

Cite as Det. No. 15-0188, 34 WTD 545 (2015)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for)	<u>D E T E R M I N A T I O N</u>
Correction of Assessment of)	
)	No. 15-0188
)	
...)	Registration No.
)	

Rule 102; RCW 82.04.470: B&O TAX - RETAIL SALES TAX - WHOLESALING - RETAILING - RESELLER PERMIT - SUBSTANTIATION. A taxpayer objected to the reclassification of sales from wholesaling to retailing. The Taxpayer did not provide required documentation to substantiate sales at wholesale. The Department denied Taxpayer’s petition, finding that Audit properly reclassified the sales at issue to retailing.

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.

Kreger, A.L.J. – An electrician protests reclassification of sales from wholesale to retail where valid reseller permit information was not available. Because no records were provided to substantiate any additional wholesale sales, we sustain the assessment and deny the Taxpayer’s petition.¹

ISSUE

Were sales, for which a reseller permit from the buyer was not available, properly reclassified from wholesale to retail under RCW 82.04.470(1) and WAC 458-20-102(5)?

FINDINGS OF FACT

[Taxpayer] is a Washington corporation engaged in the business of providing electrical services during the audit period. The Department of Revenue (Department) audited the Taxpayer’s Washington business activities for the period of January 1, 2010 through June 30, 2013 which resulted in an assessment, Document No. . . . , being issued for additional tax due in the amount of \$² The Taxpayer timely appealed the assessment asserting that it had additional information to support characterizing income as wholesale rather than retail.

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

² The assessment is comprised of a small business credit of (\$. . .), retail sales tax of \$. . . , retailing business and occupation (B&O) tax of \$. . . , wholesaling B&O of \$. . . , interest of \$. . . , and a 5% assessment penalty of \$. . .

The Taxpayer had limited business records to provide to the auditor for the audit period at issue. The auditor primarily relied upon check stubs, bank deposits, and information from the excise tax returns filed by the Taxpayer. During this time, the Taxpayer was using a bookkeeping service in . . . and had not retained full copies of its records. The Taxpayer asserts that the bulk of the work it performed was wholesale in nature but did not have records beyond what was provided to the auditor to substantiate this. The Taxpayer indicated that it requested records from its bookkeeper, and would provide additional information.

The Taxpayer was given until April 13, 2015 to provide additional information. The Taxpayer subsequently requested an extension of time to review the materials that had been received from the [bookkeeper,] and the due date to provide any additional records was extended to May 1, 2015. No additional records were provided.

ANALYSIS

Washington imposes retail sales tax on each retail sale in this state. RCW 82.08.020. The term “retail sale” includes the sale or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the constructing, repairing, decorating, or improving of new or existing buildings or other structures on real property of or for consumers. RCW 82.04.050(2)(b). Persons “engaged within this state in the business of making sales at retail” are also subject to a retailing [business and occupation (B&O)] tax. RCW 82.04.250. It is the seller’s responsibility to collect retail sales tax from the buyer. RCW 82.08.050. If the seller fails to do so, then it is personally liable for the amount of tax [due] unless the seller maintains proper records of exempt transactions and provides them to the Department when requested. RCW 82.08.050. Thus, a seller is liable for the retail sales tax due on any retail sale unless it has the documentation to show that the sale was exempt or otherwise not subject to retail sales tax. Det. No. 01-193, 21 WTD 264 (2002).

The Taxpayer’s electrical services constitute retail sales if [sold] to a consumer. If the services are instead sold to persons who are not consumers, those transactions would instead fit within the definition of a “sale at wholesale.” RCW 82.04.060(2).

RCW 82.04.470 provides that “[t]he burden of proving that a sale is a wholesale sale rather than a retail sale is on the seller.” RCW 82.04.470(1). 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. RCW 82.04.470(1). In addition to a copy of the reseller permit, there are uniform exemption certificates that may be relied upon or a record of the relevant data that would be captured on such an exemption certificate. RCW 82.04.470(2-4). The statute concludes by noting that a taxpayer may also substantiate a wholesale sale “by demonstrating facts and circumstances, according to rules adopted by the department, that show the sale was properly made without payment of retail sales tax.” RCW 82.04.470(5).

WAC 458-20-102 (Rule 102) is the administrative regulation addressing reseller permits and provides addresses alternative documentation as follows:

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.

Rule 102(7)(h). .

In this case, the Taxpayer has not provided additional reseller permits, applicable exemption certificates, or alternative documentation demonstrating facts and circumstances of a wholesale sale. As noted above, in the absence of the requisite documentation sales will be treated as retail rather than wholesale.

Taxpayers have an affirmative duty to maintain adequate records and to provide the Department access to those records so that the Department can reasonably ascertain a taxpayer's tax liability. RCW 82.32.070. *See also* WAC 458-20-254 (Rule 254); Det. No. 99-341, 20 WTD 343 (2001). RCW 82.32.070 specifically requires that "[e]very person liable for any fee or tax imposed by chapters 82.04 through 82.27 RCW shall 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...." See also Rule 254.

In this case, while the Taxpayer asserted that the majority of its activities were wholesale sales, it was not able to provide the detail to support that assertion. Additional time was provided for the Taxpayer to review records retrieved from the company filing its tax returns, however, no additional detail was produced. Due to the absence of detail to support the Taxpayer's assertions, we sustain the assessment as issued.

If the Taxpayer can provide additional records to support adjustments to the assessment, it may file a petition for refund. Application for refund or credit cannot be made for taxes paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed. RCW 82.32.060(1). Additional information on requirements and procedures for claiming a refund can also be found in WAC 458-20-229.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 20th day of July, 2015.