Cite as Det. No. 99-346, 19 WTD 891 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment	)	D E T E R M I N A T I O N
	)	No. 99-346
. . .	)	Registration No. . . .
	)	FY. . . /Audit No. . . .

RULE 170; RULE 224; RCW 82.04.050; RCW 82.04.290: RETAILING VS. SERVICE – SERVICES IN RESPECT TO CONSTRUCTING – CONSTRUCTION MANAGEMENT SERVICES. Where the taxpayer's construction management services were necessary for the timely completion of the renovation but did not entail the direction or management of the actual construction process or actual building activities, the taxpayer was not responsible for "constructing." As such, the taxpayer's gross income was subject to service, rather than retailing B&O tax .

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this determination.

NATURE OF ACTION:

The taxpayer disputes that its construction management services are retail services subject to retailing business and occupation (B&O) tax.[1]

PROCEDURAL BACKGROUND AND HISTORY:

Kreger, A.L.J. – . . . (the taxpayer) is a corporation, registered to do business in Washington since 1985. The taxpayer provides "management services" that include construction management and consulting services. In February 1998, the Department of Revenue (the Department) audited the taxpayer's business records for the period of January 1, 1994 through September 30, 1997.

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

The Audit Division found the taxpayer incorrectly reported gross receipts it received for providing "management services" under two contracts. The taxpayer reported the receipts under the Services and Other Activities B&O tax classification rate. Based on the activities involved in these two contracts, the Audit Division determined that the taxpayer actually provided services in respect to construction activities and, therefore, should have reported the receipts under the retailing B&O tax classification. The Audit Division reclassified these receipts and assessed B&O tax and retail sales tax as a result of the reclassification. The Department issued tax assessment Document No. FY. . . for $. . . consisting of $. . . retail sales tax, $. . . retailing B&O tax, and $. . . in government contracting B&O tax, and a credit of $. . . for the B&O tax paid at the service and other activity rate. The assessment also included $. . . in applicable interest. No penalties were assessed.

Audit Division's Position:

In deciding to reclassify the taxpayer's activities, the Audit Division relied primarily on the language contained in the two contracts at issue. One contract was with the . . . School District . . . and the other was with [Company]. The Audit Division focussed on the contract language itself and the scope and nature of the work the taxpayer contracted to perform. It concluded that the gross receipts from these contracts were subject to retailing B&O and retail sales tax. It based this conclusion on RCW 82.04.050, which classifies services rendered in respect to constructing for consumers, as retail sales. The Audit Division also relied on WAC 458-20-170 (Rule 170), the administrative rule that administers this tax.

The Taxpayer's Position:

The taxpayer appealed the reclassification and the resulting assessment on the grounds that the services provided to the . . . School District and the [Company] were not rendered in respect to constructing. The taxpayer says it provided supervisory and consulting services distinctly separate from the construction activities. It distinguishes its management services from those more integrated with, and directly connected to, the work of a general contractor; and from [those] provided by a manager responsible to, or under the control of, a general contractor. The taxpayer believes it properly reported its activities under the "services and other activities" B&O tax classification.

The taxpayer characterizes its business activities as "pure construction management" and stated its fundamental purpose is to provide an independent assessment of a project and the work performed. The taxpayer states it does not guarantee timelines or the manner in which work is performed. Rather, its services consist mainly of information review, quality assurance, and compliance checks. The taxpayer provided detailed information regarding its specific activities on each project.

The . . . School District Contract:

As the scope of the work performed for the . . . School District was substantial and complex, the taxpayer's testimony regarding the . . . High School renovation was verified and supplemented by information from the Assistant General Counsel for the . . . Public Schools (the School District). The School District explained that the . . . High School renovation was unusual because of the extremely short time allotted for [the] $. . . million project. Bids on the project were accepted in April of 1997, and contracts were awarded in May of 1997. The project had to be completed by December 31, 1997, as the building had to be open for the first day of school in January 1998.

The general contractor selected for the project was . . . Inc., who completed its work on January 5, 1998. The general contractor had an experienced senior site superintendent assigned to the project in addition to a separate construction foreman. These individuals were identified as responsible for actually directing the construction work. A separate contract had been awarded to [Roofing] Inc. to replace the roof. The roofing contract was entered into in April of 1997 and this work was completed in September of 1997. The other contractor involved in the project was a company retained to work on the elevators in the building.

