Cite as Det. No. 12-0040ER, 33 WTD 506 (2014)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of . . .	)	EXEC LEVEL DETERMINATION No. 12-0040ER Appeal of Determination No.12-0040 Registration No. . . .

[1] RCW 82.16.010: PUBLIC UTILITY TAX – If a business collects construction, demolition, and land clearing debris (CDL) for disposal or incineration, the income is subject to the Service & Other Activities B&O tax, and the collection service provider must collect the solid waste collection tax. If a business collects CDL for recycling at its own facility, the income is subject to Service & Other Activities B&O tax. If a business collects CDL and merely hauls for hire to a third-party recycling facility, the income is subject to public utility under either the Motor Transportation or Urban Transportation classification.

[2] RCW 82.04.120; RCW 82.08.02565: MACHINERY & EQUIPMENT EXEMPTION - Sorting, cleaning, and packaging recycling materials are not manufacturing activities under RCW 82.04.120 because the process does not create a new, different, or useful substance.

[3] RCW 82.08.050(9): BUYER TO PAY, SELLER TO COLLECT TAX – STATEMENT OF TAX - Even if the buyer and seller represent that the invoiced amount includes retail sales tax, RCW 82.08.050(9) requires the retail sales tax be separately stated on any sales invoices or other instrument of sale.

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.

Callahan, A.L.J. – A company ("Taxpayer") primarily engaged in the business of collecting construction, demolition, and land clearing debris (CDL) and hauling it to third-party recycling facilities petitions for Executive Reconsideration of a determination concluding that: 1) Taxpayer's income from the collection and hauling of CDL to third-party recycling facilities for compensation is subject to the Service & Other Activities business and occupation (B&O) tax classification, rather than the Motor Transportation or Urban Transportation public utility tax

(PUT) classification; 2) Taxpayer's rental of a trackhoe for use at its recycling facility does not qualify for the manufacturer's machinery and equipment retail sales tax exemption (M&E exemption); and 3) Taxpayer failed to establish that it paid retail sales tax on recycling containers at the time of purchase. Taxpayer's petition is granted with regard to the first issue, but denied as to the remaining issues; however, with regard to the third issue, the Department will adjust the measure of the retail sales tax on the recycling containers to reflect the actual purchase price.[1]

ISSUES

1. Is the collection and hauling of CDL to third-party recycling facilities for compensation subject to Service & Other Activities B&O tax under RCW 82.04.290(2), or is it subject to either the Motor Transportation or Urban Transportation PUT classification under RCW 82.16.010 (5) or (11)?

2. Does Taxpayer's rental of a trackhoe for use at its recycling facility qualify for the "M&E exemption" for machinery and equipment used directly in a manufacturing operation under RCW 82.08.02565?

3. Has Taxpayer substantiated that it paid retail sales tax on recycling containers at the time of purchase?

FINDINGS OF FACT

Taxpayer's primary business activity is collecting construction, demolition, and land clearing debris (known in the industry as "CDL"),[2] which it hauls to third-party recycling facilities. Taxpayer also operated a recycling facility.

Taxpayer reported its income from collecting and hauling CDL under the Wholesaling B&O or Retailing B&O tax classifications from January 1, 2006, to October 30, 2008, and under the Service & Other Activities B&O tax classification from November 1, 2008, to March 31, 2010.[3]

The Department of Revenue's (the "Department") Audit Division examined Taxpayer's books and records for the period of January 1, 2006, through March 31, 2010 (the "audit period"), and issued a tax assessment (Doc. No. 201108388) in the amount of $. . . .[4] In the assessment:

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

[2] Construction, demolition, and land clearing debris (CDL) are wastes generated at new construction, remodeling, and demolition sites, as well as wastes that come from road and utilities projects. CDL waste includes concrete, pavement, roofing materials, wood products, glass, carpet, paint, gypsum wallboard, appliances, and fixtures, to list just a few. http://www.ecy.wa.gov/programs/swfa/greenbuilding/AltWaste.html, visited December 3, 2012.

