

Cite as Det. No. 16-0304, 36 WTD 481 (2017)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Joint Petitions for )	<u>D E T E R M I N A T I O N</u>
Correction of Assessments of )	
)	No. 16-0304
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[1] RCW 82.08.02745; WAC 458-20-262: RETAIL SALES TAX – EXEMPTION – AGRICULTURAL EMPLOYEE HOUSING. Agricultural employee housing does not include housing regularly provided on a commercial basis to the general public. An apartment complex that rents units to the general public does not qualify for the exemption from retail sales tax, even if most of the occupants are farmworkers.

[2] RCW 82.08.050(10); WAC 458-20-262(3)(a)(iv): DEFERRED SALES TAX – LIABILITY OF BUYER – CONCURRENT ASSESSMENTS. The Department may, in its discretion, proceed directly against a buyer for failure to pay retail sales tax, including instances when an exemption for retail sales tax is disallowed. The Department may also concurrently assess retail sales tax against one business and deferred sales tax against another business for the same underlying transaction. However, the Department may not collect tax from both entities for the same transaction.

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, T.R.O. – A building contractor and four of its apartment complex clients protest assessments of retail sales tax for disallowed agricultural employee housing exemptions taken in error, claiming the exemption applies to the percentage of housing set aside for farm workers under a federal low income housing credit program. The petitions are denied.<sup>1</sup>

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

## ISSUE

Does the owner of an apartment complex qualify for the agricultural employee housing exemption from retail sales tax under RCW 82.08.02745 and WAC 458-20-262 when 75 percent of units are set aside for farmworkers and the remaining units are available for rent by the general public?

## FINDINGS OF FACT

. . . (Contractor) is a Washington building contractor specializing in multi-family residential housing projects. [Owner A], [Owner B], [Owner C], and [Owner D] (collectively Owners) are each owners of real property within the city limits of . . . , Washington. Owners each individually contracted with Contractor to build an apartment complex on their respective parcels. [Owner B], [Owner C], and [Owner D] are affiliated with Contractor through common ownership. All four apartment complexes owned by Owners use the property management company . . . (Manager). Manager is also affiliated with Contractor through common ownership.

The Department of Revenue (Department) conducted a partial audit of Contractor and Owners for the period January 2011 through September 2014. The Department discovered that Contractor charged and collected retail sales tax on only 25 percent of the contract price for building each apartment complex. Contractor and Owners explained that the apartment complexes were financed under the low-income housing tax credit (LIHTC) program.

By way of background, the federal Tax Reform Act of 1986 established the LIHTC program, allowing property owners to take a federal tax credit equal to a percentage of the eligible costs incurred for the development of low-income housing. IRC §42. Each state is allocated a portion of the total available credits, to be distributed by that state's designated housing credit agency. IRC §42(m). The Washington State Housing Finance Commission (Commission) was designated as Washington's allocating agency for the LIHTC program. Wash. State Hous. Fin. Comm'n, Housing Finance Plan 9 (2011).

Beyond the federal requirements imposed on the LIHTC program, the Commission has developed additional allocation criteria that must be met by project owners to ensure the goals of the program are met. *Id.* at 58. Most of these criteria are given a point value and used to rank projects against other applications. *Id.* After all projects are scored, federal tax credits are awarded to eligible projects in descending point order until all credits are allocated. *Id.*

Allocation criteria that garner points include fully funded projects, sustainable development, coordination with local governments, rehabilitation of existing housing, housing located in counties with identified needs, and projects that set aside a percentage of total units for special needs populations. *Id.* at 59-60. Recognized special needs populations consist of farmworkers, the homeless, the elderly, persons with mental or physical disabilities, and large households. *Id.* at 59. Homeless and farmworker households are considered high priority populations and garner more points than other special needs populations. *Id.* Since initiating a farmworker priority in 1998, over 1,500 units of permanent farmworker housing have been financed in 44 different projects. *Id.*

Each of the four Owners separately applied for federal credits under the LIHTC program for construction of their respective apartment complexes. The Commission awarded credits to Owners for their construction projects, with the stipulation that each Owner set aside 75 percent of the units in the apartment complex for farmworker housing.

