

Cite as Det. No. 20-0333, 41 WTD 262 (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. 20-0333
)	
... )	Registration No. . . .
)	

[1] RCW 82.04.217; RCW 82.04.2909: EXCISE TAXES – BUSINESS AND OCCUPATION TAX – EXEMPTIONS. A nonresident recycler of aluminum that has not established it: (1) processes alumina into aluminum, and (2) is a direct service industrial customer, is not eligible for the preferential business and occupation tax rate available to aluminum smelters.

[2] WAC 458-20-193; RCW 82.04.067: EXCISE TAXES – BUSINESS AND OCCUPATION TAX – SUBSTANTIAL NEXUS. A nonresident recycler of aluminum established substantial nexus with Washington by exceeding the economic nexus standards.

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.

McCormick, T.R.O. – A . . . company that produces aluminum ingots from recyclable aluminum disputes the Department’s tax assessment because the company asserts that it is an aluminum smelter and qualifies for the preferential business and occupation (B&O) tax rate. The company further asserts that its nexus with Washington ended on December 31, 2015. . . . We deny the petition because the company is not a direct service industrial customer, it does not process alumina into aluminum, and its wholesale sales are subject to economic nexus standards. . . .<sup>1</sup>

ISSUES

1. Whether a company that manufactures aluminum ingots from recyclable aluminum in . . . manufacturing facility and then sells the aluminum ingots to wholesale customers in Washington is an aluminum smelter under RCW 82.04.217 and eligible for the preferential B&O tax rate under RCW 82.04.2909.

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

2. If not eligible for the preferential B&O tax rate, whether, under RCW 82.04.067 and WAC 458-20-193, the company's wholesale sales are sufficient to establish substantial nexus based on economic nexus standards, for 2016, 2017, and 2018.

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#### FINDINGS OF FACT

(Taxpayer) is an . . . [out-of-state] based company that produces aluminum ingots from recyclable aluminum and makes wholesale sales of the ingots to its customers in Washington. Taxpayer registered with the Department on . . . 2019, and was assigned to report and pay its tax liability on a quarterly basis.

In November 2018, the Department's Compliance Division (Compliance) initiated an investigation of Taxpayer's business activities in Washington for the period of January 1, 2014, through December 31, 2018. On October 15, 2019, the Department issued Letter ID . . . and a notice of balance due (Assessment) in the amount of \$ . . . , which includes \$ . . . in wholesaling B&O tax, a five percent unregistered business penalty of \$ . . . , a five percent substantial underpayment penalty of \$ . . . , a 20 percent additional assessment penalty of \$ . . . , a 29 percent delinquent penalty of \$ . . . , and interest of \$ . . . . On November 13, 2019, the Department granted an extension of the Assessment due date to December 16, 2019. The Assessment remains unpaid. The Assessment is based on the following:

In January 2019, Taxpayer submitted a completed Washington Business Activities Questionnaire (Questionnaire) to Compliance. The Questionnaire stated that Taxpayer visited Washington three times during 2014 for "customer relationship visit." Questionnaire at 2. As part of the review, Taxpayer provided Compliance a copy of its sales data sheet, which includes the gross income amount Taxpayer received during each quarter throughout the review period, beginning with Quarter 1 2014. The information Taxpayer provided as part of the review also named five of its Washington customers, but did not include any customer-specific sales information. Compliance determined that during the review period, Taxpayer's business activities consisted of making wholesale sales of aluminum ingots to its Washington customers and that it established substantial nexus through its physical presence for 2014 when it first visited Washington on February 4, 2014, and had trailing nexus based on such physical presence in 2015.

Compliance calculated the amount of tax due based on the information Taxpayer provided in the sales data sheet. According to the sales data sheet, Taxpayer's annual gross income from its sales in Washington was as follows: \$ . . . in 2014; \$ . . . in 2015; \$ . . . in 2016; \$ . . . in 2017; and \$ . . . in 2018. Compliance determined that Taxpayer further established substantial nexus with Washington by exceeding the economic nexus standards for the years 2015, 2016, 2017, and 2018.

On December 12, 2019, Taxpayer timely petitioned for administrative review of the Assessment. Taxpayer contends that it qualifies for the preferential B&O tax rate for aluminum smelters, its tax reporting obligations ended on December 31, 2015. . . . According to Taxpayer, its "primary business is the processing and manufacturing of scrap aluminum into ingot, which . . . [it] then sells at wholesale to customers." Petition at 6.

