

Cite as Det. No. 15-0284, 34 WTD 595 (2015)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

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| 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. 15-0284 |
| |) | |
| ... |) | Registration No. . . . |
| |) | |

[1] RULE 102; RCW 82.32.291: PENALTY – MISUSE OF RESELLER PERMIT – OUT-OF-STATE PICK-UP. The penalty for the misuse of a reseller penalty is not applicable to products not subject to sales tax when the purchaser picked-up the products at an out-of-state location.

[2] RULE 102; RCW 82.32.291: PENALTY – MISUSE OF RESELLER PERMIT – ELECTRONIC DATABASE. The penalty for the misuse of a reseller penalty is applicable to retail sales of products in Washington when the buyer was unable to provide evidence that its vendors did not previously use electronic means to look up the purchaser’s reseller permit.

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 company that provides communication services, and designs voice and data networks, appeals a penalty for misuse of its reseller permit. Some of the company’s vendors delivered products to the company at out-of-state locations, and did not charge the company sales tax, while others did not charge sales tax after they obtained the company’s reseller permit. We uphold the penalty assessed on sales of deliveries into Washington from vendors that may have obtained the company’s reseller permit. However, the penalty was not applicable to products the company picked up at out-of-state locations, and later brought into Washington. We grant the petition in part, deny it in part, and remand the assessment for adjustment.¹

ISSUES

1. Under RCW 82.32.291, was a penalty for misuse of the buyer’s reseller permit applicable to [out-of-state] purchases upon which use tax was assessed?

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

2. Under RCW 82.32.291, was a penalty for misuse of its reseller permit on retail sales in Washington applicable when the buyer was unable to provide evidence that its vendors did not obtain the buyer's reseller permit electronically from the Department of Revenue's database?

FINDINGS OF FACT

[Taxpayer] is a Washington company that provides communication services, and designs voice and data networks. The taxpayer obtained a reseller's permit from the Department of Revenue (Department).

The Department's Audit Division audited the taxpayer for the period of January 1, 2009 through December 31, 2012 with the objective of verifying that the taxpayer's business activities and transactions were properly reported on its excise tax returns. As a result, on October 2, 2013, the Audit Division issued the assessment (Document No. . . .).² After the taxpayer provided additional records, the Audit Division agreed to revise the assessment in a post audit adjustment (PAA). The PAA reduced the assessment to \$. . . due on April 7, 2014. The taxpayer and the Audit Division agree to the adjustments. The only issue is the 50% penalty for misuse of the taxpayer's reseller permit. As adjusted, that penalty totals \$. . . , and applies to the taxpayer's purchases in the years 2010 through 2012 from five vendors:³ The taxpayer contends that the penalty should be removed entirely.

The five vendors did not charge the taxpayer retail sales tax on its purchases of goods used in its business.⁴ Each vendor is a large international company and the taxpayer made multiple purchases from each vendor during the audit period. By the end of the audit period, each vendor was registered with the state of Washington. The Audit Division assessed use tax and/or deferred sales tax on the taxpayer's purchases from the five vendors and then assessed a 50% penalty for misuse of the taxpayer's reseller permit on the use tax and/or deferred sales tax assessed.

The taxpayer states that it does not recollect providing its reseller permit to any of the vendors, and states that it did not represent that the purchases were made for resale, and thus exempt from sales tax. It does not know whether the vendors obtained the permit electronically through the Department's database.

The taxpayer agrees that products it purchased from [Vendor 1], which were delivered by common carriers to the taxpayer in Washington, were subject to retail sales tax. However, the taxpayer states that it picked up some of [Vendor 1's] products at [Vendor 1's] [out-of-state] store, and those purchases were not subject to Washington retail sales tax, but were subject to Washington use tax when brought into Washington. The taxpayer provided copies of [Vendor 1's] invoices. The invoices noted in the routing box which products were delivered to the taxpayer in Washington, and those products that the taxpayer picked up [out-of-state]. Because

² The original assessment totaled \$

³ From workpaper F in the original assessment, adjusted in the PAA.

⁴ See Schedules 5A and 5B, which assessed use tax and deferred sales tax on purchases of capital assets and consumables. Workpaper F lists hundreds of purchases.

the misuse of reseller permit penalty applies only to sales tax, the taxpayer contends that the “picked-up” product purchases [out-of-state] subject to use tax should not have been included in the measure of the 50% penalty.

The majority of the taxpayer’s purchases subject to deferred sales tax were from [Vendor 2]. After the penalty was assessed, the taxpayer contacted [Vendor 2] and was told [Vendor 2] did have the taxpayer’s reseller permit on file, and therefore, did not charge the taxpayer retail sales tax. The taxpayer was unable to determine how [Vendor 2] obtained a copy of the reseller permit.

The taxpayer states that when it began purchasing products from [Vendor 3], [Vendor 3] was not registered with the Department. [Vendor 3] registered on December 14, 2009, long after the taxpayer had become a frequent customer. The taxpayer did not become aware that [Vendor 3] was registered until the audit. The taxpayer reasons that because it did not know [Vendor 3] was registered, it was unaware that it should pay retail sale tax to [Vendor 3]. The taxpayer did not pay use tax when it received the goods in Washington. We do not have evidence that products purchased from [Vendor 3] were delivered outside of Washington.

