Cite as Det. No. 04-0287E, 24 WTD 275 (2005)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In The Matter of the Petition For Correction of Assessment of	)	F I N A L E X E C U T I V E D E T E R M I N A T I O N
	)	No. 04-0287E
. . .	)	Registration No. . . .
	)	Document. No. . . .
	)	Audit No. . . .
	)	Document No. . . .
	)	Audit No. . . .
	)	Docket No. . . .

[1] RULE 111; ETA 2016; RCW 82.04.050: B&O TAX – TEMPORARY LABOR – TAX CLASSIFICATION. A staffing company's B&O tax reporting classification is determined based on the services performed by the staffing company's employees. If the work performed is classified as a retailing activity under RCW 82.04.050, the staffing company must collect retail sales tax from its client, unless specifically exempt by law. A client of a staffing company has the corresponding liability to pay retail sales tax

[2] RULE 111; ETA 2016; RCW 82.32.070: B&O TAX – TEMPORARY LABOR—TAX CLASSIFICATION – LACK OF RECORDS – PRESUMPTION. A residential housing contractor was correctly assessed deferred retail sales tax on all the charges it paid to TSCs for the use of laborers when no records documented the nature of work they performed because the Department is entitled to a presumption, under RCW 82.32.070, that temporary labor performed for a contractor was related to the contractor's main business activity – the building of homes.

[3] RULE 111: EXCISE TAX LIABILITY – INSURANCE PREMIUMS PAID FOR BANKRUPT STAFFING AGENCY. When a taxpayer is required by RCW 51.16.060 to pay a bankrupt temporary staffing agency's industrial insurance premiums, that liability does not relieve a taxpayer from those B&O and retail sales tax liabilities otherwise due because there is no corresponding or offsetting relief in The Revenue Act

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:

Bauer, A.L.J -- Taxpayer, a general contractor, objects to an assessment of deferred sales tax on amounts it paid to various temporary staffing companies (TSCs) for the temporary services of laborers. We hold that Taxpayer was properly charged deferred sales tax on its services.[1]

ISSUES:

1. Can temporary labor provided to a general contractor by a TSC be properly classified as a "retail sale" under RCW 82.04.050?

2. If so, was a residential housing contractor correctly assessed deferred retail sales tax on all the charges it paid to TSCs for the use of laborers when no records document the nature of work they performed?

3. If the taxpayer properly owed retail sales tax on the labor purchased from a TSC, is the taxpayer relieved of that liability when the taxpayer was also required by operation of law[2] to pay the bankrupt TSC's employer's industrial insurance premiums on the hourly wages of those employees who worked on the job?[3]

4. If Taxpayer is found to owe deferred retail sales tax, is it entitled to a larger tax paid at source retail sales tax deduction for work performed on its custom construction projects?

FINDINGS OF FACT:

The Audit Division (Audit) of the Department of Revenue (Department) audited the business records of . . . (Taxpayer) from January 1, 1996 through December 31, 1997 (first audit period). As a result, Doc. No. . . . was issued on February 7, 2003 granting a credit of $ . . . , which amount included refund interest.

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

[2] RCW 51.16.060, which provides:

> [A] temporary help company which provides workers on a temporary basis to its customers shall be considered the employer for purposes of reporting and paying premiums and assessments under this title according to the appropriate rate classifications as determined by the [Labor and Industries] department; PROVIDED, that the employer shall be liable for paying premiums and assessments should the temporary help company fail to pay the premiums and assessments under this title.

[3] This issue and its corresponding analysis were revised after issuance of the proposed determination pursuant to input received from both Taxpayer and Audit.

Audit also reviewed Taxpayer's records from January 1, 1998 through June 30, 2001 (second audit period). As a result, Doc. No. . . . was issued on February 7, 2003 assessing a total amount due of $ . . . , which amount included interest through that date. A total of $ . . . is at issue in this appeal.

Taxpayer, a master builder, developed and built high-end single family housing, and often developed entire neighborhoods. During the audit period, most of Taxpayer's income derived from speculative ("spec") building, although it did some custom work "when it wanted to avoid the financial responsibility" of spec building. Taxpayer generally sold . . . to . . . houses per year.

Taxpayer generally paid retail sales tax on all of its building materials, and took a "retail sales tax paid at source deduction" on labor and materials for its custom construction.[4] Thus, when Taxpayer built a custom home, it correctly charged its customer retail sales tax on the total sales price of the home. When filing its excise tax returns, the Taxpayer calculated the amount of tax owed the Department, after taking a "sales tax paid at source" deduction, which deduction represented amounts of retail sales tax Taxpayer had paid suppliers and subcontractors in lieu of issuing a resale certificate.