[3] On August 20, 2008, Taxpayer requested a letter ruling from the Department's Taxpayer Information and Education (TI&E) Division on the correct B&O tax classification of its business activities. On October 28, 2008, TI&E responded that Taxpayer's income is subject to the Service & Other Activities B&O tax classification. Taxpayer has been reporting its income under the Service & Other Activities B&O tax classification since November 2008.

[4] The assessment consisted of retail sales tax of $. . . , a Wholesaling B&O tax credit of $. . . , Service & Other Activities B&O tax of $. . . , use tax/deferred sales tax of $. . . , and interest of $. . . .

1. Audit reclassified the income from collecting and hauling CDL that Taxpayer had reported under Wholesaling or Retailing B&O tax classification during the earlier part of the audit period to the Service & Other Activities B&O tax classification, resulting in additional taxes owed.[5] Taxpayer asserts that this income is properly subject to either the Motor Transportation or Urban Transportation classification of the Public Utility Tax (PUT), and exempt from Service & Other Activities B&O tax.

2. Audit also assessed retail sales tax on a trackhoe that Taxpayer rented for use at its recycling facility. Taxpayer asserts that this equipment qualifies for the "M&E exemption."

3. Finally, Audit assessed retail sales tax on recycling containers. Taxpayer asserts that it paid retail sales tax to the manufacturer/vendor of the recycling containers at the time of purchase.

Taxpayer's website[6] describes the CDL collection and hauling portion of its business as follows:

> [W]e drop off and pick up steel containers to job sites and private residences to capture all the "recyclable" building materials. When your container is full call dispatch and we'll pick it up.

Taxpayer's website also states that it does not pick up household garbage, TVs, computers, or monitors, oils, solvents, or paints, asbestos containing materials, treated wood, fluorescent tubes, car batteries, or tires.

When Taxpayer is hired by a customer, Taxpayer and the customers enter a Transport Agreement ("Agreement"). The Agreement, in relevant part, contains the following language:

> **TERMS AND CONDITIONS:** [Taxpayer] agrees to set a container at your (customer) site, pick up the container from the customers site and recycle the materials at a recycling facility. For this service it is agreed that the customer will pay per agreed terms . . .
>
> . . . .
>
> **CONTAMINATED LOADS:** [Taxpayer] accepts only recyclable material including construction, demolition, land clearing and yard debris. [Taxpayer] will not transport household garbage, tires, treated wood, paints, oils, solvents, railroad ties, PCB's, asbestos materials, monitors, TV's or other items not deemed "recyclable" by our partner facilities. If these items are discovered, we will ask you to remove them and/or your invoice will reflect a surcharge indicating the amount found.

[5] Audit also found that Taxpayer collected retail sales tax on sales it had reported under the Retailing B&O tax classification and failed to remit the tax to the Department. This collected but unremitted retail sales tax was included in the assessment.

[6] . . . visited December 3, 2012.

To emphasize for the customer that Taxpayer only accepts recyclable material, the following warning appears immediately before the customer signature line on the Agreement:

> **Protect Yourself - Please Read:** [Taxpayer] will not transport garbage, tires, hazard [sic] materials, fluorescent tubes, paints, oils, car batteries, TVs, monitors, asbestos containing materials or other non-construction, land clearing and demolition materials. If a container is "tipped" and any of these materials are found then [Taxpayer] will sur-charge this credit card as separate charge to reflect the amount of material found. . . . Your signature below acknowledges acceptance of this disclaimer and subsequent charges to the credit card listed.

The invoices that Taxpayer issues to its customers reflect that Taxpayer charges its customers a service fee referred to as "Round Trip Truck." The fee is measured by the weight of the debris in the containers when they are picked up. Taxpayer charges its customers over weight fees when applicable. Taxpayer does not charge its customers separately for the containers that it leaves at the sites. Taxpayer charges its customers a separate dump fee for dropping off the materials to a third-party recycling facility. Pursuant to the agreement with its customer, its customers know that the debris collected in Taxpayer's containers is for recycling.

