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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 and Refund of )	
)	No. 04-0102
)	
... )	Registration No. . . .
)	Document No. . . .
)	Audit No. . . .
)	Docket No. . . .

RULE 254; RCW 82.08.0273, RCW 82.32.070; ETB 316.08.193: RETAIL SALES TAX – NONRESIDENT EXEMPTION – RECORDS. Taxpayers must maintain records required under RCW 82.08.0273 for each nontaxable sale to nonresidents to qualify for that statutory exemption.

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 Washington retailer destroyed records regarding its sales to nonresidents prior to an audit. After the Audit Division assessed retail sales tax on the sales, the taxpayer requested the Department use records from a later period to estimate exempt sales during the assessment period. Because the nonresident exemption statute requires sellers to maintain records, and holds them liable for the tax if they fail to keep the records, the taxpayer must pay the tax if it destroyed the records.<sup>1</sup>

ISSUE

If a retailer destroys records required for the nonresident exemption, is the Department required to accept an estimate of sales to nonresidents based on records kept for later periods?

FINDINGS OF FACT

. . . (taxpayer) operates numerous retail stores in Washington, which sell tangible personal property to consumers. The taxpayer charges retail sales tax on most of its sales, collects the tax, and remits it to the Department of Revenue (Revenue).

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

The taxpayer did not charge sales tax on some sales, particularly numerous sales made in stores close to the Oregon border. The taxpayer states the untaxed sales were made to nonresidents of Washington, and were exempt under RCW 82.08.0273.

The taxpayer explains that if its sales clerks did not charge retail sales tax on a sale, normally the clerks would inspect the purchaser's driver's license and record information regarding the state of residency, expiration date, and identification number with the sale. Every day the stores would mail these records to the taxpayer's out-of-state headquarters. After preparing its tax returns and other financial statements, the taxpayer stored the records in a warehouse. The taxpayer states that it had an unwritten policy of destroying records after three years due to the costs associated with storing them.

In November, 2002, the Department's Audit Division notified the taxpayer it would audit the taxpayer's excise tax returns for the period from January 1, 1999 through September 30, 2002. Because the taxpayer closed registration number . . . effective July 31, 2000, two audits were simultaneously performed, one for the period from January 1, 1999 through July 31, 2000, and a second audit for the period from August 1, 2000 through September 30, 2002.

The Audit Division first notified the taxpayer of the audit by phone on November 8, 2002. On January 6, 2003 the auditor met with the taxpayer's accountant, and performed a general review of the taxpayer's books. On January 7, 2003 the Audit Division took note of the taxpayer's nonresident sales. On January 13, 2003 the Audit Division agreed to block sample three different months of the taxpayer's records for each audit. They agreed the results would be applied to the respective audits. They selected the months of March 1999, November 1999, and June 2000 for the audit of registration number . . . . Two months in 2001 and one in 2002 were used in the audit for the later period.

The taxpayer was unable to provide any records of nonresident sales for 90% of the sampled sales pertaining to the earlier audit period, while the taxpayer provided records supporting all but 10% of the sales sampled in the later period.<sup>2</sup> The taxpayer explains the nonresident documents had been destroyed under their three year record retention policy.<sup>3</sup> Because of the lack of records establishing entitlement to the claimed exemption, the Audit Division assessed \$ . . . sales tax plus interest for the early audit period (1999 – July, 2000).

The taxpayer met with the field audit manager and requested the results of the sample for the subsequent audit period be applied to the audit of the early period. The field audit manager

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<sup>2</sup> While the auditor initially determined in March, 2003 that 86% of the sales in the later period were not documented, after hiring temporary workers to assist in the search, by June, 2003 the taxpayer was able to document 90% of the sales in the subsequent period. The later assessment has not been appealed, and therefore is not directly affected by this determination.

<sup>3</sup> We note that for at least one of the sample months in the earlier assessment period, June 2000, the records should have still been available under the taxpayer's three year retention policy. Likewise, the records for November 1999 should have been retained upon notice of the audit.

checked the taxpayer's prior audit history, and noted that in 1994 the taxpayer had been instructed following an audit to keep documents to support its deductions. The taxpayer states it was unaware of the instructions. Apparently, the taxpayer also destroyed its records of the 1994 audit.

### ANALYSIS

Retail sales tax is imposed upon retail sales. RCW 82.08.020. When the seller makes a retail sale, it is obligated to collect retail sales tax. RCW 82.08.050. When a seller fails to collect the retail sales tax, the seller becomes liable for the tax. RCW 82.08.050.

RCW 82.08.0273 allows an exemption from retail sales tax for sales to nonresidents of tangible personal property for use outside the state. This exemption, like all tax exemptions in Washington, is strictly construed in favor of application of the tax and against the person claiming the exemption. The burden of proof is upon the one claiming the exemption. *Yakima Fruit Growers Ass'n v. Henneford*, 187 Wash. 252, 258, 60 P.2d 62 (1936); *All-State Construction Co. v. Gordon*, 70 Wn.2d 657, 659, 425 P.2d 16 (1967); *Budget Rent-A-Car, Inc. v. Department of Rev.*, 81 Wn.2d 171, 174-75, 500 P.2d 764 (1972).

