Cite as 1 WTD 229 (1986)

BEFORE THE INTERPRETATION AND APPEALS SECTION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Refund of	D E T E R M I N A T I O N
	No. 86-264
. . .	Registration No. . . .
	Tax Assessment No. . . .

[1] **MISCELLANEOUS**: USE TAX --CONTRACT -- MISTAKE -- OBLIGATION TO PAY. The Department has no authority, under statutory or other law, to assess someone other than the correct taxpayer when parties to a contract are mistaken as to their correct tax liabilities.

This headnote is provided as a convenience for the reader and is not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .
. . .
. . .

DATE OF HEARING: March 11, 1986

NATURE OF ACTION

A routine tax audit of the taxpayer's books and records resulted in the assessment of use tax on materials purchased for public road construction.

FACTS AND ISSUES

Marguerite M. Burroughs, Administrative Law Judge -- The Department of Revenue examined the business records of . . . (taxpayer) for the period of April 1, 1982 to December 31,

1984. As a result of this audit, the Department issued the above-referenced tax assessment on July 30, 1985 . . .

In November of 1982 the City of . . . was advised by the State of Washington Department of Transportation that its . . . Highway . . . project had been selected for funding. The city was advised that federal-aid funding of this project would be limited to $145,040.

Pursuant to this notification, the City of . . . solicited bids for the project. The taxpayer, in preparing its bid, became involved in the following sequence of events (as explained in the taxpayer's letter dated September 27, 1985):

> On August 8, 1983, Mr. [A], General Superintendent, Electrical Division of . . . contacted Mr. [B] [from the City of . . .] at 8:45 a.m. Mr. [A] requested clarification on payment of Sales Tax prior to bidding said "Master Signal" contract. Mr. [B] "did not know", but would either find out or direct us to another "responsible" party. At approximately 9:20 a.m., Mr. [B] returned [A's] call and said to "call the State Rightaway Division through Mr. [C]."
>
> At 9:30 a.m., Mr. [A] contacted Mr. [C] with the State. Mr. [C] was briefed on which contract Mr. [A] was inquiring about and responded that the State would be paying through the City, Sales Tax on any work on State Rightaway. Mr. [C] continued by describing said work . . . ." Mr. [C] also stated that this portion would be inspected by a State employee.
>
> Mr. [A] then deleted the 8.1% W.S.S.T. on said areas of work and continued with the project estimate. The accounted total of sales tax not paid is $13,000.00, to date.
>
> On the first monthly payment by the City, sales tax was paid on the unit work items in the questioned areas. At the time of our second monthly payment, the City of . . . informed us that the State had contacted them and reneged on reimbursement for sales tax in said areas; they had made a "mistake" in informing us that they would in fact pay tax on Rightaway work.

> Our complaint was logged with Mr. [B] who called Mr. [C] and investigated the circumstances. Mr. [B] said "That in fact we were told that tax would be paid but that an error had been made by the State in interpreting their participation. Mr. [B] then stated that he would look into reimbursement and advise us.
>
> We feel that we have been more than patient in waiting for the City to evaluate payment means. We hope that your Department sees the reimbursement of sales tax on work in the detailed areas of this project as a priority task. Although the W.S.D.O.T. participated on said project, and they, not the city was in error on interpretation of specification, we feel the contracting agency (City of . . .) has the overall moral responsibility for actions of its designated agents.

The taxpayer, as a result of the audit of the completed project (termed . . .), claims that it paid a total of $14,969.12 which had not been planned on when formulating its bid.

DISCUSSION

WAC 458-20-170 (Rule 170), which concerns the construction and repairing of new or existing buildings or other structures upon real property, provides in pertinent part as follows:

. . .

RETAIL SALES TAX

> Prime contractors are required to collect from consumers the retail sales tax measured by the full contract price. Where no gross contract price is stated, the measure of sales tax is the total amount of construction costs including any charges for licenses, fees, permits, etc., required for construction and paid by the builder.
>
> . . .
>
> Sales to prime contractors and subcontractors of materials such as concrete, tie rods, lumber, finish hardware, etc., which become part of the structure

> being built or improved are sales for resale and are not subject to the retail sales tax. . . .