Taxpayer is regulated as a common carrier by the Washington Utilities and Transportation Commission (WUTC), and has held a WUTC permit since July 2, 2007. WUTC has confirmed that Taxpayer's activity of hauling CDL to recycling facilities for compensation makes it subject to regulation as a "common carrier" as that term is defined in RCW 81.80.010(1).[7]

With respect to the trackhoe rental, Taxpayer explained that it operated a recycling facility during the audit period. Taxpayer used the trackhoe to handle recyclable raw materials and finished products at its recycling facility. Taxpayer asserts that recycling is a manufacturing activity, and, therefore, the trackhoe qualifies for the M&E exemption.

With respect to the recycling containers, the Department assessed retail sales tax because Taxpayer provided insufficient records showing that it paid retail sales tax to the manufacturer/vendor at the time of purchase. Taxpayer asked the vendor to provide records of the transaction. In response, the vendor provided invoices for the containers with a total purchase

[7] An email dated September 17, 2012, [an employee of], WUTC, states in part:

> I am familiar with [Taxpayer] and their business activities. [Taxpayer] holds Common Carrier Permit # . . . issued by the UTC. They hold that permit because they are subject to regulation by the UTC as a Common Carrier as that term is defined in RCW 81.80.010 (1). Specifically [Taxpayer] transports its customer's recyclable materials from client work sites to appropriate recycling facilities. To perform the task they deliver large empty metal containers to the customer's site. The customer fills the container with recyclable material from the site. When the customer has filled the container it calls [Taxpayer] to pick up the full container and transport the recyclable material to a recycling facility where the container load is delivered.
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> Being compensated to transport its customers recyclable material to recycling facilities makes [Taxpayer] a Common Carrier as that term is defined in RCW 81.80.010 (1). As a Common Carrier [Taxpayer] is subject to regulation by the (UTC).

price, including shipping/freight, of $. . . .[8] The invoices also included separately stated retail sales tax totaling $. . . . However, the vendor also provided two subsequently issued credit invoices in the same amount as the retail sales tax. The vendor provided a memo dated September 16, 2010, explaining that it issued the credit invoices for the retail sales tax after receiving Taxpayer's resale certificate, which was dated December 20, 2007.[9]

In a letter dated December 20, 2007 (the same date as the resale certificate), Taxpayer sent a letter to the vendor stating that the pay-off amount for the recycling containers was $. . . (i.e., the total amount of the invoices described above, exclusive of retail sales tax). The letter further stated that Taxpayer was enclosing a check in the amount of $. . . in payment toward the pay-off amount, less $. . . that Taxpayer was holding back because of manufacturing defects in the recycling containers "until repairs are completed to our satisfaction." The vendor signed the letter accepting this partial payment, and acknowledging that it would make the repairs within a reasonable amount of time. Taxpayer never paid the additional $. . . because the vendor failed to repair the recycling containers.

Taxpayer explains that it gave the resale certificate to the vendor believing that it might resell some of the recycling containers, but in fact did not. However, Taxpayer insists that it paid the vendor retail sales tax, and has provided an affidavit by a former employee of the vendor dated October 23, 2012, stating that the $. . . included retail sales tax.

Taxpayer asserts that it neither requested nor received a refund of the retail sales tax paid on the containers. Taxpayer claims that the vendor, without Taxpayer's knowledge or consent, requested a refund of retail sales tax from the Department. Instead of repairing the defective recycling containers, Taxpayer asserts that the vendor applied the refunded retail sales tax to the disputed $. . . . Taxpayer speculates that the invoices showing a total purchase price of $. . . and separately stated retail sales tax totaling $. . . , as well as the subsequent invoices crediting the sales tax, were created after the fact.

Between the invoices showing a purchase price of $. . . , exclusive of sales tax, and an after-acquired affidavit claiming this amount included retail sales tax, we find the former to be more credible evidence. We note the purchase prices on the individual invoices are round numbers that do not suggest the inclusion of retail sales tax.

