

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	<u>D E T E R M I N A T I O N</u>
For Correction of Assessment of)	
)	No. 88-260
)	
. . .)	Registration No. . . .
)	Tax Assessment No. . . .
)	

- [1] **RULE 109 AND RCW 82.04.080:** B&O TAX -- INTEREST -- PURCHASE MONEY NOTE -- REAL ESTATE -- CONSTRUCTION SERVICES -- INTEREST PAID TO CONSTRUCTION LENDER. The statutory definition of "gross income of the business" includes interest received without any deduction for interest paid out as an expense. Where taxpayer, in the construction business, sells real estate and its construction services, and is paid in part with an interest-bearing purchase money promissory note, the interest received is not offset by the taxpayer's payment of interest on its loan from a construction lender.
- [2] **RULE 109, RCW 82.04.4281 AND RCW 82.04.390:** B&O TAX -- INTEREST -- REAL ESTATE TRANSACTION -- DEED OF TRUST -- INVESTMENT OF MONEY -- LOAN -- PURCHASE MONEY NOTE. Where taxpayer, in the construction business, sells real estate and its construction services, and is paid in part with an interest-bearing purchase promissory note secured by a deed of trust, the interest income is a taxable financing charge and does not meet the test of an investment nor loan of money for purposes of RCW 82.04.4281. The taxpayer made no actual loan of money to the person paying interest. Detlefsen v. State Dept. of Revenue, BTA case cited. Sellen case discussed.
- [3] **RULE 197, AND RCW 82.08.100:** RETAILING B&O TAX -- SALES TAX -- WHEN TAX LIABILITY ARISES -- CASH RECEIPTS BASIS -- PROMISSORY NOTE PAID AS CONSIDERATION -- ACCOUNT RECEIVABLE -- SPECIAL APPLICATION TO CONTRACTORS -- METHOD THREE OF RULE 199.
A promissory note, while considered as consideration for the purchase of construction services, is not a cash payment but is deemed an account receivable. The taxpayer, as a construction contractor and on a cash receipts basis, is

subject to Rule 197's special application to contractors for reporting gross proceeds of sale.

- [4] **RULE 235 AND RULE 199:** TAX RATE CHANGES -- CASH RECEIPTS TAXPAYER --ACCOUNTS RECEIVABLE ADJUSTMENT. Taxpayers filing returns on a cash receipts basis per Rule 199's method three must make an accounts receivable adjustment at the time of a change in tax rates. Where a cash receipts taxpayer held a promissory note (deemed an account receivable) and a tax rate change became effective May 1, 1982, the account receivable became subject to taxation in the reporting period for April 1982.

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.

TAXPAYER REPRESENTED BY: . . .
. . .

DATE OF HEARING: December 17, 1985

NATURE OF ACTION:

Petition protesting taxation of interest received on a promissory note given by a buyer of real estate and construction services, and protesting the time when the sale of the construction services is taxable when the taxpayer is on a cash receipts basis. The petition also seeks a waiver of interest on the basis that the taxpayer received contrary instructions from the Department. The petition also seeks a credit for sales taxes paid by two subcontractors to the Department.

FACTS AND ISSUES:

Krebs, A.L.J. -- . . . (taxpayer) is a construction company specializing in the construction of large multi-family residential developments.

The Department of Revenue examined the taxpayer's business records for the period from January 1, 1981 through March 31, 1984. As a result of this audit, the Department issued Tax Assessment No. . . . on January 22, 1985 asserting excise tax liability in the amount of \$. . . and interest due in the amount of \$. . . for a total sum of \$ The taxpayer made payment of \$. . . on March 15, 1985 and the balance remains due.

The taxpayer's protest involves Schedules III, IV, and VI of the audit report.

Schedule III. The auditor assessed Service business and occupation (B&O) tax on interest income received on a promissory note which the taxpayer had taken in partial payment on its sale of an apartment complex called . . . located in . . . , Washington.

The background of the "partial payment promissory note" is as follows. In 1981, the taxpayer was the owner of the land on which it was to construct On December 16, 1981, the taxpayer entered into a Construction Loan Agreement with . . . as lender of \$9,620,000. The taxpayer as grantor, executed a deed of trust on December 16, 1981 on the . . . property with . . . as beneficiary to secure the loan and payment of \$11,250,000.

