Cite as Det. No. 21-0195, 42 WTD 038 (2023)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON[1]

In the Matter of the Petition for Refund of	)	D E T E R M I N A T I O N
	)	
	)	No. 21-0195
	)	
. . .	)	Registration No. . . .
	)	

[1] RCW 82.32.070; RCW 82.32.100; WAC 458-20-254: PUBLIC ROAD CONSTRUCTION/GOVERNMENT CONTRACTING B&O TAX – RECORDKEEPING. A taxpayer has a duty to maintain suitable records to allow the Department to calculate the taxpayer's income and, where the Taxpayer cannot provide such documentation, it is not entitled to an adjustment of an assessment of B&O tax on the associated income.

[2] RCW 82.32.070; RCW 82.32.100; WAC 458-20-254: USE TAX – GOVERNMENT CONTRACTING – RECORDKEEPING. A prime contractor engaged in government contracting is considered the consumer of materials consumed on such projects and is liable for use tax thereupon unless it can prove through suitable records that retail sales tax had already been paid.

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.

Farquhar, T.R.O. – A Washington construction company seeks a refund of amounts it paid towards an assessment of business and occupation ("B&O") tax and use tax following two partial audits. The Department assessed the subject B&O tax because it found the company reported certain income under the wrong tax classification and failed to report other income. The Department assessed the use tax on the estimated value of materials the company installed on public road construction and government contracting jobs because the company did not provide documentation showing that the materials were previously subject to retail sales tax. We conclude that the company has failed to provide suitable documentation to support its argument that the B&O and use tax assessments should be adjusted and, therefore, there is no basis for granting the refund the company seeks. Petition denied.

ISSUE

Whether a company has met its burden, under RCW 82.32.070, RCW 82.32.100, and WAC 458-20-254, of showing through suitable documentation that the Department's calculation of its tax liability, based in part on an estimate, was flawed and the resulting assessments should be adjusted.

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

FINDINGS OF FACT

. . . ("Taxpayer") is a construction company located in . . . , Washington. Taxpayer's business activities consist primarily of erecting steel structures for customers in Washington. During the periods at issue here, Taxpayer also made sales to customers . . . [outside of Washington].

This case arises out of two partial audits conducted by the Department's Audit Division ("Audit"). Both audits involved a review of Taxpayer's records and business activities for the period of January 1, 2011, through September 30, 2014 ("the Audit Period"). The first audit ("First Audit") reviewed Taxpayer's liability for all taxes except use tax owed on materials installed in public road construction and government contracting jobs. Audit reviewed Taxpayer's liability for use tax on materials used in public road construction and government contracting in the second audit ("Second Audit").

During its review, Audit requested copies of various business records and other information related to Taxpayer's business activities. The records requested included, among other items, Taxpayer's accounting records and financial statements with supporting source documents for all years of the Audit Period, contracts and invoices between Taxpayer and its customers and suppliers, proof of payment (e.g., cancelled checks and bank or credit card statements) of retail sales tax on certain materials, and copies of reseller permits.

Taxpayer provided some of the records Audit requested but, despite multiple requests, Taxpayer did not provide all the documents and information Audit needed. Taxpayer informed Audit that it had suffered a computer malfunction during the Audit Period and lost most of its financial software data. Taxpayer recreated its financial records but did not provide the recreated records in electronic form to Audit.

Taxpayer provided portions of its financial statements, certain invoices between its customers and suppliers, and select contracts. However, Taxpayer failed to produce complete copies of its financial statements for each year, all contracts between Taxpayer and its customers or other contractors or suppliers, proof of payment of retail sales tax paid on materials incorporated into jobs Taxpayer worked on, and source documents to support its financial statements.

