

Cite as Det. No. 15-0130, 36 WTD 379 (2017)

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. 15-0130
)	
... )	Registration No. . . .
)	

RULE 17001; RCW 82.04.050(12); RCW 82.04.190(6); RCW 82.12.020: GOVERNMENT CONTRACTING – CRANE INSTALLATION. A taxpayer who entered into a contract with a United States agency to replace cranes at . . . including installation of the cranes, is a government contractor and consumer of installed materials, and is subject to retail sales tax or use tax on those materials.

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 provider of gantry cranes to the [United States agency] appeals the assessment of government contracting business and occupation (B&O) tax and use tax on grounds that it is a seller of tangible personal property liable only for retailing B&O tax, rather than a government contractor liable for government contracting B&O tax and use tax on materials incorporated into the work. We deny the petition.<sup>1</sup>

ISSUE

Whether, under [RCW 82.04.050(12), RCW 82.04.190(6), and RCW 82.12.020], a taxpayer is a government contractor subject to government contracting B&O tax and use tax.

FINDINGS OF FACT

. . . (Taxpayer) specializes in unique custom design, manufacturing, and installation of industrial electromechanical lifting devices. The Department of Revenue’s (Department) Audit Division (Audit) examined Taxpayer’s account for the period of January 1, 2010, through September 30, 2013, and on April 23, 2014, assessed Taxpayer \$ . . . . The assessment is comprised of \$ . . . in use/deferred sales tax, \$ . . . in government contracting B&O tax, and a credit of \$ . . . in retailing B&O tax.

During the examination period, Taxpayer entered into three separate contracts with the [United States agency] for the design, manufacture, delivery, and installation of five cranes. The cranes

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

were manufactured at Taxpayer's facility and then delivered to the construction sites for reassembly. Taxpayer was required to remove the existing cranes upon completion of the installation. The three contracts are summarized below:

Contract No. [1] – Two 130-ton capacity gantry cranes: one for use at . . . , and one for use at . . . . These types of cranes are used on . . . . They are able to traverse . . . on rails.

Contract No. [2] – Two 10-ton capacity gantry cranes for use at . . . – one for use . . . , Washington . . . , and one for use [out-of-state]. These cranes are used in the operation and maintenance . . . . They are able to traverse . . . on rails.

Contract No. [3] – One 130-ton capacity gantry crane for use at . . . . This crane is similar in design and function to the cranes in [Contract No. 1].

Audit considered whether Taxpayer was engaged in . . . installation activity in determining that Taxpayer was engaged in government contracting. Taxpayer provided a copy of Contract No. [1], which details 3 contract line numbers (CLINs) for each crane as requirements. The CLINs are comprised of: 1. design, manufacturing, and delivery of the cranes; 2. installation of the new cranes; and, 3. removal of the existing cranes. Audit found that separation of the installation requirement from the delivery component indicates that installation is a . . . activity. Audit's Detail of Differences, Page 4. On appeal, Taxpayer explains that design, manufacturing, and delivery of the cranes comprises most of the contract value (\$ . . . ) as opposed to installation (\$ . . . ) and removal (\$ . . . ), and asserts that any services provided incident to the sale are de minimis and should not be the basis for classifying the contract for B&O tax purposes. Taxpayer's Supplemental Brief, Pages 7-8.

Audit also noted that the contract requires specific load testing procedures to be completed prior to [United States agency] acceptance, and examined Taxpayer's breakdown of the working days required for each stage of the on-site work at . . . . The activities include offloading and receiving, mechanical and electrical reassembly, electrical check out, commissioning, load testing, and acceptance. Audit's Detail of Differences, Page 4. Forty-two working days were required in total for on-site activities, which Audit found suggests that installation required far more time and effort than mere delivery. *Id.* On appeal, Taxpayer explains that this is a miniscule part of the overall contract, which may take up to 96 weeks, and should not determine the classification of the contract. Taxpayer's Supplemental Brief, Page 8.

Audit found that Taxpayer was engaged in government contracting, and assessed government contracting B&O tax on gross billings and use/deferred sales tax on installed materials. Taxpayer asserts that it was making retail sales of tangible personal property and is only subject to retailing B&O tax.

## ANALYSIS

Under Washington law, most prime contractors are liable for retailing B&O tax and must collect retail sales tax from their customers based on the gross contract price. RCW 82.04.050, RCW 82.04.250; WAC 458-20-170 (Rule 170).

However, amounts derived from constructing or improving buildings or other structures, including installing tangible personal property, [on real property] of or for the United States or its instrumentalities, are taxable under the government contracting classification of the B&O tax. RCW 82.04.280(1)(g); RCW 82.04.190(6); Rule 17001(3). Further, RCW 82.04.050(12) excludes government contracting from the definition of “retail sale” as follows, in pertinent part:

The term [retail sale] does not include the sale of or charge made for labor and services rendered in respect to the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for the United States [or] any instrumentality thereof . . . 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 82.04.190(6), in turn, includes government contractors within the definition of consumers and, as a consequence, government contractors must pay retail sales or use tax on materials used in completing the contract. *See also* Rule 17001; Det. No. 00-029, 19 WTD 714 (2000).<sup>2</sup> RCW 82.04.190(6) provides:

Any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property of or for the United States [or] any instrumentality thereof . . . 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 . . . Any such person is a consumer within the meaning of this subsection in respect to tangible personal property incorporated into, installed in, or attached to such building or other structure by such person . . . .