[On March 6, 2012, the Department issued Determination No. 12-0040 to Taxpayer. Det. No. 12-0040 held, as follows: (1) Taxpayer's collection of materials for recycling is subject to the service and other activities B&O tax; (2) Taxpayer was not in the urban transportation business and was not subject to the public utility tax [PUT]; (3) Taxpayer was neither a manufacturer, nor a processor for hire, and was not eligible for the machinery and equipment [M&E] exemption; and (4) Taxpayer was liable for retail sales tax on containers that it did not resell, but instead used in its own business. Taxpayer timely filed a petition for executive reconsideration of Det. No. 12-0040.]

[8] Multiple invoices between April and August 2007
[9] The resale certificate stated that it was effective for the period 3/31/05 – 3/31/08.

ANALYSIS

A. Taxation of Income from Collecting and Transporting CDL to Third-Party Recyclers

Washington imposes a B&O tax "for the act or privilege of engaging in business" in the State of Washington. RCW 82.04.220. Business activities other than those that are specifically taxable elsewhere in Chapter 82.04 RCW are subject to the Service & Other Activities B&O tax classification. RCW 82.04.290(2).

However, RCW 82.04.310 provides the B&O tax:

> [D]oes not apply to any person in respect to a business activity with respect to which tax liability is specifically imposed under the provisions of chapter 82.16 RCW including amounts derived from activities for which a deduction is allowed under RCW 82.16.050.

The PUT applies to motor transportation and urban transportation businesses. RCW 82.16.020(1)(d), (f). Therefore, if Taxpayer's business activity constitutes either motor transportation business or urban transportation business, then the B&O tax does not apply.[10]

"Motor transportation business" is defined as:

> [T]he business (except urban transportation business) of operating any motor propelled vehicle by which persons or property of others are conveyed for hire, and includes, but is not limited to, the operation of any motor propelled vehicle as an auto transportation company (except urban transportation business), common carrier, or contract carrier as defined by RCW 81.68.010 and 81.80.010. . . . .

RCW 82.16.010(5).

"Urban transportation business" is defined as:

> [T]he business of operating any vehicle for public use in the conveyance of persons or property for hire, insofar as (a) operating entirely within the corporate limits of any city or town, or within five miles of the corporate limits thereof, or (b) operating entirely within and between cities and towns whose corporate limits are not more than five miles apart or within five miles of the corporate limits of either thereof. . . . .

RCW 82.16.010(11). [11]

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[10] Motor Transportation PUT tax rate (0.01926) is actually higher than the Service & Other Activities B&O tax rate (0.018), while the Urban Transportation PUT rate (0.00642) is much lower. Taxpayer argues for application of the PUT rather than B&O tax because it asserts that it has sufficient records to demonstrate that it qualifies for the lower Urban Transportation PUT rate. [The Department held, in Det. No. 12-0040 that Taxpayer was not in the urban transportation business and was not subject to taxation at the PUT rate.]

[11] While the definition of "urban transportation business" does not include the reference to "common carrier" as defined in RCW 81.80.010, we assume that person operating a motor vehicle as common carrier as defined in RCW 81.80.010 would qualify for the preferential Urban Transportation PUT rate if it operated within the prescribed

RCW 81.80.010 provides:

> (1) "Common carrier" means any person who undertakes to transport property for the general public by motor vehicle for compensation, whether over regular or irregular routes, or regular or irregular schedules, including motor vehicle operations of other carriers by rail or water and of express or forwarding companies.

Persons who collect and transport solid waste for disposal are "common carriers" as defined by RCW 81.77.010(3);[12] however, RCW 82.16.100 provides that the public utility tax does not apply to transporters of solid waste.[13] Nor is there any specific B&O tax classification applicable to these businesses. Consequently, solid waste collection businesses fall under the catch-all Service & Other Activities B&O tax classification provided in RCW 82.04.290(2).