The taxpayer does not explain why [Vendor 4] and [Vendor 5] did not charge it retail sales tax. [Vendor 5] registered with the Department on March 4, 1999. [Vendor 4] registered with the Department on March 14, 2007. The taxpayer contends that it never provided [Vendor 4] or [Vendor 5] reseller permits.

The taxpayer does not dispute the taxes assessed, only the reseller permit misuse penalty computed at 50% of the use tax/deferred sales tax assessed on purchases from [Vendor 1’s] [out-of-state] store, and on products delivered to the taxpayer in Washington from the five vendors, when the taxpayer states it did not provide the vendors a copy of its reseller permit.

ANALYSIS

The Audit Division concluded that the taxpayer improperly used its reseller permit, and assessed a 50% penalty under RCW 82.32.291, which provides in part:

(1) Except as otherwise provided in this section, if any buyer improperly uses a reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 to purchase items or services at retail without payment of sales tax that was legally due on the purchase, the department must assess against that buyer a penalty of fifty percent of the tax due, in addition to all other taxes, penalties, and interest due, on the improperly purchased item or service.

...

(3) A buyer that purchases items or services at retail without payment of sales tax legally due on the purchase is deemed to have improperly used a reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 to purchase the

items or services without payment of sales tax and is subject to the penalty in subsection (1) of this section if the buyer:

(a) Furnished to the seller a reseller permit number, a reseller permit or copy of a reseller permit, or other documentation authorized under RCW 82.04.470 to avoid payment of sales tax legally due on the purchase; or

(b) Made the purchase from a seller that had previously used electronic means to verify the validity of the buyer's reseller permit with the department and, as a result, did not require the buyer to provide a copy of its reseller permit or furnish other documentation authorized under RCW 82.04.470 to document the wholesale nature of the purchase. In such cases, the buyer bears the burden of proving that it did not improperly use its reseller permit to make the purchase without payment of sales tax.

The “goal in statutory interpretation is to effectuate the legislature’s intent.” *Burns v. City of Seattle*, 161 Wn.2d 129, 140, 164 P.3d 475 (2007). When a statute’s meaning is “plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). “[A]ll that the Legislature has said in the statute and related statutes” should be part of the plain language analysis. *Id.* at 11. “Language is unambiguous only when it is not susceptible to two or more reasonable interpretations.” *State v. Delgado*, 148 Wn.2d 723, 726-27, 63 P.3d 792 (2003). However, “a statute is not ambiguous merely because different interpretations are conceivable.” *State v Hahn*, 83 Wn. App. 825, 831, 924 P.2d 392 (1996).

A. January through June 2010

The sales in question were all made after January 1, 2010, when reseller permits replaced resale certificates to document wholesale sales. The reseller permit penalty statute, RCW 82.32.291, was amended twice during the audit period. The statute was initially amended in Laws of 2009, ch. 563, § 212, effective January 1, 2010. The statute was subsequently amended in 2010, effective July 1, 2010, and the amendment applies prospectively only. Laws of 2010, ch. 112, §§ 12, 17. The above cited language comes from this later amendment.

Thus, during the first six months of 2010, the issue of whether a taxpayer misused a reseller permit and is subject to a penalty should be analyzed under the version of RCW 82.32.291 that was in effect from January 1, 2010 through June 30, 2010:

Any person who uses a seller’s permit to purchase items or services without payment of sales tax, or who uses a uniform exemption certificate developed by the multistate tax commission or approved by the streamlined sales and use tax agreement governing board to claim a purchase for resale exemption, and who is not entitled to use the seller’s permit or exemption certificate for the purchase shall be assessed a penalty of fifty percent of the tax due, in addition to all other taxes, penalties, and interest due, on the improperly purchased item or service. . . .

(Emphasis added). Under this version of RCW 82.32.291 applicable for the first half of 2010, the taxpayer's purchases subject to retail sales tax where the taxpayer *used* its reseller's permit were subject to the 50% penalty. Because we cannot tell from Audit's schedules and workpapers how many of the sales at issue were assessed the misuse of reseller permit penalty during this period, we remand the issue to Audit. On remand, if Audit has evidence that the taxpayer used its permit during this time frame for taxable purchases, the 50% would be properly imposed. If it does not have evidence of such use, the penalty does not apply under the prior version of the statute.

B. July 2010 through December 2012

RCW 82.32.291 applies to situations where a purchaser failed to pay sales tax on a purchase when it misused its reseller permit to do so. RCW 82.32.291 does not mention use tax. Washington's retail sales tax imposes tax on retail sales of tangible personal property in this state. RCW 82.08.020; RCW 82.04.040. Sales take place in Washington when buyers take delivery in Washington. *Id.*; *see also* WAC 458-20-103. When the taxpayer picked the products up [out-of-state], Washington retail sales tax was not due; rather, use tax was due when the taxpayer brought the products into Washington. *See* RCW 82.12.020 and WAC 458-20-178. Because the taxpayer picked up \$. . . of the [Vendor 1] products at [Vendor 1's] [out-of-state] store, those purchases were not subject to Washington sales tax, but rather use tax when the taxpayer brought them into Washington. The sale occurred outside of Washington, and there is no reason for the taxpayer to furnish a reseller permit or for the seller to look one up. The penalty under RCW 82.32.291 was inapplicable to these purchases.

