

Cite as Det. No. 20-0197, 41 WTD 207 (2022)

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

In the Matter of the Petition for Correction of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
)	No. 20-0197
)	
...)	Registration No. . . .
)	

WAC 458-20-170; RCW 82.04.050, RCW 82.04.051: B&O TAX – RETAIL SALES TAX – SERVICES IN RESPECT TO CONSTRUCTION. Where invoice items indicate Taxpayer was performing activities normally engaged in by contractors responsible for the construction, and Taxpayer has provided no evidence that he was merely acting as a consultant and owner representative not responsible for the projects, we conclude that Audit correctly reclassified the receipts and assessed Taxpayer retail sales tax.

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.

Margolis, T.R.O. – A provider of consulting, client representation, general contracting, and construction management services (Taxpayer) protests the reclassification of receipts to the retailing business and occupation (B&O) tax classification and assessment of retail sales tax on grounds that the receipts are not from services with respect to construction. We deny the petition.¹

ISSUE

Whether, under RCW 82.04.051, Taxpayer’s charges were for consulting services subject to service and other activities B&O tax rather than services with respect to construction subject to retailing B&O tax and retail sales tax.

FINDINGS OF FACT

Taxpayer is a one person company run by its President, and is a licensed construction contractor. Taxpayer explains that it provides a variety of services, including consulting, client representation, general contracting, and construction management. The Department of Revenue’s Audit Division (Audit) examined Taxpayer’s records for the period January 1, 2014, through September 30, 2017, and on June 19, 2019, issued a Notice of Balance Due for \$. . . This amount is composed of a credit for \$. . . in service and other activities B&O tax, a credit of \$. . . in tax paid at source, \$. . .

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

in retailing B&O tax, \$. . . in retail sales tax, \$. . . in a delinquent return penalty, and \$. . . in interest, minus \$. . . in payment received.

Audit determined that most of the income reported under the service and other activities B&O tax classification was actually for services rendered with respect to construction, and the services were above and beyond mere consulting as stated on the various invoices. Audit reviewed each service/consulting invoice to determine the correct B&O tax classification, reclassified receipts to the retailing B&O tax classification, and assessed retail sales tax. Taxpayer selected and purchased materials during the consulting phase of the transaction, and consistently claimed the tax paid at source deduction to recoup retail sales tax paid at source. Taxpayer explained that it purchased the materials on behalf of its customers, leveraging business relationships and discounts.

Taxpayer provided a sample “Agreement for Construction Management and Consulting Services” and a sample “Construction Agreement.” [Taxpayer’s president] explained he signed the consulting contract with the client for phase 1 development of the design, and after the owner received the construction permit, got other bids, and decided to continue with Taxpayer for the construction, executed the Construction Agreement. [Taxpayer’s president] explains that he collects and remits retail sales tax when he is responsible for the construction, but not when consulting, even when selecting materials to be used in the project. Taxpayer provided invoices and supporting documents, a sampling of which we discuss below.

Invoice . . . [#1], for Project . . . [#1], dated 10/22/2015, is titled . . . [Project #1], and lists 23 items for a total of \$. . . The first 17 items list total dollar amounts measured by time spent that occurred between 10/1 and 10/21, including “10/17 meeting with . . . , . . . Home Depot Fixtures selection;” “10/19 meeting with roofing contractor, review invoice, email, misc;” and “10/21, Meeting with . . . and . . . to finalize Playground contract and deposit, review roofing invoice.” The last 5 dated items show specific material purchases, such as “10/11 Home Depot, \$. . . , \$. . . , \$. . . ” for \$. . . . “10/12, Home Depot \$. . . ” for \$. . . , and “10/17, Home Depot light Fixtures” for \$. . . . Item #24 is for “B & O and overhead on purchases 3% . . . ” for \$. . . .² Taxpayer asserts that its invoice is for consulting and acting as an owner representative with regards to a non-profit . . . community center, where the work was performed mostly by community members and volunteers.

