

of students enrolled that reside [out of state], but commute to Washington to attend classes. Taxpayer has a bookstore on site where students purchase class materials, including text books.

In 2014, the Department's Audit Division conducted a review of Taxpayer's books and records for the period of January 1, 2010 through December 31, 2013 (audit period). During its review, the Audit Division found a deficiency in Taxpayer's records of purported nonresident sales where it did not charge retail sales tax. Specifically, the Audit Division found that Taxpayer's log of sales to "[Out of state] Residents" in all instances failed to record expiration dates of the identification examined.

On May 13, 2014, as a result of the Audit Division's findings, the Department issued a tax assessment for \$. . . , which included \$. . . in uncollected retail sales tax, \$. . . in use tax and/or deferred sales tax, and \$. . . in interest. In addition, the Audit Division issued future reporting instructions to Taxpayer, stating the following:

[T]he deduction for sales to qualified nonresidents does not apply to articles sold to nonresident students attending schools in this state. Therefore, nonresident students should no longer be given the retail sales tax exemption provided in RCW 82.08.0273.

Taxpayer timely appealed the tax assessment and the future reporting instructions.

ANALYSIS

1. Adequacy of Records for Nonresident Sales

Generally, retail sales tax is imposed upon all retail sales. RCW 82.08.020. When a 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, however, allows an exemption from retail sales tax for sales of tangible personal property to nonresidents for use outside the state. We note that exemptions are strictly construed in favor of application of the tax and the burden of proof is on the person claiming the exemption. *Budget Rent-A-Car, Inc. v. Dep't of Revenue*, 81 Wn.2d 171, 174-175, 500 P.2d 764 (1972). The nonresident exemption statute, RCW 82.08.0273, provides, in part:

(3)(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(4)(a) specifically lists the documents sellers must keep to substantiate a sale is qualified for this exemption:

Nothing in this section requires the vendor to make tax exempt retail sales to nonresidents. A vendor may choose to make sales to nonresidents, collect the sales tax, and remit the amount of sales tax collected to the state as otherwise provided by law. 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.**

(Emphasis added). As indicated above, RCW 82.08.0273(4)(a) specifically provides that a seller is not required to make tax-exempt sales to nonresidents; that decision is left to the discretion of the seller. But if the seller does choose to accept the transaction as exempt, the seller also accepts certain statutorily-defined responsibilities to do all of the following: (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 and expiration dates. RCW 82.08.0273(4)(a). The seller must fulfill all of these responsibilities to qualify the sale as exempt from retail sales tax.

The Department has issued Excise Tax Advisory 3054.2011 (ETA 3054), which is an interpretive statement that applies the statutory language and contains the following specific instructions to sellers who choose tax-exempt sales to nonresidents pursuant to RCW 82.08.0273:

Instructions to sellers

Sellers making exempt sales to eligible nonresidents must:

1. Examine one piece of identification that establishes proof of nonresidency. The identification must be a valid driver's license issued by the jurisdiction in which the out-of-state residency is claimed or a valid identification card issued by the out-of-state jurisdiction. The identification must A) bear the photograph of the holder B) show the holder's residential address, C) identify the holder's name, and D) be issued for the purpose of establishing residency.
2. Maintain a record of the type of documentation accepted as establishing nonresidency in (1) immediately above, including identification numbers, **expiration dates**, the purchaser's name, and the purchaser's state of residency.
3. Record the documentation accepted as establishing nonresidency on the invoice or other written evidence of sale and retain the information or maintain a legible photocopy of the documentation establishing nonresidency as part of the seller's accounting records for the statutory period of five years (refer to RCW 82.32.070). In the case of a seller making cash sales without issuing invoices (for example, retail hardware stores) and maintaining a log, such a log must identify the date and amount of sale, and the information described in (2) immediately above or in the case of corporate nonresidents the corporate nonresident permit number.

...

(Emphasis added). Here, Taxpayer failed to maintain the expiration date of the nonresident identification presented. We have previously held that a taxpayer must fulfill all of the records requirements in RCW 82.08.0273(4)(a) and ETA 3054 in order to be relieved of the duty to

collect retail sales tax on nonresident sales. *See* Det. No. 13-0249, 33 WTD 29 (2014); Det. No. 12-0134, 32 WTD 128 (2013).

Taxpayer argued on appeal that by including customers' signatures in its records, such signatures indicated that those customers were attesting to the validity of their current nonresident status. Taxpayer also argued that while its records did not include the expiration date, Taxpayer believed its inclusion of customers' signatures in its log, and its inclusion of all other required information in those logs demonstrated substantial compliance with RCW 82.08.0273. We conclude that there is no provision in RCW 82.08.0273 allowing for "substantial compliance" with the requirements of that statute. Indeed, we conclude that the statute has specific requirements that must be met, and states specifically that "[a]ny vendor who makes sales without collecting the tax and who fails to maintain records of sales to nonresidents as provided in this section is personally liable for the amount of tax due." RCW 82.08.0273(6)(a); Det. No. 13-0249, 33 WTD 29(2014).