The School District retained the taxpayer's services in June of 1997, after the general contractor and other contractors were already selected and actively engaged in the construction process. The School District stated that in the ordinary course of events School District employees would have supervised and coordinated the construction work. However, due to the magnitude of the project, the compressed time frame, and the limited internal resources available, the School District realized their normal staff did not have the time or resources to manage the project, and so contracted for the taxpayer's services. The School District says it elected to hire the taxpayer to act as their representative for the project.

In addition to retaining the taxpayer, the School District also contracted for a separate full time "on-site representation by the A/E[Architect/Engineer], ..." The School District likened the taxpayer's services to those of the architect's representative and stated that while the architect's representative could have provided a number of the services the taxpayer provided, they wanted to have an objective third party to assure the timely completion of the project. The School District also indicated that the services of the taxpayer were more cost-effective than having this work performed by an architect's representative.

Both the taxpayer and the [A/E] representative were paid by lump sum fee arrangements. The fees for these services were not accounted for as part of the construction costs for the project. The taxpayer's fees were treated as internal costs of the School District as were the architect's fees.

The taxpayer says it served as a conduit for information and facilitated an organized process for the project. The taxpayer said that at least half of the work it performed on this project involved writing reports and attending meetings. The taxpayer maintained a separate set of offices on the site and had its own set of files distinct from those of the general contractor.

The taxpayer and the School District acknowledge that the contract states that the taxpayer was to "manage, supervise and coordinate." The School District emphasizes, however, that the contract also specified the taxpayer was at all times "subject to the supervision, direction and control of the Owner" (the School District). Furthermore, the School District states that, while the taxpayer was on site full time, ". . . [the taxpayer] did not manage, direct or control the contractor's activities. The contractor had a full time site superintendent and support staff, and all contracts with the contractor and the subcontractors were by the site superintendent, not [the taxpayer]."

Before the School District retained the taxpayer, the general contractor had selected all the subcontractors. The general contractor was responsible for all purchasing. The method and means of the construction were within the general contractor's discretion. The School District negotiated directly with the general contractor on scheduling matters and changes. The approval of change orders involved a bilateral process between the School District and the general contractor. Change orders were signed and approved by the School District. Over $2,000,000 in change orders were approved. The taxpayer's contract provided that the taxpayer was to review and analyze contractor change requests but could not approve changes, unless the changes were immaterial.

The School District also emphasizes that matters of design "submittals, non-conforming work, RFI's, punch lists" were delegated to the architect and engineer and that the "construction schedule, costs, safety, changes in work [and] subcontracts" were the responsibility of the contractors and subcontractors. The School District further clarified that the particular contractual language "direct and coordinate work of the contractor" was "lifted from prior CM [construction management] contracts and does not represent [the taxpayer]'s role or authority." According to the School District, "other clauses in [the taxpayer]'s contract, such as consultants (Article 10) and testing (Article 12) were not used, but were inserted by the District for its flexibility and benefit, to avoid separate contracts." The School District identifies the taxpayer's authority as limited and urges that the use of general contract terms be interpreted and considered in light of the intent of the parties and the actual work performed by the taxpayer.

The taxpayer states it was very cautious about its liabilities on the project and considered itself primarily responsible for the efficient relay of information. It notes that the authority to stop work in emergency situations granted by the contract was never exercised. The supervision duties it performed related to oversight and monitoring progress, rather than involvement with the actual physical construction.

[Company] Contract:

The second contract at issue involved work performed for the [Company] over a three-year period. This contract is much smaller than the School District Contract and far more general. The work at issue was the supervisory services the taxpayer provided for a number of smaller projects occurring simultaneously at the [Company]'s [Washington] site. Again the contract contains several sections of "boilerplate" language provided by [Company].

The taxpayer's services were to coordinate the work and be aware of the progress on the various projects for the express purpose of mitigating the impact of these improvements upon the staff at the site and reduce interference with the office's operation to the greatest extent possible. The taxpayer did not handle any materials, equipment, or subcontractors on the projects. [Company] conducted all the negotiations for the actual labor, signed all contracts with the contractors, and prepared the completion schedules. The taxpayer's duties were to monitor the budget, report the percentage of work completed, provide an independent review of the change order work, and provide an opinion as to whether the estimates were reasonable.

While the contract provides different hourly rates for several of the taxpayer's employees, a single employee performed the actual work on a part-time basis. The taxpayer's employee worked intermittently at the [Company] site. The employee did not have an office on site. This employee was primarily responsible for record keeping, review, and the preparation of reports and recommendations.

