

Cite as Det. No. 14-0317, 35 WTD 382 (2016)

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. 14-0317
	)	
...	)	Registration No. ...
	)	

[1] RULE 254; RCW 82.32.070: RECORDKEEPING – PUBLIC ROAD CONSTRUCTION. A subcontractor has the burden to maintain records that establish whether its purchases of materials were purchased for resale or for public road construction subject to retail sales tax.

[2] RULE 171; RCW 82.04.050: PUBLIC ROAD CONSTRUCTION – CAMERAS – RETAINAGE PONDS. A subcontractor's purchases of materials for cameras used to monitor vehicle traffic were made for public road construction and subject to retail sales tax, and where it provided no evidence that its purchases of materials for retainage ponds were not for public road construction, we find no grounds to adjust the assessment.

[3] RULE 102; RCW 82.32.291: RESELLER PERMITS – 50% PENALTY FOR IMPROPER USE. A taxpayer does not qualify for waiver of the penalty where it has not shown that the misuse was due to circumstances beyond its control.

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.

Margolis, A.L.J. – A road construction subcontractor (Taxpayer) appeals the assessment of use/deferred sales tax on materials purchased for public road construction and seeks waiver of the reseller permit misuse penalty. We deny the petition.<sup>1</sup>

### ISSUES<sup>2</sup>

1. Whether, under RCW 82.32.070, Taxpayer has provided adequate records to support an adjustment to the measure of use/deferred sales tax assessed on materials used for public road construction.

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

<sup>2</sup> ...

2. Whether, under WAC 458-20-171, Taxpayer purchased materials as a consumer for public road construction when it used the materials for the installation of cameras and retainage ponds.
3. Whether, under RCW 82.32.291, Taxpayer has met its burden of establishing that it did not improperly use a reseller permit to purchase items for public road construction subject to retail sales tax or qualifies for waiver of the reseller permit misuse penalty.

### FINDINGS OF FACT

Taxpayer is a construction company engaged in subcontracting work on public road projects. It installs cameras, fencing, permanent signs, construction signs, utility adjustments, joint and crack sealing, flexible guide posts, mail boxes, fences, and erosion control items. Taxpayer presented a resale certificate or resellers permit to vendors of construction materials, and purchased materials without paying retail sales tax.<sup>3</sup> It reported no use/deferred sales tax on these purchases.

The Department of Revenue's (Department's) Audit Division (Audit) examined Taxpayer's account for the period January 1, 2009 through September 30, 2012, and on September 4, 2013, assessed Taxpayer \$ . . . . The assessment was comprised of \$ . . . in wholesaling business and occupation (B&O) tax, \$ . . . in use/deferred sales tax, \$ . . . in a resale certificate/reseller permit misuse penalty, \$ . . . in interest, \$ . . . in a 5% assessment penalty, and \$ . . . in additional interest from July 16, 2013 to October 4, 2013.

Audit examined descriptions of Taxpayer's public works jobs in order to determine the measure of tax on materials that Taxpayer purchased as a consumer for public road construction. These descriptions came from the Department of Labor and Industries website, prime contractor notices of completion, and jobsite diagrams where parts of projects were on state or private roads, as well as city or county roads. Audit assessed Taxpayer use/deferred sales tax and the reseller permit misuse penalty accordingly.<sup>4</sup> Taxpayer asserts that the measure was based on the assumption that "any contract involving the city or state involved work on city- or state-owned land," and thus, might be overstated. Attachment to Taxpayer's Petition, Page 1. We asked Taxpayer to provide records showing that the measure was overstated based on where the work was completed. Taxpayer provided no records.

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<sup>3</sup> Effective January 1, 2010, resale certificates were replaced with reseller permits, which allow businesses [meeting certain conditions] to purchase items or services without paying retail sales tax. *See* WAC 458-20-102.

<sup>4</sup> Audit previously assessed Taxpayer use/deferred sales tax on materials used in public road construction. Audit examined Taxpayer's account for the period January 1, 1995 through December 31, 1998, and on May 19, 1999, assessed Taxpayer \$ . . . for these materials. Audit also examined Taxpayer's account for the period January 1, 2001 through March 31, 2005, and on December 1, 2005, assessed Taxpayer \$ . . . for these materials. Audit gave Taxpayer explicit written instructions regarding materials purchased for public road construction. In 2005, Audit wrote that Taxpayer "must pay retail sales tax or use tax on all materials [Taxpayer] will install in the streets, roads, etc., [Taxpayer] construct[s] and on the value of all materials [Taxpayer] use[s] while conducting [its] business activities." Detail of Differences and Instructions for December 1, 2005 Assessment, Pages 2-3.

