

Cite as Det. No. 15-0009, 34 WTD 369 (2015)

BEFORE THE APPEALS 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. 15-0009
... )	
)	Registration No. . . .
)	

[1] RCW 82.04.290 – SERVICE AND OTHER ACTIVITIES B&O TAX – FLAGGING. Income from flagging, the control of traffic at road construction sites, is taxable under the service and other activities B&O tax classification.

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, A.L.J. – A flagging services company (“Taxpayer”) protests the Department of Revenue’s (“Department”) reclassification of income from the public road construction and wholesaling business and occupation (“B&O”) tax classifications to the service & other activities B&O tax classification. We deny the petition.<sup>1</sup>

ISSUE

Is flagging classified for B&O tax purposes as public road construction under [RCW 82.04.280(1)(b) and] WAC 458-20-171 (“Rule 171”), wholesaling under [RCW 82.04.060(2) and] WAC 458-20-170 (“Rule 170”), or service & other activities under [RCW 82.04.290(2) and] WAC 458-20-224 (“Rule 224”)?

FINDINGS OF FACT

Taxpayer is a flagging services company based in . . . Washington. Flagging involves the control of traffic at road construction sites. Taxpayer registered with the Department as of July 1, 2008, and initially reported under the public road construction B&O tax classification. In 2009, Taxpayer reported for most of the year under the wholesaling B&O tax classification, but then switched back to the public road construction B&O tax classification. Taxpayer then switched again to the wholesaling B&O tax classification in 2010, and continued to report under that B&O tax classification until the last quarter of 2013, when it reported for the first time under the service & other activities B&O tax classification.

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

In 2013, the Department's Audit Division ("Audit") partially audited Taxpayer's records for the time period January 1, 2009, through December 31, 2013. As a result of the partial audit, Audit reclassified all of Taxpayer's income that had been reported under both the public road construction and wholesaling B&O tax classifications to the service & other activities B&O tax classification. This resulted in an assessment of \$. . . .<sup>2</sup>

Taxpayer timely appealed the assessment noting that state tax law does not allow for the bifurcation of public road construction jobs. Taxpayer states that if a general contractor performed both flagging and public road construction activities it would not be subject to B&O tax under the service & other activities classification on flagging income because all the income would be taxed under the public road construction B&O tax classification.

## ANALYSIS

Chapter 82.04 RCW imposes the B&O tax under various rates based on different business activity tax classifications. If a business activity is not specifically classified, the activity will be taxed under RCW 82.04.290(2), the service & other activities B&O tax classification.

### 1. Public Road Construction

Under RCW 82.04.280(1)(b), Washington's imposes its B&O tax under the public road construction classification for:

[B]uilding, repairing or improving any street, place, road, highway, easement, right-of-way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle 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 . . .

Rule 171 is the Department's administrative rule providing further guidance on the public road construction B&O tax classification. Rule 171 lists activities that constitute public road construction as "building, repairing or improving of a publicly owned street, place, road, etc."<sup>3</sup> Flagging is not included in this list. Because the taxpayer's flagging activities are not "building, repairing or improving of a publicly owned street, place, road, etc.," they are not taxable as public road construction. *See also* RCW 82.04.050(10) (describing the activities that are not classified as retail sales with respect to public road construction).<sup>4</sup>

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<sup>2</sup> The assessment consists of \$. . . in service & other activities B&O tax, a tax credit of \$. . . for wholesaling B&O tax paid, a B&O tax credit of \$. . . for public road construction B&O tax paid, and \$. . . in interest.

<sup>3</sup> Rule 171 provides:

The term "building, repairing or improving of a publicly owned street, place, road, etc.," includes clearing, grading, graveling, oiling, paving and the cleaning thereof; the constructing of tunnels, guard rails, fences, walks and drainage facilities, the planting of trees, shrubs and flowers therein, the placing of street and road signs, the striping of roadways, and the painting of bridges and trestles; it also includes the mining, sorting, crushing, screening, washing and hauling of sand, gravel, and rock taken from a public pit or quarry.

<sup>4</sup> RCW 82.04.050(10) provides that a retail sale does not include:

## 2. Wholesaling

Under RCW 82.04.050(2)(b), “sale at retail” or “retail sale” includes labor and services rendered in respect to the “constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers . . . .” Under Rule 170(1)(e), “constructing, repairing, decorating or improving of new or existing buildings or other structures,” includes:

[T]he construction of streets, roads, highways, etc., owned by the state of Washington. The term includes the sale of or charge made for all service activities rendered in respect to such constructing, repairing, etc., regardless of whether or not such services are otherwise defined as . . . “sales at retail” by RCW 82.04.050.

RCW 82.04.051 governs the taxation of “services rendered in respect to” construction. In 1999, the Legislature enacted RCW 82.04.051, the intent of which was “to clarify which services, if standing alone and not part of the construction agreement, are taxed as retail or wholesale sales, and which services will continue to be taxed as a service.” Laws of 1999, ch. 212, §1. This statute incorporated a specific reference to flagging in the context of what does not constitute services rendered in respect to constructing, a retail sale under RCW 82.04.050. RCW 82.04.051(1) provides: “The term [services rendered in respect to] does not include services such as engineering, architectural, surveying, flagging, accounting, legal, consulting, or administrative services . . . .” (Emphasis added) The [Legislature’s statement regarding intent] contains the following: “Services that are otherwise subject to tax as a service under RCW 82.04.290(2), including . . . flagging . . . remain subject to tax as a service under RCW 82.04.290(2), if the person responsible for the performance of those services is not also responsible for the performance of the constructing . . . activities.” [Laws of 1999, ch. 212, § 1(3). ] Thus, flagging by itself is not construction. *See* Det. No. 88-183, 5 WTD 311, 313 (1988). The taxpayer here was not responsible for any construction in addition to providing flagging, but rather was hired to provide only flagging.

RCW 82.04.060(2) defines “sale at wholesale” or “wholesale sale” as any charge for “labor and services rendered for persons who are not the consumers, in respect to real or personal property, if such charge is expressly defined a retail sale by RCW 82.04.050 when rendered for customers.” Because Taxpayer’s flagging activities would not qualify as a retail sale under RCW 82.04.050, they cannot be wholesale sales under RCW 82.04.060. We conclude Taxpayer’s flagging activities are not taxable under the wholesaling B&O tax classification.

## 3. Service & Other Activities

Flagging activities are not specifically classified; therefore, flagging activities have been classified for B&O tax purposes under the service & other activities classification under RCW

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[T]he sale of or charge made for labor and services rendered in respect to the building, repairing, or improving of any street, place, road, highway, easement, right of way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle 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 including mass transportation vehicles of any kind.

82.04.290(2). *See also* WAC 458-20-224; 5 WTD 311.<sup>5</sup> Accordingly, we conclude that Audit properly reclassified Taxpayer's income to the service & other activities B&O tax classification.<sup>6</sup>

#### DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 16th day of January, 2015.

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<sup>5</sup> 5 WTD 311 applied the law prior to the enactment of RCW 82.04.051 in 1999, and discussed the public road construction and wholesaling classifications. 5 WTD 311 concluded that the service & other activities B&O tax classification applied to subcontractor receipts from flagging activities.

<sup>6</sup> Taxpayer argues that if it had performed its flagging services in conjunction with performing public road construction it would not have to separately report its income under the service & other activities B&O classification. Since that is not at issue here we have not addressed it in our analysis.