

Cite as Det No. 08-0211, 28 WTD 47, (2009)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition For Refund of	)	<u>D E T E R M I N A T I O N</u>
	)	
	)	No. 08-0211
	)	
...	)	Registration No. . . .
	)	Document No. . . /Audit No. . . .
	)	Docket No. . . .
	)	

RCW 82.08.820: SALES TAX EXEMPTION – WAREHOUSE – BUILDING -- MANUFACTURING. A taxpayer that operates a cold storage facility within a building, is not entitled to the warehouse tax exemption under RCW 82.08.820, because another business operates a food processing plant in another portion of the building.

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.

Pardee, A.L.J. – Taxpayer, a Washington corporation that operates a cold storage facility in the same structure as a [food] processing plant, protests disallowance of the warehouse tax exemption (RCW 82.08.820). We deny the petition.<sup>1</sup>

ISSUE

Is a taxpayer that operates a cold storage facility entitled to claim the warehouse tax exemption (RCW 82.08.820) if another business operates a [food] processing plant in another portion of the building?

FINDINGS OF FACT

[Taxpayer], a Washington Corporation, operates a cold storage facility in . . . Washington. Taxpayer’s facility stores frozen and processed foods . . . . In . . . Taxpayer’s [owner] purchased

<sup>1</sup> Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

property (roughly ... acres) in ... Washington and began building a public cold storage facility . . . . [Later], Taxpayer expanded its cold storage facility . . . . [Later], Taxpayer conveyed to [Company A] via Special Warranty Deed,<sup>2</sup> [more than half of the acres it had acquired in that location]. . . . The . . . acres [sold] and the portion retained by Taxpayer, are separate tax parcel numbers for . . . county assessment purposes. In . . . , Taxpayer expanded its existing facilities . . . and [Company A] built a [food] processing plant adjacent to Taxpayer's facilities. The same general contractor handled both projects. However, Taxpayer and [Company A] hired different architectural firms.

Since time and temperature control issues are critical to product quality in processing [food products], Taxpayer and [Company A] created an internal direct access route (a conveyor) to Taxpayer's facilities, in order to avoid exposing [Company A's] product to the summer heat.<sup>3</sup> There are wall penetrations with roll doors from Taxpayer's cold storage facility to the [Company B (formerly Company A)] food production area. There are 5 doors linking Taxpayer's and [Company B's] facilities: one on the dock, three inside, and one that is on the conveyor (more of a conveyor door). Taxpayer is responsible for maintaining those doors. [Company B] is responsible for maintaining the conveyor system. Taxpayer can lock the 5 doors, but Taxpayer's plant manager explains they never do, since some work would have to be done to actually lock them. The doors have hasps on them, and ice would have to be chipped away for them to be locked.

On May 21, 2004, Taxpayer and [Company B] executed a Storage and Freezing Services Agreement (Agreement). The Recitals portion of the Agreement states:

. . . [Company B] and [Taxpayer] desire to set forth the terms and conditions of their agreement pursuant to which [Company B] shall use [Taxpayer's] services for the cold storage and handling of (a) product to be frozen or packaged at [Company B's] Plant, and (b) product after being reworked or repackaged at [Company B's] Plant.

. . . [Taxpayer] owns certain freezing equipment and fixtures listed on Exhibit A (the "Freezing Equipment"). [Taxpayer] and [Company B] desire to set forth the terms and conditions of their agreement pursuant to which [Company B] will use this Freezing Equipment and [Taxpayer] will supply coolant for the Freezing Equipment.

With regard to ownership of pallets in both Taxpayer's facilities and [Company B's] facilities, Section ... of the Agreement states:

[Taxpayer] owns all of the pallets located at [Taxpayer's] Warehouse and at [Company B's] Plant.

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<sup>2</sup> Which conveyance was not recorded until [four years after the transaction].

<sup>3</sup> Taxpayer explains that without this direct access, [Company A/B] would have to transport the product from the manufacturing facility, by going outside and down the road to Taxpayer's entrance.

The interrelationship of Taxpayer and [Company B] is evidenced in . . . the Agreement, Freezing Equipment and Freezing Services, which states:

. . . Identification of Freezing Equipment

. . . The Freezing Equipment owned by [Taxpayer] includes the equipment and fixtures listed in Exhibit A, attached hereto and incorporated by this reference. . . .

. . . Operation of Compressors

. . . [Taxpayer] shall operate and be responsible for the compressors located at [Taxpayer's] Warehouse that supply coolant . . . to the Freezing Equipment located within [Company B's] Plant.