Taxpayer also argues that the measure should not include materials for the installation of cameras that only allow others to view the flow of traffic, on grounds that the cameras are not related to the function of the roadway, and for work on retainage ponds.

### ANALYSIS

RCW 82.08.020 imposes a retail sales tax on each retail sale in Washington. The term “retail sale” includes the constructing of structures on real property of or for consumers, including the construction of highways, easements, etc., on property owned by private persons. RCW 82.04.050(2)(a); WAC 458-20-170 (Rule 170). Rule 170 explains that prime contractors, who are persons performing construction for consumers, are making retail sales. Generally, subcontractors, such as Taxpayer, who perform construction for prime contractors, are engaging in wholesaling activity (sales for resale). Purchases by these subcontractors of materials, which become part of the improvement to the real estate, are generally considered purchases for resale not subject to the retail sales tax.

However, road construction performed on land owned by a municipal corporation, a political subdivision of the state or the United States, is not classified as a retail activity. RCW 82.04.050(10). Generally, construction on property owned by such entities is classified as “public road construction.” WAC 458-20-171 (Rule 171). Contractors and subcontractors constructing for those entities are themselves considered the consumers of the materials, equipment, and supplies that they purchase for incorporation in the public right-of-way. RCW 82.04.190(3). Therefore, the retail sales tax applies to sales of construction materials to those contractors and subcontractors engaged in public road construction.<sup>5</sup>

Taxpayers have a duty to maintain their records in such a manner that their tax liabilities can be determined. RCW 82.32.070. This includes a specific obligation to generate, maintain, and preserve records and documentation necessary to establish tax liability. RCW 82.32.070(1); WAC 458-20-254(3)(b) (Rule 254). Taxpayers must keep and preserve suitable records, and make them available for examination by the Department for five years. RCW 82.32.070; RCW 82.32A.030. Thus, according to these principles, the burden rests on Taxpayer to maintain records that establish whether its purchases of materials were purchased for resale or for public road construction subject to retail sales tax.

Taxpayer argues that some of the material purchases at issue might have been used for construction that did not occur on land owned by a municipal corporation, political subdivision of the state, or the United States, and were instead purchased for resale. However, as Taxpayer has provided no records showing it . . . [purchased the materials for resale], we have no grounds for adjusting the assessment.

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<sup>5</sup> In general, public road construction contractors are taxable under the public road construction B&O tax classification on the total contract price. Rule 171. Taxpayer reported B&O tax under the wholesaling classification. Both classifications have rates of .00484. [See RCW 82.04.270 (wholesaling classification); RCW 82.04.280(1) (public road construction classification).]; [see generally] <http://dor.wa.gov/content/findtaxesandrates/bandotax/bandorates.aspx> (last accessed September 23, 2014.)

Taxpayer also argues that it accepted reseller permits from prime contractors, and thus met its burden of proof under RCW 82.04.470(1) to treat purchases from its vendors as purchases for resale not subject to retail sales tax. However, [the Department has expressly informed the public that] reseller permits cannot be used for such purposes. See <http://dor.wa.gov/Docs/Misc/SampleResellerPermit.pdf> (permits cannot be used for the purchase of “[m]aterials and contract labor for public road construction.”); Rule 171.

More importantly, Taxpayer confuses the issue by focusing on its transactions with prime contractors. The transactions at issue concern Taxpayer’s purchases of materials from its suppliers, not its subsequent sale of those items. While RCW 82.04.470(1) provides that sellers can meet their burden of proving a wholesale sale by taking a copy of a reseller permit, Taxpayer was acting as a buyer, not a seller, when it purchased the materials at issue from vendors. Even if Taxpayer had accepted reseller permits from prime contractors, this does not relieve Taxpayer of its duty as a buyer of materials from its vendors to inquire into the nature of the work to be performed and pay retail sales tax as required by law.

