

Cite as Det. No. 16-0045, 35 WTD 520 (2016)

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. 16-0045
)	
...)	Registration No. ...
)	

[1] RCW 82.04.290 BUSINESS & OCCUPATION TAX – SERVICE AND OTHER ACTIVITIES CLASSIFICATION – FIRE FIGHTING AND FIRE SUPPRESSION. Wildfire suppression activities performed by a private contractor are subject to Business & Occupation tax under the catchall service and other activities tax classification because firefighting is not specifically classified in the Washington tax code.

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.

Poley, A.L.J. – A wildfire suppression private contractor seeks a refund of tax, penalties, and interest paid to the Department of Revenue [Department] for an assessment of service and other Business & Occupation (B&O) tax, claiming that its activities are properly classified under the wholesaling B&O tax classification The petition is . . . denied¹

ISSUES

Are fire suppression activities performed by trained fire fighters subject to the service and other activities business & occupation tax classification under RCW 82.04.290(2)(b)?

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FINDINGS OF FACT

[Taxpayer] provide wildfire suppression and firefighting services to the United States Government. Taxpayer has two “type 6” fire engines and one “type 5” fire engine. Each engine is operated by a three person crew, one of which is an “engine boss.” Crew members are required to have certain types of training in a variety of safety topics and fire suppression tactics. The engine boss generally has more extensive training and experience, and is the leader of the crew. The crew and engine are leased together as a unit, never separately.

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

Every three years, Taxpayer submits bids with the United States Forest Service (USFS) for a fire suppression contract and placement on a dispatch list. The USFS ranks bidders and lists them on the dispatch list in priority order. This list is used by a variety of federal agencies that manage land, such as USFS, Bureau of Land Management, National Park Service, Fish and Wildlife Service, etc. When a fire occurs that requires resources beyond the capacity of the government agencies, private contractors are dispatched to the fire based on the type of engine needed and the order of the dispatch list.

When an engine and crew are dispatched to a fire, the first step is for the engine boss to check in the crew at the “fire camp,” a temporary headquarters for the fire suppression effort. After check in, the engine and crew will be inspected to make sure proper safety precautions have been taken.

Next, a government agency leader will assign an engine and its crew to a particular task. Tasks could be extinguishing flames with water, digging a fire line, clearing brush to prevent fire, digging up smoldering earth to prevent fire from reigniting, clearing debris and felling burned trees to stabilize an area after fire, moving earth for erosion control, or mobile patrol to watch for fire spreading. As part of bidding eligibility, all crew members must be trained and knowledgeable in performing any of these tasks. A crew may be asked to perform multiple tasks during a day or only one task over the course of several days. The government agency leader decides task assignments on an as-needed basis and no party knows who will be assigned to which task until assignment occurs.

Once a crew has finished their time assisting with the fire, the engine boss will check out the crew at fire camp. The engine boss completes a form to verify the activities performed and number of days worked. This form serves as an invoice. Later, the applicable federal agency will mail a check to Taxpayer. Taxpayer is paid a set daily rate specific to the engine dispatched. The rate is the same regardless of what tasks the engine’s crew performs.

On appeal, Taxpayer also provided a copy of its 2012 contract with USFS (Agreement). Under a section entitled, “D.1—Scope of Agreement,” the contract states, “[Taxpayer] is responsible for all equipment, materials, supplies, transportation, lodging, *personnel, and supervision and management of those personnel*, necessary to meet or exceed the Agreement specifications.” Agreement p. 29 (emphasis added).

The Agreement also specifies that Taxpayer shall furnish each engine with a three person crew, two of which are “Firefighter Types 1 or 2” (FFT) and one of which is a “Single Resource Boss—Engine” (ENGB). Agreement p. 37. Among other requirements, FFTs must have completed firefighter training and an annual fireline safety refresher course. Agreement p. 47-48, 110-111. ENGBs must have completed engine boss training, an annual fireline safety refresher course, and have shown satisfactory performance as an FFT for 15 operational periods on three separate wildland fire incidents. *Id.*

In 2015, the Department conducted a [desk examination] of Taxpayer’s business for the period 2011 through 2014. During the course of the [desk examination], the Department determined that Taxpayer’s business activities were firefighting and should have been reported under the service

and other [B&O] tax classification. Up until this time, Taxpayer had reported its income under the wholesaling B&O tax classification.