Our second issue pertains to the misuse of reseller permit penalty on purchases of products delivered to the taxpayer in Washington, when the taxpayer states that it did not misuse its reseller permit to obtain the products. RCW 82.32.291(1) requires the imposition of the penalty "if any buyer improperly uses a reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 to purchase items or services at retail" This clause provides that the buyer must improperly use the certificate for the penalty to apply.

A buyer is deemed to have improperly used a reseller permit "when the buyer purchases items or services at retail without payment of sales tax legally due on the purchase . . ." under RCW 82.32.291(3). However, the statute then clearly explains that this deemed misuse of the reseller permit only applies "if the buyer" misuses the permit. Under subsection RCW 82.32.291(3), buyers are deemed to have improperly used their permit under two circumstances, set forth in RCW 82.32.291(3)(a) and (3)(b). Buyers must either, under (a), furnish, "the seller a reseller permit number, a reseller permit or copy of a reseller permit, or other documentation . . . ;" or (b) "purchase from a seller that had previously used electronic means to verify the validity of the buyer's reseller permit with the department and, as a result, did not require the buyer to provide a copy of the reseller permit . . ." RCW 82.32.291(3). There is no evidence that the taxpayer misused its permit under RCW 82.32.291(3)(a); therefore, we must consider whether the taxpayer misused its permit under RCW 82.32.291(3)(b).

RCW 82.32.291(3)(b) addresses the situation where a taxpayer who is the purchaser failed to disclose the true nature of the purchase to the seller who previously used electronic means to verify the taxpayer's reseller permit. In such a situation, the seller would be selling property under the false assumption that the sale is for resale in the regular course of business. For imposition of the penalty under RCW 82.32.291(3)(b), "the buyer bears the burden of proving that it did not improperly use its reseller permit to make the purchase without payment of sales tax." WAC 458-20-102 adds the following about this burden:

[T]he buyer bears the burden of proving that the purchases made without payment of sales tax were qualified purchases or the buyer remitted deferred sales tax directly to the department. The buyer not realizing that sales tax was not paid at the time of purchase is not a reason for waiving the penalty.

WAC 458-20-102(9)(a)(ii). This provision also requires the taxpayer to show that its vendor did not previously look up its reseller permit information electronically under RCW 82.32.291(3)(b). Unless otherwise mandated by statute or due process principles, Washington applies the preponderance of evidence standard in administrative proceedings. *Nguyen v. Dep't of Health Medical Quality Assurance Comm'n*, 144 Wn.2d 516, 535, 29 P.3d 689 (2001); citing *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 797, 982 P.2d 601 (1999). Because the legislature did not specify the burden of proof that is required for RCW 82.32.291(3)(b), we conclude that the burden is on the taxpayer to prove that its vendors did not previously look up its permit by a preponderance of the evidence.

In this case, under RCW 82.32.291(3)(b), if the vendors previously used electronic means to verify the taxpayer's reseller permit and did not charge retail sales tax on the current sales, the penalty would apply.⁵ Therefore, for this provision to apply, the vendors would have to have a previous selling relationship with the taxpayer. *Id.* In this case, it appears that the taxpayer had previous purchasing relationships with all of the five vendors at issue. It made multiple purchases from each vendor. However, we do not know whether it made purchases from the vendors before the audit period. The taxpayer claims that it did not provide its reseller permit to any of these vendors. However, upon being contacted, the taxpayer's most frequent vendor explained that it did have a copy of the taxpayer's reseller permit.

Because the taxpayer has not provided evidence that the vendors did not previously use electronic means to check the taxpayer's permit, we find that the penalty applies under RCW 82.32.291(3)(b). It is the taxpayer's burden to show that these vendors, from whom it regularly purchased items at retail without paying retail sales tax, did not previously use electronic means to look up the taxpayer's reseller permit. The taxpayer has not met that burden here. The taxpayer has also not established its burden to show that the sales were either qualified purchases or that deferred sales tax was paid. Therefore, we conclude that for products delivered to the taxpayer in Washington, including purchases picked up by the taxpayer at the vendors' Washington stores, the Audit Division properly applied the misuse of reseller penalty.

⁵ In January of 2010, before the language of RCW 82.32.291(3)(b) was added to the statute, the Department added reseller permit information to its electronic Business Records Database, meaning that, as of that date, taxpayers could look up on the Department's website whether a business had a reseller permit. The Department later added other ways that a taxpayer could electronically look up a business' reseller permit.

DECISION AND DISPOSITION

We grant the taxpayer's petition in part, and deny it in part. We remand the assessment to the Audit Division for adjustment consistent with this determination.

Dated this 23rd day of October, 2015.