for either the land or the improvements to that land.

Finally, Rule 170 requires an examination of the manner in which all parties, including financiers, dealt with the land. No distinction is made at the federal statutory and regulatory level between projects developed by the turnkey method and others. All are treated as government contracts. Once . . . C made a commitment to enter into a turnkey contract, . . . C could not in any event retain possession of the land on which the turnkey contract is to be performed. As discussed above, the land reverts to the original owner

> if the turnkey contract is not executed. If the turnkey contract is performed, the land, purchased with the credit of the housing authority, must be turned over to it. In that case, property taxes are prorated and allocated to the housing authority from the date that . . . C purchased the land. During construction, . . . C does not have exclusive occupation. Representatives of the housing authority and HUD inspect the premises and direct the project. If for any reason . . . C does not perform the turnkey contract, it cannot retain the land, as a speculative builder would, but immediately loses possession. Under interlocking contractual relationships, the interim lender, the housing authority and HUD are obligated to remove the contractor and complete the project. Ownership cannot be attributed to one who under no circumstances has the power to retain possession.

The taxpayers submitted the documentary evidences referred to above.

Alternatively, the taxpayers argue that when construction work is performed for county or city housing authorities the construction contractor is always the consumer of tangible personal property, but not subcontract labor, utilized in performing such construction work, under the provisions of RCW 82.04.190 as amended in 1975. Under this statutory scheme it is immaterial who owns the land upon which the construction work is being performed in such cases. The taxpayers' petition states:

> In the Determination the Administrative Law Judge also completely ignored Taxpayer's arguments regarding the effect of the 1975 amendments contained in RCW 82.04.050(7) and RCW 82.04.190(6). Prior to July 1, 1975, the sales tax law made no distinction between government contract construction and construction for private consumers. In either case, the owner was the "consumer" on whom the tax burden fell. Thus, RCW 82.04.190 states:
>
> > 'Consumer' means the following: . . . (4) Any person who is an owner . . . or has the right of possession to . . . real property which is being constructed . . . by a person engaged in business. . . .
>
> The flaw in this prior law scheme was that in the case of construction on real property owned by a housing authority, the tax burden was allocated to an entity that was immune from taxation.

In 1975 the State Legislature sought to remedy the aforementioned flaw by enacting a comprehensive statutory framework for the sales tax treatment of all government building contracts. Chapter 90, Washington Laws, 1975, lst Ex. Sess. amended RCW 82.04.190 by adding paragraph (6) which provides that "consumer" means the following:

> Any person engaged in the business of constructing . . . new . . . buildings . . . upon . . . real property of or for the United States . . . or a county or city housing authority . . . . 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 . . . by such person. [Emphasis supplied.]

Under this new statutory scheme, in the context of government housing contracts, the contractor is always the consumer, regardless of the method of contracting, but only on purchases of materials -- not on labor or services.

The State Legislature carefully drafted these new provisions to apply to both turnkey and other government contracts by extending the definition of retail sale to construction on real property "of or for" housing authorities. When, as required by its turnkey contract, a government contractor temporarily holds title to the real property on which it is constructing buildings, it still is performing the construction contract for a housing authority. Ownership of the real property is irrelevant, regardless of whether that ownership is determined by focusing on fee title (as the Administrative Law Judge decided) or by reference to Rule 170 (as Taxpayers argue). The State Legislature used the term "for" in its common meaning, which does not involve the element of ownership.

Riley Pleas and ETB 449.12.170, relied upon by the Administrative Law Judge, involved the old statute, i.e., before the addition of the new "of or for . . . a county or city housing authority" language. Riley Pleas involved a taxpayer who constructed housing for a housing authority pursuant to a turnkey contract. The taxpayer argued that no sales tax was due since he was

> not the "consumer," i.e., the owner of the materials and services. Without focusing on Rule 170, the court held that the taxpayer was the owner and therefore the consumer. After the amendments, however, the issue does not stop there. Even if a contractor is an "owner," he is exempt from tax on services where he constructs "for" a housing authority.

Finally, the taxpayers assert that if the taxes are sustained, as assessed, such treatment of turnkey construction contractors should be given prospective application only.

DISCUSSION:

Issue No. 1.

The taxpayers have presented no new or different evidence or authorities which were not fully considered by the Administrative Law Judge and treated in Determination 85-231, except to assert that the decision in Valley Cement, supra, is distinguishable. We find that the decision is not distinguishable and is controlling in this case.

[1] The taxpayers propose five respects in which they feel the Valley Cement case is significantly different from theirs.

1. The taxpayer's affiliates carrying the employees on their books and records and charge their payroll as an expense of each job.

