Cite as Det. No. 98-164, 19 WTD 393 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment and Refund of	)	D E T E R M I N A T I O N
	)	No. 98-164
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .
. . .	)	Registration No. . . .
	)	FY. . . ./Audit No. . . .

[1] RULE 179: PUBLIC UTILITY TAX AND BUSINESS AND OCCUPATION TAX – DEDUCTIONS. The deductions from the measure of tax listed in Rule 179(10) apply to both the public utility tax and the business and occupation tax, while the deductions listed in Rule 179(9) apply only to the public utility tax.

[2] RULE 179; ETA 209: PUBLIC UTILITY TAX AND BUSINESS AND OCCUPATION TAX – DEDUCTIONS – AMOUNTS RECEIVED IN LIEU OF EMINENT DOMAIN. When a public utility receives funds from the Department of Transportation to reimburse it for the costs of moving public utility facilities necessitated by the Department of Transportation's construction, improvement, or demolition of a state highway, the amount of the payment is in lieu of eminent domain proceedings. As such, the amounts received are not subject to either business and occupation or public utility taxes, provided the amounts received do not include the costs of any improvements to the public utility facilities.

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 public utility department of a city protests the assessment of business and occupation (B&O) tax on amounts received from the State of Washington, Department of Transportation to reimburse it for the costs associated with the relocation of utility lines necessitated by the road construction performed by the Department of Transportation.[1]

FACTS:

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

Coffman, A.L.J., as successor to Danyo, A.L.J. -- The taxpayers are two divisions (Light and Water) of a Washington city's Public Utility Department. Their respective requests for refunds have been consolidated at their request, because the transactions at issue arose from the same factual situation.

The Audit Division (Audit) of the Department of Revenue (Department) reviewed the books and records of the Water Division for the period October 1, 1992 through June 30, 1996. As a result of this review, Audit determined that the taxpayer had underpaid its B&O, retail sales, and use tax obligations and overpaid its public utilities tax (PUT) obligations. The net effect of these findings was a tax assessment in the amount of $. . . plus interest in the amount of $. . . . The Water Division paid the tax assessment in full and now requests a refund of a portion of the tax assessment.

Audit, also, reviewed the books and records of the Light Division for the period January 1, 1993 through March 31, 1997. As a result of that review, Audit determined that the Light Division had underpaid its B&O and PUT in a total amount of $. . . . Audit issued a tax assessment in that amount plus interest in the amount of $. . . . The Light Division paid the tax assessment in full and now requests a refund of a portion of the tax assessment.

The Water Division concurs with the tax assessment, except as it relates to two items. First, the taxpayer claims that, for internal accounting purposes, it transferred money from one account designation to another. Audit discovered the entry of "income" on the Water Division's books and deemed it to be income. However, after receipt of the Water Division's appeal, Audit reexamined the transfer and has determined that the Water Division was correct and that an adjustment will be necessary. Because Audit has agreed to make the requested adjustment and refund the overpaid taxes, this matter will not be addressed further.

Second, the Water Division and the Light Division entered into contracts with the State of Washington's Department of Transportation (DOT) relating to DOT's plan to demolish . . . reroute traffic. These contracts were intended to reimburse the Water and Light Divisions for their actual costs incurred in relocating their utility lines. The contracts are on standard forms used by DOT (DOT Form 224-053) and state:

> WHEREAS, the STATE [DOT] is planning the construction or improvement of the State Route shown above, and in connection therewith it is necessary to remove and/or relocate certain UTILITY facilities as set forth in the attached plans, and
>
> WHEREAS, it is deemed in the best public interest for the UTILITY, as owners of said facilities, to perform the work of removing, adjusting, and relocating the facilities, and
>
> WHEREAS, the UTILITY has a compensable interest in its facilities and right-of-way by virtue of being located on easements or UTILITY owned right-of-way, and the STATE is obligated to reimburse the UTILITY for the relocation of these facilities, and

> the UTILITY is obligated for the cost of any relocation required for facilities not on easements or UTILITY owned right-of-way.

(Emphasis added.) DOT agreed to pay the costs of moving the utility facilities, but not for any improvements to those facilities. ¶ IX, DOT Form 224-053. Further, the taxpayers agreed to quit claim all of their prior interests within DOT's right-of-way and the DOT agreed to grant to the taxpayers "an easement, permit, or franchise" for the new location of their facilities. ¶¶ XII and XIII, DOT Form 224-053. Audit determined that the amounts received from DOT were subject to the B&O tax under the service and other activities classification.