After reviewing the information related to the First Audit, Audit found several issues with Taxpayer's tax reporting. First, Audit found that Taxpayer had reported certain income under the wholesaling B&O tax classification that should have been reported under the retailing B&O tax classification. Audit reclassified that income and assessed corresponding retail sales tax on the underlying sales. Audit also found that Taxpayer had not reported all its income. Audit classified the unreported income based on the type of business activity it was derived from and assessed B&O tax accordingly. Finally, Audit concluded that Taxpayer did not pay retail sales tax or use tax on certain materials and supplies consumed in some projects. Accordingly, Audit assessed use tax or deferred sales tax on those purchases.

Regarding the Second Audit, Audit found that Taxpayer was unable to prove that the materials it installed in public road construction and government contracting jobs were subject to retail sales or use tax. Pursuant to RCW 82.04.190 and WAC 458-20-17001, Audit determined that Taxpayer

was the "consumer" of those materials and, therefore, Taxpayer owed retail sales tax or use tax on their value. Based on the limited records Taxpayer provided, Audit was unable to determine the actual cost of the materials. As such, Audit estimated the value of the materials Taxpayer used at 40% of the income Taxpayer reported earning under the public road construction and government contracting B&O tax classifications and assessed use tax on that amount.

After completing the audits, Audit issued two assessments. Audit issued the first assessment ("First Assessment"), which was based on the adjustments from the First Audit, on August 17, 2015. *See* Document No. . . . . The First Assessment totaled $. . . and was composed of $. . . in taxes, $. . . in penalties, and $. . . in interest. The tax portion of the First Assessment consisted of the adjustments Audit made to Taxpayer's B&O tax reporting and the use/deferred sales tax assessed on consumable supply purchases. Taxpayer paid the First Assessment in full on September 15, 2015.

Audit issued the second assessment ("Second Assessment"), which was based on the adjustments from the Second Audit, on December 4, 2015. *See* Document No. . . . . The Second Assessment totaled $. . . and was composed of $. . . in taxes, $. . . in penalties, and $. . . in interest. The tax portion of the Second Assessment consisted of the retail sales tax Audit assessed on materials installed in public road construction and government contracting jobs. The due date for the Second Assessment was January 4, 2016, but Taxpayer did not pay the balance by that date. Due to the late payment, Taxpayer incurred a late payment penalty of $. . . and $. . . in additional interest. Taxpayer paid the full amount of the Second Assessment, including the late payment penalty and additional interest, on January 29, 2016.

On January 2, 2020, we received two petitions ("the Prior Petitions") for review from Taxpayer, one for each of the two assessments.[2] Along with the Prior Petitions, Taxpayer submitted documents that Audit had not yet reviewed. The records included documents supporting the wholesale nature of certain sales and additional information regarding Taxpayer's consumable supply purchases. As a result, on February 6, 2020, we notified Taxpayer that we were remanding the case to Audit for further review.

Audit reviewed the information Taxpayer provided with the Prior Petitions and concluded that Taxpayer was entitled to an adjustment of only the First Assessment. The adjustments included reclassifying retail sales that Taxpayer had originally reported as wholesale sales back to wholesale where Taxpayer was able to document the wholesale nature of those sales. Audit provided a corresponding credit for retail sales tax and retailing B&O tax. Audit declined to adjust other issues Taxpayer identified with the reconciliation of Taxpayer's income because Taxpayer did not provide a full copy of its financial statements and other supporting documentation for each year of the Audit Period. Audit also removed the use tax or deferred sales tax assessed on certain supply purchases. Audit found that the original assessment had, in error, included use tax or deferred sales tax on purchases that either should not have been subject to the tax or should have been included in the adjustments made through the estimation method used in the Second Audit. Audit removed

[2] Both petitions were dated . . . , and were postmarked on . . . . We accepted the petitions as timely submitted.

all use tax and deferred sales tax adjustments from the First Assessment. Audit did not make any adjustments to the Second Assessment.[3]

On April 29, 2021, Audit issued a report ("PAA Report") stating that Taxpayer was entitled to a refund of $. . . of the tax base of the First Assessment. *See* Letter ID No. . . . . On May 3, 2021, the Department issued a refund notice to Taxpayer stating that it would receive a refund of $. . . , which included $. . . in taxes and $. . . in penalties and interest. *See* Letter ID No. . . . . The refund reduced the amount of tax Taxpayer paid on the First Assessment to $. . . . The amount of tax Taxpayer paid on the Second Assessment remains at $. . . . These are the amounts of tax at issue in the present case.