For each project, the Commission recorded with the county a Regulatory Agreement between it and the respective Owner. Wash. State Hous. Fin. Comm'n, ARRA Regulatory Agreement (Revised Oct. 14, 2009) (hereinafter Regulatory Agreement). In the Regulatory Agreement, each Owner agreed to comply with the LIHTC program and Commission requirements, including the commitment to set aside 75 percent of housing units for occupancy by residents who are farmworkers. *Id.* at Exhibit C, 6. Owners also agreed that units set aside for farmworkers will not be geographically segregated from other housing units in the construction project. *Id.* at 9. The terms and conditions of the Regulatory Agreement “touch and concern, run with, and bind the Project and the Land . . . and all other Bound Parties.” *Id.* at 3. A “Bound Party” includes “all current and future owners, developers, lessees . . . easement holders, or licensees of all or any portion of or interest in the Property.” *Id.* at Exhibit C, 2.

Owners also wished to take advantage of Washington’s retail sales tax exemption in RCW 82.08.02745 for construction of agricultural employee housing (Exemption). During construction of their respective apartment complexes, Owners each provided Contractor with an Agricultural Employee Housing Exemption Certificate. Owners and Contractor reasoned that since 75 percent of the apartment units were set aside for farmworkers, Owners would qualify for the Exemption on 75 percent of the contract price of construction. Contractor charged, and Owners paid, retail sales tax on only 25 percent of the contract price. When reporting retail sales tax to the Department, Contractor deducted 75 percent of its revenues from Owners’ construction projects and remitted retail sales tax on the remaining 25 percent.

The Department disagreed with Contractor’s and Owners’ reasoning, finding that the statute and rule governing the Exemption do not authorize taxpayers to claim the Exemption based on a percentage of occupancy. The Department disallowed Contractor’s retail sales tax deductions and assessed deferred sales tax against Owners for the unpaid retail sales tax.

On May 1, 2015, the Department issued five tax assessments (Assessments), one against each taxpayer. The assessment against Contractor included \$ . . . in uncollected retail sales tax, \$ . . . in assessment penalty, and \$ . . . in interest, for a total of \$ . . . . The assessment against [Owner A] included \$ . . . in deferred sales tax, \$ . . . in assessment penalty, and \$ . . . in interest, for a total of \$ . . . . The assessment against [Owner B] included \$ . . . in deferred sales tax, \$ . . . in assessment penalty, and \$ . . . in interest, for a total of \$ . . . . The assessment against [Owner C] included \$ . . . in deferred sales tax, \$ . . . in assessment penalty, and \$ . . . in interest, for a total of \$ . . . . The assessment against [Owner D] included \$ . . . in deferred sales tax, \$ . . . in assessment penalty, and \$ . . . in interest, for a total of \$ . . . .

Contractor and Owners jointly sought administrative review of the Assessments. Contractor and Owners claim that nothing in the statute precludes them from applying the Exemption to a portion of the construction project. Contractor and Owners also state that they did not apply the Exemption

based on a percentage of occupancy, which has always exceeded 75 percent, but on a percentage of units legally dedicated to farmworkers under the recorded Regulatory Agreement.

To support their claim, Contractor and Owners rely on a Special Notice issued by the Department that discussed the application of the Exemption to systems that supply drinking water to agricultural employee housing. The Department concluded that construction of water systems or improvements to existing water systems operated by agricultural employers for agricultural employee housing qualify for the Exemption. Special Notice, *Farmworker Drinking Water Special Notice*, issued May 2, 2000 (reissued April 2002). The Special Notice indicates that if an employer connected the employer's personal residence to the water system at the same time it replaced or upgraded the water system for agricultural employee housing, the cost associated with extending the water line to the employer's residence is not eligible for the Exemption. In such instances, the Special Notice states an employer must segregate the eligible and ineligible costs. Contractor and Owners liken their construction projects to a water system upgrade by an agricultural employer that contains both eligible and ineligible costs.

Additionally, Owners claim that an "all or nothing" application of the Exemption would frustrate the purpose of the Exemption by disqualifying virtually every multifamily housing project that sought to mitigate the massive shortage of agricultural employee housing. Finally, Contractor protests the Department's assessment of tax against both it and Owners, alleging the Department is taxing the same transactions twice.

#### ANALYSIS

Washington imposes retail sales tax on each retail sale in this state unless an exemption applies. RCW 82.08.020. The term "retail sale" includes services rendered in respect to the construction, improvement, or repair of new or existing buildings or other structures, under, upon, or above real property of or for consumers. RCW 82.04.050(2)(b). It is the seller's responsibility to collect retail sales tax from the buyer, and if the seller fails to do so, the seller is personally liable for the amount of tax. RCW 82.08.050. The retail sales tax rate is applied to the selling price of each retail sale. RCW 82.08.020(1).

