

Cite as Det. No. 14-0253, 34 WTD 382 (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. 14-0253 |
| |) | |
| ... |) | Registration No. ... |
| |) | |

[1] RCW 82.08.998 – Retail Sales Tax Exemption – Weatherization Materials: Subcontractor’s sales of weatherization materials to a Department of Commerce weatherization program contractor, when such materials became components of residences and were used in the weatherization of homes pursuant to the Department of Commerce’s weatherization assistance program under RCW 70.164, were exempt from retail sales tax.

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.

Anderson, A.L.J. – A contractor, specializing in electrical and weatherization work, appeals an assessment of use/deferred retail sales tax on materials used in weatherizing residences for the County Housing Authority under a weatherization program administered by the Washington State Department of Commerce, asserting all such items are exempt from use/deferred retail sales tax pursuant to RCW 82.08.998 and RCW 82.12.998. Petition granted.¹

ISSUE

Whether the retail sales tax exemption in RCW 82.08.998 for sales of tangible personal property used in the weatherization of a residence under the weatherization assistance program under chapter 70.164 RCW applies to a subcontractor’s sales of weatherization materials to a Commerce Department contractor.

FINDINGS OF FACT

[Taxpayer] is a contractor specializing in electrical and weatherization construction work. It helps customers maximize energy savings and improve light quality. During the period at issue, Taxpayer did a substantial amount of work for the [County Housing Authority]. Much of Taxpayer’s work for the [County Housing Authority] was the weatherization of residences

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

pursuant to the Washington State Department of Commerce's (the "Department of Commerce's") Weatherization Program.²

Although the Department of Commerce runs the Weatherization Program, it does not weatherize houses directly and contracts with local agencies for the weatherization of qualifying homes and apartments. The Department of Commerce Weatherization Manual provides, "Local agencies may subcontract labor and installation services in accordance with procurement standards described in Commerce's *General Terms and Conditions*, and subject to Commerce's approval of plans provided in the local agency's General Weatherization Work Plan." Department of Commerce Weatherization Manual, Section 8.4 Subcontracting, A. Policy.³

The [County Housing Authority] is the local agency/weatherization contractor providing weatherization services to low income residents in . . . County . . . and, in doing such work, hires subcontractors to perform the actual weatherization work.⁴ [County Housing Authority] will solicit bids from subcontractors for the performance of such weatherization through issuing a competitive Request for Proposals ("RFP"). As relevant here, the [County Housing Authority's] RFP for Weatherization states as follows:

...

[As relevant here, the County Housing Authority's RFP for Weatherization has a section devoted to the payment of sales tax. The RFP states that RCW 70.164 provides a retail sales tax exemption for weatherization materials - tangible personal property - installed in qualifying residences, pursuant to the Low-Income Weatherization Program, and the RFP goes on to provide examples of qualifying weatherization materials. However, the RFP states that charges for labor and services used to install such materials are subject to retail sales and use tax. As a result, the RFP requires contractors to break each unit price into materials and labor/overhead/profit components, so that the County Housing Authority can clearly see the costs subject to retail sales tax because the County Housing Authority will not pay retail sales tax on exempt materials.]

Taxpayer was selected as a subcontractor through such a competitive bidding process to perform the weatherization of qualifying residences for the [County Housing Authority] during the period at issue. It purchased all [County Housing Authority] job materials using a reseller permit and did not pay retail sales tax at the times of purchases. The [County Housing Authority] would inform Taxpayer if the job qualified for the weatherization program and instruct Taxpayer to separately invoice materials that became a component part of the residence and to not charge retail sales tax on such materials. For later periods, Taxpayer produced an exemption certificate from the [County Housing Authority] as to such materials. If the job qualified for the

² "Weatherization is adding insulation, sealing cracks, and making other changes that reduce heat loss, save you money on heating bills and make your home or apartment healthier. The federal government and Washington State offer weatherization programs, which Commerce runs, for qualified low-income household." <http://www.commerce.wa.gov/Programs/services/weatherization/Pages/default.aspx> (July 22, 2014).

³ <http://www.commerce.wa.gov/Programs/services/weatherization/Pages/WeatherizationTechnicalDocuments.aspx> (August 7, 2014).

⁴ . . . (July 22, 2014).

weatherization program, Taxpayer did not collect and remit retail sales tax with respect to such job materials but did collect and remit retail sales tax on the labor.

