

Cite as Det No. 11-0345, 32 WTD 117 (2013)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
)	No. 11-0345
...)	
)	Registration No. . . .
)	Document No. . . . /Audit No. . . .
)	Docket No. . . .
)	.

[1] RULE 211; RCW 82.04.050: RETAIL SALES TAX – RENTAL OF EQUIPMENT WITH OPERATOR – CRANE RENTALS. A taxpayer is subject to retail sales tax on the rental of cranes with operators when the taxpayer directs the lifts, the taxpayer is charged on the basis of the amount of time the cranes are used, and the crane operator does not perform work to contract specifications or use skills beyond those needed to operate the equipment.

[2] RCW 82.08.010: RETAIL SALES TAX – SALES PRICE. Amounts charged by a renter of cranes with operators for permit fees and subsistence are seller expenses included in the measure of retail sales 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.

Margolis, A.L.J. – An erector and installer of structural steel appeals the assessment of deferred sales tax on rentals of cranes with operators on grounds that (1) it hired the crane company to do work as a subcontractor for resale, and (2) it should be permitted to deduct the crane company's expenses from the measure of tax. We deny the petition.¹

ISSUES

1. Whether, under WAC 458-20-211 (Rule 211), Taxpayer rented cranes with operators subject to retail sales tax.

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

2. Whether, under RCW 82.08.010, Taxpayer may deduct the crane company's expenses from the measure of retail sales tax.

FINDINGS OF FACT

Taxpayer is a . . . Washington-based corporation that specializes in the installation of reinforcing, structural, and miscellaneous steel for owners, developers, and general contractors. The Audit Division of the Department of Revenue (Audit) conducted a partial compliance audit for the period January 1, 2006, through March 31, 2010, to verify that Taxpayer had properly reported taxes due on selected Washington State business activities and transactions. On November 4, 2010, Audit issued an assessment consisting of \$. . . in retail sales tax, and \$. . . in interest, for a total assessment of \$

Taxpayer contracted with [a crane company] to provide cranes with operators to be used at its construction sites. When Taxpayer rented the cranes . . . , it gave [the crane company] a resale certificate, and [the crane company] did not charge Taxpayer retail sales tax. Both Taxpayer (the buyer) and [the crane company] (the seller) treated the rentals, for tax purposes, as sales for resale to others upon which no retail sales tax was due. Audit, however, determined Taxpayer was not renting the cranes with operators for resale to others, so the resale certificate provided [the crane company] was invalid and Taxpayer was liable for the unpaid retail sales tax on its purchases from [the crane company].

Taxpayer appealed the assessment. It subsequently provided invoices for the audit period 2006-2009 showing that it paid retail sales tax on invoices in 2006 and 2007 for which it was assessed deferred sales tax. Taxpayer also asserted that it should not have been assessed \$. . . in deferred sales tax on charges for permits (state highway permits) and subsistence charges (charges for food and/or lodging for the crane operators) that were included in those invoices. We forwarded the invoices to Audit. On September 14, 2011, while the appeal was pending, Audit issued a post assessment adjustment (PAA) which reduced the assessed deferred retail sales tax where Taxpayer had proved that retail sales tax had been paid. However, no adjustment was made for the permit and crew subsistence charges. Audit reduced the assessment of retail sales tax to \$. . . , and interest to \$. . . , for a total assessment of \$. . . (not including extension interest of \$. . .).

Taxpayer asserts that its purchases from [the crane company] are exempt from retail sales tax because it contracted with [the crane company] to operate a crane at its construction jobsites as a subcontractor. Taxpayer explained its process for hiring [the crane company], and [the crane company's] role on the jobs. According to Taxpayer, [the crane company] visits the worksite, and discusses the projects with Taxpayer to determine the lift requirements. [The crane company] tells Taxpayer what it needs to provide the crane services, such as the removal of power lines. [The crane company] develops a lift plan, which establishes the placement, model, and configuration of the crane, as well as rigging components, total load calculation, and percent of weight capacity. [The crane company] and Taxpayer agree on an amount for the job, and [the crane company] invoices Taxpayer for its time. During the project, Taxpayer selects the objects to lift, attaches items to the crane, and directs where the crane operator should move the items,

and [the crane company] is responsible for lifting the items as specified in the lift plan. Taxpayer provided copies of its yearly Master Services Subcontract agreements with [the crane company]. The agreements refer to Taxpayer as the contractor, and [the crane company] as the subcontractor.

