Cite as 3 WTD 91 (1987)

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

In the Matter of the Petition For Correction of Assessment of)	D E T E R M I N A T I O N
)	No. 87-143
)	
)	Registration No. . . .
. . .)	Tax Assessment No. . . .
)	
)	

[1] **RULE 170, RULE 211, AND RULE 224; RCW 82.04.050(2)(b) AND RCW 82.04.190(4):** B&O TAX -- SERVICE V. WHOLESALING -- CRANE SERVICES -- CONSTRUCTION PROJECT. Persons who rent or lease equipment with an operator for construction purposes to prime or subcontractors are deemed themselves to be subcontractors. A provider of a crane with an operator for construction projects is B&O taxable under Wholesaling. Use of the crane must be reasonably related to construction, but the actual installation/attachment requirement of previous determinations is rejected. To the extent that Determinations 82-45, 85-65, 85-65A, and 85-151 conflict with this ruling, they are hereby overruled.

[2] **RULE 170 and RCW 82.04.050(2)(b):** MISCELLANEOUS -- STATUTORY CONSTRUCTION -- "INCLUDES" -- MEANING. The term "includes" is a term of enlargement, not one of limitation. Band of Indians vs. State, 102 Wn.2d 1,682 P.2d 909 (1984).

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: January 29, 1986

NATURE OF ACTION:

This is a petition by a general construction contractor to reverse the reclassification from Wholesaling to Service & Other of income derived from crane services.

FACTS AND ISSUES:

Dressel, A.L.J.-- . . . (taxpayer) is a general construction contractor. Its books and records were audited by the Department of Revenue for the period Januaryá1, 1981 through Juneá30, 1985. As a result Tax Assessment No. . . . was issued October 31, 1985 for excise tax and interest totaling $ . . . . Payment of $ . . . was received Novemberá27, 1985. The balance remains outstanding.

Although it holds itself out to be a general contractor, the taxpayer derives a significant portion of its income from the furnishing of crane services. It provides these services either with or without an operator. At issue here is the income from six construction projects where crane services were provided with an operator. Believing itself to be a subcontractor on these projects, the taxpayer reported the income therefrom under the business and occupation tax classification, Wholesaling. The Department in its audit, however, reclassified this income to Service and Other Business Activities. In so doing the auditor reasoned that since crane services are not included in the definition of "retail sale," they must fall into the catch-all business and occupation classification, Service and Other. The taxpayer counters by stating that all of the crane work at issue was pursuant to written contracts, that it was contractually obligated, and that the work it performed was an integral part of the construction contracts. For those reasons it should be considered a subcontractor subject to Wholesaling tax pursuant to WAC 458-20-170 (Rule 170).

Some further factual illumination is appropriate here. The taxpayer points out that when it puts the crane to work with one of its own employees as the operator, it fills out the same forms and assorted paperwork as it would if it were entering into a more "conventional" subcontract to do the plumbing, electrical, concrete, or other specialized portion of the total project. These contracts are frequently of several months' duration. In none of the six instances at issue was the taxpayer performing anything but crane services for another prime or subcontractor. The taxpayer did not have mechanical, plumbing or other construction responsibilities of

its own on the disputed projects. The taxpayer does not characterize these owner-operated situations as leases or rentals, but rather as subcontracts for the use of its 50-ton crane. The six projects under consideration involved the construction of either buildings or pipelines. The contracts called for the taxpayer to be paid on a monthly basis.

After the conference in this matter, the taxpayer submitted the form contract it executes when providing its crane with operator to a construction contractor. The form is titled, "Subcontract," and the taxpayer is listed as the "Subcontractor." The sample submitted calls for the taxpayer to be paid $9,500 per month. As a subcontractor the taxpayer agrees to "furnish and perform all work as described in paragraph 3 hereof for the construction of . . . Building . . ." Paragraph 3 of the agreement states that the taxpayer agrees to provide all supervision, materials, labor, supplies and equipment for "(o)ne 50 Ton Crane with operator to complete work as directed per plans and specifications . . ."

The question to be decided is whether income received for the use of the taxpayer's crane is subject to business and occupation tax under the Wholesaling or under the Service classification. The difference in the rates for the two classes is considerable. At present the Wholesaling rate is .484ápercent. Service is 1.5 percent.

DISCUSSION:

In support of the Service classification the auditor has stated in her report:

> Crane services, the mere lifting, hoisting, moving, setting down, and placing of materials even when performed on a job site of retail or wholesale construction work are taxed under the Service and Other Activities classification Business & Occupation taxes. Mere crane services are not expressly included within the definition of "retail sale" so they fall within the general catch-all classification of Service and Other Business Activities. Other activities that fall in this same category are erection, placement and moving of scaffolding, pilot car services, etc.
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> Charges for service activities such as surveying, architecture, engineering, scaffolding, crane hoisting and setting, etc., can be part of the construction work and taxable as such if they are

> included in the construction contract and are actually performed by the construction contractor "in respect to" its construction work. The precise same activities are separately taxable as services if they are performed by third party providers who are not legally or contractually obligated to the person for whom the construction work is being performed and are not an integral part of the construction contract.