On June 6, 2021, we received two additional petitions ("the Present Petitions") from Taxpayer contesting Audit's adjustments in the PAA, one for each of the two underlying audits.[4] Taxpayer seeks an additional refund of $. . . on the First Assessment and $. . . on the Second Assessment.[5] Taxpayer does not contest that it is generally liable for B&O tax on the income it earns in Washington, nor does it contest that materials used in public road construction and government contracting jobs are subject to use tax if they have not been subject to retail sales tax.

Regarding the First Audit, Taxpayer argues that Audit overstated its sales when calculating its B&O tax liability and Audit should have used the amounts listed in its 2013 financial statement when calculating the tax due. Present Petitions, pp 4-5. Taxpayer also argues that Audit should have allowed credits for "sales or use tax paid on purchases of materials installed on government construction projects" because "these purchases are taxed again in a separate audit for Federal Government construction materials subject to sales or use tax." *Id*. at pg. 5. Because Audit removed all retail sales and use tax adjustments from the First Assessment, we presume that Taxpayer's argument regarding sales and use tax addresses the amounts included in the Second Assessment.

Regarding the Second Audit, Taxpayer asserts that the prime contractor who supplied the materials should be held responsible for the use tax, not Taxpayer. Present Petitions, pp. 1-3. Taxpayer cites to WAC 458-20-17001(9), which states that "the use tax is to be reported and paid by the government contractor who actually installs or applies" the materials on the project. Taxpayer also cites to Det. No. 88-286, 6 WTD 223 (1988) and Det. No. 89-480, 8 WTD 283 (1989). *Id*. at pp. 2-3. Taxpayer argues that the determinations hold that "the prime contractor who has contracted directly with the federal government for improvements to real property is considered the installing contractor under WAC 458-20-17001(9)" and the "subcontractor who actually installs materials supplied by the prime contractor will not be forced to pay a tax obligation that is properly that of the prime contractor." *Id*.

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[3] We note that while Audit's conclusions indicate that the First Assessment included use or deferred sales taxes that could have been included in the Second Audit, Audit did not increase the amount of the Second Assessment after the post-remand review.

[4] We reviewed the Present Petitions together as a single 7-page PDF file. The first three pages of the file include the petition related to the Second Assessment. The remaining four pages of the file contain the petition for the First Audit. For convenience, will refer to the 7-page file in its entirety herein as the "Present Petitions."

[5] While Taxpayer's refund request for the Second Assessment is more than the tax base and, therefore, must include a request for a refund of a portion of the penalties and interest included therein, Taxpayer did not make any specific arguments regarding a penalty or interest waiver. Nevertheless, if we were to find that Taxpayer is entitled to a refund of the entire tax base, Taxpayer would, necessarily, receive a refund of the associated penalties and interest.

Taxpayer also argues that Audit's estimate of the value of the materials is incorrect. Present Petitions, pp. 1-3. Taxpayer states that Audit did not provide an explanation of how it calculated the 40% estimate amount and that the figure is based on revenue that was "considered only to be from labor to install these materials." *Id*. at pg. 3. Taxpayer believes the estimate is incorrect because "most projects include direct materials, direct labor, overhead and profit" and only the "value of direct labor should be used to calculate the value of materials." *Id*.

Along with the Present Petitions, Taxpayer provided three one-page summaries of its financial statements for 2012, 2013, and 2014, as well as a spreadsheet purporting to show what Taxpayer reported under the government contracting B&O tax classification. The financial statements and spreadsheet did not include any supporting source documents, such as invoices or contracts. Audit reviewed these documents and stated that the financial statements are incomplete, and the amounts listed in the spreadsheet do not match the amounts Audit reviewed during their review process.