Taxpayer asserts that, “[a]s an industrial processor and manufacturer of aluminum, . . . [Taxpayer] is an aluminum smelter per the definition of RCW 82.04.217.” Petition at 9. However, Taxpayer also argues that the statutory definition of “aluminum smelter” under RCW 82.04.217 is unconstitutional in that it discriminates against interstate commerce by placing geographical limits on who may qualify. Taxpayer argues that by requiring an aluminum smelter to be a direct service industrial customer, the statute seeks to limit who may qualify for the preferential B&O tax rate to regional customers that purchase power for direct consumption from the Bonneville Power Administration. Taxpayer contends that because the statutory definition of “aluminum smelter” is unconstitutional, the plain meaning of the term should apply. Taxpayer further contends that it is an aluminum smelter under RCW 82.04.2909(2), whose plain meaning is intended to include every aluminum smelter regardless of geographical location. Taxpayer asserts that RCW 82.04.2909 applies the preferential B&O tax rate to “every aluminum smelter that sells its own manufactured aluminum at wholesale,” including Taxpayer, and that it qualifies for the preferential rate. Petition at 9.

Additionally, Taxpayer asserts that because it qualifies for the preferential rate, it is not precluded from retroactively reporting and paying its tax liability at the preferential rate, including filing annual performance reports. Taxpayer maintains that because it was not registered with the Department and did not claim a preferential tax rate prior to the Assessment, no annual performance reports were required to be filed. Taxpayer asserts that because its obligation to file annual performance reports arose only after it retroactively claimed a preferential tax rate, the statutorily established due date for annual performance reports does not apply and it is not subject to any corresponding penalties.

Taxpayer also disputes the Department’s determination that it established substantial nexus with Washington by exceeding the economic nexus standards that went into effect on September 1, 2015. Taxpayer asserts that the economic nexus standards apply to taxpayers that report under the wholesaling B&O tax classification only, and not to Taxpayer, who is eligible to report under the wholesaling of manufactured aluminum B&O tax classification. Taxpayer contends that because the economic nexus standards are inapplicable, the only way for it to establish substantial nexus with Washington is through its physical presence. Taxpayer concedes that it established physical presence nexus when it visited Washington three times during 2014, and that it was subject to trailing nexus for 2015. Taxpayer asserts that its substantial nexus with Washington expired after December 31, 2015 (when its trailing nexus ended), due to lack of any physical presence after 2014.

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## ANALYSIS

### 1. Taxpayer is not an aluminum smelter under RCW 82.04.217 and is ineligible for the preferential B&O tax rate under RCW 82.04.2909.

Washington imposes a B&O tax on “every person that has a substantial nexus” with Washington. RCW 82.04.220(1). The B&O tax is imposed on every person for the act or privilege of engaging in business activities in Washington. *Id.* The tax is measured by applying particular rates against

the value of products, gross proceeds of sale, or gross income of the business as the case may be. *Id.* Any person engaged in the business of making sales at wholesale must pay wholesaling B&O tax on the gross proceeds of sales. RCW 82.04.270.

However, aluminum smelters meeting certain conditions are eligible for a preferential B&O tax rate. In pertinent part, RCW 82.04.2909(2) reads as follows:

(2) Upon every person *who is an aluminum smelter* engaging within this state in the business of making sales at wholesale of aluminum manufactured by that person, as to such persons the amount of tax with respect to such business is equal to the gross proceeds of sales of the aluminum multiplied by the rate .2904 percent.

(3) A person reporting under the tax rate provided in this section *must file a complete annual tax performance report* with the department under RCW 82.32.534.

(Emphasis added.) Thus, in order to qualify for the preferential B&O tax rate, a taxpayer must be an aluminum smelter that makes wholesale sales of the aluminum it manufactures and file a complete annual tax performance report with the Department. *Id.*

The term “aluminum smelter” is statutorily defined. RCW 82.04.217(2) defines “aluminum smelter” as “the manufacturing facility of any *direct service industrial customer* that processes alumina into aluminum.” (Emphasis added.)<sup>[2]</sup> “[D]irect service industrial customer” is defined in RCW 82.16.0495, to mean “a person who is an industrial customer that contracts for the purchase of power from the Bonneville Power Administration for direct consumption as of May 8, 2001.” RCW 82.04.217(1), RCW 82.16.0495(1)(a).