A special rule, however, applies when construction is performed for a municipal corporation or political subdivision of the state or by the United States and which are used primarily for foot or vehicular traffic. WAC 458-20-171 (Rule 171) provides in pertinent part as follows:

. . .

BUSINESS AND OCCUPATION TAX

> Such contractors are taxable under the public road construction classification upon their total contract price.
>
> The business and occupation tax does not apply to the cost of or charge made for labor and services performed in respect to the mining, sorting, crushing, screening, washing, hauling, and stockpiling of sand, gravel, and rock, when such sand, gravel, or rock is taken from a pit or quarry which is owned by or leased to a county or city and such sand, gravel or rock is
>
> a. stockpiled in said pit or quarry for placement on the street, road, or highway by the county or city itself using its own employees, or
>
> b. placed on the street, road, or highway by the county or city itself using its own employees, or
>
> c. sold by the county or city at actual cost to another county or city for road use.

RETAIL SALES TAX

> The retail sales tax applies upon the sale to such contractors of all materials including prefabricated and precast items, equipment and supplies used or consumed in the performance of such contracts.
>
> The retail sales tax does not apply upon any portion of the charge made by such contractors.

> The sales tax does not apply to charges made for labor and services which are exempt from business tax as indicated above. (Emphasis provided.)

Thus, when a contractor performs road construction for the State of Washington, neither retail sales tax nor use tax applies to its purchase and use of "materials . . ., equipment and supplies used or consumed in the performance of the contract." This cost will then not be figured into the contractor's original bid, as the state will pay sales tax over and above the bid price. On the other hand, if the contractor performs road construction for a municipality or the federal government, it, and not the governmental entity, will be required to pay retail sales tax/use tax on its materials, and thus these costs will have to be factored into the original bid. Retail sales tax will not be collected from the municipality or federal government.

In this case, because the taxpayer was mistakenly advised that the project was a state project and that sales tax would be paid by the state over and above the bid price, the retail sales and use taxes on materials was not included in the taxpayers bid. In actuality, the project was a municipal project, and the sales and use taxes on materials were correctly payable by the taxpayer when obtained or used. Thus, these costs should have been included in the bid price.

When the taxpayer was advised that the State of Washington would not pay retail sales tax above and beyond the bid price, the taxpayer then had to pay sales/use tax on its purchases from its own assets.

The taxpayer concedes that the tax as assessed is correct, since the project was a municipal project. The taxpayer suggests, however, that the city for whom the construction was performed should have the responsibility for payment of the tax, since it was only on that city's advice that the Department of Transportation (DOT) was contacted and the erroneous information obtained.

For purposes of this appeal, the Department will assume that the taxpayer's assertions regarding parties' statements about tax liability on the project are correct. Even assuming this, however, we must find that the taxpayer cannot be granted the relief it requests.

RCW 82.32.100 provides in pertinent part as follows:

> As soon as the department procures such facts and information as it is able to obtain upon which to base the assessment of any tax payable by any person who has failed or refused to make a return, it shall proceed to determine and assess against such person the tax and penalties due, . . . (Emphasis added.)

The Department of Revenue clearly has the authority to assess and collect taxes from persons who, under the Revenue Act, are liable for such taxes. There is no statutory or other authority, however, which permits the Department to shift tax liability from such a party to another.

The taxpayer recognizes that only it, and not the municipality, was correctly liable under the Revenue Act for payment of use tax on the value of materials used in the road project here at issue. The taxpayer urges the Department to enforce collection of these taxes against the municipality, however, because the municipality, in referring the taxpayer to a DOT employee who gave erroneous tax advice, was responsible for the taxpayer's bid not including those costs.

We can understand the taxpayer's frustration in this matter. Because the Department has only the authority to collect taxes from those who correctly owe them, however, it may not, under the law, shift responsibility for payment of the use taxes to the municipality. Thus, the taxpayer's petition in this matter must be denied.

DECISION AND DISPOSITION

The taxpayer's petition is denied.