Taxpayer also provided a 63-page contract between itself and . . . . Taxpayer asserts that the contract shows that Taxpayer provided all materials used on the job. However, Taxpayer did not provide documentation showing that Taxpayer, or any other party, actually paid retail sales or use tax on those materials.

On September 21, 2021, following the hearing held with Taxpayer's representative, we requested additional documentation from Taxpayer. Our request included proof of payment (such as a canceled check or credit card or bank statement showing a payment amount) for the retail sales tax Taxpayer alleges it paid on materials it purchased for its jobs, contracts between itself and its customers and suppliers, and Taxpayer's financial software data for the entire Audit Period.

In response to our documentation request, Taxpayer provided a 57-page contract between Taxpayer and a company named ". . . , LLC," and a 26-page document entitled "Consolidated Financial Statements for the years ended December 31, 2013, and 2012" bearing Taxpayer's name at the top of the document.

In response to Taxpayer's contention that the estimated 40% materials cost was unreasonable, Audit provided us with a copy of a document published online by the American Institute of Steel Construction ("AISC"). *Available at* https://www.aisc.org/why-steel/resources/construction-costs/ (last viewed December 2, 2021). The document, entitled "Construction Costs: Structural Steel is the Cost Leader," generally describes the costs associated with building a steel structure. According to the document, 28% of the construction costs are related to raw materials used to create the steel and 46% are related to designing, fabricating, and delivering to the jobsite the steel components of the structure. In other words, 74% of the construction costs are related to the steel materials themselves and 26% of the costs are related to erecting the structure (e.g., jobsite labor). Based on this information, Audit argues that estimating the materials costs at 40% of the total project cost is reasonable because it is well below the 74% figure that the steel fabrication industry expects materials to cost when building a steel structure.

ANALYSIS

RCW 82.04.220 imposes a B&O tax on "every person that has a substantial nexus with this state . . . for the act or privilege of engaging in business activities" in Washington. The measure of the tax imposed on persons engaged in public road construction and government contracting business activities is "the gross income of the business multiplied by the rate of 0.484 percent." RCW 82.04.280.

In Washington, all sales of tangible personal property to consumers are subject to retail sales tax unless an exemption or exclusion applies. RCW 82.08.020(1)(a); RCW 82.04.050(1)(a). Washington also imposes a use tax, which complements the retail sales tax by imposing a tax of like amount upon the privilege of using within this state, as a consumer, any article of tangible personal property acquired without payment of retail sales tax. RCW 82.12.020(1)(a); s*ee also* WAC 458-20-178 ("Rule 178").

The definition of "consumer" found in RCW 82.04.190 includes the following:

> Any person engaged in the business of contracting for the building, repairing or improving of any street, place, road, highway, easement, right-of-way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle which is owned by a municipal corporation or political subdivision of the state of Washington or by the United States and which is used or to be used primarily for foot or vehicular traffic including mass transportation vehicles of any kind as defined in RCW 82.04.280, *in respect to tangible personal property when such person incorporates such property as an ingredient or component* of such publicly owned street, place, road, highway, easement, right-of-way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle by installing, placing or spreading the property in or upon the right-of-way of such street, place, road, highway, easement, bridge, tunnel, or trestle or in or upon the site of such mass public transportation terminal or parking facility;

RCW 82.04.190(3) (emphasis added.) RCW 82.04.190 also includes the following definition of "consumer:"

> 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, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW, 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; also, any person engaged in the business of clearing land and moving earth of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW. *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 . . .* ;

RCW 82.04.190(6) (emphasis added).

WAC 458-20-17001 ("Rule 17001"), the Department's administrative rule regarding government contracting, states that use tax is due on:

> 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). Rule 17001 goes on to state that the use tax must be "reported and paid by the government contractor who actually installs or applies the property to the contract. Where the actual installing contractor pays the tax, no further use tax is due upon such property by any other contractor." Rule 17001(9).

