Cite as Det. No. 16-0029, 36 WTD 229 (2017)

BEFORE THE APPEALS DIVISION
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. 16-0029
. . .	)	Registration No. . . .

RULE 111; RULE 170; RCW 82.04.050; RCW 82.04.051: RETAIL SALES TAX – B&O TAX – ADVANCEMENT OR REIMBURSEMENT – BUILDING PERMITS. When a building contractor is contractually obligated to obtain a building permit and is not acting solely as an agent, the funds it receives from its client for the cost of the building permit are properly included in the measure of retail sales tax and B&O tax.

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.

M. Pree, A.L.J. – A building contractor disputes retail sales tax and business and occupation (B&O) tax assessed on permit fees and other charges from a city, which it contends were excludable as reimbursements from the landowner. Because the taxpayer was liable to pay the city, other than as agent, the charges were not excludable. We deny the petition.[1]

ISSUE

Under RCW 82.04.050, RCW 82.04.051, and WAC 458-20-170 (Rule 170), were the taxpayer's fees and other charges for the building permit subject to retailing B&O tax and retail sales tax, or were they excludable under WAC 458-20-111 (Rule 111) as reimbursements?

FINDINGS OF FACT

[Taxpayer] is a licensed Washington contractor. The taxpayer constructed buildings as a speculative builder on land it owned, and also constructed buildings as a prime contractor for customers who owned their own land. This appeal involves the taxpayer's construction of an apartment building as a prime contractor in a Washington city (city) for a limited liability company (owner) that owned the land.

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

The taxpayer agreed to provide "all labor, materials, equipment and services necessary" to construct the building.[2] The taxpayer applied to the city for the building permit, and . . . , the taxpayer's president, signed the permit with a city official. The taxpayer paid the city fees associated with the permit, as well as the water hookup fee, "General Facility Charge" for the sewer, and various other impact fees required to build. The owner agreed to pay the taxpayer for those fees. The taxpayer completed the building charging the owner retail sales tax on most of its construction charges, but not on its payments to the city.

The Department of Revenue (Department) reviewed the taxpayer's available documents for the period of January 1, 2010, through March 31, 2014 (audit period). On April 2, 2015, the Audit Division issued Document No. . . . , which assessed $ . . . in retail sales tax, $ . . . in B&O tax under the retailing classification, $ . . . in B&O tax under the wholesaling classification, plus $ . . . in interest, and additional interest of $ . . . . The assessment totaled $ . . . .[3] The taxpayer paid $ . . . , which was not in dispute, and appealed. The taxpayer disputes retail sales tax, B&O tax under the retailing classification, and the corresponding interest assessed on $ . . . of the $ . . . listed as "Building Permit Fee not included in Sales per Building Permit" on Schedule 3A of the assessment.[4]

The taxpayer provided a breakdown of the fees and charges from the city, which shows:

Building Permit Plan Review Fee	$ . . .
State Building Code Council Fee	$ . . .
Building Permit Fee	$ . . .
Water Hookup Fee	$ . . .
Transportation Impact Fees – Commercial	$ . . .
General Facility Charge – Sewer	$ . . .
Reinspection Fee (Hourly)	$ . . .
School Impact Fees – Multi-Family	$ . . .
General Facility Charge – Stormwater Commercial	$ . . .
Total Fees Paid	**$ . . .**

The taxpayer contends that it paid these fees and charges to the city as the owner's agent, for which the owner reimbursed the taxpayer. As such, the taxpayer contends the fees and charges were not subject to retail sales tax, and excludable from the taxpayer's measure of retail sales and B&O taxes. The Audit Division contends that the city's fees and charges were part of the taxpayer's construction costs, and should have been included in the taxpayer's measure of retail sales and B&O taxes.

[2] Undated excerpt from contract with owner, §3.1.1, provided by taxpayer.

[3] A Post Assessment Adjustment (PAA), issued on April 2, 2015, reduced the amount due to $ . . . .

[4] Schedule 3B computes the retail tax on $3 . . . , which includes other undisputed adjustments (e.g. reclassification from speculative building to retailing from other projects). Also, the signed permit, submitted as the taxpayer's Exhibit A5-1, shows total fees paid of $ . . . . The difference with the assessment appears to be the Plan Review Fee - Revision $ . . . (Hourly) from the Audit Division's unsigned copy of the permit. There is no evidence the taxpayer paid the city the additional $ . . . , or charged the client the $ . . . . The Audit Division will adjust the assessment by removing the additional $ . . . .

The taxpayer signed a . . . contract [(the Contract)] to construct the apartment building for $ . . . ,[5] which . . . [according to the Contract, is subject to "increase[s] or decrease[s] as provided in article 8." The Contract, § 7.1. Article 8 allows for increases to the Contract Price based on changes to the "Cost of Work," which specifically includes the cost of "permits, fees, licenses, tests, and royalties." The Contract, § 8.3.1.3.11.]. The taxpayer applied for the building permit, and after paying the fees, would separately list the payments it made to the city on invoices to the owner. The taxpayer did not add sales tax on the city's charges, but combined the amounts due from those charges with other construction charges, to which it added retail sales taxes, on monthly invoices sent to the owner to determine the amount due.