[1] WAC 458-20-170 (Rule 170) states in part that, "Prime contractors are taxable under the retailing classification, and subcontractors under the wholesaling classification upon the gross contract price." Thus, if the taxpayer is a subcontractor, its contention that its income from crane activities is business and occupation taxable under the Wholesaling category is correct.

The beginning portion of Rule 170 reads:

> **WAC 458-20-170 Constructing and repairing of new or existing buildings or other structures upon real property.**
>
> DEFINITIONS
>
> As used herein:
>
> The term "prime contractor" means a person engaged in the business of performing for consumers, the constructing, repairing, decorating or improving of new or existing buildings or other structures under, upon or above real property, either for the entire work or for a specific portion thereof. The term includes persons who rent or lease equipment to property owners for use in respect to constructing, repairing, etc., buildings or structures upon such property, when the equipment is operated by the lessor.
>
> The word "subcontractor" means a person engaged in the business of performing a similar service for persons other than consumers, either for the entire work or for a specific portion thereof. The term includes persons who rent or lease equipment to prime contractors for use in respect to constructing, repairing, etc., when such equipment is operated by the lessor . . .

The taxpayer here is performing work for a general contractor who is not a consumer in this situation because it is not the owner, lessee, or person with the right of possession to real property which is being constructed, repaired, etc. See RCW 82.04.190(4). Indeed, the consumer here is the owner of the property who hired the general contractor to construct the building, pipeline, or whatever. Therefore, if the taxpayer otherwise fits the definition it is a subcontractor, not a general contractor, because it is working for somebody other than a consumer.

As stated in the rule, a subcontractor provides a service similar to a prime contractor except to nonconsumers. The service performed by a prime contractor is the "constructing, repairing, decorating or improving of new or existing buildings or other structures under, upon or above real propertyá.á.á." That quoted phrase is explained later in the text of Rule 170 as follows:

> The term "constructing, repairing, decorating or improving of new or existing buildings or other structures," in addition to its ordinary meaning, includes the installing or attaching of any article of tangible personal property in or to real property, whether or not such personal property becomes a part of the realty by virtue of installation, the clearing of land and the moving of earth, and the 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 "sale" by RCW 82.04.040 or "sales at retail" by RCW 82.04.050. Hence, for example, such service charges as engineering fees, architectural fees or supervisory fees are within the term when the services are included within a contract for the construction of a building or structure. The fact that the charge for such services may be shown separately in bid, contract or specifications does not establish the charge as a separate item in computing tax liability . . . (Emphasis ours.)

The taxpayer's 50-ton crane, according to the sample contract, is "to complete work as directed per plans and specifications [for construction of the . . . Building] . . ." (Bracketed

inclusion ours.) In other words, the taxpayer is to provide service activities in respect to constructing, repairing, etc., of buildings or other structures. According to the Rule 170 definitions such service activities are tantamount to constructing, repairing, etc., which qualifies one as a contractor. Such is the function of the taxpayer in the case at hand. Again, because the taxpayer is performing such service for someone other than a consumer, the specific label to be attached to the taxpayer is "subcontractor." As previously indicated, subcontractors are taxable under the Wholesaling classification upon the gross contract price. The assessment of Service business and occupation tax against this taxpayer for the income derived from its crane activities, therefore, is error.

One can reach the identical conclusion via another line of reasoning. Quoting again from Rule 170, we note the following language:

> The word "subcontractor" means a person engaged in the business of performing a similar service for persons other than consumers, either for the entire work or for a specific portion thereof. The term includes persons who rent or lease equipment to prime contractors or subcontractors for use in respect to constructing, repairing, etc., when such equipment is operated by the lessor. When equipment or other tangible personal property is rented without an operator to contractors, subcontractors or others, the transaction is a sale at retail (See RCW 82.04.040 and 82.04.050). (Emphasis ours.)

In spite of the "subcontract" label on the agreements between the taxpayer and the general contractors, the arrangements for use of the crane could also be construed as rentals or leases. "Rent" is defined in Black's Law Dictionary (Revised 4th Edition, 1975) as "consideration paid for use or occupation of property." Here, the general contractors pay for the use of the taxpayer's crane. Therefore, they are renting the crane from the taxpayer.[1] As per the quoted passage from Rule 170

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[1]Formerly, WAC 458-20-211 (Rule 211) excluded a rental with operator from the definition of "renting" or "leasing." That provision of the administrative rule has been invalidated by the Washington Court of Appeals in Duncan Crane Service v. Department of Revenue, 44 Wn.App. 684 (1986).

in the previous paragraph, the term "subcontractor" includes persons who rent or lease equipment to prime contractors or subcontractors for use in respect to constructing, repairing, etc., when such equipment is operated by the lessor. Here, then, the taxpayer is a subcontractor because it is performing construction work pursuant to a written subcontract and also because it is renting equipment to a prime or subcontractor. As a subcontractor the taxpayer is liable for Wholesaling rather than Service business and occupation tax.