Thus, in order to qualify for the aluminum smelter preferential B&O tax rate, a taxpayer must establish that it (1) is an aluminum smelter, (2) made wholesale sales of the aluminum it manufactured, and (3) filed completed annual tax performance reports with the Department.

Here, Taxpayer processes scrap aluminum into aluminum ingots at its manufacturing facility in . . . , and then sells the aluminum ingots at wholesale to its Washington customers. In order to qualify for the aluminum smelter preferential B&O tax rate, Taxpayer must show that it is an “aluminum smelter,” as defined in RCW 82.04.217(2) (“Aluminum smelter” means the manufacturing facility of any direct service industrial customer that processes alumina into aluminum.”). Accordingly, Taxpayer must establish both that its manufacturing facility is a facility of a “direct service industrial customer” and that it processes alumina into aluminum. *Id.*

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<sup>[2]</sup> [“Alumina” is defined by Merriam-Webster’s dictionary as “the oxide of aluminum Al<sub>2</sub>O<sub>3</sub> that occurs both in pure form as corundum and in hydrated forms (as in bauxite).” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/alumina> (accessed January 3, 2022). The Legislature created the aluminum smelter B&O tax classification (RCW 82.04.2909) within the same legislation where it defined “aluminum smelter” (RCW 82.04.217(2)). Laws of 2004, ch. 24, §§ 2, 3. Therefore, although the statutes do not reference each other, the Legislature appears to have intended them to be read together.]

A “direct service industrial customer” is a person who is an industrial customer that contracts for the purchase of power from the Bonneville Power Administration for direct consumption as of May 8, 2001. RCW 82.16.0495(1)(a). Taxpayer has not shown that, as of May 8, 2001, it had contracted for direct purchase of power from the Bonneville Power Administration as an industrial customer. Accordingly, as Taxpayer has not shown that it is a “direct service industrial customer,” its . . . manufacturing facility fails to constitute an “aluminum smelter” under RCW 82.04.217.

Additionally, according to Taxpayer, it processes scrap aluminum into ingots. Taxpayer does not assert that it processes alumina into aluminum. Taxpayer has also provided no evidence that it processes alumina into aluminum. Accordingly, we find that Taxpayer has failed to establish that it processes alumina into aluminum as required by RCW 82.04.217. Accordingly, because Taxpayer has failed to establish that it is a direct service industrial customer and processes alumina into aluminum, it has failed to establish that it is an aluminum smelter eligible for the preferential B&O tax rate under RCW 82.04.2909.

Taxpayer asserts that the statutory definition of “aluminum smelter” under RCW 82.04.217 is unconstitutional in that it discriminates against interstate commerce by placing geographical limits (where the Bonneville Power Administration services industrial customer) on who may qualify. Taxpayer further asserts that because the statutory definition is unconstitutional, the plain meaning of the term “aluminum smelter” should apply. However, an administrative body does not have the authority to determine the constitutionality of the law it administers; only the courts have that power. *Bare v. Gorton*, 84 Wn.2d 380, 383, 526 P.2d 379 (1974). Further, we note that, even if Taxpayer were not required to be a direct service industrial customer, Taxpayer would still be ineligible for the preferential B&O tax rate because it has not established that it processes alumina into aluminum.

Because Taxpayer has failed to establish that it is an aluminum smelter under RCW 82.04.217 eligible for the preferential B&O tax rate under RCW 82.04.2909, we need not consider the remaining elements of the aluminum smelter preferential B&O tax rate, or Taxpayer’s argument that it is not precluded from retroactively reporting and paying its tax liability at the preferential rate, including filing annual performance reports. Accordingly, we deny the petition as to this issue.

2. Because Taxpayer has failed to establish that it is eligible for the aluminum smelter preferential B&O tax rate under RCW 82.04.2909, it remains subject to the economic nexus standards established by RCW 82.04.067 and WAC 458-20-193.

Taxpayer concedes that its customer visits established substantial nexus with Washington for the years 2014 and 2015, based upon physical presence and trailing nexus, respectively. However, Taxpayer disputes whether it established substantial nexus for 2016, 2017, and 2018.

