

Cite as Det. No. 13-0290, 36 WTD 160 (2017)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for)	<u>D E T E R M I N A T I O N</u>
Correction of Assessment of)	
)	No. 13-0290
)	
...)	Registration No. . . .
)	

[1] RULE 17001; RCW 82.04.190: GOVERNMENT CONTRACTING – USE TAX ON MATERIALS USED -- CONSUMER. A Subcontractor who installed materials for the federal government fits within the definition of a consumer of those materials and therefore is liable for the use tax based upon the material costs.

[2] RULE 17001; RCW 82.04.190: GOVERNMENT CONTRACTING – USE TAX ON MATERIALS USED -- CONSUMER. General contractual language and assertions that tax should have been paid by the Prime Contractor are insufficient to excuse the use tax liability of a Subcontractor who installed materials for the federal government, absent proof that the tax at issue was actually paid.

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.

Kreger, A.L.J. – A company, specializing in concrete underlayment work, protests the assessment of use tax on materials used in government contracting. The Taxpayer asserts that it had no direct contractual relationship with the government entity, and acted as a subcontractor and reported tax based on instructions and information provided by the prime contractor on the projects. The Taxpayer’s petition is denied.¹

ISSUE

Whether use tax was properly assessed on materials used in government contracting projects under WAC 458-20-17001.

FINDINGS OF FACT

[Taxpayer] is a Washington corporation engaged in the installation of custom . . . concrete. The Taxpayer specializes in concrete installation for sound control, floor leveling, and fire protection. At issue here, are two projects where the Taxpayer was a subcontractor for government contracting

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

jobs. The first project was . . . for the . . . County Housing Authority and the second was for the Federal Government.

The Taxpayer asserted that the prime contractor remitted the tax at issue, but has not provided any corroborating evidence of this. Alternatively, the Taxpayer asserts that as it was a subcontractor on the projects, it did not contract directly with the governmental entities and should not be considered to be engaged in governmental contracting as it lacked notice that these projects were government contracting. Taxpayer also asserts that it acted as instructed by the prime contractor and relied upon bid documents and resale certificates.

ANALYSIS

Contractors who perform certain construction, installation, and improvements to real property of or for the United States, its instrumentalities, or a county or city housing authority are subject to tax as provided in [RCW 82.04.280(1)(g) and 82.14.190. *See also*] WAC 458-20-17001 (Rule 17001). [This is generally referred to as the Government Contracting B&O tax classification.] Rule 17001(1) expressly applies to both “prime and subcontractors.”² Generally, constructing, repairing, decorating, or improving building or properties are defined as a retail sale. RCW 82.04.050(2)(b). However, performing these specific construction activities are excluded from the definition of a retail sale when performed for the government, its instrumentalities, or a county or city housing authority. RCW 82.04.050(10). Thus, the contractor or subcontractor providing these services is defined as the consumer of the “tangible personal property which is installed, applied, attached, or otherwise incorporated in their government contracting work.” RCW 82.04.190(6)³; *see also* Rule 17001(5).

The Taxpayer does not contest that the projects at issue were performed for the [U.S.] government or a [city or county] housing authority. The Taxpayer initially asserted that the use tax on materials was remitted by the prime contractor. The Audit Division indicated that it would make adjustments where the Taxpayer could substantiate that the tax had been paid by the prime contractor, but the Taxpayer was not able to provide any evidence to corroborate this assertion.

We find no basis for the Taxpayer’s assertion that the liability for tax on materials should be limited to prime contractors. Conversely, as noted above, both Rule 17001 and the Department’s construction guide expressly refer to both prime and subcontractors.

² Similarly, the Departments Industry Guide also expressly states that both prime and subcontractors are liable for tax on materials in the section on Government contracting which states: “The contractor (prime or subcontractor) must pay sales or use tax on all materials which become a physical part of the project.” <http://dor.wa.gov/Content/DoingBusiness/BusinessTypes/Industry/construction/default.aspx#GovernmentContractin>

³ RCW 82.04.190(6) states that a person providing these services is a consumer:

Any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States, any instrumentality thereof, or a county or city housing authority . . . is a consumer within the meaning of this subsection in respect to tangible personal property incorporated into, installed in, or attached to such building or other structure by such person . . .

Furthermore, we note that the Reseller Permit⁴ from the prime contractor, applicable for periods after 2010, which would cover the last three years of the audit period, expressly notes that the permit cannot be used to purchase materials used in government contracting.