In order to clarify when the public road construction [taxation] applies, Rule 171 defines the term “building, repairing, or improving a publicly owned street, place, road, etc.” as including the following:

[C]learing, 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. It also includes the constructing of road and street lighting systems, even though portions of such systems also are used for purposes other than street and road lighting; also the constructing of a drainage system in streets and roads, even though such system is also used for the carrying of sewage: Provided, That the drainage facilities are sufficient for disposal of the normal runoff of surface waters from the particular streets and roads in which the system is constructed or an ordinance authorizing the construction of a combined sewer system is incorporated by reference in the contract and the contract or specifications clearly indicate that the system is designed and intended for the disposal of the normal runoff of surface waters from the streets and roads in which the system is constructed.

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Except as provided above, the term does not include the constructing of water mains, telephone, telegraph, electrical power, or other conduits or lines in or above streets or roads, unless such power lines become a part of a street or road lighting system as aforesaid; nor does it include the constructing of sewage disposal facilities, nor the installing of sewer pipes for sanitation, unless the installation thereof is within, and a part of, a street or road drainage system.

Taxpayer argues that it was assessed use/deferred sales tax on purchases of materials for installing cameras and work on retainage ponds that do [not] qualify for the public road

construction [taxation] and were instead purchased for resale. In order to determine whether these items [that do not qualify for public road construction taxation and were instead purchased for resale], we interpret and apply the above definition from Rule 171.

In any question of statutory construction, we strive to ascertain the intention of the legislature by first examining a statute's plain meaning. *G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010). The rules of statutory construction apply to the interpretation of administrative rules and regulations. *Multicare Medical Ctr. v. Dep't of Social and Health Svcs.*, 114 Wn.2d 572, 790 P.2d 124 (1990) (citing *State v. Burke*, 92 Wn.2d 474, 478, 598 P.2d 395 (1979)); *Musselman v. Dep't of Social and Health Svcs.*, 132 Wn. App. 841, 846, 134 P.3d 248, 250-51 (2006). Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. *Id.*; *See also* Det. No. 04-0180E, 26 WTD 206 (2007). Courts assess a statute's meaning "viewing the words of a particular provision in the context of the statute in which they are found, together with related statutory provisions, and the statutory scheme as a whole." *Burns v. City of Seattle*, 161 Wn.2d 129, 140, 164 P.3d 475 (2007).

Although Rule 171 does not specifically reference cameras, it does provide that street lighting systems and drainage systems are part of public road construction, even through portions of the systems are used for other things, and excludes items that are part of different utility systems, such as water mains, telephone, telegraph, electrical power, or other conduits or lines. The cameras at issue appear to be used to monitor vehicle traffic. Such cameras are similar to street lighting systems and drainage systems in that they facilitate the effective use of the roadway, and are distinct from items that are part of different utility systems that merely run through the roadway, but are otherwise unrelated to its function. In the instant case, considering RCW 82.04.050(10) and Rule 171 as a whole, we conclude that the cameras are part of improvements to the right of way and qualify as public road construction. Since Rule 171 explicitly includes the construction of drainage facilities, absent evidence indicating otherwise, Taxpayer has not established that work on retainage ponds is not part of public road construction. In conclusion, we find no grounds for adjusting the assessment based on Taxpayer's claim that the activities do not qualify as public road construction.

With respect to the reseller permit misuse penalty, RCW 82.32.291 provides that the Department *must* assess a fifty percent penalty for improper use of a reseller permit when certain conditions are met.<sup>6</sup> . . .

The Department adopted WAC 458-20-102 (Rule 102) to administer RCW 82.32.291. Rule 102(9) mirrors the language in RCW 82.32.291 in respect to the improper use of a reseller permit, and states that the penalty "can be imposed even if there was no intent to evade the payment of retail sales tax." Rule 102(9). Taxpayer misused a reseller permit when it used its reseller permit to purchase materials for use in public road construction without paying retail sales tax.

Taxpayer requests a onetime waiver of this penalty, asserting that "[t]his penalty will have a significant hardship on my company." Rule 102(13) addresses waiver of the penalty, and explains that the Department will waive the penalty upon finding that the use was due to

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<sup>6</sup> Previously this section addressed the misuse of a resale certificate.

circumstances beyond the control of the buyer. The penalty will not be waived because the buyer was not aware of either the proper use of the permit or the penalty, and the burden of proving facts is on the buyer. *Id.* Because Taxpayer has not shown that the misuse was due to circumstances beyond its control, we find no grounds to waive the penalty.

#### DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 2nd day of October, 2014.