This interrelationship is further evidenced [in] the Agreement, Provisions Related to the Freezing Equipment, which states:

. . . Easement and Right of Access

[Company B] hereby grants to [Taxpayer] an easement and the right to enter and move across the [Company B] Plant to obtain access to the Freezing Equipment. Such rights may be exercised by [Taxpayer's] employees, agents, suppliers, lenders and contractors. The purpose for which [Taxpayer] may exercise the rights of access to the Freezing Equipment include (a) inspecting, maintaining, repairing and replacing the Freezing Equipment, (b) exercising any rights, responsibilities, or duties with respect to [Taxpayer's] ownership of the Freezing Equipment, (c) taking delivery of ...[food] from [Company B] for storage In [Taxpayer's] Warehouse, and (d) taking any other actions in connection with this Agreement or in furtherance of this Agreement.

The Agreement also contains an interesting Section 4, entitled Rental of Space, which states:

. . . Rental of Buffer Zone

[Taxpayer] shall rent to [Company B], and [Company B] shall rent from [Taxpayer], certain space within [Taxpayer's] Warehouse located adjacent to [Company B's] Plant and the doors between [Taxpayer's] Warehouse and [Company B's] Plant, near the northeast corner of [Taxpayer's] Warehouse . . . . [Company B] and [Taxpayer] sometimes refer to such space as the "Buffer zone," [Company B] shall maintain the Buffer Zone and keep the Buffer Zone clean and safe. [Company B] shall keep the doors between [Company B's] Plant and the Buffer Zone closed at all times except during those brief intervals of time during which an individual or a forklift is moving through the doorway. . . .

Exhibit D to the Agreement, entitled Fees and Charges, states the following:

. . . Supplying Coolant to Water Chillers

. . . [Company B] shall pay fees to [Taxpayer] for supplying coolant . . . to the water chillers at [Company B's] Plant.

\* \* \*

. . . Allocation of Electric Power Bills

[Company B] shall pay to [Taxpayer] each month a portion of the electric power bill that [Taxpayer] receives each month for all electric power used at [Taxpayer's] Warehouse.

[Taxpayer] shall pay the amount of \$. . . of each monthly electric power bill and [Company B] pays the balance of each monthly electric bill sent to [Taxpayer]. ([Company B] makes such payment to [Taxpayer] and [Taxpayer] pays the full amount of the bill to the electric utility.)

. . . Reimbursement of Expenses Related to Supply of Coolant to and Light Maintenance of Repack Refrigeration Equipment

. . . [Company B] shall reimburse [Taxpayer] each month for costs and expenses incurred by [Taxpayer] related to the supply of coolant and light maintenance of certain existing repack refrigeration equipment located in [Company B's] Plant. . . .

. . . . Rent for Buffer Zone

. . . [Company B] shall pay to [Taxpayer] each month the amount of \$. . . as rent for the Buffer Zone.

[Taxpayer's cold storage facility and Company B's facility have different street addresses.] Both Taxpayer's and [Company B's] facilities . . . share roof joints and wall joints.

On October 12, 2007, the Washington State Department of Revenue's (DOR) Taxpayer Account Administration (TAA) Division found that Taxpayer's [cold storage facility] did not qualify for the exemption in RCW 82.08.820 for the period from 2003 through 2<sup>nd</sup> Quarter 2006, concluding that manufacturing activity was taking place there. Therefore, TAA denied the exemption . . . .

## ANALYSIS

Wholesalers or third-party warehouse owners who own or operate warehouses, and who have paid the tax levied by RCW 82.08.020 on material-handling and racking equipment, and labor and services rendered in respect to installing, repairing, cleaning, altering, or improving the equipment, are eligible for an exemption in the form of a remittance. RCW 82.08.820(1). The amount of the remittance is computed under RCW 82.08.820(3), and is based on the state share

of sales tax. *Id.* Former RCW 82.08.820(3)(a),<sup>4</sup> in effect during the audit period, states that for warehouses with at least 200,000 square feet, the remittance is equal to 50 percent of the amount of tax paid for qualifying material-handling equipment and racking equipment, and labor and services rendered in respect to installing, repairing, cleaning, altering, or improving the equipment. RCW 82.08.820(2)(m) defines warehouse as, “[A]n *enclosed building or structure* in which finished goods are stored.”<sup>5</sup> (Emphasis added). However, warehouse does not include “a building in which manufacturing takes place.” *Id.*

The word “enclosed” is not defined in RCW 82.08.820. When statutory terms are not defined, DOR turns to their “ordinary dictionary meaning.” Det. No. 04-0147, 23 WTD 369 (2004); *Western Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 609, 998 P.2d 884 (2000).

Webster’s Third New International Dictionary, 746 (1993) defines enclose as:

1 a: to close in < ~ a porch with glass> : SURROUND <a yard with a fence>; *specif*: to individual use b: ENVELOP, ENFOLD <mountains *enclosed* the town . . . c: to hem in : CONFINE <a convict *enclosed* within walls for life . . . d: to complete the shell of (a building under construction) so as to make weatherproof and secure from intrusion . . .