On March 1, 1982, the taxpayer entered into an Agreement of Sale whereby it sold the . . . property to [X], [a] . . . Limited Partnership, for a total purchase price of \$10,243,000 to be paid by [X], purchaser, to the taxpayer, seller, at the closing date. The closing was held on April 22, 1982. At the closing, [X] paid \$50,000 cash and issued a promissory note, the "partial payment promissory note," in the amount of \$10,193,000 which was secured by a subordinate Deed of Trust granted by [X] with the taxpayer as beneficiary. The interest rate on the "partial payment promissory note" was 20.125%. The note matured on December 31, 1984.

Interest payments during the audit period (January 1, 1981 through March 31, 1984) were as follows:

\$2,460,465	on October 15, 1982
2,375,710	on January 15, 1983
663,000	on October 15, 1983
<u>\$5,499,175</u>	Total

The above amounts were subjected to Service B&O tax in Schedule III of the audit report. Interest payment of \$3,000 was to be made on December 31, 1984.

The principal of the note in the amount of \$10,193,000 was to be paid as follows: \$571,000 on October 15, 1983 and \$9,640,000 on December 31, 1984 by issuance of a new promissory note by [X] secured by a new deed of trust with the taxpayer as beneficiary.

The Agreement of Sale dated March 1, 1982 between the taxpayer and [X] had the following additional pertinent provisions:

1. The taxpayer and [X] were to enter into a management agreement on the closing date under which the taxpayer will manage the . . . property (Par. 1.16).
2. The buyer, [X], agreed to lend \$450,000 to the taxpayer-seller at the closing. The taxpayer was to give a note to [X] in the amount of

\$450,000 with principal and interest (16.6%) due October 15, 1982 (Par. 2.5).

3. The taxpayer will pay \$950,710 to [X] as "acquisition fee" payable as follows: \$915,710 on January 15, 1983 and \$35,000 on December 31, 1984 (Par.3.).
4. The taxpayer at its sole cost and expense will construct and complete the . . . apartment complex no later than December 31, 1982 (Par. 4.1). (Construction was completed on April 1, 1983.)
5. [X] will have no personal liability on taxpayer's construction loan from the bank (Par. 11.).
6. [X] agreed to enable the lending bank to encumber the property as security for the bank's loan to the taxpayer (Par. 12.).
7. The taxpayer-seller was to commence construction "on or before May 1, 1982" and to complete construction by December 31, 1982 (Par.17.10). (Construction was completed on April 1, 1983. The closing was held on April 22, 1982.)

While the Agreement of Sale dated March 1, 1982 stated that the construction lender was [a bank], in the amount of \$9,620,000, the taxpayer in its post-conference letter accompanying the submission of the Agreement of Sale stated that "the name of the construction lender is . . . Company (formerly . . . Savings and Loan, now . . . Savings and Loan) and the original construction amount was \$9,600,000." The name of the construction lender and the slight discrepancy in the amount of the loan appears to be of no consequence in deciding the tax consequences in this case. We will refer to the lending bank as the "construction lender."

The taxpayer protests the taxability of the interest received on the "partial payment promissory note" for the following reasons:

1. [X]'s note to the taxpayer "wrapped" around the underlying note from the taxpayer to the construction lender. The functional result of the transaction was that [X] acquired the property subject to the construction financing which was paid, in turn, with [X]'s payments on its purchase note. The transaction was in no sense a loan to [X] by the taxpayer. [X] acquired the property and, in effect, the taxpayer's financing. [X] could have assumed the construction financing and indirectly did so because while the taxpayer received money from the construction lender on its

construction loan, [X] made payments to the taxpayer according to the terms of its note to the taxpayer.

2. The deduction created by the statute, RCW 82.04.4281, is applicable to the interest income earned by the taxpayer on the purchase money note. The interest constitutes an amount derived from "investments or the use of money as such." The taxpayer is not engaged in a banking, loan or security business in relation to that income, nor is its purpose to offer the services such businesses provide. The taxpayer is engaged in the construction business. The interest on the purchase money note is income from the taxpayer's investment in that note and is deductible under RCW 82.04.4281.

The issues are whether the interest received by the taxpayer on the "partial payment promissory note" (the purchase money note) is not subject to the Service B&O tax because (1) [X]'s payments on the note were in effect and functionally financing the taxpayer's construction and (2) the deduction/exemption in RCW 82.04.4281 applies to the taxpayer's situation.