Here, Taxpayer was engaged in the business of public road construction and government contracting. As such, pursuant to RCW 82.04.220 and RCW 82.04.280, Taxpayer is liable for B&O tax on the gross income of those business activities. Furthermore, in cases where Taxpayer installed materials on government contracting jobs where such materials were not previously subject to retail sales tax, Taxpayer is responsible for use tax on the value of those materials pursuant to RCW 82.04.190 and Rule 17001. RCW 82.04.190(6); Rule 17001(7), (9).

Taxpayer argues that the records it produced support a further refund of the B&O and use taxes assessed in the two assessments. As such, our analysis turns to whether Taxpayer has met its burden of proving through suitable documentation that it is eligible for such a refund.

RCW 82.32.070 requires every taxpayer liable for the payment of excise taxes to keep and preserve, for a period of five years, suitable records as may be necessary to determine the taxpayer's tax liability. RCW 82.32.070(1); *see also* RCW 82.32A.030(3) ("To ensure consistent application of the revenue laws, taxpayers have certain responsibilities under chapter 82.32 RCW, including, but not limited to, the responsibility to . . . (3) [k]eep accurate and complete business records . . . ."), and Det. No. 08-0116, 27 WTD 228 (2008). The law also requires the person to make those records open for examination at any time by the Department. RCW 82.32.070(1).

WAC 458-20-254 ("Rule 254") is the Department's administrative rule regarding recordkeeping. Rule 254 sets forth specific requirements for maintaining and disclosing to the Department a taxpayer's books, records, and other sources of financial information. Rule 254 provides, in pertinent part, the following:

> (a) **Duty of taxpayer to keep records.** Every taxpayer liable for a tax or fee imposed by the laws of the state of Washington for which the department has primary or secondary administrative responsibility . . . must keep complete and adequate records from which the department can determine the tax liability of the taxpayer.

> It is the duty of each taxpayer to prepare and preserve all records in a systematic manner conforming to accepted accounting methods and procedures. Records are to be kept and preserved and must be presented upon request by the department or its authorized representatives. The records should demonstrate:
>
> > (i) The amounts of gross receipts and sales from all sources, however derived, including barter or exchange transactions, whether or not such receipts or sales are taxable. These amounts must be supported by original source documents or records including but not limited to all purchase invoices, sales invoices, contracts, and such other records as may be necessary to substantiate gross receipts and sales.
> >
> > (ii) The amounts of all deductions, exemptions, or credits claimed through supporting records or documentation required by statute or administrative rule, or other supporting records or documentation necessary to substantiate the deduction, exemption, or credit.
> >
> > (iii) The payment of retail sales tax or use tax on capital assets, supplies, articles manufactured for your own use, and other items used by the taxpayer as a consumer.
> >
> > (iv) The amounts of any refunds claimed. These amounts must be supported by records as may be necessary to substantiate the refunds claimed. Refer to WAC 458-20-229 Refunds, for information on the refund process.
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> (b) **Types of Records.** The records kept, preserved, and presented must include the normal records maintained by an ordinary prudent business person. These records may include general ledgers, sales journals, cash receipts journals, bank statements, check registers, and purchase journals, together with all bills, invoices, cash register tapes, *and other records or documents of original entry supporting the books of account entries*. *The records must include all federal and state tax returns and reports and all schedules, work papers, instructions, and other data used in the preparation of the tax reports or returns*.

Rule 254(3) (emphasis added, bolding in original).

Here, Taxpayer argues that its records support an adjustment of the B&O and use tax liabilities imposed in the two assessments. We disagree. With respect to the B&O tax liability, Taxpayer argues that Audit overstated its income during the Audit Period, however it did not provide suitable documentation regarding the types and amounts of the income it earned during the Audit Period. Audit requested copies of Taxpayer's financial statements for all years included in the Audit Period, as well as Taxpayer's financial software data. Taxpayer only provided its financial statements for 2012 and 2013 and did not provide the financial software data at all. Furthermore, Taxpayer did not provide suitable source documentation to support the financial statements it did provide as required by Rule 254(3)(b). Without supporting records, such as invoices, contracts, bank statements, etc., Audit was unable to determine whether the amounts Taxpayer reported were

accurate. As such, we conclude that Audit correctly denied Taxpayer's request for a refund of the B&O tax included in the First Assessment beyond what was provided in the PAA report.