What constitutes a “building” has been traditionally defined “as a structure or edifice *enclosing a space within its walls*, and usually covered with a roof.” *White v. Wilhelm*, 34 Wn. App. 763, 768 (1983).<sup>6</sup>

<sup>4</sup> 2006 c 354 § 11, effective July 1, 2007, added an additional provision to RCW 82.08.820(3)(a) for cold storage warehouses with at least 25,000 square feet, which states that for such warehouses the remittance is equal to 100 percent of the amount of tax paid for qualifying material-handling equipment and racking equipment, and labor and services rendered in respect to installing, repairing, cleaning, altering, or improving the equipment.

<sup>5</sup> Prior to the enactment of 2006 c 354 § 11, this identical definition was contained in 82.08.820(2)(l).

<sup>6</sup> It is also interesting to look at RCW 9A.04.110(5), the burglary statute, which defines building, in part, as:

[E]ach unit of a building consisting of two or more units separately secured or occupied is a separate building.

In *State v. Miller*, 90 Wn. App. 720, (1998), the court quoted from *Deitchler*, 75 Wn.App. at 137, which stated:

Here, the evidence locker was a smaller space or structure located within the larger police station. As far as the record shows, *the police station was occupied by a single tenant*, and thus was not a building consisting of two or more units separately secured or occupied. *State v. Thomson*, 71 Wash.App. 634, 861 P.2d 492 (1993). As a result, the evidence locker was neither a “unit” of the police station nor a “separate building” inside the police station, and a charge of burglarizing the evidence locker cannot be sustained. . . . Similarly, Jim’s Car Wash was occupied by a single tenant and was not a building consisting of two or more units separately secured or occupied. As a result the separate stalls and coin boxes were not “units” of the car wash nor “separate buildings” inside the car wash, and the charge of burglarizing the separate stalls or the coin boxes cannot be sustained.

(Emphasis added). The applicability of RCW 9A.04.110(5) to Taxpayer’s situation lies in the fact that we theoretically have two separate tenants (owners) of the facility . . . (i.e., Taxpayer and [Company B]). Therefore, as a result, under *Miller and Deitchler*, Taxpayer’s cold storage facility is analogous to a unit of the . . . facility, as is

[Company B] (and previously [Company A]) is engaged in business as a manufacturer as defined in RCW 82.04.110 and 82.04.120 within its portion of the facility. *See Stokely-Van Camp, Inc. v. State*, 50 Wn.2d 492, 312 P.2d 816 (1957). The question is thus whether this manufacturing activity occurs within the same building as Taxpayer's warehousing activity. If so, then the building is not a warehouse as defined in RCW 82.02.820(2)(m).

Taxpayer in Det. No. 02-0136, 23 WTD 70 (2004), provided a public, refrigerated, third party warehouse receiving, storing, and shipping service for finished frozen food and grocery products. Within the same building, taxpayer also processed fresh or previously frozen fish. In Det. No. 02-0136 the taxpayer used the same street address for both the storage and processing operations. Taxpayer in Det. No. 02-0136 also explained that the processing section plus the two cold storage sections of the building were constructed by the same contractor following the plans of a single architect, even though a different roof structure covered the processing area, which had different ceiling heights than the cold storage areas. Given the separate cold storage and processing operations, Taxpayer in Det. No. 02-0136 argued that the manufacturing activities it performed in the processing area did not disqualify it from taking the warehouse exemption (RCW 82.08.820) in its cold storage area. The DOR rejected the taxpayer's argument, *holding in Det. No. 02-0136 that the storage areas and fish processing area were within the same enclosed building*.

Even though Taxpayer and [Company A] used different architects when constructing their facilities, and their facilities have different addresses, both operations (warehousing and manufacturing) are *enclosed* within the same *building or structure*. Taxpayer and [Company A] created an internal direct access route (a conveyor) to Taxpayer's facilities. In addition, both Taxpayer's and [Company B's] facilities . . . share roof joints and wall joints. . . . The same general contractor handled both Taxpayer's expansion of its existing facilities . . . and [Company A's] construction of a [food] processing plant adjacent to Taxpayer's facilities.

As with the taxpayer in Det. No. 02-0136, the processing activities (of [Company B]) and the cold storage activities (of Taxpayer) take place in the same enclosed building or structure. The main difference in Det. No. 02-0136 was that the taxpayer in question owned both the processing and storage facilities, whereas here different entities (Taxpayer and [Company B]) own the processing and storage facilities. However, this does not alter the fact that processing and storage activities are occurring in the same enclosed building or structure. Taxpayer's cold storage facility is not a warehouse within the definition of RCW 82.08.820(2)(m), because it is "a building in which manufacturing takes place." *Id.* There is no requirement that the manufacturing activity be performed by the same person who operates the warehouse in order for the exclusion to apply. Taxpayer is therefore not entitled to the exemption in the form of a remittance (RCW 82.08.820(1)). Additional persuasive authority supports this conclusion.