Taxpayer permanently employed construction managers; project managers; schedulers; accounting, sales and marketing personnel; contract negotiators; and administrative staff. Taxpayer subcontracted out most of the building activities to unrelated construction companies, who provided their own employees. During the audit periods at issue, Taxpayer also contracted with several TSCs who provided skilled and unskilled labor on various construction jobs.

When it needed highly skilled construction labor, such as additional framers, it went to [Labor Pool] and paid retail sales tax on the charges. [Labor Pool], unlike the other TSCs, had a contractor's license. [Labor Pool's] hourly rates for its temporary workers ranged from $ . . . to $ . . . per hour. These charges reflected the skill level of the workers.

When Taxpayer needed less specialized labor at a lower cost, it went to other TSCs that were not licensed as contractors, but supplied temporary workers who could perform a broader range of services, ... These TSCs' hourly rates were approximately $ . . . an hour, which, like [Labor Pool], included overhead and profit margin. These TSCs did not add retail sales taxes to their invoices. Because Taxpayer did not pay use or retail sales tax on the charges from these TSCs, the Audit Division assessed deferred retail sales tax measured by the TSCs' charges.

Taxpayer disputes the assessment, stating that not all temporary workers were used to perform building or constructing activities and that neither the TSCs' nor Taxpayer's records document exactly what work was performed by the temporary laborers supplied to Taxpayer. There are some indicators, however. For example when temporary laborers were requested, Taxpayer

[4] The majority of the credit received for the first audit period constituted retail sales tax paid at source deductions that had not been taken.

would specify the nature of skills desired *e.g.*, "heavy lifting" or "digging," and where the laborers were to report for work. Taxpayer, in reviewing the TSC invoices Audit used for its 6-month test period, notes that the detail on the majority of invoices indicates the work performed required "heavy lifting." The invoices also detail the Taxpayer's marketing and office department as supervising these workers and indicate there was work performed at job sites for the marketing department.

According to Taxpayer, when a temporary laborer was hired to perform a "marketing" function for Taxpayer, [the laborer] would be told to report to Taxpayer's headquarters' address, and the invoice would reflect the headquarters address as the "job address." Marketing functions included moving boxes in the office; moving model home furnishings on and off of trucks; sweeping houses; washing signs; and picking up stray lumber, cigarette butts, and other trash in order to keep the neighborhoods and properties sale-ready. In addition, according to Taxpayer, speculative homes included fully furnished "model homes" that would require a complete compliment of furniture and furnishings. The marketing department would require personnel to perform "heavy lifting," that is, to move furniture.

The marketing department also had outside potted trees and plants in front of model homes that would need to be moved from one location to another. Finally, according to Taxpayer, the invoices also indicate these same laborers were used to direct traffic. Taxpayer estimates that approximately 70% of its temporary workers performed such jobs.

When temporary laborers were hired to perform at certain development sites, they would be advised to report directly there, and the invoice would reflect the particular site address. Jobs performed at particular sites might include: pre-grading of lots with hand rake to clean the site before landscaping, rake the floor of garage before concrete base is laid, digging ditches for underground lines to outlying electric fixtures such as lights on the street, and stripping forms on sidewalks. Such jobs were done before the arrival of subcontractors (such as landscapers, concrete layers, and electricians) because any delay waiting for the subcontractors would make the neighborhoods look messy. Taxpayer estimates that about 30% of its unskilled worker expenses were for such site work.

The TSCs did not provide tools or other equipment for its workers on the job site. Taxpayer only requested the temporary laborers to show up with hardhat, boots, gloves, and safety glasses -- the minimum equipment required for visitors to Washington construction sites. Based on this equipment requirement, the fact that Taxpayer was a contractor and the fact that the 6-month test period TSC invoices did not describe the activities of its workers when they were provided to Taxpayer, Audit concluded the casual laborers were performing the retail activities of building and cleaning buildings. . . . Audit assessed deferred retail sales tax because Taxpayer, a contractor, was not able to provide detailed records as to what the day laborers did and it could be assumed that it was assisting Taxpayer in its business of contracting, thus coming within the scope of RCW 82.04.050's definition of retail services.