Schedule IV. The auditor assessed Retailing B&O tax and sales tax liability on the retail sales of improvements (construction) and personal property related to the . . . apartment complex as of March 31, 1982, the closing date per March 1, 1982 Agreement of Sale between the taxpayer and [X]. (The actual closing took place on April 22, 1982.) The measure of tax was \$8,406,000 (\$7,061,000 for improvements plus \$1,345,000 for personal property) per allocation of purchase price. Par. 2.4 of March 1, 1982 Agreement of Sale.

The taxpayer, instead of reporting the proceeds of the sale of \$8,406,000 as of March 31, 1982, reported its draws on the construction financing in a total amount of \$7,697,610 periodically taken from April 1982 through the end of 1983. The taxpayer asserts that it did such reporting based on instructions received by telephone from a representative of the Department for the reasons that the taxpayer was on a cash receipts basis and that the periodic construction draws would be some evidence of the portion of the services contracted for that had actually been performed. The taxpayer contends that the Department through the auditor's action now takes a contrary position.

The taxpayer contends that the auditor's action ignores the clear mandate of RCW 82.08.100 that a cash-basis-accounting taxpayer should be allowed to report its sale on a cash-receipts basis. The regulations, WAC 458-20-197, 198, 199 and 235 (Rules 197, 198, 199 and 235 respectively), relied upon by the auditors are in derogation of the taxpayer's right to report its sale on a cash-receipts basis and inconsistent with the statute. Citing Lone Star Industries v. Dept. of Revenue, 97 Wn.2d 630 (1982), the taxpayer asserts "to the extent an administrative agency's regulations are

not consistent with the statutes they seek to implement, they are invalid." Thus, the taxpayer contends that the Department's attempt to apply its regulations to the taxpayer is invalid.

If it is determined that the taxpayer should have reported receipts other than on its draws from construction financing per Department's advice, the taxpayer deems it inappropriate for the Department to seek additional interest.

The issue is whether the taxpayer should have reported the sale for tax purposes as of March 31, 1982, the closing date (April 22, 1982) for the sale, or as of the various times of the taxpayer's draws on its construction loan. Another issue is whether the interest should be waived if the reporting is determined to have been due as of the time other than as reported (on a construction draw basis) by the taxpayer.

Schedule VI. The auditor assessed use tax (deferred sales tax) on taxpayer's purchases and charges made by its subcontractors without payment of sales tax. These items were related to the taxpayer's activity as a speculative builder of [an] apartment complex, . . . , Washington on land owned by the taxpayer.

The taxpayer concedes use tax (deferred sales tax) liability on all items except as to two subcontractors, . . . , Inc. and . . . of Washington. The taxpayer asserts the two subcontractors collected sales tax from it and in turn remitted the sales tax to the Department.

The taxpayer obtained and submitted records and copies of tax returns from . . . , Inc. which it claims payment of sales tax to be established. The taxpayer obtained and submitted a ledger card from . . . which it claims payment of sales tax to be established.

The issue is whether the taxpayer has established by the submitted documentary evidence that it paid sales tax to the two subcontractors and is thereby relieved of use tax (deferred sales tax) liability.

DISCUSSION:

The issues will be discussed in the order presented.

Schedule III. The auditor assessed Service B&O tax on interest income received by the taxpayer on a promissory note taken as partial payment on its sale of the . . . apartment complex. For details of the transaction, see the Facts and Issues part of this Determination. Briefly, the following occurred.

In December 1981, the taxpayer, a construction company, owned land on which it was going to build The taxpayer obtained a construction loan commitment from a "construction lender" bank.

The taxpayer gave a deed of trust to the construction lender to secure the loan.

On March 1, 1982, the taxpayer agreed to sell . . . to [X] for a total price of \$10,243,000. The closing was held on April 22, 1982. [X] paid \$50,000 cash and issued a promissory note for the balance in the amount of \$10,193,000 secured by a deed of trust subordinate to the deed of trust given by the taxpayer to the construction lender. The interest paid on [X]'s note at various times during the audit period to the taxpayer was assessed the tax in question.

On or about May 1, 1982, the taxpayer commenced construction of . . . On April 1, 1983, the taxpayer completed the construction.

The taxpayer contends that [X]'s payments of interest on the purchase money note are not subject to Service B&O tax because effectively and functionally they financed the taxpayer's construction.