Title 81.77 RCW, which contains the regulatory provisions relating to solid waste collection businesses, distinguishes between solid waste collection and the transportation of recyclable materials to a recycler for recycling or reclamation. RCW 81.77.010(8) provides:

> "Solid waste collection" does not include collecting or transporting recyclable materials from a drop-box or recycling buy-back center, or collecting or transporting recyclable materials by or on behalf of a commercial or industrial generator of recyclable materials to a recycler for use or reclamation. Transportation of these materials is regulated under chapter 81.80 RCW.

Likewise, WAC 480-70-011[14] provides in part:

> (2) The following collection and hauling operations are not regulated by the commission [WUTC] as solid waste:
>
> . . .
>
> (b) A carrier collecting or transporting recyclable materials from a drop box or recycling buy-back center, or collecting or transporting recyclable materials by or on behalf of a commercial or industrial generator of recyclable materials to a recycler for use or reclamation. This type of operation is regulated under chapter 81.80 RCW as transportation of general commodities.

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geographical limitations. The Department has never made a distinction between "motor transportation business" and "urban transportation business," other than the geographical limitations that apply to the latter.

[12] [The fact that the definition of "motor transportation business" "includes" common carriers as defined in RCW 82.68.010 and RCW 81.80.010 does not mean common carriers as defined in other statutes, such as RCW 81.77.010(3), are necessarily precluded from being "motor transportation businesses." For example, if a business operated a motor vehicle to convey persons or property of others for hire, it may qualify as a "motor transportation business." Being a common carrier as defined in RCW 82.68.010 and RCW 81.80.010 is a sufficient, but not a necessary, condition to fall within the definition. It is RCW 82.16.100 that precludes application of the PUT.]

[13] In excluding solid waste businesses from the PUT, RCW 82.16.100 distinguishes recycling materials. The definition of "solid waste" applied in RCW 82.16.100 expressly excludes "material collected primarily for recycling or salvage." RCW 82.18.010(3).

[14] Chapter 480-70 WAC pertains to solid waste and/or collection companies.

(Brackets added.)

Title 81.80 RCW, which contains the regulatory provisions relating to motor freight carriers (including "common carriers" as defined in RCW 81.80.010 (1) and contract carriers defined in RCW 81.80.010(2)), contains a similar provision. RCW 81.80.470(1)[15] provides:

> The collection or transportation of recyclable materials from a drop box or recycling buy-back center, or collection or transportation of recyclable materials by or on behalf of a commercial or industrial generator of recyclable materials to a recycler for use or reclamation is subject to regulation under this chapter.

Title 81.77 RCW also distinguishes between solid waste collection and collection and transportation of recyclable materials by a recycling company. RCW 81.77.140 provides in part:

> Nothing in this chapter shall prevent a recycling company or nonprofit entity from collecting and transporting recyclable materials from a buy-back center, drop-box, or from a commercial or industrial generator of recyclable materials, or upon agreement with a solid waste collection company.

Such businesses are not regulated by WUTC. WAC 480-70-011 provides in part:

> (1) The following collection and hauling operations are not regulated by the commission:
> . . .
> (e) The operations of a recycling company or nonprofit entity collecting and transporting recyclable materials from a buy-back center, drop box, or from a commercial or industrial generator of recyclable materials when those recyclable materials are being transported for use other than disposal or incineration, or under agreement with a solid waste collection company (refer to RCW 81.77.140);

Based on the foregoing, we conclude:

- If a business collects CDL for disposal or incineration, the income is subject to the Service & Other Activities B&O tax, and the collection service provider must collect the solid waste collection tax.[16]

- If a business collects CDL for recycling at its own facility, the income is subject to Service & Other Activities B&O tax.