The Washington State Department of Revenue's (the "Department's") Audit Division ("Audit") reviewed Taxpayer's books and records from January 1, 2011 through June 30, 2012 (the "Audit Period"). . . . On June 4, 2013, Audit issued an assessment against Taxpayer, for the Audit Period, in the amount of \$. . . , consisting of \$. . . in retail sales tax, \$. . . in service and other activities business and occupation ("B&O") tax, \$. . . in government contracting B&O tax, a credit of \$. . . in retailing B&O tax, a credit of \$. . . in wholesaling B&O tax, \$. . . in use tax/deferred retail sales tax, \$. . . in reseller permit misuse penalty (assessed only with respect to the \$. . . in use tax/deferred retail sales tax), and \$. . . in interest.

Taxpayer appeals the assessments of \$. . . in use tax/deferred retail sales tax and \$. . . in reseller permit misuse penalty. It asserts that the Department improperly assessed use tax/deferred retail sales tax on job materials – bathroom vents, fans, and heat exhaust systems – used in weatherizing residences for the [County Housing Authority] pursuant to the Department of Commerce's Weatherization Program. Taxpayer asserts such items are exempt from tax pursuant to RCW 82.08.998 and RCW 82.12.998.

Audit does not dispute Taxpayer's contention that job materials were used to weatherize qualifying homes and apartments pursuant to the Department of Commerce's Weatherization Program, as administered by the [County Housing Authority]. However, Audit cites to *Special Notice: Sales and Use Tax Exemption for the Weatherization Assistance Program*, originally issued May 22, 2008 and reissued August 4, 2009, which states as follows:

Taking the Exemption

Only the Commerce Department's weatherization program contractors are eligible for the exemption. When purchasing qualifying materials, a qualified Commerce Department contractor must provide a completed *Buyers' Retail Sales Tax Exemption Certificate*. . . .

Audit contends that Taxpayer is not a weatherization program contractor and not eligible for an exemption from retail sales or use tax on such materials.

ANALYSIS

RCW 82.08.020 imposes a retail sales tax on each retail sale in Washington. RCW 82.08.020(1). The tax is to be paid by the buyer to the seller. RCW 82.08.050. As relevant here, with respect to construction, the term "retail sale" includes the sale or charge made for tangible personal property consumed and/or for labor and services rendered in the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers. RCW 82.04.050(2)(b); WAC 458-20-170. WAC 458-20-170 explains that prime contractors, who are persons performing construction for consumers, are making retail sales. Subcontractors, who perform construction activity for prime contractors, are engaging in wholesaling activity (sales for resale). Purchases by prime contractors and subcontractors of materials, which become part of the structure being built or improved, are purchases for resale, and not subject to the retail sales tax. RCW 82.04.050(1)(a)(i). All sales

are retail unless a taxpayer can show an exemption applies, e.g., by providing an exemption certificate. RCW 82.04.470; WAC 458-20-102.

. . . Taxpayer asserts that it was told by the [County Housing Authority] that such materials purchases were exempt from retail sales tax as materials incorporated in the weatherization of residences pursuant to the Department of Commerce's weatherization assistance program. Taxpayer cites RCW 82.08.998 and RCW 82.12.998 in support of its assertion that Audit has incorrectly assessed deferred retail sales/use tax on the weatherization materials.

In 2008, the Washington State Legislature passed a retail sales tax and use tax exemption for tangible personal property used in the weatherization of residences pursuant to the Department of Commerce's weatherization assistance program. RCW 82.08.998, RCW 82.12.998. Both exemptions became effective June 12, 2008, and provide, in pertinent part, that the tax imposed under the respective chapters [82.08 RCW and 82.12 RCW] does not apply to sales/the use, ". . . of tangible personal property used in the weatherization of a residence under the weatherization assistance program under chapter 70.164 RCW. (Chapter 70.164 RCW establishes the Department of Commerce's Weatherization Assistance Program.) The exemption only applies to tangible personal property that becomes a component of the residence." 2008 c 92 § 1, 2; RCW 82.08.998(1); RCW 82.12.998(1). "'Residence' and 'weatherization' have the meanings provided in RCW 70.164.020." RCW 82.08.998(3); RCW 82.08.998(2). And, the exemption from retail sales tax requires a buyer to provide the seller with an exemption certificate in the form and manner prescribed by the Department. RCW 82.08.998(2).

[The exemption provided by RCW 82.08.998 applies here because (1) the items at issue did, in fact, become "components of the residence," as required by RCW 82.08.998,⁵ and (2) those items were, in fact, used in the weatherization of "the weatherization assistance program under RCW 70.164" as required by RCW 82.08.998(2).] Accordingly, we conclude that Audit erred in assessing use tax/deferred retail sales tax on job materials used in weatherizing qualifying residences for the [County Housing Authority] pursuant to the Department of Commerce's Weatherization Program, and remand for adjustment.

DECISION AND DISPOSITION

Taxpayer's petition is granted.

Dated this 7th day of August, 2014.

⁵ [As opposed to materials or property consumed by the contractor in the course of providing weatherization services.]