Cite as Det. No. 14-0360, 35 WTD 305 (2016)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 14-0360
. . .	)	Registration No. . . .

RCW 82.04.240, RCW 82.04.110, RCW 82.04.120, RCW 82.04.130, RCW 82.04.190; ETA 3071.2009: BUSINESS AND OCCUPATION TAX – MANUFACTURING – PUBLIC ROAD CONSTRUCTION – ASPHALT PRODUCTION – CONSTRUCTION SITE – PRODUCTION ONSITE – PRODUCTION OFFSITE: If a taxpayer is manufacturer of asphalt, the taxpayer is liable for manufacturing B&O tax on its sales of asphalt to other commercial users. If a taxpayer is a consumer of its own manufactured asphalt, the taxpayer is liable for manufacturing B&O tax on the value of the asphalt it uses in its public road construction projects.

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.

Valentine, A.L.J. – A Washington corporation, [Taxpayer], objects to the classification of asphalt production as manufacturing for business and occupation (B&O) tax purposes. . . . Taxpayer's petition is denied . . . .[1]

ISSUES

1. Pursuant to RCW 82.04.240, RCW 82.04.110, RCW 82.04.120, RCW 82.04.130, and RCW 82.04.190, does the Department properly classify Taxpayer's production of asphalt as manufacturing, for B&O tax purposes, when Excise Tax Advisory 3071.2009 (ETA 3071)[2] differentiates between the B&O tax liabilities of taxpayers who produce asphalt for use in [public road construction (PRC)] projects on or near the construction site and those who produce the asphalt offsite?

. . .

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.
[2] Excise Tax Advisories are interpretive statements authorized by RCW 34.05.230. Interpretive statements are advisory only. RCW 34.05.230(1).

FINDINGS OF FACT

Taxpayer is in the business of utility and road construction. Taxpayer's primary business is road construction, which includes asphalt paving. Taxpayer produces asphalt at two permanent plants it owns and operates in Washington State. Taxpayer uses asphalt it produces for completion of its own contracted PRC jobs. Taxpayer also sells some of the asphalt it produces to commercial customers. The [Department of Revenue's (Department)] Audit Division (Audit) reviewed Taxpayer's business activities for the period of January 1, 2009 through March 31, 2013.

Taxpayer disagrees with the Department on two points: 1) Taxpayer contends that asphalt production is not properly classified as manufacturing for B&O tax purposes; and 2) Taxpayer disagrees with Audit that an asphalt value of $ . . . per ton is the proper measure of its use tax liability for the asphalt used in its PRC projects during the audit period.

During the audit period, Taxpayer collected from its PRC customers and remitted use tax to the Department on a value of $ . . . per ton. Taxpayer has collected and paid use tax on an asphalt value of $ . . . per ton for approximately 30 years. Audit assessed Taxpayer for use tax, plus interest, on the difference between an asphalt value of $ . . . per ton and $ . . . per ton.[3]

. . . . Prior to the audit at issue in this appeal, Audit reviewed Taxpayer's business activities for the period of January 1, 2004 through December 31, 2007. That audit was a partial scope audit and did not include a review of Taxpayer's PRC income and related use tax liability for the production and use of asphalt in its PRC projects. Audit also reviewed Taxpayer's business activities for the period of January 1, 1992 through December 31, 1995. Again, Audit did not review Taxpayer's PRC income and related use tax liability for the production and use of asphalt.

Between approximately 1985 and 1999, the Department audited Taxpayer's PRC contracts and certified that the appropriate amount of tax was paid or that funds were available to cover the correct amount of tax.[4] The Department did not make corrections to the reported asphalt value of $ . . . per ton during that time. In the year 2000, with the Department's approval, Taxpayer began self-reporting its use tax liability for the asphalt it manufactured at its own plants and used in its PRC projects. Taxpayer continued to report a per-ton asphalt value of $ . . . from 2000 through the audit period at issue in this appeal.

ANALYSIS

1. Does the Department properly classify Taxpayer's production of asphalt as manufacturing, for B&O tax purposes, when ETA 3071 differentiates between the B&O tax liabilities of

[3] The assessment is for $ . . . ($ . . . in use tax and $ . . . in interest).

[4] See RCW 60.28.011 for information about public improvement contract monetary retainage reserved for "the state with respect to taxes . . . imposed pursuant to . . . 82 RCW which may be due from such contractor." See RCW 60.28.051 for information about the Department's role in certifying that "all taxes, increases, and penalties due from the contractor, and all taxes due and to become due with respect to such contract have been paid in full . . . or . . . are . . . readily collectible without recourse to the state's lien on the retained percentage."

taxpayers who produce asphalt for use in PRC projects on or near the construction site and those who produce the asphalt offsite?

RCW 82.04.220 imposes a B&O tax "for the act or privilege of engaging in business activities" in Washington. Taxpayer does not dispute that it owes B&O tax on the gross income it obtains from PRC jobs.[5] Rather, Taxpayer disputes that manufacturing B&O tax is also owed on the production of the asphalt used in its PRC projects.