[15] This provision was enacted in 2007, and consequently was not in effect during the entire audit period. However, the provision in RCW 81.77.010(8) stating that, "Transportation of these materials [solid waste] is taxable under chapter 81.80 RCW" was in effect during the entire audit period. The 2007 enactment provided clarification by including within Title 81.80 RCW, relating to motor freight carriers, a provision similar to the one already contained in Title 81.77 RCW. This view is consistent with the fact that the Code Reviser chose as the caption to RCW 81.80.470 the words "Recyclable materials collection and transportation – Construction."

[16] *See* RCW 82.18.020, -.040.

- If a business collects CDL and merely hauls for hire to a third-party recycling facility, the income is subject to PUT under either the Motor Transportation or Urban Transportation classification. In this situation, the operator is responsible solely for loading, unloading, and transporting another's materials to a third-party recycling facility (i.e., the operator does not sort or otherwise handle CDL).[17] However, any amounts the business separately charges its customers as a dump fee or "tipping" fee paid to the recycling facility are subject to Service & Other Activities B&O tax.

We reverse Det. No. 12-0040 to the extent it is inconsistent with this conclusion.

B. Application of M&E Exemption to Trackhoe Rental

With respect to the M&E exemption issue, Taxpayer relies on Det. No. 95-170, 16 WTD 043 (1995) and argues that the operation of its recycling facility qualifies as either manufacturing or processing for hire. That determination concluded that sorting and compacting loose sheet metal into cubes for others constituted "processing for hire." The determination explained that the metal reclamation process involves heating the scrap metal in large melting pots. If only loose sheet metal were put into the pots approximately 75% of the metal would be burned up by the process. However, if compacted sheet metal cubes are used, the metal melts instead of burning and the loss is reduced to 5%. 16 WTD 043 therefore concluded that there was a significant change in the form and the physical properties of the metal, which resulted in a new, different, or useful substance within the meaning of RCW 82.04.120.

Taxpayer's reliance on 16 WTD 043 is misplaced. Taxpayer's recycling facility merely sorts, cleans, and packages the recycling materials. Unlike the taxpayer in 16 WTD 043, Taxpayer does not turn the recyclable materials into something new, different, or useful. The activities conducted at Taxpayer's recycling facility more closely align with those described in Det No. 10-0108, 31 WTD 1 (2012), where we concluded that:

> [T]he sorting and bundling of recyclable materials is not manufacturing under RCW 82.04.120 because the process does not create a new, different, or useful substance. While the process changes the value of the materials, it does not change their form or properties or meet the other factors of manufacturing.

We affirm our conclusion in Det. No. 12-0040 that retail sales tax was properly assessed on the trackhoe rental payments.

C. Retail Sales Tax on Recycling Containers

With respect to the retail sales tax on the recycling containers issue, the after-acquired affidavit from the vendor's former employee stating that the $. . . purchase price included retail sales tax is not persuasive. Moreover, even if the parties agreed and understood this amount to include retail sales tax, RCW 82.08.050(9) requires that the retail sales tax be separately stated on any sales invoice or other instrument of sale. Taxpayer has presented no sales invoices or other instruments of sale showing that retail sales tax was paid on this amount. On the contrary, the

[17] *See* ETA 3050.2014, which was issued on April 29, 2014.

copies of the invoices the vendor issued and Taxpayer's letter of December 20, 2007, letter clearly demonstrate that the price of the recycling containers, exclusive of retail sales tax, was $. . . . In short, we see no evidence that retail sales tax was paid on the recycling containers at the time of purchase.

However, we note that the Taxpayer's letter of December 20, 2007, states that Taxpayer would only pay $. . . , and would withhold $. . . from the purchase price until the recycling containers were repaired to Taxpayer's satisfaction. The vendor accepted this reduced amount and agreed to repair the containers. Taxpayer never paid the additional $. . . because the vendor failed to repair the containers. Under these circumstances we conclude the selling price under RCW 82.08.010(1)(a) was the amount actually paid, i.e., $. . . , rather than the amount originally invoiced to Taxpayer.

DECISION AND DISPOSITION

Taxpayer's petition is denied in part and granted in part.

Dated this 20th day of May, 2014.