

Cite as Det. No. 14-0244, 34 WTD 460 (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. 14-0244 |
| |) | |
| ... |) | Registration No. . . . |
| |) | |

1. RULE 193; RCW 82.08.0254: B&O AND RETAIL SALES TAX – MANUFACTURER’S SALES –OUT-OF-STATE CONSUMERS – OUT-OF-STATE DELIVERY – PROOFS. Washington sellers that ship goods to out-of-state consumers are entitled to both B&O and retail sales tax exemptions if the seller retains adequate proofs documenting actual out-of-state delivery.

2. RULE 102; RCW 82.04.050(3), RCW 82.04.470(1), RCW 82.08.050(1)(a): B&O AND RETAIL SALES TAX – MANUFACTURER’S SALES TO RETAIL BUSINESSES. A seller that does not obtain reseller permits from a buyer, or who has not proven by other means that a sales is wholesale in nature, is liable for retail sales taxes if such tax has not been charged, collected, and remitted.

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.

Bauer, A.L.J. – A Washington manufacturer, retailer, and wholesaler of pet supplies objects to the assessment of retailing business and occupation (B&O) tax and retail sales taxes on its sales to out of state consumers and to other pet supply stores and retailers. We uphold the assessment.¹

ISSUES

1. Whether, under RCW 82.08.0254 and WAC 458-20-193 (Rule 193), retailing B&O and retail sales taxes were correctly imposed on a manufacturer’s sales to out-of-state consumers.
2. Whether, under RCW 82.04.050, RCW 82.04.470, RCW 82.08.050, and WAC 458-20-102 (Rule 102), retailing B&O and retail sales taxes were correctly imposed on a manufacturer’s sales to other businesses who would be reselling those products.

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

FINDINGS OF FACT

The Audit Division (Audit) of the Department of Revenue (Department) audited the books and records of [Taxpayer] for the period . . . (audit period). The audit was conducted on an actual basis; sampling was not used. Audit issued the above-referenced assessment on July 10, 2013 in the following amounts:

| | | |
|----------|--|--|
| \$. . . | | Retail Sales Tax |
| | | Retailing B&O |
| . . . | | Wholesaling |
| . . . | | Manufacturing |
| . . . | | Total Tax |
| . . . | | Interest |
| . . . | | 5% Assessment Penalty for Substantial Underpayment |
| \$. . . | | Total Assessed |

Taxpayer appealed the imposition of . . . of retail sales tax and retailing B&O tax on August 5, 2013.

During the audit period, Taxpayer sold pet products – collars, harnesses, leashes, and other such small pet restraints – directly to consumers and to businesses throughout the United States. Taxpayer noted each invoice with the customer’s full name and address.

Taxpayer took interstate B&O and retail sales tax deductions² for its sales to its out-of-state customers. Audit disallowed the interstate deductions when Taxpayer had not documented them as such. Taxpayer additionally reported its sales to other Washington pet suppliers and retailers as “wholesale” sales, a classification that required no collection or remittance of retail sales tax. Audit reclassified certain of these sales to retailing, finding them to be “undocumented.”

ANALYSIS

1. Out of State Sales. The Commerce Clause of the United States Constitution grants Congress the power to regulate commerce among the states.³ The United States Supreme Court has held that the negative implication of this grant of power is that states may not impose taxes that place an “undue burden” on interstate commerce, even in the absence of Congressional action.⁴ This prohibition is repeated in RCW 82.08.0254, which provides that the state may not impose the retail sales tax on sales where it would be prohibited under the United States Constitution.⁵

² Although listed as a “deduction” on the Excise Tax Return, we note that it is in fact an exemption.

³ U.S. Const. art. I, § 8.

⁴ This concept is referred to as the “dormant” or “negative” Commerce Clause doctrine. See *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994) (quoting *The Federalist* No. 22, pp. 143–145 (C. Rossiter ed. 1961) (A. Hamilton); Madison, *Vices of the Political System of the United States*, in 2 Writings of James Madison 362–363 (G. Hunt ed. 1901)).

⁵ RCW 82.08.0254 provides: “The [retail sales] tax levied by RCW 82.08.020 shall not apply to sales which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States.”

Rule 193 is the Department's administrative rule explaining the B&O and retail sales tax applications to interstate sales of tangible personal property. It covers the tax implications of outbound sales of goods originating in this state to persons outside this state. Subsection (3) provides:

Outbound sales. Washington state does not assess its taxes on sales of goods which originate in Washington if receipt of the goods occurs outside Washington.

(a) Where tangible personal property is located in Washington at the time of sale and is received by the purchaser or its agent in this state, or the purchaser or its agent exercises ownership over the goods inconsistent with the seller's continued dominion over the goods, the sale is subject to tax under the retailing or wholesaling classification. The tax applies even though the purchaser or its agent intends to and thereafter does transport or send the property out-of-state for use or resale there, or for use in conducting interstate or foreign commerce. It is immaterial that the contract of sale or contract to sell is negotiated and executed outside the state or that the purchaser resides outside the state.