The Service B&O tax is measured by the "gross income of the business." RCW 82.04.290.

[1] RCW 82.04.080 defines the term "gross income of the business" in pertinent part to mean:

. . . the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, . . . interest . . . and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, . . . or any other expense whatsoever paid or accrued . . . (Emphasis supplied.)

Thus, the taxpayer's receipt of interest from [X] is includible in the taxpayer's gross income without any deduction for the interest which the taxpayer pays to its construction lender. See ETB 165.04.109. This is so even if the taxpayer used [X]'s interest payments to make interest payments to its construction lender although there is no documentary proof, that is, the deed of trust and note from the taxpayer to the construction lender, that such actually occurred. Furthermore, it is noted that [X] had no personal liability on the taxpayer's construction loan from the construction lender. See Par. 11 of the March 1, 1982 Agreement of Sale between the taxpayer and [X]. We reject the taxpayer's contention that the interest is not taxable because it financed the taxpayer's construction loan interest payments to its construction lender.

[2] The taxpayer further contends that the deduction/exemption in RCW 82.04.4281 applies to the taxpayer's receipt of interest from [X]. The statute provides:

In computing tax there may be deducted from the measure of tax amounts derived by persons, other than those engaging in banking, loan, security, or other financial business, from investments or the use of money as such, and also amounts derived as dividends by a parent from its subsidiary corporations. (Emphasis supplied.)

The taxpayer relies on Sellen Construction v. Dept. of Revenue, 87 Wn.2d 878 (1976). In Sellen, the court held that the income from incidental investments of surplus funds by businesses that were not similar to banking, loan or security businesses was deductible as income "from investments or the use of money as such."

After Sellen was issued, the Department issued an excise tax bulletin summarizing the case. (ETB 505.04.109, . . .). ETB 505, inter alia, provides no B&O tax deduction is permitted for interest or similar financial charges relating to real estate transactions.

B&O tax exemption statute RCW 82.04.390 provides:

This chapter shall not apply to gross proceeds derived from the sale of real estate. This however, shall not be construed to allow a deduction of amounts received as commissions from the sale of real estate, nor as fees, handling charges, discounts, interest or similar financial charges resulting from, or relating to, real estate transactions. (Emphasis supplied.)

ETB 505 cites RCW 82.04.390. RCW 82.04.390 in its present form was adopted by the legislature subsequent to the adoption of RCW 82.04.4281. The legislature is presumed to have contemplated and taken into consideration all the pertinent law in force at the time in relation to the enactment of a new, or an amendment to, an existing statute. The legislature on at least two occasions, at the time of enactment of RCW 82.04.390 and again in 1970 when it amended RCW 82.04.4281, had the opportunity to consider the relationship between the two statutes but left both standing. Thus, we believe that the legislature intended that interest earned by a taxpayer selling real estate on contract, deed of trust, or mortgage is taxable and not exempt under RCW 82.04.4281.

As the Board of Tax appeals concluded in Donald F. Detlefsen v. State, Docket No. 84-38 (1985):

. . . interest income is a financing charge, it occurs by allowing payments to be made over an extended period of time and as a result, a fee or interest is realized; this does not meet the test of an investment.

Contrary to the taxpayer's assertion that the interest received from [X] was income from the taxpayer's investment in [X]'s note, that is, income for the mere use of money, the taxpayer made no actual loan of money to the person paying interest. Put simply, the transaction in question involved the extension of payment for the real estate and construction over a period of time, not the loaning or investment of money. It does not meet the test of "investment or the use of money as such" to be entitled to the deduction/exemption of RCW 82.04.4281.

Accordingly, the assessment of Service B&O tax on the interest income received by the taxpayer on [X]'s note is proper.

Schedule IV. The auditor assessed Retailing B&O tax and sales tax liability on the retail sales of improvements (construction) and personal property related to the . . . apartment complex as of March 31, 1982, the closing date per March 1, 1982 Agreement of Sale between the taxpayer, seller, and [X], buyer. (The actual closing took place on April 22, 1982.) The purchase price was \$8,406,000 allocated for the construction and personal property. Additionally, \$1,837,000 was allocated for [X]'s nontaxable purchase of the land. The total purchase price of \$10,243,000 was paid at the closing on April 22, 1982 and consisted of \$50,000 cash and a promissory note in the amount of \$10,193,000 specifying principal payments of \$571,000 on October 15, 1983, \$2,000 on December 31, 1984, and \$9,620,000 on December 31, 1984 by issuance of a new promissory note bearing no interest by [X]. [X] had the option to make payments of principal and/or interest to the construction lender to reduce amounts due on the underlying deed of trust.