The Contract with the owner provided in § 4.4:

> BUILDING PERMIT, FEES, AND APPROVALS Except for those permits and fees related to the Work which are the responsibility of the [taxpayer], the Owner shall secure and pay for all other permits, approvals, easements, assessments and fees required for the development, construction, use or occupancy of permanent structures or for permanent changes in existing facilities, including the building permit.

. . . [The Contract does not specify the "permits and fees" that are the responsibility of the taxpayer versus those permits and fees that Owner will secure and pay for. "Work," under the contract, is defined as "the construction and services necessary or incidental to fulfill the [taxpayer's] obligations for the Project in conformance with this Agreement and the other Contract Documents." Contract, § 2.4.27.] The "SCOPE OF WORK"[6] attached to the Contract was organized in divisions and sections, which outlined the taxpayer's responsibilities. For Division 22, plumbing, §122 states, "Includes permit." For Division 23 HVAC, §131 states, "Includes permit." For Division 24, electrical, §124 states, "Includes permit."

While the owner was responsible, under § 4.4 of the Contract, [to "secure and pay for" certain] approvals, easements, and assessments, the contract required the taxpayer to give public authorities all notices and schedule the required tests, approvals, and inspections. The city had an on-line building permit process in which the applicant could be the owner, the owner's authorized agent, or licensed contractor. It only allowed the applicant to submit the application with the approval of all owners of the affected property. As previously stated, the taxpayer actually applied for the permit and signed the application.[7] Because the taxpayer was the applicant and contractually responsible for the permit, we find that the owner was not solely responsible for the permit.

[5] Including change orders, as of February 2, 2015, the contract totaled $ . . . .

[6] Taxpayer's Exhibit A-43 – A1-50.

[7] The application did name the owner, but if the owner did not sign, the application could be signed by either the owner's agent or a licensed contractor. The signature line read, "SIGNATURE OF OWNER OR AGENT _____."

ANALYSIS

RCW 82.08.020 imposes a retail sales tax on "each retail sale in this state." The seller must collect retail sales tax from its customer, the buyer. RCW 82.08.050(1). Where the buyer has failed to pay the seller the sales tax, the Department may proceed directly against the buyer for collection of the tax. RCW 82.08.050(6).

The Audit Division assessed sales tax on payments the owner made to the taxpayer for the fees required by the city . . . . The taxpayer paid the city and the owner paid the taxpayer as required in § [8.3] of their contract. Our issue is whether the taxpayer should have included the city's fees and other charges in its measure of sales tax and B&O tax. In other words, were the taxpayer's charges for its payments to the city made for the taxpayer's construction services, or were the charges excluded from the taxpayer's measure of tax as reimbursements?

Construction services are included in the definition of retail sale and subject to retail sales tax and retailing B&O tax. RCW 82.04.050 defines a "sale at retail" to include:

> [T]he sale of or charge made for tangible personal property consumed and/or for labor or 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, ...

RCW 82.04.050(2). . . .. . . Rule 170 defines the term "constructing, repairing, or improving new or existing buildings" as including:

> [T]he 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.

Rule 170(1)(e). . . . RCW 82.04.250 imposes retailing B&O tax on the gross proceeds of sales, multiplied by the applicable B&O tax rate. RCW 82.04.070 defines "Gross proceeds of sale" as:

> [T]he value proceeding or accruing from the sale of tangible personal property and/or for services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

Rule 170(3)(b)[8] recognizes that permits and other charges by a contractor are included in total construction costs used to measure of B&O tax:

> Where no gross contract price is stated in any contract or agreement between the builder and the property owner, then the measure of business and occupation tax is the total amount of construction costs, including any charges for licenses, fees, permits, etc., required for the construction and paid by the builder.

Unless excludable under Rule 111, charges by the taxpayer for permits and other fees are subject to B&O tax.

Retail sales tax is levied and collected on the selling price on each retail sale in Washington State. RCW 82.08.020. "Selling price" is defined as:

> "Selling price" includes "sales price." "Sales price" means the total amount of consideration, except separately stated trade-in property of like kind, including cash, credit, property, and services, for which tangible personal property, extended warranties, digital goods, digital codes, digital automated services, or other services or anything else defined as a "retail sale" under RCW 82.04.050 are sold, leased, or rented, valued in money, whether received in money or otherwise. No deduction from the total amount of consideration is allowed for the following: (i) The seller's cost of the property sold; (ii) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller; (iii) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges; (iv) delivery charges; and (v) installation charges.

RCW 82.08.010(1)(a) (emphasis added).

