

Cite as Det No. 12-0134, 32 WTD 128 (2013)

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 of)	
)	No. 12-0134
)	
....)	
)	Registration No. . . .
)	Document No. . . . /Audit No. . . .
)	
)	Docket No. . . .
)	

[1] RCW 82.08.020; RCW 82.08.0273: RETAIL SALES TAX – EXEMPTION FOR SALES TO NONRESIDENTS FOR USE OUTSIDE OF WASHINGTON. Retailer is liable for retail sales tax on sales to alleged nonresidents because it failed to maintain records to establish the purchasers’ residency.

[2] RULE 254; RCW 82.32.070: RETAIL SALES TAX – DOCUMENTATION SHOWING PAYMENT OF RETAIL SALES TAX. A purchaser of retail construction services is not subject to retail sales tax when it can show through invoices and other documentation that the contractor collected retail sales tax that it remitted to the Department of Revenue.

[3] RULE 228; RCW 82.32.105(3): WAIVER OF INTEREST. The Department of Revenue does not have the authority to waive interest assessed when the taxpayer made a good faith effort to comply with the law.

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.

Jensen, A.L.J. – A retailer protests an assessment of retail sales tax claiming that certain sales should be exempt from tax because its records sufficiently document that the sales were to nonresidents. The retailer also protests deferred retail sales tax assessed on construction services it purchased for two projects in Washington, claiming that it should be allowed a credit for taxes it paid on these projects. Finally, the retailer asks that we waive interest included in the assessment because it made a good faith effort to comply with Washington law. We reverse

deferred retail sales tax assessed on construction services performed in one of the projects at issue. Otherwise, we uphold the assessment.¹

ISSUES

1. Are a retailer's sales exempt under RCW 82.08.0273 as sales to nonresidents where it does not maintain records of the purchaser's identification presented, such as driver's license number and expiration date?
2. . . .
3. Has the retailer provided sufficient documentation under WAC 458-20-254 to show that it paid retail sales tax on construction services performed in this state?
4. Does WAC 458-20-228 allow for waiver of interest based upon a taxpayer's good faith effort to comply with the law?

FINDINGS OF FACT

[Taxpayer] is a . . . retailer . . . with retail stores in Washington State. The Department of Revenue's (Department's) Audit Division (Audit) reviewed Taxpayer's records for the period of January 1, 2006, through December 31, 2009. Based upon its review, Audit issued an assessment against Taxpayer in the amount of \$. . . on July 14, 2011. This assessment included \$. . . in retail sales tax, \$. . . in deferred retail sales tax, and \$. . . in interest. Taxpayer appeals this assessment.

On appeal, Taxpayer first argues that the Department incorrectly assessed retail sales tax on sales to nonresidents. Taxpayer limits its challenge to sales where the alleged nonresident was from a state that did not impose a sales tax. Taxpayer's records kept track of these sales by including the following information: store number, date, amount, customer name, and customer address. Taxpayer also took down its customer's out of state identification number, such as a driver's license number.

Audit assessed tax on sales where Taxpayer's records did not identify the type of out of state identification presented, the identification number, or the expiration date. Taxpayer suspects that this was because its computers only allowed employees to enter so many numbers, which likely caused it to not obtain the entire driver's license number or the expiration date. Taxpayer also did not keep copies of the driver's licenses or other identification cards because employees did not have the capability to scan documents.

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410. Nonprecedential portions of this determination have been deleted.

Taxpayer has a rewards program for customers Taxpayer keeps an address on file for all customers that participate in [the rewards program.] Taxpayer also argues that sales to customers who participate in this program, where its records show that the customer lived in another state should similarly be exempt from sales tax as sales to nonresidents....

Taxpayer also protests the deferred retail sales tax portion of the assessment. This relates to Audit's review of all capital asset invoices during the audit period to determine if Taxpayer had properly paid retail sales tax on these purchases. Audit assessed tax on Taxpayer's purchases of construction services for two stores in Washington State, one in [City A] and the other in [City B].

For the [City B] store, Taxpayer employed [Contractor], a contractor from [another state]. Audit assessed use tax on invoices from [Contractor] because it was unable to determine if Taxpayer paid retail sales tax on these invoices. The applicable combined state and local retail sales tax rate during the time frame was 8%. The documentation provided by Taxpayer states an unidentified tax amount that is less than 8%. Audit did not provide a credit for the taxes collected by [Contractor] because it could not determine whether it collected Washington's retail sales tax.

On appeal, Taxpayer provided documentation that it obtained from [Contractor] showing that it remitted to the Department the taxes that it collected from Taxpayer. [Contractor] provided copies of its combined excise tax return for the [City B] project showing its remittance of the collected taxes. The return also showed that [Contractor] took a large deduction for taxes paid at source, which was included in the invoiced amount to Taxpayer. . . .

Finally, Taxpayer requests a waiver of interest assessed because it claims to have acted in good faith, with no intent to defraud the Department. Taxpayer asserts that failure to comply with Washington's sales and use tax laws was due to misinterpretation of those laws. Taxpayer admits that it has had administrative challenges with complying with sales and use tax laws and that it is instituting changes to help it better comply in the future.

