

Cite as Det. No. 19-0109, 40 WTD 200 (2021)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS 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. 19-0109
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...)	Registration No. ...
)	

[1] RULE 249; RCW 82.08.031: RETAIL SALES TAX – ARTISTIC AND CULTURAL OBJECTS – DISPLAY OF OBJECTS OF ART. When a fixture or equipment displays objects of art, and is not specifically listed in an item under Rule 249 subject to its “directly and exclusively used” restriction, that fixture or equipment will qualify for the artistic and cultural exemption, even if it displays art a minority of the time.

[2] RULE 171; RCW 82.04.280(1)(b): B&O TAX – PUBLIC ROAD CONSTRUCTION – STRUCTURES AND THE “RIGHT-OF-WAY.” Planters and canopies attached to a building are not within the “right-of-way” under RCW 47.14.020(1), and therefore do not qualify for the public road construction B&O tax rate.

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.

Sattelberg, T.R.O. – A museum protests the Department’s disallowance of a refund of retail sales tax. The museum argues that certain purchases should be exempt from sales tax as artistic and cultural objects. The museum also argues that a portion of its costs should be considered public road construction. We grant the petition in part and deny it in part.¹

ISSUES

1. Whether certain purchases by a museum qualify for exemption as artistic and cultural objects under RCW 82.08.031 and WAC 458-20-249.
2. Whether certain purchases by a museum qualify as public road construction under RCW 82.04.280(1)(b) and WAC 458-20-171.

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

FINDINGS OF FACT

. . . (“Taxpayer”) is a museum serving Washington and the Northwest through its . . . collection, exhibitions, and also through its learning programs. . . . Taxpayer began expanding its museum. . . . as well as added new signage and a canopy to the exterior. Taxpayer hired . . . (“Contractor”) as the general contractor for the expansion. In addition to the facility expansion, Taxpayer engaged in road construction in the right of way, which was partially reimbursed by the [C]ity [where Taxpayer is located]. Taxpayer did not claim exemption from retail sales tax for the expansion under the artistic and cultural exemption or consider any amounts as public road construction at the time.

In 2017, Taxpayer filed for the refund of retail sales tax paid for three major categories: 1) fixtures and equipment as artistic and cultural; 2) embedded objects as artistic and cultural; and 3) road construction as public road construction. The Department’s Audit Division (“Audit”) reviewed the refund in significant detail. Audit allowed a refund for various amounts from each of the three categories, but disallowed the majority of amounts requested for refund from each category.² On October 5, 2017, Audit issued Taxpayer a refund of \$. . .³ We address the items in each category that Audit denied whether in whole or in part:

1. Fixtures and Equipment

Audit disallowed the full amount Taxpayer requested to be considered exempt as artistic and cultural for each of these items:

- A. . . .
- B. Freestanding display kiosks: Freestanding street-side digital displays and posters advertising upcoming exhibitions and events.
- C. Donor wall: A sign listing notable donors to the museum.
- D. Interactive tables: Tables in a family area [built with] plexiglass tops and open spaces underneath . . . to display art, upcoming class flyers, or anything that will fit within their space. . . .
- E. Specialty shelving: Custom shelving built to house collection items when they are not on display. The shelving is in a storage room not open to the public and items on them are enclosed.

² The refund allowed the exemption of a total of \$. . . in fixtures and equipment, \$. . . in embedded objects, and \$. . . in road construction. The refund denied a total of \$. . . in fixtures and equipment, \$. . . in embedded objects, and \$. . . in road construction.

³ The refund consisted of \$. . . of retail sales tax paid in error, as well as \$. . . in interest on the overpaid retail sales tax.

2. Embedded Objects

Audit allowed portions of some of these items as exempt as artistic and cultural:

A. Acoustic and fabric panels: Panels used to deaden sound in the galleries. Taxpayer requested 25 percent of its costs of \$. . . be exempt. Audit accepted 17 percent as exempt, and then made adjustments for labor and overhead attributable to exempt art displays. After adjustment, Audit allowed \$. . . as exempt.

B. Gallery frontage: Construction on the exterior of the museum, including windows, gallery entries, and display cases. Taxpayer requested 25 percent of its costs of \$. . . be exempt. Audit only accepted the display cases as exempt, and then made adjustments for labor and overhead attributable to exempt art displays. After adjustment, Audit allowed \$. . . as exempt.

C. Framing and drywall: Temporary walls and display case construction. Taxpayer requested 15 percent of its costs of \$. . . be exempt. Audit accepted Taxpayer's request, and then made adjustments for labor and overhead attributable to exempt art displays. After adjustment, Audit allowed \$. . . as exempt.