The taxpayer was compensated on an hourly basis for the services provided. The taxpayer estimates that the [Company] work generally constituted between 50% to 70% of the employee's time during the course of the particular projects being managed. All of the projects managed were of short duration, each between three to six months, and the employee frequently monitored two or three different projects concurrently.

The contractors hired to perform the labor were selected from a list of pre-qualified bidders maintained and prepared by [Company]. The work performed by the contractors was in accordance with and governed by [Company]'s standard contract forms. A [Company] employee, the contract officer, directed the work for the projects. The taxpayer reviewed costs and scheduling for the "contracting officer," who was a [Company] employee, but the taxpayer had no authority to direct any of the contractors or enter into any contracts with the contractors. The taxpayer characterized its services as similar to follow-up services traditionally provided by architecture and engineering firms.

ISSUE:

Were the taxpayer's activities under the two contracts at issue, services rendered in respect to construction?

DISCUSSION:

General Law:

Washington imposes the Business and Occupation (B&O) tax on the privilege of engaging in business in this state. Depending on the nature of the business activity being conducted, the tax is levied upon the value of products, the gross proceeds of sales, or the gross income of the business. RCW 82.04.220.

The Service B&O tax is imposed by RCW 82.04.290 upon persons engaged in business activities other than or in addition to those for which a specific rate is provided elsewhere in chapter 82.04 RCW. *See also* WAC 458-20-224 [Rule 224]. Such persons are taxable upon the "gross income of the business," defined in RCW 82.04.080 as:

> . . . the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, . . . all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

In general, a company constructing, repairing, or improving new or existing buildings for a consumer is required to collect retail sales tax from the consumer and to pay retailing B&O tax. RCW 82.04.050; WAC 458-20-170 (Rule 170). In contrast, providing services, including professional services such as engineering or architectural services, generally is not classified as a retail activity, but the company must pay tax at the higher "service and other activities" B&O tax rate on its gross income. RCW 82.04.290; Rule 224.[2] However, under certain circumstances a service, ordinarily classified as professional service, would be considered a retail service activity.[3] In those circumstances, the gross receipts received for providing those services would be subject to retailing B&O and retail sales tax.

The term "sale at retail" as defined by RCW 82.04.050(2) expressly includes services provided for construction activities. This statute provides in pertinent part:

> [T]he sale of or charge made for tangible personal property consumed and/or for **labor or services rendered in respect** to the following: . . . (b) **the constructing**, **repairing, decorating, or improving of new or existing buildings** or other structures under, upon, or above real property of or **for consumers**, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation . . . .

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[2] From July 1, 1993, until repealed effective July 1, 1998, certain business activities were classified for B&O tax purposes as selected business services. RCW 82.04.290. Various professional services, such as engineering and architectural services, were specifically included as selected business services.

[3] If the services are functionally integrated with what is predominately a retail activity, such as occurs under a contract to design and build a new structure, then the entire contract price is subject to tax. *See Chicago Bridge & Iron v. Department of Rev.*, 98 Wn.2d 814, 659 P.2d 463, *appeal dismissed*, 464 U.S. 1013 (1983).

(Emphasis added.) Accordingly, "services rendered in respect to . . .constructing" are retailing activities.

Interpretation of "in respect to constructing":

Rule 170 is the Department's administrative rule implementing the statutes regarding construction activities. RCW 82.04.040, RCW 82.04.050, RCW 82.04.290, RCW 82.08.020, RCW 82.08.130, and RCW 82.12.020. The rule explains what the measure of the retail sales tax is and when the retail sales tax must be paid by the purchaser/consumer. Rule 170 clarifies that construction activities are categorized based upon both the type of activity at issue and also the relationship that the individual or entity providing the services has to the project. The rule recognizes that the provision of design, inspection and supervisory services in certain instances may be sufficiently distinct from the actual construction process so as to be taxed as professional services rather than as retailing. The definition section of Rule 170 specifically references an illustrative instance when design and supervisory activities shall be considered rendered in respect to constructing activities. The rule in pertinent part states:

> (1)(e) The **term "constructing**, repairing, decorating or improving of new or existing buildings or other structures," in addition to its ordinary meaning, includes: The installing or attaching of any article of tangible personal property in or to real property, whether or not such personal property becomes a part of the realty by virtue of installation; the clearing of land and the moving of earth; and the construction of streets, roads, highways, etc., owned by the state of Washington. The **term includes** the sale of or charge made for **all service activities rendered in respect to such constructing**, repairing, etc., regardless of whether or not such services are otherwise defined as "sale" by RCW 82.04.040 or "sales at retail" by RCW 82.04.050. Hence, for example, **such service charges as engineering fees, architectural fees or supervisory fees are within the term when the services are included within a contract for the construction of a building or structure. The fact that the charge for such services may be shown separately in bid, contract or specifications does not establish the charge as a separate item in computing tax liability.**

(Emphasis added.) The precise delineation when professional services are rendered in respect to construction has presented a substantial challenge. The interpretation of the language in Rule 170 and related statutes has been a much-contested point. A number of cases have visited the issue without producing an unequivocal test or standard to apply to the review of construction management services.[4] As a result of the lack of clarity provided by recent case law, the

[4] *See Steele v. Department of Rev.*, No. 47590 (Bd. of Tax Appeals 1996); *Beacham v. Department of Rev.*, No. 47414 (Bd. of Tax Appeals 1996); *Traffic Expediters, Inc., v. Department of Rev.*, No. 96-83 (Bd. of Tax Appeals 1998); *Riplinger v. Department of Rev.*, No. 51234 (Bd. of Tax Appeals 1998). (We note that *Traffic Expediters* was appealed to Thurston County Superior Court, Docket No. 98-00831-5 (1998).) The Department has also held in a number of instances that construction management services constitute services in respect to constructing activity. *See* Det. No. 89-63, 7 WTD 163 (1989); Det. No. 93-159, 13 WTD 316 (1994); Det. No. 98-27, 17 WTD 99 (1998).

legislature has issued clarifying legislation of what constitutes services rendered in respect to constructing, building, repairing etc.

Chapter 212, Laws of 1999 (HB 2261) became effective on July 25, 1999. The introduction to HB 2261 specifically addresses the need for clarification on services rendered in respect to construction and states:

> NEW SECTION. **Sec. 1.** (1) The legislature finds that the taxation of "services rendered in respect to constructing buildings or other structures" has generally included the entire transaction for construction, including certain services provided directly to the consumer or owner rather than the person engaged in the performance of the constructing activity. Changes in business practices and recent administrative and court decisions have confused the issue. ***It is the intent of the legislature to clarify which services, if standing alone and not part of the construction agreement, are taxed as retail or wholesale sales, and which services will continue to be taxed as a service.***
>
> (2) It is further the intent of the legislature to confirm that the entire price for the construction of a building or other structure for a consumer or owner continues to be a retail sale, even though some of the individual services reflected in the price, if provided alone, would be taxed as services and not as separate retail or wholesale sales.
>
> (3) Therefore, ***the intent of this act is to maintain the application of the law and not to extend retail treatment to activities previously treated as retail activities***. Services that are otherwise subject to tax as a service under RCW 82.04.290(2), including but not limited to engineering, architectural, surveying, flagging, accounting, legal, consulting, or administrative services, remain subject to tax as a service under RCW 82.04.290(2), if the person responsible for the performance of those services is not also responsible for the performance of the constructing, building, repairing, improving, or decorating activities. Additionally, unless otherwise provided by law, a person entering into an agreement to be responsible for the performance of services otherwise subject to tax as a service under RCW 82.04.290(2), and subsequently entering into a separate agreement to be responsible for the performance of constructing, building, repairing, improving, or decorating activities, is subject to tax as a service under RCW 82.04.290(2) with respect to the first agreement, and is subject to tax under the appropriate section of chapter 82.04 RCW with respect to the second agreement, if at the time of the first agreement there was no contemplation by the parties, as evidenced by the facts, that the agreements would be awarded to the same person.

(Emphasis added.)

Because HB 2261 is a clarifying statute and not an amendatory statute, it has retroactive application. *Marine Power and Equip. Co. v. Human Rts. Comm. Hearing Tribunal*, 39 Wn.App. 609, 614, 694 P.2d 697 (1985). The retroactive application [of] HB 2261 applies even though an appeal may be pending. *Id.* 620-21. Therefore, the standards articulated in this

legislation apply to this appeal even though the activities in dispute took place before its effective date.