During the audit period of January 1, 1981 through March 31, 1984, the taxpayer reported its draws on the construction loan in a total amount of \$7,697,610 periodically taken from April 1, 1982 through the end of 1983. The auditor gave a credit for this reporting which he found to be incorrect.

Construction commenced about May 1, 1982 and was completed on April 1, 1983.

The taxpayer maintains its accounting records on the cash receipts basis.

The taxpayer's sale of construction services and tangible personal property is a "sale at retail." RCW 82.04.050.

RCW 82.04.250 provides that the measure of the Retailing B&O tax as to persons making "sales at retail" is the "gross proceeds of sale" which is defined in RCW 82.04.070 in pertinent part to mean:

. . . the value proceeding or accruing from the sale of tangible personal property and/or for services rendered,
. . . (Emphasis supplied.)

The term "value proceeding or accruing" is defined in RCW 82.04.090 in pertinent part to mean:

the consideration, whether money, credits, rights, or other property expressed in terms of money, actually received or accrued. The term shall be applied, in each case, on a cash receipts or accrual basis according to which method of accounting is regularly employed in keeping the books of the taxpayer . . . (Emphasis supplied.)

RCW 82.08.020 provides that the measure of the retail sales tax is the "selling price" which is defined in RCW 82.08.010(1) in pertinent part to mean:

. . . the consideration, whether money, credits, rights, or other property . . . expressed in the terms of money paid or delivered by a buyer to a seller . . . (Emphasis supplied.)

[3] WAC 458-20-197 (Rule 197), . . . , clarifies when tax liability arises and in pertinent part provides:

Gross proceeds of sales and gross income shall be included in the return for the period in which the value proceeds or accrues to the taxpayer . . .

. . .

CASH RECEIPTS BASIS. When returns are made upon cash receipts and disbursements basis, value proceeds or accrues to a taxpayer as of the time the taxpayer receives, either actually or constructively, the consideration promised. It is immaterial that the contract is performed, in whole or in part, during a period other than the one in which payment is received.

. . .

SPECIAL APPLICATION, CONTRACTORS. In the case of building and construction contractors value proceeds or accrues to the taxpayer as follows:

. . .

2. When the taxpayer maintains his accounting records on the cash receipts basis, as of the time that the consideration or compensation is received, but provided

that the contractor shall make an annual adjustment of accounts receivable according to the procedure set forth in method three of WAC 458-20-199, accounting methods (Emphasis supplied.)

In this case, the taxpayer as a construction contractor maintained its records on a cash receipts basis. Therefore, the value proceeds or accrues "as of the time that the consideration or compensation is received." That time was the closing date of April 22, 1982 when the taxpayer actually received the consideration, cash and promissory note, promised per the Agreement of Sale. Under the "cash receipts basis," it matters not that the construction was done, "in whole or in part, during a period other than the one in which payment" was received. Rule 197. Here, the taxpayer received payment in advance before it began construction. Under agreements, written or oral, a party may be entitled to consideration or compensation upon the mere making of a promise to perform.

We are convinced that all payments to the taxpayer, whether cash or promissory note, constitute "consideration" actually received by the taxpayer. Note that the terms "value proceeding or accruing" and "selling price" speak of the "consideration" as "money, rights or other property expressed in terms of money." RCW 82.04.090 and RCW 82.08.020. Among the many definitions of "rights" in Black's Law Dictionary, Third Edition is

Rights are either "in personam" or "in rem." A right "in personam" is one which imposes an obligation on a definite person.

The promissory note is an obligation on a definite person expressed in terms of money and when delivered to a seller is a right given as consideration.

The taxpayer relies on sales tax statute RCW 82.08.100 which in pertinent part provides:

The department of revenue, by general regulation, shall provide that a taxpayer whose regular books of account are kept on a cash receipts basis may file returns based upon his cash receipts for each reporting period and pay the tax herein provided upon such basis in lieu of reporting and paying the tax on all sales made during such period.