Invoice . . . [#2], for Project . . . [#2], dated 05/23/2016, is titled . . . [Project #2], and lists 37 items for a total of \$. . . Taxpayer is listed as the contractor for permits associated with the project. The first 24 items list total dollar amounts measured by time spent that occurred between 2/10 and 5/20, such as “2/10, Talking to subs for bids,” “3/29, site Excav,” and “4/22, site” for a “consulting” subtotal of \$. . . . Item #s 24-35 show specific item purchases, including purchases from other contractors and suppliers, such as “4/14 . . . [Contractor A]” for \$. . . , “4/19, . . . [Contractor B]” for \$. . . , and “4/17, . . . [Contractor C]” for \$. . . . Item #36 is for “B & O and overhead on purchases 5%” for \$. . . . The 4/14 invoice from . . . [Contractor A] was billed to Taxpayer, and its \$. . . charge is for “[l]abor and materials for footings, walls, porch slab, rat slab, shop slab.” The 4/19 invoice from . . . [Contractor B] references Taxpayer’s President, and the \$. . . charge is for various construction materials. The 4/17 invoice from . . . [Contractor C] was billed

² We note that the Washington Supreme Court has held that under RCW 82.04.500, even if disclosed, a seller is prohibited from recouping its B&O taxes by collecting a surcharge from customers in addition to its selling price. *Peck v. AT&T Mobility*, 174 Wn.2d 333, 340, 275 P.3d 304 (2012).

to Taxpayer and President, and the \$. . . charge is for excavation work. [Taxpayer's president] asserts that his invoice is for consulting, explaining that . . . [the owner of Project #2] mostly gets its own permits, contractors, and subs; and Taxpayer was hired to be the owner representative, perform design and design review, select and buy materials, and sometimes pay contractors.

Invoice . . . [#3], for Project . . . [#3], dated 2/28/2017, is titled . . . [Project #3], and lists 14 items for a total of \$. . . . The first 12 items list total dollar amounts measured by time that occurred between 11/7 and 2/9, such as "11/10 Site meeting with Excavation Contractor," and "2/8, City Comments, contractors." The final two items are "11/22, . . . [Contractor D] \$. . ." for \$. . . , and "B&O and overhead on purchases 3% (\$. . .)" for \$. . . . The 11/22 invoice from The . . . [Contractor D] was billed to Taxpayer and President, and the charges are for printing/stapling services. Invoice . . . [#4], also for Project . . . [#3]2, dated 6/12/2017, lists 13 items for a total of \$. . . . The items are measured by time and occurred between 5/3 and 6/12, including "5/11, meeting, Sub contractors Coordination, misc," and "6/4, Meeting with . . . , Misc." Taxpayer asserts that these invoices are for phase 1 of the project, when Taxpayer worked on planning and design review, and met with architects and engineers; the owner was his own developer, and a permit was issued in July 2017 when phase 2 construction started.

Invoice . . . [#5], for Project . . . [#4], dated 10/31/2016, is titled . . . [Project #4] General Consulting, and lists 4 dated items for a total of \$. . . (after balance adjustment/credit and payments). Item #s 1, 2, and 4 list total dollar amounts measured by time and occurred between 8/19 and 9/21, as follows, ". . . 8/19: 1 Hr., 8/29: 2 Hrs., 9/13: 2 Hrs., Misc. 1 Hr. Total 6 Hrs. Meeting with . . . [Contractor E's] Restaurant supply, cabinet work, equipment installation;" "9/20 King County Health Permit;" and "9/21 King County Health Inspection." Item 3 is "9/20, King County Permit." [Taxpayer's president] asserts that he went shopping with this client, provided expertise, evaluated . . . [Contractor E's] restaurant supply proposal, helped the client apply for her King County Health Department permit, and met with [the client] to review proposals for cabinet work.

Invoice . . . [#6], for Project . . . [#5], dated 12/31/2016, is titled . . . [Project #5], and lists 30 items for a total of \$. . . . Items 1 through 7 list total dollar amounts measured by time, with columns designating hours as either "Consulting Hours" or "Construction Hours," that occurred between 5/31 and 12/28, . . . designated as 5 Consulting Hours and 4.25 Construction Hours, for \$. . . . Item numbers 9-29 show specific item purchases, including items from contractors and suppliers The invoice from . . . [Contractor F] is for a shower door, pull handle, and silicone, with all material and installation included. It was billed to President. Taxpayer explains that this invoice was for a mix of consulting and construction services; the client hired Taxpayer to consult regarding design; the client got materials from Taxpayer's account to get a discount and better pricing and reimbursed Taxpayer; and, only 23 hours of Taxpayer's time was related to construction.