The additional language interpreting professional services related to managing construction activities in HB 2261 provides:

> NEW SECTION. **Sec. 2.** A new section is added to chapter 82.04 RCW to read as follows:
>
> (1) As used in RCW 82.04.050, the term "services rendered in respect to" means those ***services that are directly related to the constructing***, building, repairing, improving, and decorating of buildings or other structures ***and that are performed by a person who is responsible for the performance of the constructing***, building, repairing, improving, or decorating activity. The term does not include services such as engineering, architectural, surveying, flagging, accounting, legal, consulting, or administrative services provided to the consumer of, or person responsible for performing, the constructing, building, repairing, improving, or decorating services.

(Emphasis added.) Thus, if the taxpayer is not responsible for the constructing, building, etc., then the taxpayer's gross income is not subject to the retail sales tax. The term "responsible for the performance" is defined in section 2(4) of HB 2261 as:

> the ***person is obligated to perform the activities***, either personally or through a third party. A person who ***reviews work for a consumer, retailer, or wholesaler but does not supervise or direct the work is not responsible for the performance of the work.*** A person who is financially obligated for the work, such as a bank, but who does not have control over the work itself is not responsible for the performance of the work."

(Emphasis added.)

The new statutory language provides for consideration of both the nature of the services provided and the entity providing them in characterizing the services for tax purposes. To be rendered in respect to construction activities the services themselves must "directly relate to the constructing" and the provider of the services must be responsible for "the performance of the constructing."

Analysis of the . . . School District Construction Management Services:

The Audit report focuses primarily upon specific contractual language to support the conclusion that the taxpayer's services were rendered "in respect to constructing." [5] It is important to note the statute refers to the activity of "constructing," not construction in general.[6] The use of this term sets up a requirement for a direct relationship to the actual building process. We recognize that some of the general terminology of the taxpayer's contract identified by the Audit Division standing alone can be considered as encompassing services that could directly relate to constructing activities. However, the taxpayer identifies several instances where the language used in the audit report is more general or differs from the actual phrasing used in the contract.[7]

The taxpayer notes in addition to the duties identified in the audit report, the contract also contains language limiting the taxpayer's authority. For example, the taxpayer does not have the authority to bind the School District, direct any changes in plans and specifications, issue change orders, or agree to payment of additional compensation.[8] Rather than discuss each of the contested contractual passages individually, we note, generally, that the Audit Division provided reference to a number of passages to explain why it reclassified the taxpayer's activities to retailing and that these passage are subject to a different interpretation when read in their entirety. The taxpayer urges that we look at the actions as well as the intent of the parties in determining the scope and nature of the taxpayer's activities.

The taxpayer and the School District both testified as to the parameters and nature of work the taxpayer actually performed and argued for an interpretation of the contract conveying a more limited authority to the taxpayer. Furthermore, both the taxpayer and the School District assert that it was their mutual intent in entering into the contract to only grant the taxpayer limited authority. The taxpayer and the School District provided substantial information as to their intent in entering into the contract and the actual nature and scope of services the taxpayer did provide.

The parties' intent is by law to be afforded substantial weight in interpreting the contract. *Burgeson v. Columbia Producers*, 60 Wn. App. 363, 367 803 P.2d 838 (1991). The interpretation of a contract is a process of determining the parties' intent and this analysis

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[5] We note that the audit report was prepared prior to the clarifying statutory amendment discussed above.

[6] The term "constructing" means "to put together by assembling parts; BUILD", whereas the term "construction" has a more general meaning, that is, "the act or process of constructing." *Webster's II New Riverside University Dictionary*, at 303 (1988).

[7] For example the audit report states that the contract requires the taxpayer to "on a daily basis verify that [construction] work being performed is acceptable per contract requirements." The taxpayer notes that the actual contractual language specifies the taxpayer is to "observe the progress of the work on a daily basis" and that the contract does not mention or link these observation duties to "contract requirements." The taxpayer also clarifies that the contract renders them responsible for budget oversight rather than control. The taxpayer emphasizes contractual language that supports their limitations to monitoring and conveying information.

[8] For example, the taxpayer emphasizes the fact that the Audit report does not specifically address contractual language limiting the taxpayer's authority, such as: "Article IIIE of the contract also provides 'the construction manager cannot bind the Owner and its sole function will be to make recommendations to the Owner.'" (Emphasis supplied by taxpayer.)

involves a question of fact. *Berg v. Hudesman,* 115 Wn.2d 657, 663, 801 P.2d 222 (1990); A. Corbin, Contracts · 534 (Supp. 1990).