Such tax application finds corroboration in WAC 458-20-211 (Rule 211) which reads in part:

> Persons who rent equipment or other tangible personal property and, in addition, operate the equipment or supply an employee to operate the same, are subject to the business and occupation tax (or public utility tax) according to the classification of the activities performed by the equipment and operator. Thus, the charge made to a construction contractor for equipment with operator used in the construction of a building would be taxable under wholesaling-other and a similar charge to a contractor for use in the construction of a publicly owned road would be taxable under public road construction. (Emphasis ours.)

There exists a previous line of Determination authority from this section of the Department to the effect that the "mere lifting, placing, loading or unloading" of items by a crane, even though done in conjunction with a construction project, are not the activities of a prime or subcontractor so such activities must be taxed under the Service category. In fact, those Determinations doubtlessly furnished the auditor in this instance with the inspiration to likewise assess the Service tax instead of Wholesaling. These earlier rulings, however, were largely based on a vulnerable premise. As previously indicated, a prime or subcontractor is engaged in the business of "constructing, repairing, decorating or improving of new or existing buildings or other structures under, upon or above real property . . ." See Rule 170. "Constructing, repairing, etc." is defined in the same rule:

> The term "constructing, repairing, decorating or improving of new or existing buildings or other

> structures," in addition to its ordinary meaning, includes the installing or attaching of any article of tangible personal property in or to real property, whether or not such personal property becomes a part of the realty by virtue of installation, the clearing of land and the moving of earthá.á.á. (Emphasis ours.)

Previous Determinations have concluded that to be deemed as "constructing, repairing, etc." one must actually install or attach articles of tangible personal property to real property according to the "includes" language which appears in the rule. In fact, that language actually has a statutory origin in that it is part of RCW 82.04.050 which defines a retail sale. The statute reads in part:

> (2) The term "sale at retail" or "retail sale" shall include the sale of or charge made for tangible personal property consumed and/or for labor and 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, and shall also include the sale of services or charges made for the clearing of land and the moving of earth excepting the mere leveling of land used in commercial farming or agriculture; . . .

[2] We do not believe that the previous Determinations properly limit the "constructing, repairing, etc." definition to only those instances where personal property is actually installed or attached to real property. The definition states that "constructing, etc." includes installing and attaching. It also states that "constructing, repairing, etc." shall be given their ordinary meanings. Certainly, real property can be repaired, decorated, or improved without installing or attaching personal property to it. If one performs such activity, she or he is "constructing, repairing, decorating, or improving" just like somebody who is installing or attaching. One who fits that definition also fits the definition of prime or subcontractor so is bound to report income as either retailing or wholesaling which is what the taxpayer has done in the case at hand.

With respect to the use of the word "includes" in both the cited rule and statute, it is useful to observe that "includes" when appearing in a statutory definition is construed as a term of enlargement, not limitation. Band of Indians v. State, 102 Wn.2d 1, 682 P.2d 909 (1984). Although a statutory definition may declare what it includes, other items may also be includable though not specifically enumerated. See Sutherland Statutory Construction, section 47.07 (4th edition).

Here, the specific enumeration in Rule 170 merely serves to illustrate examples of items which may constitute "constructing, repairing, etc.," and does not purport to be an exhaustive list. The substantive portion of the pertinent rule provision is the one that states that "constructing, repairing, decorating or improving are to be accorded their ordinary meanings." "Installing or attaching" as used in the rule expands it. It is not to be interpreted as having a limiting effect as has been suggested in previous Determinations.

Henceforth, it shall be the policy of this section to consider crane work reasonably related to construction, repair, decoration, or improvement of real property as coming within the Rule 170 definition of those terms such that the party performing same is a prime or subcontractor subject to Retailing or Wholesaling business and occupation tax, as the case may be. Certainly, a crane completing work in aid of the construction of a building or pipeline at the site of construction is doing work reasonably related to construction, repair, etc. so as to qualify for contractor status and not be subject to Service business and occupation tax. It should be pointed out, however, that where such reasonable relationship does not exist, income from a crane may be subject to Service tax. An example would be a crane which is used to simply unload freight from railroad cars onto flatbed trailers or other mode of further transportation. In such an instance there would be no reasonable relationship to constructing, repairing, decorating, improving, installing, or attaching and, consequently, no prime or subcontractor status on which to base Retailing or Wholesaling business and occupation tax.

In addition to the rationale stated above, our holding in this case is supported by that of the Thurston County Superior Court in Sunnen Crane Service, Inc. v. Department of Revenue, Cause No. 85-2-01075-0, wherein that court reversed a Determination by the Department that crane services with

operator were taxable under the Service & Other Activities classification of the B&O tax.

DECISION AND DISPOSITION:

The taxpayer's petition is granted. The balance owing on Tax Assessment No. . . . is hereby cancelled.

DATED this 30th day of April 1987.