ANALYSIS

[1] RCW 82.08.020 imposes a tax equal to a percent of the selling price on each retail sale in Washington. Selling price includes sales price. RCW 82.08.010. The meaning of sales price includes the total amount of consideration, except separately stated trade-in property of like kind, for which tangible personal property is leased or rented, without deduction for any expense of the seller. *Id.* During the audit period, the term “retail sale” included

[p]roviding tangible personal property along with an operator for a fixed or indeterminate period of time. A consideration of this is that the operator is necessary for the tangible personal property to perform as designed. For the purpose of this subsection (4)(a)(ii), an operator must do more than maintain, inspect, or set up the tangible personal property.

RCW 82.04.050(4)(a)(ii) (2008).² Thus, Washington law imposes retail sales tax on the rental of equipment with an operator, without deduction for any expense of the seller.

Generally, the seller must collect retail sales tax from the buyer, and then remit the collected tax to the Department. RCW 82.08.050(1). Sellers are relieved from personal liability for the amount of tax if they properly obtain a copy of a reseller permit issued to the buyer by the department.³ RCW 82.08.050(7), (13). If the buyer fails to pay the seller the tax imposed by 82.08 RCW and the seller has not paid it to the Department, the Department may proceed directly against the buyer for collection of the tax. RCW 82.08.050(10).

WAC 458-20-211 is the administrative rule regarding leases or rentals of tangible personal property, and provides additional clarification on when items qualify as rentals of equipment with an operator. Rule 211(2)(d) defines “rental of equipment with operator” as:

[T]he provision of equipment with an operator to a lessee to perform work under the specific direction of the lessee. In such cases the lessor is generally not responsible for performing work to contract specification and does not determine how the work will be performed. Though not controlling, persons who rent equipment with an operator typically bill on the basis of the amount of time the equipment was used.

Rule 211(1) explains that “some activities performed by operated equipment may be taxable under classifications other than retail sales if the operator and equipment perform activities as a prime contractor or subcontractor and these activities are specifically classified under other tax

² Laws of 2003, ch. 168, § 104. [In 2010, the legislature moved the substantive language of former RCW 82.04.050(4)(a)(ii) to new subsection (9). Laws of 2010, ch. 106, § 202.]

³ Resale certificates were replaced with reseller permits effective January 1, 2010.

classifications by the revenue act.” In this case, Taxpayer argues that [the crane company] rented the equipment with operator to perform activities as a subcontractor.⁴

Rule 211(2)(c) defines “subcontractor” as:

[A] person who has entered into a contract for the performance of an act with the person who has already contracted for its performance. A subcontractor is generally responsible for performing the work to contract specification and determines how the work will be performed. In purchasing subcontract services, the customer is primarily purchasing the knowledge, skills, and expertise of the contractor to perform the task, as distinguished from the operation of equipment.

Therefore, pursuant to these definitions, the key distinctions between rental of equipment with an operator and subcontractor services are: (1) who determines how the work is performed; and (2) whether the party is hired primarily for the knowledge, skills, and expertise to perform the task rather than operating the equipment.

With respect to the first item, Rule 211(2)(c) explains that a subcontractor is “generally responsible for performing work to contract specification and determines how the work will be performed.” A renter of equipment with an operator, however, generally does not perform the work to contract specification, but performs work under the direction of the lessee pursuant to Rule 211(2)(d).

The yearly agreements provided by Taxpayer showed that Taxpayer contracted with [the crane company], but do not show that [the crane company] was performing work on projects to contract specifications. Taxpayer directed [the crane company’s] lifts, and [the crane company] performed the job by following Taxpayer’s instructions. While [the crane company] provided lift plans and other lift-related specifications, Taxpayer directed its on-site work. [The crane company] performed work under Taxpayer’s direction rather than to contract specification, and charged Taxpayer on the basis of the amount of time the equipment was used, indicating that [the crane company] was a renter of equipment with an operator rather than a subcontractor.