The *Berg* decision provides the following discussion on the issue of interpretation, and particularly when extrinsic evidence relating to the entire set of circumstances, including subsequent conduct of the contracting parties, should be used as an aid in interpretation.

> . . . Interpretation is the process whereby one person gives a meaning to the symbols of expression used by another person. . . . Construction of a contract determines its legal effect. 'Construction . . . is a process by which legal consequences are made to follow from the terms of the contract and its more or less immediate context . . . . ' The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties' . . . . **Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all circumstances surrounding the contract, and the reasonableness of respective interpretations advocated by the parties**.

Berg, *supra*., at 663, and 667 (emphasis added).

The School District disclosed that some of the passages identified by the Audit Division contained general "boilerplate" language from previous construction management contracts. The taxpayer and the School District have provided additional clarifying details about the actual activities performed by the taxpayer and the intent of the parties in entering into the contract, which provides an interpretive overlay in construing the contractual language at issue. Both the School District and the taxpayer contend the taxpayer's construction management services were necessary for the timely completion of the renovation but did not entail the direction or management of the actual construction process or actual building activities.

Upon reviewing the contract in its entirety, we determined that nothing in the contract renders the taxpayer responsible for the performance of the "constructing" work. While, the taxpayer's construction management services did relate generally to the construction process and were likely of great importance, we find that the taxpayer did not directly control or direct the actual constructing.

In reaching this conclusion, we considered the following: Neither the taxpayer nor the School District intended the taxpayer to have the authority to direct any constructing; the taxpayer's compensation was based on an hourly pay rate and was not tied to the construction costs; the taxpayer was not the general contractor on the project; there was a general contractor who had its own contract with the School District and who had a separate supervisor on site; the general contractor's supervisor controlled and directed the actual constructing activities; the taxpayer's services were characterized by both the taxpayer and the School District as similar to those traditionally provided by architects and engineers; and the parties intended that the taxpayer serve primarily as a conduit for information, assimilating and organizing information from those doing the building to enable timely inspection and progress.

The facts support the taxpayer's contention that regardless of certain boilerplate contract language the intention and action of the parties was that taxpayer provide only records management, review, analysis, coordination of information pertaining to the project's progress. This characterization of the taxpayer's activities is not inconsistent with the contract viewed as a whole and particularly when viewed in conjunction with the factual information as to the work the taxpayer actually performed. Further, we find the general contractor's construction superintendent provided the actual direction and control of the construction activities. The taxpayer had no obligation to perform constructing activities nor did they have the authority to direct the construction work. The taxpayer did engage in activities that were classified as supervisory, but did not directly supervise the constructing work. Rather, the taxpayer provided the administrative framework that enabled and supported that constructing work.

The taxpayer's efforts unquestionably facilitated and expedited the construction process, but the vital distinction is that the taxpayer's services did not directly relate, direct or control, the physical building activities but rather related to the administrative, regulatory, bookkeeping, and organizational details that arose from actual constructing activities. Based on the foregoing information, we find that the taxpayer's services on the . . . High School renovation were not directly related to constructing.

[Company] Contract:

Applying the same analytical framework to the [Company] contract we note that again the taxpayer did not select the contractors and was not directly involved in supervising or directing the actual constructing work. Again there was a separate and distinct contracting officer assigned to the projects, and it was this individual who had the authority and the responsibility to direct the projects. The taxpayer's responsibility was to provide this contracting officer with advice and recommendations and serve as a gatherer of information from the different projects being simultaneously undertaken. In this case, the taxpayer's primary purpose was not to expedite the completion of the project, as with the . . . School District job but to minimize disruption to the [Company] employees and those conducting business at the site.

The taxpayer's services were predominately administrative, including review of cost estimates and scheduling information provided to the contracting officer. The taxpayer neither directed any of the workers hired by [Company], nor did they enter into any contracts with any of these workers or contractors. The taxpayer was not the general contractor and had no responsibility for directing the entities actually engaging in the constructing work. In this case, the person with that responsibility was [Company]'s contracting officer. The taxpayer provided quality assurance and coordination of information. The taxpayer was a source of expert information for [Company] about the work being performed, but was not responsible for its performance.

Based on the facts and the terms of the contract, we find the taxpayer's services under both the contract with the School District and with [Company] were not services rendered with respect to

constructing, but rather were administrative-type services, subject to the service and other activities B&O tax rate.

DECISION AND DISPOSITION:

The taxpayer's petition is granted. The assessment, including interest is reversed.

Dated this 30th day of December, 1999.