ANALYSIS

[1] Washington imposes a retail sales tax on each retail sale in this state. RCW 82.02.020. "Retail sale" is broadly defined in RCW 82.04.050 to include "every sale of tangible personal property (including articles produced, fabricated, or imprinted) to all persons irrespective of the nature of their business" RCW 82.04.050(1)(a). "Retail sale" also includes the sale of certain services, including services rendered in respect to constructing or improving new or existing buildings. RCW 82.04.050(2)(b).

RCW 82.08.0273 (2009) provides an exemption from the retail sales tax for:

[S]ales to nonresidents of this state of tangible personal property, digital goods, and digital codes, when [such property is for use outside this state, and the purchaser (a) is a bona fide resident of a state or possession or Province of Canada other than the state of

Washington and such state, possession, or Province of Canada does not impose a retail sales tax or use tax of three percent or more or, if imposing such a tax, permits Washington residents exemption from otherwise taxable sales by reason of their residence. . . .]

RCW 82.08.0273(1).

At issue in this case is whether Taxpayer collected sufficient documentation to show that some of its sales were to nonresidents of Washington. RCW 82.08.0273(4)(a) explains, in pertinent part:

If the vendor chooses to make a sale to a nonresident without collecting the sales tax, the vendor [shall, in good faith,] examine the purchaser's proof of nonresidence, determine whether the proof is acceptable under subsection (3)(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.

RCW 82.08.0273(3)(b) provides what documentation an out of state purchaser must provide to prove the person's nonresident status.^[2] Basically, the purchaser would need to provide an identification card from his/her jurisdiction, such as an out of state driver's license, which shows the person's out-of-state address along with a photograph of the person.

Therefore, to properly document sales to nonresidents, Taxpayer must examine the purchaser's out-of-state identification to determine if it is acceptable and maintain records that show: (1) the type of proof of out-of-state residency accepted, (2) the identification number of that proof, and (3) its expiration date. Taxpayer must maintain such records "for each nontaxable sale." RCW 82.08.0273(4)(a).

In this case, Taxpayer maintained such documentation for some of its sales to nonresidents. However, for the sales at issue, Taxpayer did not maintain records that showed all three of the required elements. RCW 82.08.0273(6)(a) explains 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." Because Taxpayer failed to keep such records for the sales at issue, it is personally liable for the retail sales tax.

Taxpayer also argues that sales under its [rewards] program should be allowed to qualify as exempt sales to nonresidents because, under the program, it has its customer's address on file. RCW 82.08.0273 allows retailers to accept a properly completed exemption certificate in lieu of providing the information in RCW 82.08.0273(4)(a). However, it does not allow retailers to accept other documentation that it believes appropriate to establish the purchaser's residency in another state. Moreover, solely using documentation from Taxpayer's rewards type program is

² [RCW 82.08.0273 was amended in Laws of 2010 c 106 § 215, effective July 1, 2010, and provides alternative methods to document exempt sales to nonresidents.]

problematic to prove that the sale was to a nonresident. There is no evidence that the rewards program regularly updates the participant's address such that Taxpayer can be assured that the purchaser has not moved to Washington State or to another state whose residents do not qualify for exemption under RCW 82.08.0273....

[2] Taxpayer also protests the deferred sales taxes assessed against it on two construction projects in Washington State. Taxpayer does not contend that the construction services at issue are not retail sales under RCW 82.04.050(2)(b), but argues that it should receive a credit for the taxes that it did pay on these projects.

The Department's assessment of deferred sales tax in this case ultimately comes down to a lack of records. RCW 82.32.070(1) explains that taxpayers must "keep and preserve, for a period of five years, suitable records as may be necessary to determine the amount of any tax for which he may be liable" Taxpayers also bear the statutory responsibility to "[k]eep accurate and complete business records." RCW 82.32A.030(3). WAC 458-20-254 (Rule 254) explains what kinds of records a taxpayer must maintain, including supporting records for any "deductions, exemptions, or credits claimed" and records showing "[t]he payment of retail sales tax." Rule 254(3)(b)(ii), (iii).

Invoices for the [City B] contract show that [Contractor] collected taxes from Taxpayer. Taxpayer obtained documentation on appeal that showed that [Contractor] remitted the taxes it collected to the Department. The difficulty Audit had in determining what rate [Contractor] charged Taxpayer is explained in [Contractor's] combined excise tax return. [Contractor] reported its gross income, but also took a large deduction for taxes paid at source. We find that the additional information Taxpayer obtained is sufficient to remove the taxes assessed on this project from the assessment. . . .

[3] Finally, Taxpayer asks that we waive interest assessed against it because it made a good faith effort to comply with Washington tax laws. RCW 82.32.105(3) provides the two circumstances under which the Department will waive or cancel interest:

- (a) The failure to timely pay the tax was the direct result of written instructions given the taxpayer by the department; or
- (b) The extension of a due date for payment of an assessment of deficiency was not at the request of the taxpayer and was for the sole convenience of the department.

Because Taxpayer does not meet either of these circumstances, we cannot waive or cancel interest in this assessment.

DECISION AND DISPOSITION

Taxpayer's petition is denied in part and granted in part. We grant Taxpayer's petition with respect to deferred sales tax assessed on its project with [Contractor]. Otherwise, we deny Taxpayer's petition.

Dated this 23rd day of May 2012.