RCW 82.08.0273 clearly identifies the required steps any seller must satisfy in order to be relieved of the duty of collecting retail sales tax on behalf of the state. We conclude that Taxpayer failed to fulfill its responsibility to maintain the records required by RCW 82.08.0273(4)(a) and ETA 3054, and its compliance with the certain requirements cannot excuse Taxpayer's noncompliance with another requirement.² Therefore, we must conclude that, based on Taxpayer's records, it was not entitled to avoid collecting retail sales tax from its customers on any sales at its bookstore during the audit period.

2. Future Reporting Instructions

RCW 82.08.0273 provides an exemption from retail sales tax on sales to nonresidents of tangible personal property when that property is purchased "for use outside this state." RCW 82.08.0273(1) provides the following requirements to qualify for this exemption:

- (b) The purchaser is a bona fide resident of a province or territory of Canada or a state, territory, or possession of the United States, other than the state of Washington; and
 - (i) Such state, possession, territory, or province does not impose, or have imposed on its behalf, a generally applicable retail sales tax, use tax, value added tax, gross receipts tax on retailing activities, or similar generally applicable tax, of three percent or more; or
 - (ii) If imposing a tax described in (b)(i) of this subsection, provides an exemption for sales to Washington residents by reason of their residence; and
- (c) The purchaser agrees, when requested, to grant the department of revenue access to such records and other forms of verification at his or her place of residence to assure that **such purchases are not first used substantially in the state of Washington.**

(Emphasis added.) *See also* ETA 3054. Although the term "substantially" is not defined by statute, courts in Washington have defined it in the following manner:

² [We note that, in this case, Taxpayer similarly failed to provide evidence that it met either of the alternative methods in RCW 82.08.0273(4)(b) or (4)(c) to qualify for exempt sales to nonresidents in RCW 82.08.0273.]

‘Substantial’ as an adjective means something worthwhile as distinguished from something without value, or merely nominal. Webster's New International Dictionary. 3 Bouvier's Law Dictionary (3d Ed.).

In re Krause's Estate, 173 Wash. 1, 8, 21 P.2d 268 (1933).

ETA 3054 identifies certain sales that are by their nature treated as first substantially used in Washington:

The exemption also does not apply to sales of articles substantially used or consumed within Washington. This includes, but is not limited to, sales of:

- Meals or refreshments prepared for immediate consumption.
- Articles to persons in the military stationed within Washington.
- **Articles to nonresident students attending schools in this state.**
- Articles to any other nonresident temporarily residing in Washington.

(Emphasis added). Based on the language in RCW 82.08.0273 and ETA 3054, the Audit Division issued future reporting instructions to Taxpayer advising it that the exemption does not apply to articles purchased by nonresident students at Taxpayer's bookstore.

ETA 3054 provides a nonexclusive list of articles that are considered to be purchased for use or consumption in Washington. For instance, by its nature, food “prepared for immediate consumption” is likely consumed soon after purchase, and if such food is purchased in Washington, it is reasonable to conclude that it is also consumed within Washington. Similarly, it is reasonable to conclude that nonresident students attending school in Washington use their textbooks and other course materials in Washington to some degree while attending classes here. Taxpayer acknowledged that its campus includes classrooms, a library, labs, and other common areas where students may study and otherwise use their course materials while in Washington. We conclude that any material use in Washington, whether in a library, in a class, or in discussion with other students on Taxpayer's campus, is not merely “nominal” use, and would therefore constitute “substantial” use in Washington.

Taxpayer argued on appeal that notwithstanding the language in RCW 82.08.0273 and ETA 3054, its nonresident students “substantially use” their textbooks and other course materials [out of state] as opposed to Washington, and, therefore, the exemption still applied to such sales. Taxpayer argued that it is a “commuter” school in which its nonresident students generally reside [out of state] and only cross the border to attend classes. According to Taxpayer, it follows that those nonresident students use their textbooks and other course materials to study from their homes [out of state] more so than using those textbooks and course materials on Taxpayer's campus in Washington. To clarify, the test for determining whether the use is “substantial” in Washington is not a “majority use” test requiring a determination of where the article is used the majority of the time. As discussed above, “substantial” use is only some use that is more than “nominal” use. Accordingly, even if a student mostly uses the textbooks and other course materials outside Washington, retail sales tax would still be due on the purchase in Washington because, as discussed above, the use of such articles by a nonresident student attending school in Washington is still “substantial.”

We conclude that ETA 3054 provides a reasonable application of the statutory language by treating the sale of such articles to nonresident students as being subject to tax in Washington,

and served as a proper basis for the future reporting instructions. We further conclude, based on the evidence before us, that it is reasonable to conclude that nonresident students attending school in Washington substantially use their textbooks and other course materials in Washington, and the sale of such articles are, therefore, subject to retail sales tax. As such, we affirm the future reporting instructions issued by the Audit Division and conclude they are consistent with ETA 3054.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 9th day of October, 2014.