However, there is no indication in the Board of Tax Appeals Order that Valley Cement did otherwise. The tax liability of Valley Cement did not, and could not, turn upon the vagaries of how the affiliates performed their internal accounting. The claimed distinction here was not even remotely considered by the Board in its order, nor was any evidence submitted concerning the manner in which internal accounting was performed by the affiliates. Such information is neither pertinent nor even helpful in resolving the issue before us here.

2. Payments to federal and state regulatory agencies for withholding tax, industrial insurance, unemployment compensation and social security were made on behalf of the affiliates.

However, the same representation was made and strenuously argued in the Valley Cement case. In fact, in the Valley Cement case there was even a written agreement that it was reporting to regulatory agencies only on behalf of the affiliates. Rather than being a significant distinction between these two cases,

this feature of the arrangements is a significant similarity of them.

3. There is no written agreement between the companies in this case, as there was in Valley Cement; also, the parties understood that the employees worked for the affiliates, not for . . . Company.

Though the agreement was not written in this case, the arrangement was precisely the same. The evidence reveals that . . . Company did exactly the same thing in regard to employees who worked, variously, for different affiliates as did Valley Cement with its employees. Both companies determined how and for whom the employees would work on respective construction jobs. The Board's order in Valley Cement expressly recites that, "(t)estimony indicated that the workmen considered themselves to be employees of the corporation for whom they performed services." Nevertheless, the Board ruled that the substantive facts of the employee arrangement prevailed over such subjective intentions and claimed understandings. The key was that the appellant carried the employees on its payroll, actually paid them, and reported them as its employees for regulatory purposes. Obviously, such treatment must be given great weight in resolving the issues. Otherwise any person can claim that workers who are treated in all visible and apparent ways as its own, are in reality someone else's employees, and thus seek to avoid all sorts of liabilities and duties attendant to hiring and using employees in the workplace, including tax liabilities.

4. The affiliates always remained ultimately liable to employees for all payroll expenses.

The facts of this case simply do not support this gratuitous legal conclusion. There is no evidence whatever that any enforceable payment liability existed between the affiliates and workmen who were reported as employees of . . . Company and paid on that entity's payroll vouchers. Again, this position of the taxpayer is precisely the argument posited by Valley Cement and does not represent a significant distinction from that case.

5. The employees were hired, fired and supervised by foremen of the respective affiliates.

This too was an argument made in the . . . case. The Board noted that it was, " . . . counteracted by the fact that the supervisors and foremen were also on the payroll of the appellant." Determination 85-231 recites that, "(t)his is precisely the case with . . . C." There is absolutely no evidence to the contrary.

In general, the five claimed bases for distinguishing the Valley Cement case from the taxpayers' case here are nonexistent. To simply reargue the same positions in different ways does not create significant distinctions. We adhere to the conclusions of law announced in the Valley Cement order of the Board of Tax Appeals and, under the facts of this case, we find those conclusions to be dispositive.

Finally, the taxpayers have failed to establish any entitlement to the deduction for advances and reimbursements as provided under WAC 458-20-111 (Rule 111). The applicability of this rule has been claimed without further, specific argument. However, on its face, this rule has no applicability in cases where the party claiming relief under its provisions is the party primarily liable for making payment. The taxpayers' unsupported claim to the rule's application, without any referenced authority, merits only this summary response.

For all of the foregoing reasons, as well as those expressed in Determination 85-231, we must deny the taxpayer's petition on this issue.

Issue No. 2.

[2] After a thorough review of the record of this case, including Determination 85-231 and the taxpayers' petition for review, we are convinced that the provisions of WAC 458-20-170 (Rule 170) should have been applied. By simply ruling that this issue was completely controlled by the decision in the Riley Pleas case, supra, the question of who owned the land upon which housing authority projects were being constructed was effectively ignored. In the Riley Pleas case the question of land ownership was not in issue. The Court simply announced that Riley Pleas constructed the buildings upon its own land. It then went on to directly apply the pertinent statutory law and regulatory provisions to conclude that Riley Pleas was a speculative builder/consumer. The decision turned almost exclusively upon the undisputed factual conclusion that Riley Pleas constructed the buildings upon its own land. That conclusion was determinative of the law to be applied in that case. However, neither the Rule 170 criteria for determining who owned the land, nor the amendatory provisions of RCW 82.04.190 relating to construction "of or for" housing authorities, were in place during the period covered by the Riley Pleas tax assessment. Thus, we must conclude that the decision in that case is not exclusively controlling in this case.