Taxpayer's argument regarding the use tax assessment fails on the same grounds. Taxpayer argues that it was not responsible for the use tax on the materials it installed in the public road construction and government contracting jobs because it either was not the prime contractor or because retail sales tax had already been paid. The documentation Taxpayer provided does not confirm either argument. Taxpayer failed to provide complete contracts and invoices between itself and other contractors or its customers that may have documented who was responsible for the retail sales or use tax on the subject materials. In that sense, we do not know whether another entity should have paid the tax pursuant to RCW 82.04.190 and Rule 17001. Regardless, we do know that Taxpayer meets the definition of a "consumer" pursuant to RCW 82.04.190 and Rule 17001 because it installed the materials on public road construction and government contracting jobs. As the installing contractor, Taxpayer is liable for the tax unless it can document that the materials were subjected to tax before Taxpayer installed them. *Id.* Taxpayer has not shown that to be the case, therefore we conclude that Taxpayer is liable for use tax on the subject materials.

We also note that even if Taxpayer presented a contract that specified that someone other than Taxpayer was supposed to pay the tax, the records do not establish that the tax was actually paid. Some of the invoices Taxpayer provided indicate that retail sales tax was included in the sales price, but those records alone are insufficient to show that the tax was paid. The reason for this is that contractors often possess reseller permits that allow them to purchase materials without paying retail sales tax. In those cases, an invoice may list retail sales tax, but the contractor may not pay the tax if it presents a reseller permit to the seller. Had Taxpayer provided a cancelled check or bank or credit card statement reflecting that it actually paid the amount on the invoice that included retail sales tax, Audit could have confirmed the tax was paid. Taxpayer also could have provided documents showing that another entity paid the tax before providing the materials to Taxpayer for installation. Taxpayer did not do so and, therefore, we conclude that it has not met its burden of proving through suitable records that it is eligible for a refund of the use tax.

We also find Taxpayer's reliance on Det. No. 88-286, 6 WTD 223 (1988) and Det. No. 89-480, 8 WTD 283 (1989) misplaced. Taxpayer argues that 6 WTD 223 holds that the prime contractor who contracts with the government will be held responsible for use tax, not the subcontractor. However, the prime contractor in that case had already paid use tax on the subject materials. We held that the Department could not assess use tax on the materials a second time with respect to the subcontractor who physically installed the materials on the project. This case is materially different in that we do not know if anyone paid retail sales or use tax on the subject materials. 6 WTD 223 does not hold that only the prime contractor is liable for the tax in all cases; it merely states that a subcontractor will not be held liable if the prime contractor has already paid the tax.

Taxpayer also asserts that 8 WTD 283 holds that a "subcontractor who actually installs material supplied by the prime contractor will not be forced to pay a tax obligation that is properly that of the prime contractor." Present Petitions, pp. 2-3. We disagree. That case dealt with a deferred sales tax liability. The determination included the following discussion of the issue:

> Firstly, the taxpayer refers to the tax assessed on these items as use tax; it was assessed as deferred sales tax, rather than use tax. The terms are often used interchangeably, as the rates are the same, but they are not identical concepts. Sales taxes are generally a liability of the buyer; they are imposed on the transaction, which is the purchase of tangible personal property in Washington. Use taxes are generally the liability of the person using the property, and are imposed on the use of the property in Washington, rather than the purchase, when sales tax was not paid at the time of purchase.