(b) Where the seller delivers the goods to the purchaser who receives them at a point outside Washington neither retailing nor wholesaling business tax is applicable. This exemption applies even in cases where the shipment is arranged through a for-hire carrier or freight consolidator or freight forwarder acting on behalf of either the seller or purchaser. It also applies whether the shipment is arranged on a "freight prepaid" or a "freight collect" basis. The shipment may be made by the seller's own transportation equipment or by a carrier for-hire. For purposes of this section, a for-hire carrier's signature does not constitute receipt upon obtaining the goods for shipment unless the carrier is acting as the purchaser's agent and has express written authority from the purchaser to accept or reject the goods with the right of inspection.

(Emphasis added.) Subsection (6) provides similarly for the retail sales tax. Thus, shipments of goods from Washington that are destined for an out-of-state location are taxable in Washington if the delivery takes place in Washington. If the goods are actually delivered by the seller to a destination outside of Washington, however, they are entitled to both a B&O and retail sales tax exemption. To qualify for exemption, the Washington seller must therefore provide certain proofs documenting actual out-of-state delivery. Rule 193's subsection (4) therefore provides:

Proof of exempt outbound sales.

(a) If either a for-hire carrier or the seller itself carries the goods for receipt at a point outside Washington, the seller is required to retain in its records documentary proof of the sales and delivery transaction and that the purchaser in fact received the goods outside the state in order to prove the sale is tax exempt. Acceptable proofs, among others, will be:

- (i) The contract or agreement of sale, if any, **And**
- (ii) If shipped by a for-hire carrier, a waybill, bill of lading or other contract of carriage indicating the seller has delivered the goods to the for-

hire carrier for transport to the purchaser or the purchaser's agent at a point outside the state with the seller shown on the contract of carriage as the consignor (or other designation of the person sending the goods) and the purchaser or its agent as consignee (or other designation of the person to whom the goods are being sent); or

(iii) If sent by the seller's own transportation equipment, a trip-sheet signed by the person making delivery for the seller and showing:

- The seller's name and address,
- The purchaser's name and address,
- The place of delivery, if different from purchaser's address,
- The time of delivery to the purchaser together with the signature of the purchaser or its agent acknowledging receipt of the goods at the place designated outside the state of Washington.

Subsection (6)(a) provides similarly for retail sales tax, stating: "The seller must retain proof of exemption as outlined in subsection (4), above."

In this case, Audit's disallowance of the interstate sales exemption was due to Taxpayer's lack of records documenting out-of-state deliveries. Taxpayer complains that these sales were to out-of-state buyers whose out-of-state addresses appeared on their sales invoices, and that the out-of-state nature of these sales was thereby adequately identified. Such information, however, is not adequate under Rule 193, as an out-of-state location does not automatically correlate to out-of-state delivery.⁶ We disagree that the mere invoice address can control.

In this case, Taxpayer did not document the method or place of actual delivery by retaining documentation set forth in Rule 193(4). Accordingly, we cannot grant relief.

Taxpayer's petition as to this issue is denied.

2. Reclassification of Wholesale Sales. Taxpayer complains that its larger sales were to other pet supply companies or pet stores, and thus were correctly reported as wholesale sales without the collection of retail sales taxes. RCW 82.04.050(1)(a) provides:

"Sale at retail" or "retail sale" means every sale of tangible personal property (including articles produced, fabricated, or imprinted) to all persons irrespective of the nature of their business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers other than a sale to a person who: (i) Purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person, . . .

RCW 82.04.470(1) provides:

⁶ Taxpayer has also argued that Audit was in error to assume that these taxes had been collected and not remitted, as these funds were not in Taxpayer's bank account. This assertion, however, has never been supported and will not be further addressed.

The burden of proving that a sale is a wholesale sale rather than a retail sale is on the seller. A seller may meet its burden of proving a sale is a wholesale sale rather than a retail sale by taking from the buyer, at the time of sale or within a reasonable time after the sale as provided by rule of the department, a copy of a reseller permit issued to the buyer by the department under RCW 82.32.780 or 82.32.783.⁷

(Emphasis added.) Under RCW 82.08.050(3), if a seller fails to take a reseller permit from the buyer, and then fails to charge, collect, and remit retail sales tax, then the seller becomes liable for retail sales tax that has not been collected:

Except as otherwise provided in this section, if any seller fails to collect the [retail sales] tax . . ., whether such failure is the result of the seller's own acts or the result of acts or conditions beyond the seller's control, the seller is, nevertheless, personally liable to the state for the amount of the tax.

