

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 Refund of)	
)	No. 88-250
)	
. . .)	Registration No. . . .
)	
)	

- [1] **RULE 109:** B&O TAX -- INTEREST -- INVESTMENT DEDUCTION -- WEATHERIZATION LOANS. The deduction for interest authorized by RCW 82.04.4281 does not apply to interest derived from weatherization loans. These loans are a regular part of the taxpayer's business.
- [2] **RULE 170:** SETTLEMENT -- CLAIM FOR WORK PERFORMED -- CLAIM FOR TORTIOUS DAMAGES. The taxpayer is liable for sales tax on the amount of a law suit settlement paid to a contractor. The contractor made a claim against the taxpayer for both extra work performed and destruction of business, a tort. There was no basis for determining that any portion of the settlement was attributable to tortious damages. Therefore, the entire amount of the settlement was attributed to the claim for work performed and held subject to sales tax. Excise Bulletins 413.04.109 and 444.08.170.
- [3] **RULE 179:** PUBLIC UTILITY TAX -- LIGHT AND POWER BUSINESS -- LAST DISTRIBUTION OF ELECTRICAL ENERGY -- RESIDENTIAL EXCHANGE OF POWER. Amounts received by a utility from the Bonneville Power Administration under the terms of an exchange agreement authorized by 16 U.S.C. § 839 (Pacific Northwest Electrical Power Planning and Conservation Act) are not subject to tax. F.I.D.

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: June 26, 1987

NATURE OF ACTION:

The taxpayer petitioned for a refund of taxes paid in connection with Tax Assessment No. The taxpayer also seeks a refund of taxes paid in 1986 and 1987 on amounts received from the Bonneville Power Administration in connection with a residential exchange agreement.

ISSUES:

Potegal, A.L.J. -- 1. In Schedule IV of the original audit report the taxpayer objects to tax on interest received from residential weatherization loans. The taxpayer believes it is entitled to the deduction provided by RCW 82.04.4281.

2. In Schedule V of the original audit report the taxpayer objects to tax on amounts received from third parties as reimbursements of salary and insurance expenses. In particular the taxpayer objects to these items:

a. . . . Salary Reimbursement. The taxpayer is a member of the . . . Association. As an accommodation to the other members and for ease of accounting the taxpayer paid the salary of Mr. . . . and was reimbursed by the other members for their share of his salary.

b. . . . Salary Reimbursement. The taxpayer is a participant in a joint agreement with the City of Under the agreement each party is responsible for one-half of Mr. . . .'s salary. As an accommodation the taxpayer advanced the full amount of salary to Mr. . . .'s employer and was reimbursed by the City for the City's one-half share.

c. . . . Project Insurance. Under the joint agreement with the City of . . . the taxpayer acquired insurance for itself and for the City. The City is a named insured on the policy. The taxpayer paid the full amount of the insurance cost and was reimbursed by the City for the City's share.

d. . . . Oversight Committee. The taxpayer appointed a person to a committee supervising the division of . . . assets. The person performed the services solely for The taxpayer advanced this person his expenses and was reimbursed by

3. In Schedule XII of the original audit report the taxpayer objects to use tax assessed on the amount of a sales tax credit

which it took for the overpayment of sales tax to . . . Company. The taxpayer claims that there was a change order which reduced the contract price.

4. In Schedule XIII of the original audit report the taxpayer objects to use tax assessed on the amount of a settlement paid to . . . Company. . . . was a subcontractor on a project in which the taxpayer was the owner. . . . filed a law suit claiming . . . dollars for direct and indirect costs in performing the contract work and . . . dollars for destruction of its business. The taxpayer settled the law suit for . . . dollars. The taxpayer asserts that the settlement is not part of the consideration for the work done. In the alternative, the taxpayer asserts that the portion of the settlement attributable to tortious damages is not subject to tax.

5. In Schedule XV of the original audit report the taxpayer objects to public utility tax assessed on amounts received from the Bonneville Power Administration in connection with a Residential Purchase and Sale Agreement. The taxpayer also seeks a refund of tax paid on such amounts in 1986 and 1987. Under WAC 458-20-179 (Rule 179) the taxpayer believes this income is not subject to tax.

DISCUSSION:

The issues will be discussed in the same order presented above.

1. The business and occupation tax exemption relied upon by the taxpayer is RCW 82.04.4281. That statute states in part:

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 businesses, from investments or the use of money as such, . . . (Emphasis ours.)

[1] This exemption does not apply to interest derived from weatherization loans. Although it is only a small part of the taxpayer's total operation, the taxpayer regularly makes these loans and is therefore engaging in the loan business. The fact that the interest it charges is below the market rate does not alter the conclusion that the taxpayer is in the loan business. "Business" is very broadly defined at RCW 82.04.140 to include, "all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly." The loans benefit both the taxpayer, by saving wasted energy, and the borrowers.

The taxpayer's petition will be denied on this item.

2. a. . . . The taxpayer produced evidence that Mr. . . . was an employee of the . . . Association and not its own employee.