The cost of obtaining permits is a prerequisite to building. It is an expense for the contractor when it pays the fees. The taxpayer's costs are included in the selling price under RCW 82.08.010(1)(a). Rule 170(3)(b) recognizes that a permit fees and other charges that prime contractors pass along to the owners are construction charges. [Moreover, in this case, the taxpayer was actually responsible for acquiring permits related to the Work per § 4.4 of the Contract.[9] That same section of the Contract provides that the Owner will secure the permits for which it is responsible.] Unless excludable, [the taxpayer's] charges [for the permits and fees it paid for] were subject to retail sales tax that the taxpayer should have collected from the owner and remitted to the Department.

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[8] [Rule 170(3)(a) explains that normally prime contractors are subject to retail sales tax and retailing B&O tax upon the gross contract price. Even though the Contract did provide for a contract price, that price was subject to changes based on certain charges, including charges for permits. Regardless of whether we look to Rule 170(3)(a) or (b) to determine the amount subject to retail sales tax and retailing B&O tax, the amount would be the same, either based on an updated contract price or the taxpayer's total costs.]

[9] [RCW 82.04.051 clarifies that a contractor is subject to retail sales tax and retailing B&O tax when it is responsible for retail construction services and services that would normally not constitute retail construction services, so long as the retail construction services are the predominant activity provided. In this case, the taxpayer is responsible for both types of services and the retail construction of apartment building is the predominant activity.]

The taxpayer contends that the various fees are excludable from its measure of tax under Rule 111. Rule 111 recognizes that certain receipts are merely advances or reimbursements for expenses paid for a client and not gross receipts of the business. Rule 111 states, in pertinent part:

> The word "advance" as used herein, means money or credits received by a taxpayer from a customer or client with which the taxpayer is to pay costs or fees for the customer or client.
>
> The word "reimbursement" as used herein, means money or credits received from a customer or client to repay the taxpayer for money or credits expended by the taxpayer in payment of costs or fees for the client.
>
> The words "advance" and "reimbursement" apply only when the customer or client alone is liable for the payment of the fees or costs and when the taxpayer making the payment has no personal liability therefor, either primarily or secondarily, other than as agent for the customer or client.
>
> There may be excluded from the measure of tax amounts representing money or credit received by a taxpayer as reimbursement of an advance in accordance with the regular and usual custom of his business or profession.
>
> The foregoing is limited to cases wherein the taxpayer, as an incident to the business, undertakes, on behalf of the customer, guest or client, the payment of money, either upon an obligation owing by the customer, guest or client to a third person, or in procuring a service for the customer, guest or client which the taxpayer does not or cannot render and for which no liability attaches to the taxpayer. It does not apply to cases where the customer, guest or client makes advances to the taxpayer upon services to be rendered by the taxpayer or upon goods to be purchased by the taxpayer in carrying on the business in which the taxpayer engages.

(Emphasis added).

Rule 111 would allow the taxpayer to exclude advances or reimbursements from its gross receipts only when the owner alone was liable for the payment of the fees and other charges and "when the taxpayer making the payment had no personal liability therefor, either primarily or secondarily, other than as agent for the owner." Rule 111 has been interpreted as requiring that the taxpayer prove that the advance or reimbursement in question was made pursuant to an agency relationship and prove that the taxpayer's liability to pay the fees constituted solely agent liability. [*Washington Imaging Services, LLC v. Dep't of Revenue*, 171 Wn.2d 548, 252 P.
3d 885 (2011)]; *Rho Co. v. Dep't of Revenue*, 113 Wn.2d 561, 782 P.2d 986 (1989); *City of Tacoma v. Wm. Rogers Co.*, 148 Wn.2d 169, 60 P.3d 79 (2002).

In our case, the taxpayer's liability to pay the fees was not solely that of an agent. It had contractual responsibility to pay the permits. The taxpayer, as the permit applicant, was also liable for the fees submitted upon acceptance of its permit application. Gig Harbor Municipal Code 19.12.100(A) requires that all developers pay impact fees at the time the building permit is ready for issuance.

For the purpose of impact fees, Gig Harbor Municipal Code 19.14.010(23) defines "Developer" as "[A]ny person or entity who makes application or receives a development permit or approval for any development activity as defined herein." The taxpayer made the application. Therefore, the taxpayer was also liable as the applicant/developer for the fees paid to Gig Harbor required for the permit. [The Contract also made Taxpayer responsible for acquiring any permits and fees necessary to perform its construction services.] The taxpayer has not shown that it paid these fees solely as an agent for the owner. Because the taxpayer was liable to the city [and responsible under the Contract] for the fees, the Audit Division properly included its gross receipts from those charges to the owner in the taxpayer's measure of B&O tax and retail sales tax.

DECISION AND DISPOSITION

We deny the taxpayer's petition.

Dated this 20th day of January 2016.