ANALYSIS

Washington imposes B&O tax upon the privilege of engaging in business activities in this state. The measure of the tax as well as the tax rate vary depending upon the nature (or classification) of the activity. RCW 82.04.220. RCW 82.08.020 imposes retail sales tax on each retail sale in Washington. The seller must collect sales tax from the buyer and then remit the collected tax to

the Department. RCW 82.08.050. If the seller fails to collect the tax, the seller must still pay the tax to the Department. RCW 82.08.050(3).

In general, a company constructing, repairing, or improving new or existing buildings for a consumer is required to collect retail sales tax from the consumer and to pay retailing B&O tax. RCW 82.04.050; WAC 458-20-170. In contrast, providing certain services, including professional services such as engineering or architectural design services, generally is not classified as a retail activity, but the company must pay service and other activities B&O tax on its gross income. RCW 82.04.290(2); WAC 258-20-224(2). However, under certain circumstances, a service ordinarily classified as a professional service is considered a retail service activity. In those circumstances, the gross receipts received for providing those services are subject to retailing B&O tax and the sale is subject to retail sales tax. RCW 82.04.050(2)(b); RCW 82.04.051(1); RCW 82.04.250; RCW 82.08.020(1).

RCW 82.04.050(2)(b) expressly provides that the term “retail sale” includes:

[T]he sale of or charge made for tangible personal property consumed and/or for labor or services rendered in respect to the following: . . . (b) the constructing, repairing, decorating, 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

(Emphasis added.)

RCW 82.04.051(1) clarifies that the term “services rendered in respect to” means:

[T]hose services that are directly related to the constructing, building, repairing, improving, and decorating of buildings or other structures and that are performed by a person who is responsible for the performance of the constructing, building, repairing, improving, or decorating activity. The term does not include services such as engineering, architectural, surveying, flagging, accounting, legal, consulting, or administrative services provided to the consumer of, or person responsible for performing, the constructing, building, repairing, improving, or decorating services.³

RCW 82.04.051 does not define what it means to be “directly related” to the constructing. “Words in a statute are given their ordinary and common meaning absent a contrary statutory definition.” *John H. Sellen Constr. Co. v. Dept. of Revenue*, 87 Wn.2d 878, 882, 558 P.2d 1342 (1976); *see also*, Det. No. 04-0106, 23 WTD 344 (2004). “Washington courts use WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY in the absence of other authority.” *State v. Glas*, 106 Wn. App. 895, 27 P.3d 216 (2001) (citing *In re Personal Restraint of Well*, 133 Wn.2d 433, 438, 946 P.2d 750 (1997)). WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 641, 1916 (1993),

³ This version of RCW 82.04.051(1) was in effect prior to June 11, 2020, [during the audit period in this case. The statute was amended, effective June 11, 2020, to add “land development or management” to the services excluded from the definition of “services rendered in respect to,” and added a definition for “land development or management.” Laws of 2020, ch. 109, § 2.]

defines “directly” as including “purposefully or decidedly,” and “relate” as including “to show or establish a logical or causal connection between.”

Therefore, only activities that bear a decided and logical connection to constructing are included within the definition of services rendered in respect to constructing. RCW 82.04.051 explains that the term “services rendered in respect to” constructing does not include “accounting, legal, consulting, or administrative services provided to the consumer of, or person responsible for performing, the constructing . . . services.” We have previously held that a service is clearly related to constructing where that service “controls or determines how or when the constructing activity takes place.” Det. No. 98-194, 19 WTD 9, 15 (2000). RCW 82.04.051(4) defines a person as being “responsible for performance” if that person is obligated to perform the work either personally or through a third party.