The taxpayer acted as a mere conduit for payroll purposes. Under these circumstances these amounts are not taxable.

b. The taxpayer and the City had a joint agreement for the Project. Under this agreement each party paid one-half the salary of the Water Quality Control Supervisor. The taxpayer contracted with a corporation which provided this person, Mr. . . . , a corporate employee. The corporation billed the taxpayer for Mr. . . . 's services. The taxpayer in turn billed the City for the City's one-half share of Mr. . . . 's costs and expenses. The taxpayer provided evidence that both it and the City cooperatively recruited, selected, and supervised Mr. In this instance we believe that the taxpayer was acting on behalf of both itself and the City in contracting for Mr. . . . 's services. The City paid one-half of Mr. . . . 's salary in fulfillment of the joint agreement and not as compensation to the taxpayer for services it provided. These amounts are not taxable.

c. . . . Project Insurance. Under the same joint agreement the parties agreed to procure insurance and share the costs. The taxpayer was the first named insured but the City was also a named insured. The taxpayer paid the premium and was paid by the City for the City's share. This is similar to the . . . situation and for the same reason the amount paid by the City to the taxpayer is not taxable.

d. . . . Oversight Committee. The "Agreement for Oversight Committee Services" under which the taxpayer agreed to participate in the Oversight Committee states in part:

Whereas, the Participants' Committee desires to engage . . . ("Member") as a member or alternative of an Oversight Committee to perform an oversight and advisory role relating to . . . : NOW THEREFORE,

I. Parties

This agreement is entered into by and between . . . , Participants' Committee and . . . as Member or Alternate. It is understood that these services are not being performed for . . . , but for the Participants' Committee. The . . . 's sole obligation hereunder is to pay all expenses incurred by Member under this contract, as project costs, at the written direction of the Chairman of the Participants' Committee, from available funds in the Construction Fund for

By the terms of the agreement the taxpayer is performing services for which it is compensated. This is a business activity and is subject to business and occupation tax. This is so regardless of the fact that the entity for whom the services were performed, the Participant's Committee, is different from the entity which

compensated the taxpayer, For business and occupation tax purposes the source of the compensation for business activities does not affect tax liability.

3. This matter was adjusted by the audit staff after the petition was filed.

4. Although the tax assessed in Schedule XIII was denoted use tax it is actually sales tax. The basis for the assessment was that the settlement was consideration for work performed by This work involved the clearing of land which is a retail sale under RCW 82.04.050. Use tax only applies to the use of articles of tangible personal property. The fact that the name of the wrong tax was used does not affect the assessment since the rates of the use tax and the sales tax are identical.

The taxpayer's position is two-fold. First, because the amount paid was in settlement of a disputed claim the taxpayer would have argued in the law suit that . . . was not entitled to anything and might not have been awarded anything. Second, the amount of the settlement attributable to tortious damages should not be taxed.

[2] We must reject the first theory proposed by the taxpayer. The settlement was reached to resolve a claim made by . . . that its costs of performing the contract exceeded the contract price because of changes required by the taxpayer. The settlement agreement itself recites that . . . made claims for extra costs due to redesign and delays. The agreement also refers to a Request for Equitable Adjustment of the Contract Price presented by . . . to the taxpayer. Although the settlement states that it is not an admission of liability and it is possible that the taxpayer would have prevailed in a law suit, we cannot ignore the substance of what occurred. . . . made a claim for extra work and the taxpayer paid . . . in response to that claim.

As to the second theory, we agree in principal that compensation for tortious damages would not be subject to sales tax. However, the taxpayer has not demonstrated that any portion of the settlement amount is attributable to that type of damage. When . . . filed the law suit it asked for in excess of . . . dollars for extra work and in excess of . . . dollars for destruction of business. The amount of settlement was . . . dollars, well within the amount claimed for extra work. The fact that the settlement mentions the claim for extra work but does not mention the claim for business destruction tends to support a finding that the amount paid was for extra work. The fact that the settlement states that payment was not an admission of liability tends to support our finding that the payment was not for tortious damages.

See Excise Tax Bulletins 413.04.109 and 444.08.170,

The taxpayer's petition will be denied on this item.

5. Rule 179 is a duly adopted rule of the Department of Revenue which, by virtue of RCW 82.32.300, has the same force and effect as the law. It provides that public utility tax applies to a light and power business only on the last distribution of electrical energy within this state. It goes on to state:

"An exchange" of electrical energy or the right thereto is not the last distribution of such energy. An exchange is a transaction involving a delivery or transfer of energy or the rights thereto by one party to another for which the second party agrees, subject to the terms and conditions of agreement, to deliver electrical energy at the same or another time. Examples of nontaxable exchange transactions include, but are not limited to, the following:

(1) The residential exchange of electric power entered into between a light and power business and the administrator of the Bonneville Power Administration pursuant to the Pacific Northwest Electric Power Planning and Conservation Act. . . .

[3] The residential exchange of power in the example is precisely the source of the amounts taxed. Since the rule states that this exchange is a nontaxable transaction the amounts received are not subject to tax and the taxpayer is entitled to the refunds requested.

We note that the amounts which the taxpayer received under the exchange were required under federal law to be passed on to residential customers without any gain by the taxpayer. This requirement was to help accomplish congressional intent to share the economic benefits of low-cost federal system power among all BPA residential customers.

DECISION AND DISPOSITION:

The taxpayer's petition is granted with respect to items 2.a., 2.b., 2.c., and 5. The petition is denied with respect to items 1, 2.d., and 4. A refund, with interest, will be issued to the taxpayer.

DATED this 29th day of June 1988.