The use tax is imposed for the privilege of using within this state as a consumer any articles of tangible personal property manufactured by the user. RCW 82.12.020(1)(a), RCW 82.12.020(2). The tax applies upon the value of all materials, equipment, and other tangible personal property purchased at retail, acquired as a bailee or donee, or manufactured or produced by the contractor for commercial or industrial use in performing government contracting, and upon which no retail sales tax has been paid by the contractor, its bailor or donor. Rule 17001(7).

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<sup>2</sup> 19 WTD 714, 716 explains the rationale for the statutory framework as follows (footnote omitted):

In order to receive some retail sales or use tax revenues from federal government contracting activity, Washington developed a statutory framework whereby federal government contractors pay sales or use tax on materials used in completing the contract. The sales or use tax becomes part of the cost of the project and is passed on to the United States in the contract price, thus allowing the state to collect some state tax on federal government contracts without directly taxing the United States. That procedure was sustained by the United States Supreme Court in *Washington v. United States*, 460 U.S. 536 (1983).

In ascertaining the meaning of undefined statutory terms, courts frequently resort to dictionaries. *Codd v. Stevens Pass, Inc.*, 45 Wn. App. 393, 399, 725 P.2d 1008 (1986)(citing *State ex rel. Graham v. Northshore School District 417*, 99 Wn.2d 232, 244, 662 P.2d 38 (1983)). Washington courts use Webster's Third New International Dictionary in the absence of other authority. *State v. Glas*, 106 Wn. App. 895, 905, 27 P.3d 216 (2001), *rev'd on other grounds*, 147 Wn.2d 410 (2002).

*Webster's Third New International Dictionary*, 1171 (1993) defines "install" as:

3: to set up for use or service <the electrician ~ed the new fixtures> <had gas heating ~ed>

In this case, the contract contains specific load testing procedures to be completed prior to [United States agency's] acceptance of the crane, and on-site work includes mechanical and electrical reassembly, commissioning, and load testing. This shows that Taxpayer is responsible for the set up for use or service, and thus the installation of the cranes. We find no grounds for comparing installation and material costs in determining whether Taxpayer was engaged in the business of installing the cranes. *See* 19 WTD 714, 717.

Taxpayer argues that it is not a consumer because the cranes at issue are not made part of the realty. However, "consumer" includes "[a]ny person engaged in the business of . . . improving . . . existing . . . structures . . . upon . . . real property . . . including the installing or attaching any article of tangible personal property . . . whether or not it becomes part of the realty." RCW 82.04.190(6). Taxpayer is not merely engaged in the manufacture and sale of cranes. Taxpayer is "improving" the . . . per RCW 82.04.190(6). Further, because Taxpayer is responsible for installing the cranes, it is also a consumer by virtue of the phrase "including the installing or attaching any article of tangible personal property." In conclusion, because Taxpayer entered into a contract with [United States agency] to replace the cranes at the . . . , including installation of the cranes, it is a government contractor and consumer of installed materials, and is subject to retail sales tax or use tax on those materials.<sup>3</sup>

Our holding in this matter is consistent with the *Washington v. United States*, 460 U.S. 536 (1983) decision, [in which the Supreme Court upheld Washington's assessment of use tax on government contractors. As the court recognized, in] a nonfederal contract, the consumer would be required to pay retail sales tax on all materials installed on the job, even if not permanently installed and labor costs were minor in relation to material costs, and on all labor and overhead costs. [But in] the context of a federal government contract, even if labor costs were minor in relation to material costs and installation was not permanent, the tax is still measured by "a lesser amount than the tax on nonfederal projects because the contractor's labor costs and markup are not included in the tax base." *Washington*, 460 U.S. at 540 (1983).

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<sup>3</sup> Although unpublished court decisions are not precedent (RCW 2.06.040), we note that in *APL Ltd. v. Dep't of Revenue*, 180 Wn.App. 1016, 2014 WL 1289567 (Div. 1), the court considered whether cranes constitute fixtures or personal property. The Court quoted *Union Elevator & Warehouse Co., Inc. v. Dep't of Transp.*, 144 Wn. App. 593, 603 (2008), which stated that "[i]t is well recognized that determining what constitutes a fixture as opposed to personal property is a difficult task that depends on the particular facts of the case." We find that there is not sufficient evidence in the record to make this determination, but even if the cranes are personal property, this is not grounds for holding that Taxpayer is not engaged in government contracting and is not subject to use tax on materials.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 13th day of May 2015.