D. Sunlight controls: Window fixtures, including window shades and a moving screen. Audit denied in full Taxpayer's combined request of \$⁴

E. HVAC: Custom heating, cooling, and humidity control in galleries. Audit fully denied Taxpayer's request of 40 percent of its costs of \$

F. Electrical: Electrical work to update the galleries' electrical utility and exhibit and general lighting. Audit fully denied Taxpayer's request of 35 percent of its costs of \$

3. Road Construction

Audit considered demolition, earthwork and hardscape, a vehicle drop-off extension, and landscaping and irrigation as public road construction. Audit allowed portions of the general road construction conditions, site lighting, and electrical as public road construction. Audit fully denied the following:

A. Planters: Structures used for holding plants attached to the side of the building. The planters are not in the right of way but are next to it.

B. Canopies: One canopy was attached to the building planters overhanging the right of way and another canopy was attached to the building overhanging the front entrance.

⁴ This included Taxpayer's request of 40 percent of its costs of \$. . . for window shades and its request of 100 percent of its costs of \$. . . for a movable screen.

Taxpayer timely petitioned for review of the portion of the refund request that was denied. Taxpayer's review petition separates the issues on review into the denied artistic and cultural portion and the public road construction portion.

Regarding the artistic and cultural portion, Taxpayer provided a letter ruling it received from the Department's TI&E section Taxpayer had requested a letter ruling for a construction project that was happening at the time. The letter ruling discusses the application of the artistic and cultural exemption to a wide variety of items. Taxpayer argues the letter ruling supports its position that items at issue here should be exempt, but Taxpayer does not cite any specific sections of the letter ruling.⁵

Regarding the public road construction portion, Taxpayer argues that the amount of the work it agreed to in its contract with Contractor, and partially reimbursed by the City, should be the portion taxed as public road construction. Taxpayer did not provide a copy of any of the agreements between the parties named. Taxpayer represents that Contractor did not pay any use tax on the materials it purchased for the project.

ANALYSIS

1. Artistic and Cultural Exemption

Washington imposes retail sales tax on each retail sale in this state, unless an exemption or exclusion applies. RCW 82.08.020. The term "retail sale" includes the sale or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the constructing, repairing, decorating, or improving of new or existing buildings or other structures on real property of or for consumers. RCW 82.04.050(2)(b).

An exemption from retail sales tax exists in RCW 82.08.031 for sales to artistic or cultural organizations that acquire objects for the purpose of exhibition or presentation to the general public if the objects are:

- (1) Objects of art;
- (2) Objects of cultural value;
- (3) Objects to be used in the creation of a work of art, other than tools; or
- (4) Objects to be used in displaying art objects or presenting artistic or cultural exhibitions or performances.⁶

WAC 458-20-249 ("Rule 249") is the Department's regulation administering RCW 82.08.031. Rule 249 defines "objects" as "items of tangible personal property," not including "professional or commercial services rendered by third parties." Rule 249 states that "[c]harges for materials, equipment, and services related to repair, maintenance, or replacement of buildings or structures are not exempt." Rule 249 then goes on to list examples of what does and does not qualify:

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⁶ "Artistic and cultural organization" are defined in RCW 82.04.4328 as an "organization which is organized and operated exclusively for the purpose of providing artistic or cultural exhibitions, presentations, or performances or cultural or art education programs . . . for viewing or attendance by the general public." There is no dispute Taxpayer here qualifies as an artistic and cultural organization.

Examples of what qualifies includes:

- a) Tickets, programs, signs, posters, fliers, and playbills printed for particular displays or performances; scenery, costumes, stage, props, scrims, and materials for their construction;
- b) Stage lights, filters, control panels, color medium, stage drapes, sets, set paint, gallery exhibition materials, risers, display platforms, and materials for their construction;
- c) Sheet music, recordings, musical instruments and musical supplies for the staging of displays and performances;
- d) Movie projectors, films, sound systems, video and sound equipment and supplies and computer hardware and standard, prewritten software *directly used exclusively* in the staging of performances or actual display of art objects.

Rule 249 (emphasis added).

Examples of what does not qualify include:

- a) Supplies and equipment for clerical support, including bulk tickets for general use, stationery, typewriters, copy machines, and general office supplies;
- b) Theater seats, lobby furniture, carpeting, vending machines, and general supplies for audience or patrons' convenience and use;
- c) Shipping and packing materials, crates, boxes, dunnage, labels, tags, and container-related items for transfer or storage of exempt objects;
- d) Sewing machines and other durable equipment used to prepare, repair, and maintain exempt objects (such items are deemed to be "tools," rather than exempt objects);
- e) Theater or building lighting and utility fixtures and systems, and computer hardware and software not *directly and exclusively* used in staging performances or actually displaying art objects.