Taxpayer contends that ETA 3071, titled "Public Road Construction Materials – Measure of Tax," erroneously interprets Washington's PRC statutes to allow for different treatment of taxpayers depending on where the PRC materials are produced or manufactured. Taxpayer contends that such different treatment violates the Equal Protection Clause of the federal Fourteenth Amendment and the Privileges and Immunities Clause of the Washington State Constitution.[6] Taxpayer contends that asphalt production, regardless of where it takes place, is inseparable from performing PRC, and therefore, should not be classified as manufacturing.

ETA 3071 distinguishes between PRC building materials or components fabricated at a location away from the construction site and those fabricated at the job site. It reads, in pertinent part:

> Where building materials or components are fabricated at a location away from the construction job site, use tax and the manufacturing B&O tax are due. The measure of the taxes must correspond as nearly as possible to the gross proceeds from comparable sales of the building materials. "Comparable sales" means sales at comparable locations in this state of similar products of like quality and character, in similar quantities, under comparable conditions of sale, to comparable purchasers. In the absence of comparable sales as a guide to value, such value is determined upon a cost basis, which includes every item of cost attributable to the particular article, including direct and indirect overhead costs. (See RCW 82.04.050, WAC 458-20-112, and WAC 458-20-136).
>
> Conversely, fabricating done at the construction job site is inseparable from the constructing improving or repairing of a publicly owned road and, thus, retail sales tax or use tax applies only to the value of the materials delivered to the job site; the manufacturing B&O tax does not apply.

ETA 3071 includes an example relevant to asphalt production and use:

> DEF contracts to construct a road for a county in Washington. As part of the construction project, DEF builds a temporary asphalt or concrete mixing plant in the

[5] RCW 82.04.280(1) outlines the B&O tax rate for persons, among others, engaged in "building, repairing or improving any street, place, road, highway, easement, right-of-way, mass public transportation terminal or parking facility . . . which is owned by a municipal corporation or political subdivision of the state or by the United States . . . which is used or to be used, primarily for foot or vehicular traffic." The measure of the tax "is equal to the gross income of the business." RCW 82.04.280(1). This statute, in essence, creates the PRC B&O tax classification and establishes gross income as the measure of the tax. Thus, contractors engaged in PRC are liable for B&O tax "upon their total contract price." WAC 458-20-171 (Rule 171).

[6] See Taxpayer's brief, dated November 27, 2013.

> general vicinity of the new road. For purposes of this example, presume all materials are purchased by DEF and delivered to the temporary mixing plant.
>
> The "job site" includes asphalt and concrete mixing plants temporarily located for the primary purpose of servicing a particular public road construction contract. This applies only if the temporary mixing plant is built after the contract for constructing, improving, or repairing the public road is awarded to the contractor. The site of such plants need not be adjacent to the public road, highway, or bridge which is being constructed or improved, but must bear a reasonable relationship to the location of the job to be serviced.
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> When the temporary mixing plant is built after the award of the contract, the measure of the use tax is determined by the value of the materials used to create the asphalt or concrete and will not include the labor or overhead costs associated with mixing the asphalt or concrete.
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> If the plant is built prior to the award of the contract or doesn't otherwise qualify, then DEF is a manufacturer of the asphalt or concrete. In this case, the measure of the use tax and the manufacturing B&O tax is the selling price of comparable sales of the asphalt and concrete. If there are no comparable sales, the value of the asphalt or concrete will include labor, materials, and overhead costs.

Taxpayer contends that "there is no legal reason to distinguish between asphalt produced on the job site or off the job site, as long as the tangible personal property that is incorporated into the road is in relationship to the road construction."[7] We note that location of the asphalt production facility is not the only factor outlined in ETA 3071 as a factor in the taxation of asphalt used in PRC projects. Other factors are: Whether the facility is temporary or permanent, whether the facility was built before or after the awarding of a contract, and whether the asphalt is produced only for use in a specific PRC contract.

. . . . As stated in Det. No. 11-0052, 32 WTD 35 (2013):

> The goal of statutory interpretation is to give effect to the intent of the legislature in enacting the statute. Legislative intent is determined primarily from the language of the statute itself. As summarized in *Tesoro Refining and Marketing Co. v. Dep't of Revenue*, 164 Wn.2d 310, 317, 190 P.3d 28 (2008):
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> > . . . . If the meaning of the statute is plain, the court discerns legislative intent from the ordinary meaning of the words. . . . Susceptibility to more than one reasonable interpretation renders the statute ambiguous and allows the court to employ tools of statutory construction such as legislative history to interpret the statute. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 12, 43 P.3d 4 (2002). The mere fact that two interpretations are conceivable does not make a statute ambiguous. *Agrilink [Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005] (Footnote omitted.)

[7] See Taxpayer's brief, dated November 27, 2013.