ANALYSIS:

[1] Issue #1: Can temporary labor provided to a general contractor be subject to retail sales tax under RCW 82.04.050? The following subsections of RCW 82.04.050 provide that certain services are retail sales under the Washington Revenue Act:

> (2) The term "sale at retail" or "retail sale" shall include the sale of or charge made for . . . labor and services rendered in respect to the following:
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> (b) The constructing . . . 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, and shall also include the sale of services or charges made for the clearing of land and the moving of earth . . .
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> (d) The sale of or charge made for labor and services rendered in respect to the cleaning . . . of existing buildings or structures, but shall not include the charge made for janitorial services . . . .

(Emphasis added.) Taxpayer argues that the "temporary labor" services it purchased from the TSCs cannot lawfully be considered retail sales taxable construction or cleaning labor. Taxpayer argues that the temporary labor supplied did not fit under any of the RCW 82.04.050 definitions of "retail sale" because the TSCs were not being paid to render cleaning or construction services, nor were they under contract to perform any of those activities.[5]

The arguments raised by Taxpayer as to the TSCs' B&O tax classification were fully considered in Det. No. 00-206E, 21 WTD 66 (2002). That determination held that a TSC that held itself out as able to provide employers with workers having all types of skills, including construction skills, was providing specialized workers. Accordingly, Det. No. 00-206E instructed that, when a TSC's temporary workers performed construction activities for prime contractors, it was to report its activities under the retailing or wholesaling classifications, as appropriate.

Excise Tax Advisory 2016.04.111 (ETA 2016), concerning temporary staffing companies, was issued September 23, 2003 to explain, in part, the holding in *City of Tacoma v. William Rogers Co.*, 148 Wn.2d169, 60 P.3d 379 (2002). ETA 2016 provides, as to classification, the following guidance:

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[5] Taxpayer also argued, among other things, that it was merely under contract to provide temporary laborers. Further, the TSCs at issue were not licensed as contractors, could not file construction labor liens against the projects, and were not responsible for the performance of any part of Taxpayer's construction services under RCW 82.04.051(1), and Taxpayer could not look to the TSCs for any construction liability. Thus, argues Taxpayer, the TSCs could not be considered to be providing retail (or wholesale) services when it provided temporary workers to building contractors.

> When a staffing company is the employer of the workers furnished to the client, the staffing company's B&O tax reporting classification is determined based on the services performed by the staffing company's employees. The measure of tax includes payments that the staffing company or client may designate for paying the employee's wages or benefits. If the work performed is classified as a retailing activity under RCW 82.04.050, the staffing company must collect retail sales tax from its client, unless specifically exempt by law. If an employee performs services subject to one tax classification and, incidental to those services, performs a service subject to a different tax classification, the tax classification of the predominate [sic] services performed applies to the gross income associated with that employee.
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> Examples: . . .
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> - Income for providing employees that perform construction cleanup services to a construction company is subject to the wholesaling B&O tax, but only if the staffing company obtains a resale certificate from the construction company. If a resale certificate is not obtained, retailing B&O and retail sales taxes apply.

(Emphasis added.) Although ETA 2016 directly addresses the taxation of staffing companies, Taxpayer, as a client of such TSCs, has corresponding liabilities. Thus, if the TSC is correctly taxable under the retailing B&O classification for the provision of temporary workers, then Taxpayer as the purchaser is liable for the retail sales tax on such purchase.

Taxpayer complains that it would be an unreasonable administrative burden to accurately account for the activity of each of the laborers provided by the TSCs. In Det. No. 00-206E, we addressed the taxpayer-TSC's similar contention that it would be impractical for it to know what its workers were doing for its clients, and in what capacity. Det. No. 00-206E noted that, in describing its process, the TSC had stated that it had obtained from its client a description of the work to be performed and posted descriptions of available jobs in its dispatch halls. It obtained the job descriptions in order to establish the compensation rate and in order to match the work to be performed with a worker having the necessary skills. It also required its temporary workers to return to its local office with a client authorization for payment in order to be paid. The work order/assignment process provided information on the nature of the client's business and the work to be performed. The payment authorization procedure gave the TSC the opportunity to require that the client state the nature of the work performed, whether the client was a business or a non-business consumer, and whether the client was a prime contractor, subcontractor, etc. It also gave the TSC the opportunity to verify that information by querying the worker, before the taxpayer invoiced the client. Det. No. 00-206E noted that verifying the nature of the work activity did not appear to be impractical for the temporary staffing company. . . . Taxpayer [should be able] to document what work the TSCs' employees performed . . . .