RCW 82.08.010(1)(a) explains that "selling price" or "sales price" means "the total amount of consideration . . . for which . . . services or anything else defined as 'retail sale' under RCW 82.04.050 are sold." In this case, Owners each executed a contract with Contractor for their respective construction projects. In the contracts, Contractor and Owners agreed to a single stipulated sum for the construction of each apartment complex. None of the contracts articulate the measure of retail sales tax and none mention that the Commission required Owners to dedicate a percentage of housing units to a particular population of tenants.

Owners have each claimed the Exemption from retail sales tax for 75 percent of the cost of their construction projects. The Exemption, contained in RCW 82.08.02745,<sup>2</sup> states that retail sales tax "shall not apply to charges made for labor and services rendered by any person in respect to the constructing, repairing, decorating, or improving of new or existing buildings or other structures

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<sup>2</sup> RCW 82.08.02745 was amended in 2014 to add exclusions for marijuana processing facilities. We refer to the statute here as it existed during the audit period.

used as agricultural employee housing . . . .” RCW 82.08.02745(1). The Exemption does not apply to housing built for occupancy by an agricultural employer, the employer’s family members, or other owners of an agricultural business. RCW 82.08.02745(4). RCW 82.08.02745(5)(c) defines agricultural employee housing as follows:

“Agricultural employee housing” means all facilities provided by an agricultural employer, housing authority, local government, state or federal agency, nonprofit community or neighborhood-based organization . . . , or for-profit provider of housing for housing agricultural employees on a year-round or seasonal basis, including bathing, food handling, hand washing, laundry, and toilet facilities, single-family and multifamily dwelling units and dormitories, and includes labor camps under RCW 70.114A.110. “*Agricultural employee housing*” does not include housing regularly provided on a commercial basis to the general public. “Agricultural employee housing” does not include housing provided by a housing authority unless at least eighty percent of the occupants are agricultural employees whose adjusted income is less than fifty percent of median family income, adjusted for household size, for the county where the housing is provided.

(Emphasis added.)

The Department adopted WAC 458-20-262 (Rule 262) to implement RCW 82.08.02745. As a condition of the Exemption, Rule 262(3)(iv) requires a buyer to provide the seller with an exemption certificate. Rule 262(2)(c) also states that “Agricultural employee housing does not include housing regularly provided on a commercial basis to the general public.”

Exemptions are narrowly construed in favor of application of the tax. *Budget Rent-a-Car, Inc. v. Dep’t of Revenue*, 81 Wn.2d 171, 174, 500 P.2d 764 (1972). Taxation is the rule and exemption is the exception. *Id.* A person who claims an exemption has the burden of showing that he or she qualifies for it. *Id.* at 175. The Department is without authority to expand an exemption beyond the express statement of statutory law. *Id.* at 176; Det. No. 02-0134, 24 WTD 129 (2005).

Owners and Contractor claim that the legislature intended for the Exemption to apply to multifamily housing projects and to deny Owners the Exemption would frustrate the legislature’s purpose. Although RCW 82.08.02745(5)(c) states that agricultural employee housing includes multifamily dwelling units and dormitories, it does not include “housing regularly provided on a commercial basis to the general public.”

The goal of statutory interpretation is to carry out the intent of the legislature. *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). Statutory interpretation begins with the statute’s plain meaning. *Id.* “The ‘plain meaning’ of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005) (citing *Wash. Pub. Ports Ass’n v. Dep’t of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003); *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 10-11, 43 P.3d 4 (2002)). “[T]he words of statutes—including revenue acts—should be interpreted where possible in their ordinary, everyday senses.” *Taproot Admin. Servs., Inc. v. C.I.R.*, 679 F.3d 1109, 1116 (9th Cir. 2012).

The phrase “regularly provided on a commercial basis to the general public” is not further defined in RCW 82.08.02745 or elsewhere in the Revenue code. To determine the ordinary meaning of an undefined term, we may look to the dictionary. *Garrison v. Wash. State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). According to Webster’s dictionary, “regularly” means “in a regular, orderly, lawful, or methodical way.” *Webster’s Third New International Dictionary*, 1913 (1993). “Regular” is defined as “steady or uniform in course, practice, or occurrence.” *Id.* The dictionary defines “commercial” as “from the point of view of profit: having profit as the primary aim.” *Id.* at 456.