Rule 249 (emphasis added).

A. Fixtures and Equipment

. . . The freestanding display kiosks, the donor wall, and the specialty shelving are not objects of "art," "cultural value," "used in the creation of art," or "used in displaying art objects or presenting artistic or cultural exhibitions or performances." Rule 249. While the specialty shelving holds objects of art, it does not "display" them. As such, none of these items qualify as "objects" under

Rule 249, and Audit properly denied them the artistic and cultural exemption. One of the fixtures and equipment, though, does display objects of art. Those are the interactive tables [built with plexiglass tops and open spaces underneath used to display art that, therefore,] qualify for the artistic and cultural exemption under RCW 82.08.031 and Rule 249. . . .

B. Embedded Objects

The “directly and exclusively used” requirement in Rule 249 mentioned above is applicable to many of the items in the embedded objects list. These items are the acoustic and fabric panels, sunlight controls, HVAC, and the electrical work. While each of these is “used in displaying art objects,” they also perform the dual function of controlling the sound, light, and temperature for gallery patrons. Rule 249. These systems are all “theater or building lighting and utility fixtures and systems” subject to the “directly and exclusively used” requirement in Rule 249. As such, none of them qualify for artistic and cultural exemption because they are not used “directly and exclusively” in the display of objects of art.

The other embedded objects are the gallery frontage and the framing and drywall. Audit allowed the portions of each as exempt that pertained to the display cases, and disallowed the remainder, in accord with Rule 249, as discussed above.⁷

2. Public Road Construction

Public road construction is the activity of “building, repairing or improving any street, place, road, highway . . . right of way . . . which is owned by a municipal corporation or political subdivision of the state or by the United States and which is used or to be used primarily for foot or vehicular traffic” RCW 82.04.280(1)(b). *See* WAC 458-20-171 (“Rule 171”); Det. No. 16-0230, 37 WTD 001 (2018).

Public road construction is excluded from the definition of “retail sale” and charges for those services are not subject to retail sales tax. RCW 82.04.050(10); RCW 82.08.010. Therefore, Taxpayer would not be liable for retail sales tax on the portion of its contract with Contractor that is considered public road construction. This is why Audit allowed a full retail sales tax refund for the demolition, earthwork and hardscape, a vehicle drop-off extension, and landscaping and irrigation, and a partial refund for the general road construction conditions, site lighting, and electrical. Audit fully denied Taxpayer’s refund request for the planters and canopies.

Rule 171 defines “street, place, road, highway, etc.” as “used in the ordinary sense that the combination of such words implies.” Public road construction also includes [building, repairing or improving] of a right of way. RCW 82.04.050(10); Rule 171. Further, “right-of-way” is defined in RCW 47.14.020(1) as “the area of land designated for transportation purposes.” At issue here are two portions of structures that are attached to Taxpayer’s building, the planters and the canopies.

⁷ Taxpayer mentioned in its petition that it received a letter ruling . . . that discussed the application of the artistic and cultural exemption to many items. Taxpayer, however, did not specify any portion of the letter ruling that would apply to the circumstances here. Further, while letter rulings are binding on the taxpayer and the Department under RCW 82.32A.020(2), the letter ruling Taxpayer provided was very specific to the activities involved in a . . . project and does not provide any tax reporting instructions that would apply here.

While structures encompassed within the “right-of-way” under RCW 47.14.020(1) could be considered public road construction, the planters and the canopies are part of the museum itself, and as part of a private, non-transportation-related building, they do not qualify as a “street, place, road, highway, etc.” as used in their “ordinary sense.” Rule 171. Taxpayer’s planters and canopies clearly do not fit that definition as they are part of a private, non-transportation-related building.

Taxpayer argues that the amount of the work it agreed to in its contract with Contractor, and partially reimbursed by the City, should be the portion taxed as public road construction. We disagree. We have long looked at the activities performed when determining their taxation, not how the parties may characterize them contractually. *See, e.g.*, Det. No. 06-0028, 26 WTD 97 (2007) (citing *Time Oil Co. v. State*, 79 Wn.2d 143, 146, 483 P.2d 628 (1971)). Here, Audit considered part of the activities Contractor performed for Taxpayer to be public road construction and part of them not, depending on the activity performed. We agree with Audit’s classification of these activities, and deny Taxpayer’s petition.

DECISION AND DISPOSITION

We grant Taxpayer’s petition in part and deny it in part. We grant Taxpayer’s petition with respect to the interactive display cases. We deny Taxpayer’s petition with respect to the balance of the assessment.

Dated this 16th day of April 2019.