> To ascertain legislative intent, Washington courts employ a "plain meaning" approach to interpreting statutes, absent ambiguity. . . . . Recently, the courts in Washington clarified that the plain meaning rule used in Washington also encompasses related statutes:
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> > [W]hile traditional plain language analysis of statutes focused exclusively on the language of the statute, this court recently has also recognized that "all that the Legislature has said in the statute and related statutes" should be part of plain language analysis. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.* 146 Wn. 2d 1, 11, 43 P.3d 4 (2002).
> >
> > (*Cerrillo v. Esparza*, 158 Wn. 2d 194, 142 P.3d 155, 159 (2006)).

. . .

RCW 82.04.240 establishes a specific B&O tax rate "[u]pon every person engaging within this state as a manufacturer." The measure of the tax is "the value of the products . . . so manufactured." RCW 82.04.240. The term manufacturer "means every person who, either directly or by contracting with others for the necessary labor or mechanical services, manufactures for sale or for commercial or industrial use from his or her own materials or ingredients any articles, substances, or commodities." RCW 82.04.110(1).

RCW 82.04.120(1) defines the phrase "to manufacture" as "*all activities of a commercial or industrial nature wherein* labor or skill is applied, by hand or machinery, to materials so that as a result thereof *a new, different or useful substance or article of tangible personal property is produced for sale or commercial or industrial use*, and includes: . . . (d) Crushing and/or blending of rock, sand, stone, gravel, or ore." (Emphasis added.)

RCW 82.04.130 defines the term "commercial or industrial use" as "*the following uses of products*, including by-products, *by the* extractor or *manufacturer* thereof: (1) *Any use as a consumer*; and (2) The manufacturing of articles, substances or commodities." (Emphasis added.) *See also* WAC 458-20-134 (Rule 134).

The "persons" referenced in RCW 82.04.280(1)[8] are "consumers" if their PRC projects incorporate tangible personal property "*as an ingredient or component of such publicly owned street*, place, road, highway, easement, right-of-way . . . *by installing, placing or spreading the property in or upon the right-of-way of such street, place, road, highway, easement*." RCW 82.04.190(3). (Emphasis added.)

. . . Taxpayer owns and operates two permanent facilities in Washington where it produces asphalt for its own use as a PRC contractor and for sale to other commercial users. [Pursuant to RCW 82.04.110(1),] Taxpayer's actions meet the definition of the term "to manufacture" when it produces asphalt "for sale or commercial or industrial use." RCW 82.04.120(1). Taxpayer's actions meet the definition of the term "produced . . . for commercial or industrial use" when it uses the asphalt it manufactures as a "consumer" by "installing, placing or spreading" the asphalt

[8] [*See* footnote 5, *supra*, which quotes from RCW 82.04.280(1) regarding the B&O tax classification applicable to "persons" engaged in the business of public road construction.]

"in or upon the right-of-way of such street, place, road, highway, easement" in the conduct of its PRC projects. RCW 82.04.130 and Rule 134. RCW 82.04.190(3).

We find no ambiguity in the B&O tax statutes applicable to manufacturing and manufacturers as they relate to Taxpayer. As a manufacturer of asphalt, Taxpayer is liable for manufacturing B&O tax on its sales of asphalt to other commercial users. RCW 82.04.240. As a consumer of its own manufactured asphalt, Taxpayer is liable for manufacturing B&O tax on the value of the asphalt it uses in its PRC projects. RCW 82.04.130; Rule 134.

As for ETA 3071, it is an advisory statement, not a statute or administrative rule, and its treatment of asphalt manufacturers who, like Taxpayer, manufacture asphalt at permanent off-site facilities and also use the asphalt they manufacture in their own PRC projects, is consistent with the taxation of Taxpayer and consistent with the plain meaning of the B&O taxation statutes applicable to manufacturing and manufacturers. [9]

ETA 3071 provides a different advisory interpretation for those PRC contractors who, after the execution of a specific contract, set up a temporary facility, either on or near the construction site, for the short-term production of asphalt for that specific job or jobs. Taxpayer is not in the latter category. If ETA 3071 did not exist, Taxpayer's B&O tax liability for the value of the asphalt it manufactures and uses as a consumer would not change. ETA 3071 has no effect on Taxpayer's manufacturing B&O tax liability.

We note that statutes are presumed constitutional. *Higher Educ. Facilities Auth. v. Gardner*, 103 Wn.2d 838, 843, 699 P.2d 1240 (1985). And, an administrative agency lacks the power to determine the constitutionality of statutes enacted by the state Legislature. . . . [*Bare v. Gordon*, 84 Wn.2d 380, 383, 526 P.2d 379 (1974).] . . .) Taxpayer provides no persuasive legal authority to show that the Department's taxation of Taxpayer is inconsistent with the plain meaning of the Washington B&O tax statutes applicable to manufacturing and manufacturers. Thus, we conclude it unnecessary to further explore Taxpayer's constitutional objections to ETA 3071.

Taxpayer's petition is denied on this issue.

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DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 18th day of November, 2014.

[9] . . .