The plain meaning of the Exemption is clear: the legislature intended to exclude for-profit housing supplied in a steady or uniform manner to the general public. Here, Owners rent units in their respective apartment complexes to both agricultural workers and members of the general public. [Owner B], [Owner C], and [Owner D] each have professional websites describing their amenities and offering units for rent; [Owner A] advertises on an apartment listing website.<sup>3</sup> Owners regularly provide apartments on a commercial basis to the general public. Thus, under the plain meaning of the statute, Owners’ apartment complexes do not qualify for the Exemption.

Even if the legislative intent was not clear from the plain meaning of the statute, that does not change the outcome. Where statutory language is ambiguous, the courts look to legislative history to discover the legislature’s intent in enacting the legislation. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 98 P.3d 463 (2004); *Kauzlarich v. Yarbrough*, 105 Wn. App. 632, 20 P.3d 946 (2001). A report from a legislative standing committee investigating the desirability of a statute under consideration is often used as a source of determining the intent of the legislature. 2A *Sutherland Statutory Construction*, § 48:07 (6<sup>th</sup> Ed. 2000). Such reports represent the most persuasive indicia of legislative intent. *Id.*

RCW 82.08.02745 was created by 1996 Substitute House Bill 2778 (SHB 2778). *See* Laws of 1996, ch. 117, §1. SHB 2778 limited the Exemption to agricultural employers who provided housing to their employees. SHB 2778 also stated, “Agricultural employee housing does not include housing regularly provided on a commercial basis to the general public that is provided to agricultural employees on the same terms and conditions as it is provided to the general public.”

The House Committee on Agriculture & Ecology considered SHB 2778 prior to its reading on the House floor. During the meeting, the Chairman had an exchange with staffer Bill Lynch, who wrote the language of the bill after discussion with stakeholders:

MR. CHAIRMAN: Can you explain to me, down on line fifteen, “agricultural employee housing does not include housing regularly provided on a commercial basis to the general public that is provided to agricultural employees on the same terms and conditions as it is provided to the general public.” Can you explain to me?

MR. LYNCH: My understanding of that wording, Mr. Chairman, is that, it would be, you’re not including housing that’s also available to the general public to come in and rent, and just, and you might happen to have some farmworkers renting it. It’s only housing

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<sup>3</sup> See . . . .

that's built for the purpose of farmworkers living there *and that's the only people who live there.*

MR. CHAIRMAN: Does this mean that if I build farmworker housing, but it's on a contract basis, or I rent it out to them as part of their contract, is that still considered agriculture housing and would be able to apply into this?

MR. LYNCH: If you're renting it out to your, for the purpose of providing housing for your employees, then it would qualify.

Audio recording: Hearing on SHB 2778 Before the H. Comm. on Agriculture & Ecology, 1996 Leg. (Wash. Digital Archives, Feb. 1, 1996) (emphasis added). After this exchange, the bill passed out of committee unanimously. In light of the Chairman's and Mr. Lynch's remarks, it is evident that the committee passed the bill to the floor of the House with the understanding that agricultural employees are the only people who may live in qualifying agricultural employee housing.

The legislature amended RCW 82.08.02745 in 1997 to include housing provided by a housing authority, local governments, state or federal agencies, nonprofit organizations, and for-profit entities. Laws of 1997, ch. 438, §1. In addition to expanding the Exemption to other housing providers, the legislature also removed some of the original language in RCW 82.08.02745(5)(c), shortening the sentence at issue here to its present day form. But despite permitting for-profit entities to claim the Exemption, the legislature preserved the exclusion of "housing regularly provided on a commercial basis to the general public." This shows the legislature's intent that agricultural employee housing, whether provided by a for-profit entity or not, can only be occupied by agricultural employees, and not the general public. As Owners do not provide agricultural employee housing as defined in RCW 82.08.02745, Owners' apartment complexes do not qualify for the Exemption.