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the processing facility of [Company B]. However, the units are not separately secured (i.e., given the structure-to-structure openings as explained in *Morton* below), and therefore are not separate buildings under RCW 9A.04.110(5).

The Supreme Court of Missouri, in *Morton v. Brenner*, 842 S.W.2d 538, 542 (1992), with regards to the interdependency of connected structures, and the effect of structure-to-structure openings, states:

Mindful of the rule that ambiguities in taxing statutes must be construed against the taxing authority and in favor of the taxpayer, *Cascio v. Beam*, 594 S.W.2d 942, 945 (Mo. banc 1980), we recognize, as did the State Tax Commission, that structures may indeed be separate even though they are connected. . . . *When connecting structures are not interdependent-that is, each maintains an individual physical integrity and each functions independently of the other-then they are separate structures.* As the State Tax Commission noted, the best gauge of this separateness is the presence and quality of structural walls. We believe that structures are indeed separate when the connecting walls meet the following standards:

- (1) The walls run continuously from the basement foundation to the roof *with no structure-to-structure openings*; and
- (2) The walls are load or weight bearing, with the strength and stability to allow for the collapse of the structure on either side of the wall without the collapse of the wall itself or the structure on the other side.

(Emphasis added). The facts show that Taxpayer's and [Company B's] facilities are not independent, but rather interdependent. The . . . Agreement between Taxpayer and [Company B] states that both parties intended to set forth the terms and conditions of their agreement pursuant to which [Company B] shall use Taxpayer's services for cold storage of its products. The Agreement states that Taxpayer owns all of the pallets in both the cold storage facility and [Company B's] [food] processing plant. Per the Agreement, Taxpayer is responsible for operating the compressors located in their facility which supply coolant . . . to freezing equipment located within [Company B] facility. [Company B] grants Taxpayer an easement and the right to enter and move across the [Company B] plant to obtain access to the freezing equipment. There is "Buffer Zone" located adjacent to [Company B's] plant and the doors between Taxpayer's facility and [Company B's] plant, which [Company B] has the responsibility of maintaining and cleaning, and where forklifts and individuals traverse. The Agreement requires, among other things, that [Company B] pay fees to Taxpayer for supplying coolant . . . to the water chillers and [Company B's] plant, that [Company B] pay Taxpayer each month a portion of the electric power bill, and that [Company B] reimburse Taxpayer each month for costs and expenses related to the supply of coolant and light maintenance of refrigeration equipment located in [Company B's] plant.

The aspect preventing separate structures from existing in the present case of Taxpayer/[Company B] (i.e., structure-to-structure openings) is explained in *Lucas-Hunt Village Associates, Limited Partnership v. State Tax Comm'n of Missouri*, 966 S.W.2d 308, 310 (Mo. 1998), which expounds on the holding in *Morton* and states:

In *Morton* the Supreme Court held that connecting buildings separated by load bearing structural walls, extending from the basement to the roof, with no structure-to-structure openings, and which allowed for the collapse of construction on one side without causing the collapse of the wall itself or the construction on the other side were separate structures. *Id.* In *Morton* there were no structure-to-structure openings in the connecting walls. Rather, each structure had its own separate entry with a foyer and a stairway to the second floor apartments, and there was “no entry or direct access from one structure to another.” *Id.* at 539. The walls in *Morton* correspond with the eight inch masonry walls which join each of the six- and seven-unit buildings in this case.

However, in this case, unlike *Morton*, the connecting wall separating the apartments in each six- or seven-unit building contains doorways accessing each of the units on both sides of the wall. These doorways open onto an interior stairwell which services all six or seven units in each building and provides ingress and egress from the building. A person can access all of the apartments in each building through these doorways without leaving the building. The doorways in the firewall forming the stairwell provide the type of entry or direct access from one structure to another *which constitutes structure-to-structure openings. Thus, the central firewall in each building is not a wall with no structure-to-structure openings and does not meet the first prong of the Morton test for a structural wall which creates separate structures under Section 137.016.1(1).*

(Emphasis added). There are 5 doors linking Taxpayer’s and [Company A’s] facilities: One on the dock, three inside, and one that is on the conveyor (more of a conveyor door). Taxpayer can lock the 5 doors, but Taxpayer’s plant manager explains they never do, since some work would have to be done to actually lock them. The structure-to-structure openings (5 doors) between Taxpayer’s cold storage facility and [Company B’s] processing facility prevent Taxpayer’s facility from being an enclosed structure or building in which finished goods are stored, and in which manufacturing does not take place. Therefore, RCW 82.08.820(2)(m) is not satisfied.

#### DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 12<sup>th</sup> day of August 2008.