The law is clear on the issue of a buyer's responsibility to pay retail sales tax. RCW 82.08.050(1) requires the buyer to pay, and the seller to collect, retail sales tax when it is properly due. RCW 82.08.050(4) explains that, in cases where a buyer fails to pay to the seller

retail sales taxes due, the Department may proceed directly against the buyer for collection of the tax. The law holds the buyer is required to pay retail sales tax whether it is charged by the seller or not. Here, the seller failed to collect the retail sales tax, so the Audit Division acted in conformity with the law and properly assessed retail sales tax directly against Taxpayer (the buyer of the temporary services). RCW 82.08.050(6).

Therefore, we hold that when Taxpayer obtained temporary workers from a TSC that did not charge retail sales tax but should have, Taxpayer is liable for the deferred retail sales tax. Because Taxpayer did not provide adequate records to support a finding that some TSCs provided nonretail services, we find no basis to adjust the assessment of deferred retail sales on these charges.[6]

[2] Issue #2: Was Taxpayer using its TSC laborers in retail sales taxable activities? Neither Taxpayer nor the TSCs from which Taxpayer obtained its temporary workers kept records indicating what work those temporary workers performed for Taxpayer. Taxpayer asserts, even if retail sales tax could potentially be charged for unskilled laborers, the evidence available indicates that none of this labor was used in actual construction activities or the cleaning of buildings.

We disagree, even under Taxpayer's description of the work done, that no retail sales tax is owed. Workers cleaning construction sites for landscaping and concrete work, removing forms from walks and driveways, digging ditches for underground utilities, and pre-grading construction sites by hand were performing labor that would have been provided by subcontractors had they been immediately scheduled. Such labor would have unquestionably been subject to retail sales tax if performed by a subcontractor. Because insufficient records were kept, we must sustain the department's presumption, under RCW 82.32.070, that temporary labor performed for a contractor was related to Taxpayer's main business activity – the building of homes. Based on Taxpayer's inability to supply documentation to either Audit or the Appeals Division to rebut that presumption, Taxpayer's petition must be denied.

However, as stated in the audit report, Audit will adjust the tax assessment if some of the work performed by these workers can be demonstrated to be other than within the purview of RCW 82.04.050. Audit will consider any documentation submitted and make adjustments as appropriate.

[3] Issue #3. Is retail sales tax still payable when a consumer of temporary labor becomes liable for the TSC's industrial insurance premiums under RCW 51.16.060? When one of the TSCs used by Taxpayer declared bankruptcy and became unable to pay the industrial insurance premiums on its employees, Taxpayer was required under RCW 51.16.060 to do so in the amount of $ . . . . This was in addition to the amounts already paid to that TSC for its

[6] RCW 82.32.070(1) requires that any person subject to tax under the Revenue Act must keep adequate records so that his tax liability may be established. Failure to keep or provide such records to the Department renders that person unable to question any assessment in any proceeding.

employees' services. The Department assessed retail sales tax on the TSC's charges to Taxpayer.

Considering this unique circumstance, Taxpayer argues that it should be deemed to have been the employer of the TSC's employees. Because retail sales or use taxes are not due on the labor of a taxpayer's employees, Taxpayer argues the assessment of retail sales tax on the TSC's services should be dropped in its entirety.

Although we can understand Taxpayer's frustration in this regard, the Department has no authority to deem TSC employees to have been those of the Taxpayer and thus exempt Taxpayer from the payment of retail sales tax. Although RCW 51.16.060 required Taxpayer to pay industrial insurance premiums rightfully owed by the TSC in its capacity as an employer, there is no corresponding or offsetting relief in the Revenue Act. It is well established that, as an administrative agency, the Department has no authority to grant an exemption where none exists in the law. Only the legislature, through enactment of appropriate legislation, may do so. *See* Det. No. 87-42, 2 WTD 201 (1986); Det. No. 87-169, 3 WTD 145 (1987); Det. No. 90-202, 9 WTD 286-85 (1990); Det. No. 04-0006, 23 WTD 195 (2004). Accordingly, relief as to this issue must be denied.

Issue #4: Should the tax-paid-at-source deduction be increased? We agree with Taxpayer that, when Taxpayer was assessed additional retail sales tax liability on labor related to Taxpayer's custom construction projects, it should have been granted a corresponding increase in its tax paid at source deduction for its sales tax liability which had been previously reported on its sales of custom built houses. Taxpayer's petition as to this issue is granted, and the tax paid at source deduction will be recalculated.

DECISION AND DISPOSITION:

Taxpayer's petition is denied as to Issues No. 1, 2, and 3, and granted as to Issue No. 4. As to Issue No. 2, however, Taxpayer may provide records to Audit within 30 days of the date of this determination to establish that the activities of its temporary laborers were not retail sales taxable.

DATED this 30th day of December 2004.