The taxpayers argue that the amounts received from DOT were reimbursements exempt from B&O tax per WAC 458-20-111 (Rule 111). Further, DOT, through its Assistant Attorney General filed an Amicus brief claiming that the amounts paid to the taxpayers were in lieu of damages based on the doctrine of eminent domain.

The taxpayers concur with all other portions of the tax assessments.

ISSUE:

Are amounts received from DOT to compensate a utility for the actual costs associated with the relocation of utility facilities necessitated by the construction, improvement, or removal of a state-owned highway exempt from B&O tax?

DISCUSSION:

[1] Public utilities are generally subject to the PUT on their receipts from customers. RCW 82.16.020. However, public utilities are also subject to the B&O tax when they engage in activities for a customer prior to the customer receiving utility services. §4, WAC 458-20-179 (Rule 179). Rule 179(9) identifies deductions available to persons subject to PUT. Additionally, Rule 179(10) provides that utilities may also deduct from their receipts, the following:

> (a) The amount of cash discount actually taken by the purchaser or customer.
> (b) The amount of credit losses actually sustained.
> (c) Amounts received from insurance companies in payment of losses.
> (d) Amounts received from individuals and others in payment of damages caused by them to the utility's plant or equipment.

(Emphasis added.) Rule 179(10) is not limited to PUT. These deductions apply to the B&O tax as well as PUT. Further, Excise Tax Advisory 209.16.111 (ETA 209)[2] explains:

> Where a public utility district receives reimbursement from a contractor for moving facilities, is the income from the reimbursement taxable?

[2] The Department recently cancelled all Excise Tax Bulletins and reissued them as Excise Tax Advisories.

> A public utility district temporarily relocated some of its facilities for the convenience of a contractor. The contractor reimbursed the public utility district for the expense of moving the facilities. Analogizing to eminent domain proceedings and other governmentally required relocations and the tax treatment afforded to reimbursements for such moves, it was claimed that the income from the contractor was nontaxable.
>
> When an eminent domain proceeding or actions of a governmental agency result in an enforced movement of facilities, reimbursements for such moves are considered liquidated damages and not subject to tax. However, where facilities are moved for the benefit of a business or individual, income from reimbursements is taxable. The public utility district, in moving its facilities, was rendering a service for the contractor's benefit. The reimbursement received from the contractor was ordinary income to the utility and subject to tax.

(Emphasis added.)

The facts of these appeals involve the forced relocation of utility facilities, because DOT was changing the route of a state highway. Thus, the contracts entered into between DOT and the taxpayers were in lieu of eminent domain proceedings and for the purpose of mitigating the damages to the taxpayers' facilities. We find the analysis of ETA 209 to be persuasive. Further, the damages referred in Rule 179(10)(d) necessarily include those paid in lieu of eminent domain proceedings. Therefore, we find that the taxpayers' receipts from DOT were not subject to taxation.

A copy of an April 4, 1988 letter from the Department to DOT is attached to the amicus brief filed by the Assistant Attorney General for DOT. This letter explains the taxation of the contracts such as those in this appeal. The Department stated:

> [t]he Department of Revenue's position with respect to retail sales tax on the relocation of power poles and lines as part of a road widening project.
>
> . . .
>
> It is the long-standing position of the Department of Revenue that these reimbursements are not a retail sale. In the first place the power facilities do not belong to DOT. The utility company is performing work to its own equipment and can not be said to be making a sale at retail. These reimbursements are considered to be in the form of liquidated damages. These reimbursements are not considered to be taxable income to the utility company.

(Emphasis added.)

The DOT relied upon the April 4, 1988 letter in determining the amount of reimbursement it was required to pay the taxpayers. We acknowledge that neither the doctrine of equitable estoppel, nor RCW 82.32A.020(2), technically apply to this letter. That is, the letter was not directed to the taxpayers, therefore they could not rely on it. Det. No. 89-372, 8 WTD 115 (1989); see also Det. No. 93-287R, 17 WTD 36 (1998) (Reliance may not be claimed on unpublished determinations issued to third parties.). But it is helpful here to confirm the Department's treatment of such reimbursements under similar circumstances.

DECISION AND DISPOSITION:

The taxpayers' petitions are granted.

Dated this 25th day of September, 1998.