The Department reclassified Taxpayer's income to the service and other B&O tax classification. On July 23, 2015, the Department issued a tax assessment to Taxpayer for \$. . . in tax, \$. . . in penalties, and \$. . . in interest, for a total of \$ Taxpayer paid the assessment and now seeks a refund.

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ANALYSIS

1. Fire Suppression Activities

Washington imposes a B&O tax “for the act or privilege of engaging in business” in this state. RCW 82.04.220. Washington's B&O tax applies to various tax classifications, including making sales at retail pursuant to RCW 82.04.250, making wholesale sales under RCW 82.04.270, and providing services pursuant to RCW 82.04.290. Persons engaged in business activities that are not specifically included in a tax classification under chapter 82.04 RCW, are taxable under a catchall provision: the service and other activities B&O tax classification. RCW 82.04.290(2)(b); *Steven Klein, Inc. v. Dep't of Revenue*, 183 Wn.2d 889, 891, 357 P.3d 59 (2015).

Here, Taxpayer fought, suppressed, and extinguished forest fires. These firefighting activities are not specifically classified in the Washington Tax Code (Title 82 RCW).² While a government agency leader may assign the crew to perform tasks that could conceivably fall under the definition of a retail sale in RCW 82.04.050(2)(b), such as moving of earth or clearing of land, Taxpayer contracted with USFS to provide engines and firefighters to fight fires. Because charges for forest fire suppression are not specifically classified, we conclude that the charges for Taxpayer's fire suppression activities were subject to B&O tax under the catchall service and other activities B&O tax classification.

Fire suppression tactics incorporate a wide variety of activities, a few of which may appear to be a retail sale. Charges for providing tangible personal property with an operator are included in the definition of a retail sale and thus taxable under the retailing B&O tax classification. RCW 82.04.050(9); WAC 458-20-211(5)(a). WAC 458-20-211 (Rule 211) defines “rental of equipment with operator” as “the 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.” Rule 211(2)(d).

In Det. No. 97-032R, 20 WTD 261 (2001), we held that payment from a national forest to a taxpayer for rental of emergency equipment with an operator during and after a wild fire was a retailing activity. There, a national forest paid an hourly rental rate for “dozers, loaders, graders,

² Some activities could potentially fall under the government contracting classification per RCW 82.04.280(7), but fighting forest fires on government land does not fall under the definition of a government contracting activity. See RCW 82.04.050(12); RCW 82.04.190(6); RCW 82.04.280(7).

transports, pumps, and water trucks” for the purpose of dust abatement and erosion control. 20 WTD at 262-263 (footnotes omitted). The taxpayer’s personnel operated the equipment at the direction of and under the control of a national forest representative. 20 WTD at 263. The national forest did not require special training by the operators or certification in firefighting, and the operators did not extinguish flames. 20 WTD at 264. We concluded that the true object of the rental agreement between the taxpayer and the national forest was rental of equipment, a retailing activity.

The facts here are distinguishable from the situation in 20 WTD 261. Here, Taxpayer contracted with USFS to provide a fire engine with a crew of three firefighters. Each crew member is trained in fire fighting and fire suppression tactics, and must complete an annual fireline safety course. Taxpayer’s crews extinguish flames, even if they do not extinguish flames exclusively. When a government agency leader assigns a task to a crew, the leader may specify where to perform the task, but does not supervise or instruct the crew on *how* to perform the task; as per the Agreement, all crew members must possess the knowledge and skills to perform the tasks prior to arriving at the scene of a fire-related emergency. Taxpayer is responsible for the supervision and management of its crews, not the government agency leader. The purpose of the Agreement, then, is fire suppression, an activity subject to the service and other activities B&O tax classification.

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DECISION AND DISPOSITION

Taxpayer’s request for refund is [denied].

Dated this 29th day of January, 2016.