The nonresident exemption statute, RCW 82.08.0273 provides in part:

- (2)(a) Any person claiming exemption from retail sales tax under the provisions of this section must display proof of his or her current nonresident status as herein provided.
- (b) Acceptable proof of a nonresident person's status shall include one piece of identification such as a valid driver's license from the jurisdiction in which the out-of-state residency is claimed or a valid identification card which has a photograph of the holder and is issued by the out-of-state jurisdiction. Identification under this subsection (2)(b) must show the holder's residential address and have as one of its legal purposes the establishment of residency in that out-of-state jurisdiction.

RCW 82.08.0273(3) also specifically lists the documents vendors must keep for the exemption:

If the vendor chooses to make a sale to a nonresident without collecting the sales tax, the vendor shall, in good faith, examine the proof of nonresidence, determine whether the proof is acceptable under subsection (2)(b) of this section, and maintain records for each nontaxable sale which shall show the type of proof accepted, including any identification numbers where appropriate, and the expiration date, if any.

(Underlining added.)

We first note that RCW 82.08.0273 does not require a vendor to accept a purchaser's claim of exempt nonresident status. That decision is left to the discretion of the vendor. But if the vendor does choose to accept the transaction as exempt, the retailer also accepts certain statutorily

defined responsibilities. These responsibilities are that the vendor must in good faith 1) examine the proof of nonresidence, 2) determine whether the proof is acceptable, and 3) maintain records for each nontaxable sale which shall show the type of proof accepted, including any identification numbers where appropriate, and the expiration date, if any. The vendor must fulfill each of these three responsibilities to perfect the exemption.

RCW 82.32.070 requires taxpayers to keep and preserve records for a period of five years. *See also* WAC 458-20-254 (Rule 254). RCW 82.32.070 bars taxpayers, who fail to maintain the necessary records, from appealing the correctness of tax assessments from which records have not been kept.

In the taxpayer's case, it failed to fulfill its responsibility to maintain records for each nontaxable sale. This statutory requirement under RCW 82.08.0273 must be met to obtain the exemption. While it may be possible to estimate the amount of sales to nonresidents; determining sales to nonresidents is not our issue. Rather, we must determine whether the taxpayer met the third statutory requirement in RCW 82.08.0273: maintaining records for each nontaxable sale to nonresidents. Clearly, the taxpayer failed this requirement. The taxpayer destroyed the very records, which RCW 82.08.0273 required retailers to maintain. RCW 82.08.0273 does not allow a nonresident exemption without records. In fact, RCW 82.08.0273(4)(b) addresses our issue on point:

any vendor who fails to maintain records of sales to nonresidents as provided in this section, shall be personally liable for the amount of tax due.

*See also* Excise Tax Bulletin 316.08.193 (ETB 316).

The taxpayer cites the Board of Tax Appeals Decision in *Bovay Northwest, Inc. v. Department of Rev.* Docket No. 92-14 (1995) as an instance where the Department allowed an additional test period to sample and extrapolate an exempt amount. *Bovay* did not involve determining whether sales met the statutory record requirement for nonresident exemption. Rather, the auditor took a sample in *Bovey* to determine the amount of the purchaser's consumables subject to deferred sales/use tax. The seller's statutory record requirement of RCW 82.08.0273, which our taxpayer fails, was not an issue in *Bovay*.

During the hearing, the taxpayer asked us to consider the language in RCW 82.04.470(2), which allow taxpayers not obtaining resale certificates to otherwise demonstrate facts and circumstances that show that their sales were properly made without charging sales tax:

If a seller does not receive a resale certificate at the time of the sale, have a resale certificate on file at the time of the sale, or obtain a resale certificate from the buyer within a reasonable time after the sale, the seller shall remain liable for the tax as provided in RCW 82.08.050, unless the seller can demonstrate facts and circumstances

according to rules adopted by the department of revenue that show the sale was properly made without payment of sales tax.

RCW 82.04.470 applies to a sale for resale, which RCW 82.04.050 excepts from the definition of retail sale, not sales to nonresidents exempt under RCW 82.08.0273. Taxpayers primarily purchasing property for resale (and consuming the same type of property) may document purchases with a single resale certificate, then account for the articles consumed. Rule 102 (WAC 458-20-102) describes how both sellers and purchasers of goods for resale should document and account for resale purchases. Resale certificates may apply to multiple transactions. Rule 102(2)(a). Resale certificate and Rule 102 documentation requirements simply are not applicable to documenting other retail sales tax exemptions. *See* Rule 102(4).

RCW 82.08.0273 does not contain language comparable to the facts and circumstance language in RCW 82.04.470(2). RCW 82.08.0273 expressly requires sellers to maintain records for each nontaxable sale. RCW 82.08.0273(4)(b) mandates the consequence of failing to maintain records, “. . . any vendor who fails to maintain records of sales to nonresidents as provided in this section, shall be personally liable for the amount of tax due.” We lack the authority to allow the taxpayer this exemption when it fails to maintain the records required for the exemption.

#### DECISION AND DISPOSITION

We deny the taxpayer’s petition.

Dated this 6<sup>th</sup> day of May 2004.