RCW 82.04.051(3) specifically addresses situations where the same person provides professional services followed by construction services. RCW 82.04.051(3) provides:

Unless otherwise provided by law, a contract or agreement under which a person is responsible for activities that are subject to tax as a service under RCW 82.04.290(2), and a subsequent contract or agreement under which the same person is responsible for constructing, building, repairing, improving, or decorating activities subject to tax under another section of this chapter, shall not be combined and taxed as a single activity if at the time of the first contract or agreement it was not contemplated by the parties, as evidenced by the facts, that the same person would be awarded both contracts.

(Emphasis added.)

The Department applied RCW 82.04.051(3) in Det. No. 15-0135, 35 WTD 135 (2016), which involved a taxpayer who provided both design services and construction services for its clients. In 35 WTD 135, the Department recognized that:

[RCW 82.04.051(3)] does not require a fixed agreement that both contracts are to be awarded to the same person, and specifically applies even when there are two separate contracts. Thus, the fact that the Taxpayer subsequently negotiates a separate contract for the construction work is not sufficient to segregate the two activities.

35 WTD at 138. The Department then went on to describe the relevant inquiry under RCW 82.04.051(3), as follows:

When the work is in fact performed by the same person, as is the case for the projects at issue here, to retain the service taxable nature of the initial work, it [is] necessary to show that the parties did not contemplate . . . that the work would be performed by the same person. *Id.* Thus, conversely, if there is evidence that the parties contemplated . . . that the design and construction work would be done by the same person, the design work will also be characterized as a retail service.

35 WTD at 138 (brackets and ellipses in original). The Department held in 35 WTD 135 that the language in the taxpayer's design contract and the taxpayer's marketing of the benefits of consolidating its professional and construction services, was sufficient evidence that the parties contemplated that the taxpayer would perform both the design and construction services.

The fact that the clients are under no obligation to contract with a taxpayer for construction is not sufficient to establish there was no contemplation by the parties that Taxpayer would be awarded both contracts under RCW 82.04.051(3). As noted above, RCW 82.04.051(3) does not require a fixed agreement or obligation that both contracts are to be awarded to the same person – the inquiry is whether there was contemplation by the parties that the subsequent contract would be awarded to the same person. 35 WTD at 138.

In this matter, Taxpayer is registered with the Department as a licensed contractor, and does not contest that he engages in construction activities subject to retail sales tax. Further, Taxpayer consistently took a deduction for tax paid at source on materials that he purchased for his clients, but the tax paid at source deduction is available to taxpayers that pay retail sales tax to suppliers on items for which the taxpayers must charge their customers retail sales tax on resale. *See* WAC 458-20-102(12)(b). Taxpayer's use of this deduction is consistent with Taxpayer providing retail construction services, and not with providing professional consulting services.

All of the invoices discussed above show that Taxpayer engaged in activities commonly performed by contractors responsible for construction, such as meeting with contractors and purchasing materials and/or contractor work, Taxpayer is listed as the contractor for permits associated with the . . . project, and some item descriptions are ambiguous with regards to whether Taxpayer was engaged in construction activities. Taxpayer asserts that it was only a consultant and/or owner representative with respect to the charges at issue, but [Taxpayer] has provided no agreement with these clients or other evidence establishing that it was only acting in that capacity. Given that the invoice items indicate Taxpayer was performing activities normally engaged in by contractors responsible for the construction, and it has provided no evidence that it was merely acting as a consultant and owner representative not responsible for the projects, we conclude that Audit correctly reclassified the receipts and assessed Taxpayer retail sales tax.⁴

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 20th day of July 2020.

⁴ Taxpayer also suggests that the Department is estopped from reclassifying receipts on grounds that he received advice from a Department representative indicating that receipts are not for services with respect to construction. Because Taxpayer has provided no written evidence of such advice, we find no grounds for estoppel. *See* Excise Tax Advisory 3065.2009 (ETA 3065), which explains that the Department cannot give consideration to claimed misinformation resulting from telephone conversations or personal consultations. [*See also* RCW 82.32.A.020(2) (taxpayers have the right to rely on written advice and written reporting instructions)].