Thus, the taxpayer contended that it should be allowed to report its sale on a cash-receipts basis.

Cash receipts by the taxpayer per March 1, 1982 Agreement of Sale were \$50,000 on the closing date of April 22, 1982, and per promissory note \$571,000 on October 15, 1983 within the audit

period. A proportionate amount would have to be assigned to the nontaxable purchase of the land. Furthermore, it is unknown whether [X] made any payments of principal to the construction lender during the audit period; such payments must be deemed as cash payments constructively received by the taxpayer.

The Department has previously ruled that a note payable cannot be deemed the equivalent of a cash payment and that the note and deed of trust simply provided additional security for what is basically an account receivable. Accordingly, under Rule 197's "Special Application, Contractors," the taxpayer-contractor "shall make an annual adjustment of accounts receivable according to the procedure set forth in method three of WAC 458-20-199, accounting methods."

WAC 458-20-199 (Rule 199), . . . , in pertinent part provides:

METHOD THREE, CASH RECEIPTS, ACCOUNTS RECEIVABLE ADJUSTMENT. Persons doing a charge business who do not record such charges as sales at the time the sale is made may report for tax purposes under method three.

Persons may report and pay the tax on the amount received as cash sales plus all cash received on accounts during each period. If this method is adopted, an adjustment shall be made at the end of the calendar year to add to cash received the amount of accounts receivable at the end of the year (not previously reported) to be reported along with cash receipts. A statement should accompany the return indicating the amount of accounts receivable so added. A deduction may be taken on subsequent returns filed in periods when cash is received upon accounts receivable so reported. Such receipts should be included in column 2 (gross amount) and then listed as deduction in column 3 of the excise tax return and explained on the reverse of the return as "cash received upon accounts receivable reported as of December 31, 19__." (Emphasis supplied.)

In this case, where the financing arrangements and payments are complicated, it appears that Method Three is quite appropriate as well as proper under the regulation. Otherwise, when [X]'s promissory note comes due and is replaced by another note (which can go on ad infinitum), the taxpayer will never have received cash payments for tax reporting purposes. Furthermore, if the construction lender receives cash payments of principal from [X], the construction lender would not be reporting same for tax purposes.

[4] The annual accounts receivable adjustment is affected by tax rate changes per WAC 458-20-235 (Rule 235), . . . , which in pertinent part provides:

. . . The following principles govern the applicability of changes in the rates of tax imposed under the Revenue Act with respect to contracts and sales agreements made prior to the effective date of the change:

. . .

Taxpayers filing returns on the cash basis (i.e., reporting charge sales at the time payment is received rather than at the time of sale) must make an accounts receivable adjustment (see WAC 458-20-199) at the time of a change in tax rates. For example, if a change of tax rate becomes effective July 1, a cash basis taxpayer should report along with the June cash receipts all accounts receivable outstanding as of June 30. (Emphasis supplied.)

In this case, the closing was held on April 22, 1982 at which time the taxpayer received \$50,000 cash and the promissory note (deemed an account receivable). Effective May 1, 1982, there was a change in the Retailing B&O tax rate to .00458 from the prior rate of .0044 and a change in the state and local sales tax rate to .065 from the prior rate of .066. Per Rule 235, all accounts receivable outstanding as of April 30, 1982 were to be reported along with the April cash receipts. In effect, the entire purchase price for the construction and personal property in the amount of \$8,406,000 is taxable at the rates in effect for the April 1982 period. Incidentally, this procedure will eliminate the proportioning of the \$50,000 cash for the amount to be assigned to the nontaxable purchase of the land. Furthermore, there is a reduction in the amount of tax liability by about \$7,000.

We conclude that under the applicable statutes and rules as set forth the taxpayer's sale of construction and personal property for the amount of \$8,406,000 was taxable at the rates in effect for April 1982. The assessment will be amended accordingly.

RCW 82.32.300 in pertinent part provides:

The administration of this and chapters 82.04 through 82.27 RCW of this title is vested in the department of revenue which shall prescribe forms and rules of procedure for the determination of the taxable status of any person, for the making of returns and for the ascertainment, assessment and collection of taxes and penalties, imposed thereunder.

The department of revenue shall make and publish rules and regulations, not inconsistent therewith, necessary to enforce their provisions, which shall have the same force and effect as if specifically included therein, unless

declared invalid by the judgment of a court of record not appealed from.