For 2008 and 2009, the Taxpayer has provided a copy of a Resale Certificate from the Prime Contractor. However, this certificate is not project specific. The Audit Division noted that the Taxpayer worked on several projects for this prime contractor; therefore, it was not possible to determine if this resale certificate was provided for the government contract work at issue. We also note that for government contracting work, the prime contractor, as detailed above, is defined as the consumer of materials and would not have been purchasing items for resale, and should not have issued a resale certificate for this government contracting work. WAC 458-20-102A (4)(a) (Rule 102A (4)(a)). The fact that the Taxpayer is in possession of a resale certificate from the prime contractor, that may have been issued for other non-government contracting projects, does not establish that this resale certificate was provided to the Taxpayer for the particular project at issue.

The Taxpayer has also provided a copy of a representative Tax Exemption Certificate for the . . . Housing Authority, and notes that the housing authority is exempt from payment of retail sales tax under WAC 458-20-189 (Rule 189). However, Rule 189 itself expressly directs both contractors and prime contractors to Rule 17007 for work done for housing authorities and states:

(6) **Retail sales tax exemptions.** The retail sales tax does not apply to the following:

(a) Sales to city or county housing authorities which were created under the provisions of the Washington housing authorities law, chapter 35.82 RCW. **However, prime contractors and subcontractors** for city or county housing authorities **should refer to WAC 458-20-17001** (Government contracting—Construction, installations, or improvements to government real property) to determine their tax liability.

Rule 189(6)(a) (emphasis added).

The Taxpayer has provided correspondence from the prime contractor requiring the material costs to be specifically broken out, a bid proposal with handwritten notations itemizing tax on materials, information that the tax on materials was not included in the final contract, and payment detail that the amount received from the prime contractor corresponded to the lower amount. This information is offered to support the assertion that the prime contractor was to remit tax on material. However, we do not find that this detail supports this assertion. Rather, it establishes the materials cost and that the prime contractor did not include tax on those materials in the contract with the subcontractor. Nothing indicates that the tax on materials was to be paid or was actually paid by the prime contractor.

The Taxpayer has also provided copies of sections of the instructions to bidders from the . . . Housing Authority and the . . . Housing Authority, which note that the bids shall not include

⁴ RCW 82.04.050 was amended, to replace resale certificates with reseller's permits. Laws of 2009, ch. 563, § 301. Washington amended RCW 82.04.050(1) to require the purchaser to present a reseller's permit or "uniform exemption certificate in conformity with RCW 82.04.470," instead of a resale certificate. The new law requiring wholesale purchasers to use reseller permits became effective on January 1, 2010.

Washington State Sale Tax. This provision is consistent with the tax being the obligation of the bidder rather than that of the housing authority, and does not provide any basis to alter the Taxpayer's liability for the tax as a consumer as detailed above.

The Taxpayer cites to 24 WTD 21, Det. No. 04-0081 (2004) as supporting the proposition that it should not be liable for the tax because they were at all times acting as a subcontractor on the project. We do not construe the holding of this case the same way the Taxpayer does. 24 WTD 21 involved a situation where a prime contractor defaulted, and the Town that had contracted for the work subsequently made direct payments to a subcontractor under specific provisions in the Town's contract with the defaulting prime contractor. The determination holds that this direct payment to the subcontractor did not create a separate retail construction contract between the Town and the subcontractor. The determination specifically sites the operative contract language being construed, which provided that any payments by the Town (as Owner under the contract) would be considered payments of the contractor. Rather than addressing general principles of subcontractor liability or government contracting, this determination construes specific contract language pertaining to a particular project. We do not find that this determination supports any general limitation on the liability of subcontractors in government contracting cases. Rather, the determination only stands for the proposition that the Town, as Owner on this particular project, was acting under the terms of its specific contract with the prime contractor and not creating a new contractual relationship with the subcontractor.

The Taxpayer also includes information from the Congressional Research Service addressing protections for subcontractors on federal prime contracts.⁵ Specifically, the Taxpayer notes language detailing that the Contract Disputes Act does not apply to subcontracts because there is no direct contractual relationship between the government and the subcontractor. The Taxpayer notes that it does not have a direct contractual relationship with the government entities, but rather, only with the prime contractors on the projects and asserts that this should limit the liability for the use tax at issue to the prime contractor. Regardless, the law at issue does not require a direct contractual relationship with the government entity for assessment of use tax.

We conclude that none of the information provided by the Taxpayer established that the tax at issue was actually paid by the prime contractor, or supports a limitation of liability for the tax to the prime contractor. As a subcontractor on the projects at issue, the Taxpayer fits within the definition of a consumer, and correspondingly, was liable for use tax on the materials at issue. We sustain the Audit Division's assessment.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 19th day of September 2013.

⁵ "Legal Protections for Subcontractors on Federal Prime Contracts" by Kate M. Manuel, Legislative Attorney, December 28, 2011.