RCW 82.04.067 establishes the statutory “substantial nexus” thresholds that apply to persons engaging in business in Washington. WAC 458-20-193 is the administrative rule the Department adopted to administer RCW 82.04.067, which explains the applicable nexus requirements with respect to sales of tangible personal property.

Beginning September 1, 2015, the term “substantial nexus” under RCW 82.04.067 was expanded to include businesses making wholesale sales into Washington that exceed the established economic nexus thresholds. In relevant part, it reads:

(1) A person engaging in business is deemed to have substantial nexus with this state if the person is:

...

(c) A nonresident individual or a business entity that is organized or commercially domiciled outside this state, and in the immediately preceding tax year the person had:

(i) More than fifty thousand dollars of property in this state;

(ii) More than fifty thousand dollars of payroll in this state;

(iii) More than two hundred fifty thousand dollars of receipts from this state;<sup>3</sup> . . .

...

(6)(a) Subsections (1) through (5) of this section only apply with respect to the taxes on persons engaged in apportionable activities as defined in RCW 82.04.460 *or making wholesale sales taxable under RCW 82.04.257(1) or 82.04.270*. . . .

RCW 82.04.067 (2015) (Emphasis added.)

Relevant here, RCW 82.04.270 provides:

Upon every person engaging within this state *in the business of making sales at wholesale*, except persons taxable as wholesalers under other provisions of this chapter; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of 0.484 percent.

(Emphasis added.)

Thus, beginning September 1, 2015, a person engaged in the business of making sales at wholesale in Washington may establish substantial nexus with Washington by exceeding the applicable economic nexus thresholds. RCW 82.04.067(1). The version of RCW 82.04.067 that took effect September 1, 2015, establishes that the economic nexus standards apply to taxpayers making wholesale sales taxable under RCW 82.04.270. RCW 82.04.270 includes “[e]very person engaging within this state in the business of making sales at wholesale, except persons taxable as wholesalers under other provisions of this chapter; . . . .” From September 1, 2015, through June 30, 2017, a taxpayer could establish substantial nexus with Washington by having more than \$250,000 in gross receipts from this state. From July 1, 2017, through March 13, 2019, a taxpayer could establish substantial nexus with Washington by having more than \$267,000 in gross receipts from this state.

<sup>3</sup> Beginning July 1, 2017, through March 13, 2019, the economic nexus thresholds were amended to include “More than two hundred sixty-seven thousand dollars of receipts from this state.” RCW 82.04.067(1)(c)(iii).

Here, it is undisputed that Taxpayer is in the business of making sales at wholesale of the aluminum ingots that it manufactures to its Washington customers. Taxpayer's annual gross income from Washington receipts for each year at issue is as follows: \$. . . in 2016; \$. . . in 2017; and \$. . . in 2018. Because Taxpayer's gross receipts from Washington for these years exceed both of the applicable economic nexus thresholds of \$250,000 and \$267,000, Taxpayer is deemed to have established substantial nexus with Washington based on economic presence for all the years at issue, 2016, 2017, and 2018.

Taxpayer disputes that it is subject to the economic nexus thresholds and argues that its substantial nexus with Washington ended after December 31, 2015 (the last day of the trailing nexus period following Taxpayer's establishment of substantial nexus based upon physical presence). Taxpayer asserts that the economic nexus standards apply to taxpayers that report under the wholesaling B&O tax classification only, and not to Taxpayer, who asserts it is eligible to report under the wholesaling of manufactured aluminum B&O tax classification, pursuant to RCW 82.04.2909.

As explained above, Taxpayer is not an "aluminum smelter" under RCW 82.04.217, and is not eligible to report and pay its B&O tax liability under the wholesaling of manufactured aluminum tax classification. Because Taxpayer is taxable as a wholesaler under RCW 82.04.270, the Department correctly determined that Taxpayer is subject to the economic nexus standards under RCW 82.04.067. Thus, in addition to establishing substantial nexus with Washington through its physical presence for the calendar years 2014 and 2015, Taxpayer also established substantial nexus by exceeding the economic nexus thresholds for 2016, 2017, and 2018. Accordingly, we deny the petition as to this issue.

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#### DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 15th day of December 2020.