⁴ [The definition of “retail sale” in RCW 82.04.050 includes the sale of tangible personal property consumed or labor and services provided with respect to “[t]he construction, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers, . . .” RCW 82.04.050(2)(b). This provision covers most residential or commercial construction. When Taxpayer provides such services to persons who own, lease, or have the right of possession to the real property where the construction takes place, Taxpayer is making a retail sale to a “consumer” and must collect retail sales tax for those services. *See* RCW 82.04.190(4) (definition of “consumer” includes owners and lessees of real property which is being constructed, improved, repaired, etc.). Any subcontractor with whom Taxpayer contracts to perform a portion of the construction services Taxpayer is under contract to perform for the “consumer” would be making a “sale at wholesale” to Taxpayer for its services. RCW 82.04.060(2) (“sale at wholesale” includes charge for labor and services rendered in respect to real or personal property to persons who are not consumers, if the charge is a “retail sale” when rendered to consumers). Unlike when it purchases the use of equipment such as a crane with an operator, which is a “retail sale” under RCW 82.04.050(4)(a)(ii) (currently RCW 82.04.050(9)), Taxpayer would not owe retail sales tax on its wholesale purchase of a subcontractor’s services.]

The second element of providing subcontractor services under Rule 211(2)(c) is that the subcontractor is hired for its knowledge, skill, and expertise “to perform the task, as distinguished from the operation of equipment.” While the lift and execution plans provided by [the crane company] demonstrate that the crane lifts require a certain amount of expertise, we find they do not show that [the crane company] used skills “beyond those needed to operate the equipment.” Rule 211(2)(e).

Rule 211 provides examples that help explain why this situation would not qualify as subcontract services. Rule 211(8)(a) reads as follows:

ABC Crane is hired to supply a crane and operator to lift air conditioning equipment from the ground and hold it in place on the roof of a six-story building while the prime construction contractor bolts the unit down. ABC Crane's operator will retain control over the crane. ABC Crane has no responsibility to attach wiring, plumbing, or otherwise make the unit operational. ABC Crane is renting equipment with an operator since it has no responsibility to perform actual construction to contract specification. The activity of renting a crane with an operator is a service included within the definition of a retail sale and is not otherwise tax classified elsewhere within the revenue act

Like the example, [the crane company] is hired by Taxpayer to supply a crane and operator. [the crane company's] operator retains control over the crane and [the crane company] has no responsibility to attach or detach steel to the crane or otherwise install the structural steel to contract specification. Thus, following this example, it is renting equipment with an operator to Taxpayer.

Another example provided in Rule 211(8)(b) that is helpful, reads as follows:

ABC Crane is hired by a prime contractor to install a neon sign on the side of a new six-story building which is being constructed. ABC is responsible for making certain that the sign is correctly fastened to the side of the building and for installation of the electrical connections and meets the proper building codes. ABC is directly involved in construction and performs work to contract specification. Since the work is being done for the prime contractor for further resale, this is a wholesale sale, provided a resale certificate (WAC 458-20-102A) is obtained for sales made before January 1, 2010, or a reseller permit (WAC 458-20-102) for sales made on or after January 1, 2010. **Had ABC only been hired to hold the sign in place while the prime contractor fastened it, this would have been a retail rental of equipment with operator.**

(Emphasis added.) In this case, [the crane company] is not hired to install anything, and is not performing construction work to contract specification. It is only hired to lift items and move them as directed by Taxpayer so that Taxpayer can install the items, and is thus, under this example, again renting equipment with an operator.

The Department has also adopted a “true object test” that taxpayers can use to determine whether they are renting equipment with an operator or purchasing subcontractor services. Rule 211(2)(e) defines the test as follows:

The term "true object test" as it relates to this section means the analysis of a transaction involving equipment and an operator to determine if the lessee is simply purchasing the use of the equipment or purchasing the knowledge, skills, and expertise of the operator beyond those needed to operate the equipment. Even if it is determined that the customer is purchasing the knowledge, skills, and expertise of the operator, the transaction may still be a retail sale if the activity is specifically included by statute within the definition of a retail sale. This test can also be applied to rentals of tangible personal property when the seller performs some service in connection with the rental.

In this case, Taxpayer hires [the crane company] to operate equipment. Taxpayer hires [the crane company] to lift and move steel with its cranes so that Taxpayer can erect and install it. Though this requires planning by [the crane company], we find that Taxpayer is purchasing the use of the equipment and not the knowledge, skills, and expertise of the operator beyond those needed to operate the equipment. Therefore, we conclude that [the crane company] provided equipment with an operator under the true object test in Rule 211(2)(e).

[2] Taxpayer also asserts that Audit erred by including subsistence charges and permit fees in the measure of retail sales tax. However, sales price includes the total amount of consideration the seller received without deduction of any expense of the seller. These charges and fees are the seller’s expenses. Thus, they cannot be deducted from the measure of retail sales tax, and we deny Taxpayer’s petition with regards to this issue.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 6th day of December, 2011.