8 WTD 283, at pg. 4.

The taxpayer in that case purchased materials from a supplier for a government contracting job but did not pay sales tax on the items. The taxpayer argued, in part, that the contractor who ultimately installed the items should be held responsible for use tax, instead of the taxpayer owing deferred retail sales tax. We held that the taxpayer was responsible for deferred sales tax because, as the buyer, the taxpayer was responsible for paying retail sales tax on materials that were later used for a government contracting job. When we stated that a "subcontractor . . . will not be forced to pay a tax obligation that is properly that of the prime contractor," we were stating that the subcontractor who installed the materials purchased by the taxpayer could not be held responsible for the taxpayer's deferred sales tax liability, not that a subcontractor can never be held responsible for use tax on materials provided by a prime contractor. Indeed, 8 WTD 283 later states that the "installing contractor is liable for use tax on items it installs if no other contractor has paid sales or use tax on the item." 8 WTD 283, at pg. 6 (emphasis in original). In that sense, the Department could have pursued the subcontractor for use tax because the taxpayer had not paid sales tax on the items.[6] In this case, Taxpayer has not shown that any party paid retail sales tax, deferred sales tax, or use tax. As such, Taxpayer is liable for the use tax because it installed the untaxed items.

Taxpayer also argues that Audit's estimate of the cost of the subject materials is incorrect and should be adjusted. In general, where a taxpayer fails to make available for examination the records required by RCW 82.32.070 and Rule 254, the Department is authorized to estimate a taxpayer's tax liability based on available facts and information. RCW 82.32.100 provides, in part, that "[i]f any person fails or refuses to make any return or to make available for examination the records required by this chapter, the department shall proceed, in such manner as it may deem best, to obtain facts and information on which to base its estimate of the tax . . . ." RCW 82.32.100(1). *See also* Det. No. 16-0218, 36 WTD 063 (2017). Once the Department obtains the facts and information needed, the Department "shall proceed to determine and assess against such person the tax and any applicable penalties or interest due." RCW 82.32.100(2).

RCW 82.32.100 affords the Department wide discretion in the methodology employed to calculate a reasonable estimate of tax. *See* Det. No. 15-0350, 35 WTD 291 (2015) (affirming the Department's authority to assess taxes based on a reasonable estimate and citing Det. No. 14-0106, 33 WTD 402 (2014); Det. No. 13-0302R, 33 WTD 572 (2014); Det. No. 03-0279, 23 WTD (2004); and Det. No. 97-134R, 18 WTD 163 (1999)). An abuse of discretion occurs when a decision rests

[6] Thus, although the subcontractor will not be forced to pay the prime contractor's obligation to pay deferred sales tax, the subcontractor could have been obligated to pay use tax when the sales or deferred sales tax is not paid by the prime contractor.

on untenable grounds or is manifestly unreasonable. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

Here, Taxpayer argues that even if the Department was authorized to estimate Taxpayer's use tax liability, the 40% materials cost figure that Audit used was unreasonable. We disagree. As discussed above, Taxpayer failed to provide sufficient documentation regarding the materials it installed in public road construction and government contracting jobs. Audit sought copies of invoices, receipts, and contracts that would describe the materials, what they cost, and whether Taxpayer or any other party had paid retail sales tax on the items, but Taxpayer did not produce the information. Due to that lack of documentation, Audit did not have any information upon which to calculate the cost of the subject materials. Therefore, Audit was forced to look to an outside source – the AISC – to provide a basis for their estimate. The information provided by AISC suggests that 74% of the costs associated with an average steel construction project are related to materials. In that sense, Audit may have been justified in using a figure even higher than the 40% it used. Because Audit's estimate method was guided by information it obtained from a steel fabrication trade organization and the figure Audit used was less than the estimate that organization referred to, we conclude that Audit's estimate was reasonable.

We have previously held that the Department's authority to make estimates of an individual's tax liability is not exceeded so long as the method used to make the estimate is a "reasonable" one. Det. No. 13-0302R, 33 WTD 572 (2014). We find no evidence that the Audit's estimate abused its discretion. Thus, we conclude that the estimate of Taxpayer's use tax liability in this case was reasonably based on facts and information and falls within the wide discretion granted to the Audit Division under RCW 82.32.100(1) in developing estimates. *See also* Det. No. 12-0136, 32 WTD 65 (2013) (affirming estimate of cash sales for a restaurant based on the industry average sales percentages as reasonable).

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 7th day of December 2021.