Owners' next claim that they qualify for the Exemption based on the percentage of units legally dedicated to farmworkers under the Regulatory Agreement rather than on the percentage of units actually occupied by farmworkers. However, the Regulatory Agreement expressly prohibits Owners from geographically segregating housing units occupied by farmworkers from other units. Regulatory Agreement, 9. As a result, the Regulatory Agreement requires Owners to maintain 75 percent *occupancy* by farmworkers. *Id.* at Exhibit C, 6 (emphasis added). As Owners are prohibited from dedicating specific units for farmworker housing, Owners cannot identify which charges were for construction of buildings or other structures used to house agricultural employees. It is irrelevant to our analysis whether Owners receive federal tax credits under the LIHTC program because the Exemption is not tied to the federal tax credits or the LIHTC program. RCW 82.08.02745 does not allow a housing provider to claim the Exemption based on a percentage of occupancy by agricultural employees.

We also find the Special Notice unpersuasive. The Special Notice, issued in 2000, describes a situation where two potentially separate construction projects are completed contemporaneously. According to the Special Notice, the Exemption applies to the cost of replacement or upgrade of a water system supplying agricultural employee housing. If an agricultural employer also connects his personal residence to the water system at the same time, that cost does not qualify for the

Exemption. The situation here is different. First, Owners are not agricultural employers. The Special Notice limits its conclusion to the narrow context of water systems operated by agricultural employers.

Second, as explained above, Owners cannot physically separate units reserved for farmworkers from unreserved units. As each apartment complex is one undivided construction project, Owners' apartment complexes are unlike the replacement or upgrade of a water system that supplies agricultural employee housing and also connects an employer's personal residence.

Third, the Department issued an earlier Special Notice explaining the legislature's 1997 expansion of the Exemption to include housing provided by entities other than an employer. In this earlier Special Notice, the Department informs taxpayers that "[t]he exemption does not include housing regularly provided to the general public on a commercial basis, such as hotels, motels, *apartments*, or rooming houses." Special Notice, *Expanded Sales and Use Tax Exemption for Agricultural Employee Housing*, issued Aug. 11, 1997 (emphasis added).

Moreover, the purpose of any Special Notice is to discuss recent legislative changes, explain tax application to a specific set of facts, or address certain issues. Special Notices, [http://dor.wa.gov/content/getaformorpublication/PublicationBySubject/tax\\_sn\\_main.aspx](http://dor.wa.gov/content/getaformorpublication/PublicationBySubject/tax_sn_main.aspx) (last visited May 12, 2016). A Special Notice is not a binding administrative rule. *See* RCW 34.05.230; RCW 82.32.105. It is merely advance notice of the Department's position should a dispute arise. "If [a person] violates an interpretive rule that accurately reflects the underlying statute, the public may be [sanctioned] and punished, not by authority of the rule, but by the authority of the statute." *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 120 P.3d 46 (2005).

The Department has maintained from the beginning that apartment complexes regularly provided on a commercial basis to the general public do not qualify for the Exemption. This conclusion is supported by the plain language of RCW 82.08.02745. The Exemption does not apply to Owners' apartment complexes built by Contractor and retail sales tax was owed on the full contract price of each construction project.

Retail sales tax constitutes a debt from the buyer to the seller. RCW 82.08.050(8). It is the seller's responsibility to collect retail sales tax from the buyer, and if the seller fails to do so, the seller is personally liable for the amount of tax. RCW 82.08.050(3).<sup>4</sup> Additionally, if a buyer has not paid retail sales tax to the seller and the seller has not paid the same to the Department, "the Department may, in its discretion, proceed directly against the buyer for collection of the tax." RCW 82.08.050(10). Rule 262(3)(a)(iv) also informs taxpayers that failure to comply with Rule 262 may result in a denial of the exemption and the buyer may be subject to use tax plus penalties and interest.

We have previously held that it is proper for the Department to concurrently assess retail sales tax against one business and deferred sales tax or use tax against another business for the same underlying transaction. Det. No. 01-077, 21 WTD 157, 162 (2002). However, the Department

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<sup>4</sup> Contractor has neither argued that its acceptance of an Agricultural Employee Housing Exemption Certificate from Owners relieves it of personal liability for uncollected retail sales tax under RCW 82.08.050(7)(a), nor provided evidence to substantiate such a claim. Thus, we do not address the issue here.

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may not collect both retail sales tax and deferred sales tax from two entities for the same underlying transaction. Here, to the extent that an Owner pays the tax due on its assessment, the Department will adjust the corresponding assessment against Contractor to reflect that payment and vice versa.

DECISION AND DISPOSITION

The petition is denied.

Dated this 23rd day of September 2016.