The audit and tax assessment period here is from January 1, 1980 through September 30, 1984. Rule 170 was amended, effective May 10, 1983, to include, inter alia, the four criteria for

consideration, for taxation purposes, when there is dispute about who owns land which is being improved. The rule amendments constituted a clarification of substance over form which administratively codified the Department of Revenue's longstanding position in distinguishing prime construction contractors from speculative builders for tax purposes. When there was dispute about whether a person was constructing structures on its own land or land of another, the four criteria included in the amended rule had been uniformly and consistently applied for many years before their actual incorporation in the rule.

Upon examining the attributes of ownership included in Rule 170, if the findings weigh in favor of the conclusion that the construction contractor was improving its own land, then it is, itself, the consumer of all materials incorporated in the work as well as all subcontracted labor and materials. If the conclusion is that the construction is done upon land owned by some person other than the contractor, then the construction work is a sale at retail under RCW 82.04.050 and the contractor is not the consumer of materials or subcontracted labor and materials. In the latter case the subcontracted labor and materials are purchased by the contractor at wholesale, for resale to the person for whom the prime construction contract is being performed. This is how the statutory law and administrative regulation work. However, under the 1975 amendments of RCW 82.04.050 and RCW 82.04.190, if the prime contract is being performed on land of or for housing authorities, it is excluded from the statutory definition of "retail sale" and the construction contractor reverts to being the consumer of all materials, but not subcontracted labor. The law is somewhat complex but is widely understood within the retail construction trade.

Rule 170 provides, in pertinent part, as follows:

> SPECULATIVE BUILDERS. As used herein the term "speculative builder" means one who constructs building for sale or rental upon real estate owned by him. The attributes of ownership of real estate for purposes of this rule include but are not limited to the following: 1. The intentions of the parties in the transaction under which the land was acquired; 2. the person who paid for the land; 3. the person who paid for improvements to the land; 4. the manner in which all parties, including financiers, dealt with the land. The terms "sells" or "contracts to sell" include any agreement whereby an immediate right to possession or title to the property vests in the purchaser. (Emphasis ours.)

[3] The Department of Revenue will look behind mere title of record to see who owns the land upon which construction is being done, as a matter of substantive law and fact. The attributes of ownership now included in Rule 170 have been relied upon since as early as 1972 for determining the tax consequences of construction work upon real property. The reason these criteria are valuable is because a person can hold title to something which it does not own. Ownership, or the term "owned by" in Rule 170, connotes the taking of title and possession to property for a consideration paid (absent gift or inheritance) and the exercise of ownership rights and attendant liabilities. The Revenue Act of this state operates upon these substantial facts and formal legal relationships as established by at least a preponderance of the hard evidence. The taxpayers' case here must be examined in the light of these uniformly applied principles.

It is unnecessary to restate here the taxpayers' undisputed testimony and supportive documentation pertaining to its absence of ownership attributes in this case. They are fully set forth in the Taxpayers' Exceptions portion of this Final Determination. The "Turnkey Contracts" referred to as Annual Contribution Contracts and submitted as exhibits for the record, clearly substantiate the taxpayers' testimony in these regards. We find as a matter of fact and law that the taxpayer constructed housing authority projects as a prime contractor rather than a speculative builder. Such construction work, when performed upon real property of or for county or city housing authorities, is expressly excluded from the definition of "retail sale" at RCW 82.04.050(7). Also, such contractors are expressly included as "consumers" of all tangible personal property incorporated into, installed in, or attached to the buildings being so constructed, under RCW 82.04.190(6). Moreover, such construction contractors as well as their subcontractors are subject to business tax as government contractors and are liable for sales or use tax upon materials, but not the value of subcontracted labor. (See WAC 458-20-17001.) Rule 17001, though not adopted until 1986, is the administrative implementation of the statutory changes explained earlier which occurred in 1975. That statutory law had application during the period in question here. Clearly Excise Tax Bulletin 449.12.170 has application only to turnkey projects constructed upon land owned by the contractor, not owned by the housing authorities.

We conclude that the taxpayers were engaged in government contracting, as originally correctly reported. They are also liable for retail sales tax or use tax upon the value of materials only, used in connection with the construction of housing authority contracts.

Because of the conclusion reached earlier it is unnecessary to rule upon the question concerning the amendatory language, "of or for" housing authorities, in RCW 82.04.190. Also, the request for prospective application is no longer relevant.

DECISION AND DISPOSITION:

As to Issue No. 1, the taxpayer's petition is denied. As to Issue No. 2, the taxpayer's petition is sustained. Tax Assessment Nos. . . . (. . . Co.) and . . . (. . . Co.) will be amended in accordance with the guidelines set forth herein. These amended assessments will be due for payment on the dates to be shown thereon.