Rule 102 explains reseller permits and the requirement that sellers obtain copies for their records: Subsection (7) further explains that seller has the burden of obtaining a reseller permit or proving, by alternative methods, that buyers were eligible:

Seller's responsibilities. The seller has the burden of proving that the buyer had a reseller permit at the time of sale. A seller may meet its burden by taking from the buyer, at the time of sale or within one hundred twenty days after the sale, a copy of a reseller permit issued to the buyer by the department under RCW 82.32.780 or 82.32.783.

(a) In lieu of a copy of a reseller permit issued by the department, pursuant to RCW 82.04.470 a seller may accept from a buyer that is required to be registered with the department under RCW 82.32.030:

(i) A properly completed uniform exemption certificate approved by the streamlined sales and use tax agreement governing board; or

(ii) Any other exemption certificate as may be authorized by the department and properly completed by the buyer.

(b) Certificates authorized in (a)(i) and (ii) of this subsection must include the reseller permit number issued by the department to the buyer.

(c) A seller who accepts exemption certificates authorized in (a) of this subsection is not required to verify with the department whether the buyer is required to be registered with the department under RCW 82.32.030. It must be noted, however, that nothing in this subsection (c) may be construed to modify any of the provisions of RCW 82.08.050.

(d) In lieu of a copy of a reseller permit issued by the department, pursuant to RCW 82.04.470 a seller may accept from a buyer that is not required to be registered with the department under RCW 82.32.030:

(i) A properly completed uniform sales and use tax exemption certificate developed by the multistate tax commission;

(ii) A properly completed uniform exemption certificate approved by the streamlined sales and use tax agreement governing board; or

⁷ Prior to July 1, 2010, the seller was required to take from the seller a resale certificate.

(iii) Any other exemption certificate as may be authorized by the department and properly completed by the buyer.

The Streamlined Sales and Use Tax Agreement Certificate of Exemption and Multistate Tax Commission Uniform Sales and Use Tax Exemption Certificate can each be obtained on the department's internet site at <http://dor.wa.gov>.

(e) A seller who accepts a uniform exemption certificate authorized in (d) of this subsection is not required to verify with the department whether the buyer is required to be registered with the department under RCW 82.32.030. It must be noted, however, that nothing in this subsection (e) may be construed to modify any of the provisions of RCW 82.08.050.

(f) **Data elements.** In lieu of obtaining a reseller permit or the documentation in (a) or (d) of this subsection, RCW 82.08.050(7) authorizes a seller to capture the relevant data elements as allowed under the streamlined sales and use tax agreement. "Data elements" are the information required to be supplied on the actual Streamlined Sales and Use Tax Agreement Certificate of Exemption: Name, address, type of business, reason for exemption, identification number required by the state to which the sale is sourced, state and country issuing identification number, and if a paper form is used, a signature of the purchaser. See Streamlined Sales Tax Governing Board, Inc. Rule 317.1(A) for more information.

(g) **The term "reseller permit."** For purposes of this section, unless otherwise specified, the term "reseller permit" hereinafter contemplates all of the following: A copy of a reseller permit, a uniform exemption certificate authorized by RCW 82.04.470 as described in (a) and (d) of this subsection, or data elements as described in (f) of this subsection.

(h) **Seller must provide documentation or information.** If the seller has not obtained a reseller permit or the documentation described in (a), (b), (d), or (f) of this subsection, the seller is liable for the tax due unless it can sustain the burden of proving that a sale is a wholesale sale by demonstrating facts and circumstances that show the sale was properly made at wholesale. The department will consider all evidence presented by the seller, including the circumstances of the sales transaction itself, when determining whether the seller has met its burden of proof. It is the seller's responsibility to provide the information necessary to evaluate the facts and circumstances of all sales transactions for which reseller permits are not obtained. Facts and circumstances that should be considered include, but are not necessarily limited to, the following:

- The nature of the buyer's business. The items being purchased at wholesale must be consistent with the buyer's business. For example, a buyer having a business name of "Ace Used Cars" would generally not be expected to be in the business of selling furniture;
- The nature of the items sold. The items sold must be of a type that would normally be purchased at wholesale by the buyer; and
- Additional documentation. Other available documents, such as purchase orders and shipping instructions, should be considered in determining whether they support a finding that the sales are sales at wholesale.

(Emphasis added; bolding in the original.) Taxpayer did not obtain reseller permits from the buyers that Taxpayer asserts were “wholesale” buyers. Neither has Taxpayer provided any alternative information as allowed by Rule 102. Because Taxpayer has not documented the wholesale nature of these sales, the sales will be considered to be retail in nature. Taxpayer is correctly liable for the retail sales taxes that were not charged or collected.

Taxpayer’s petition as to this issue is denied.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 29th day of July, 2014.