When reading together RCW 82.04.090's "consideration actually received," RCW 82.08.020's "consideration paid or delivered to a seller," and RCW 82.08.100's "cash receipts reporting basis in lieu of reporting all sales made during the reporting period," we do not find any of the applicable Rules 197, 199 and 235 to be of such inconsistency with RCW 82.08.100 as to warrant invalidity because of inconsistency. RCW 82.08.100 speaks of "general regulation" connoting generality, broadness, miscellany and comprehensiveness that is large in scope or content. We believe the legislature recognized the intricacies of cash receipts reporting when it provided for "general regulation" in RCW 82.08.100 whereas that term does not appear elsewhere in Chapters 82.04 and 82.08 RCW.

Furthermore, the Department as an administrative agency of Washington must presume the validity and legality of the Rules "unless declared invalid by the judgment of a court of record not appealed from." RCW 82.32.300.

The taxpayer seeks waiver of the interest applicable to the additional taxes caused by the change in the reporting period on the basis that it allegedly received contrary instructions from the Department. The alleged contrary instructions were received by telephone calls made to the Department. We find the principle applicable to oral instructions as enunciated in ETB 419.32.99, . . . , is appropriate and applicable in this situation. The Department cannot give consideration to claimed misinformation orally received over the telephone. The failure of the taxpayer to report correctly was not due to written instructions from the Department. Accordingly, the request for waiver of interest must be denied. ETB 419 and WAC 458-20-228.

Schedule VI. The issue here is whether the taxpayer has established by the submitted documentary evidence that it paid sales tax to two subcontractors, . . . , Inc. and . . . , and is thereby relieved of use tax (deferred sales tax) liability.

With respect to . . . , Inc., the tax was assessed in Schedule VI, page 3, on taxpayer's payments to . . . , Inc. for the period of June 1981 through March 1982. The payments totaled \$308,250.30. The tax related documents of . . . , Inc. submitted by the taxpayer for the same period showed that . . . , Inc. received a total of \$308,396.11 from which it broke out sales taxes in the amount of \$16,648.19 and remitted same to the Department.

The auditor correctly subjected the \$308,250.30 to tax under RCW 82.08.250, because the subcontractor's invoices to the taxpayer did not separately state the amount of the sales tax. However, the auditor in this instance neglected to give a credit for the sales tax paid by the subcontractor to the Department which is the usual

and proper procedure. Apparently, the auditor did not do so because he did not have the subcontractor's records on which to base a credit in favor of the taxpayer.

With respect to . . . , the tax was assessed in Schedule VI, page 4, on taxpayer's payments to . . . for the period from August 1981 through January 1982. The payments totaled \$30,827.68. No tax-related documents of . . . were submitted; only a ledger card, . . . , of . . . showing receipt of the taxpayer's payments but without indication of sales tax being collected nor being remitted to the Department.

The auditor taxed the following payments:

<u>Date of Payment</u>	<u>Amount</u>
8-28-81	\$19,515.60
9-16-81	351.60
10-06-81	6,498.70
11-10-81	4,342.26
1-20-82	119.52

The ledger card of . . . shows receipt of above plus receipt of the following within the audit period which were not taxed by the auditor:

<u>Date of Receipt</u>	<u>Amount</u>
12-81	\$1,830.69
2-82	639.60
3-82	1,084.20
3-82	639.60
4-82	177.91

and some other small amounts. This discrepancy and the computation of a credit in favor of the taxpayer relevant to the . . . situation and possibly in the . . . situation are left to the auditor to resolve as the taxpayer has indicated its willingness to work with the auditor as to the factual questions in Schedule VI.

DECISION AND DISPOSITION:

The taxpayer's petition is denied in part and granted in part as indicated below.

Schedule III. The taxpayer's petition is denied.

Schedule IV. The taxpayer's petition is denied in part. The auditor is directed to amend the assessment so that the purchase price of \$8,406,000 is taxable at rates in effect for April 1982 with interest due accordingly.

Schedule VI. The taxpayer's petition is granted in part. The auditor is directed to give a credit for sales taxes paid by . . .

, Inc. The auditor will also give a credit for sales taxes paid by . . . and any other subcontractor/vendor upon taxpayer's furnishing of substantiating documents.

The matter is being referred to the Department's Audit Section for action as directed in this Determination.

DATED this 30th day of June 1988.