

Cite as Det. No.15-0294, 36 WTD 174 (2017)

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. 15-0294
)	
... )	Registration No. . . .
)	

RCW 82.32.291; WAC 458-20-102: PENALTIES – MISUSE OF RESELLER PERMIT PENALTY: A road contractor was not subject to the misuse of reseller permit penalty in RCW 82.32.291 when it purchased cement from a supplier because the objective evidence showed that the road contractor did not use its reseller permit for the purchases and that the supplier did not look up the contractor’s reseller permit.

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.

M. Pree, A.L.J. – A road contractor, that did not pay a cement vendor retail sales tax on materials used for a county road project, appeals the improper use of its reseller permit penalty imposed on the materials purchased. . . . [W]e grant the petition.<sup>1</sup>

ISSUE

Under RCW 82.32.291 and WAC 458-20-102 (Rule 102), has the contractor met its burden of proving that it did not improperly use its reseller permit?

FINDINGS OF FACT

[Taxpayer] is a Washington construction contractor. The Department of Revenue (Department) issued the taxpayer a reseller permit. The Department’s Audit Division audited the taxpayer for the period of June 1, 2012 through September 30, 2013. The review did not include a detailed examination of the taxpayer’s accounting records.<sup>2</sup> During its review, Audit noticed that the taxpayer repaired a county road in Washington and did not pay retail sales tax to a cement vendor on materials it purchased for the project. The taxpayer also did not pay use tax or deferred sales tax to the Department on the materials for this project.

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

<sup>2</sup> The audit was qualified to allow a future audit covering all areas of possible taxation within the statutory period as addressed in RCW 82.32.050.

On December 27, 2013, the Audit Division issued the assessment referenced above, which totaled \$ . . . and included \$ . . . in use tax and/or deferred sales tax, and a “Resale Cert/Reseller Permit Misuse” penalty of \$ . . . . On December 10, 2013, the taxpayer paid \$ . . . , and appealed the reseller permit misuse penalty, contending that the failure to pay the tax was not intentional.

The taxpayer states that it had never done business with the cement vendor prior to this project. The cement vendor initialed a “Scope of Work” form to supply materials as the subcontractor, and the taxpayer initialed as the contractor.<sup>3</sup> The form states, “Supplier’s pricing includes any required taxes for this project.” The taxpayer understood this to mean that the vendor had agreed to include the retail sales tax on materials that it provided for the project in the total price. The taxpayer states that it did not give the vendor a reseller’s permit on the project. The vendor’s invoices did not include any charges for sales tax on the vendor’s retail sales. When the Audit Division recognized that sales tax had not been paid, the taxpayer claims that it contacted the vendor to inquire whether it paid retail sales tax. The vendor stated that it had not paid sales tax, but then paid the taxpayer \$ . . . . In the vendor’s check notation it said: “Complete settlement of disputed contract per mutual agreement between [taxpayer’s president and vendor’s president].”<sup>4</sup> While the settlement did not elaborate, the taxpayer claims the settlement payment was due to the vendor’s failure to pay the tax to the Department.

The contract with the vendor also specified that the work would be performed in accordance with the contract provisions for a specific road improvement project, which named the owner, . . . . The Department’s reseller permit form provides, “This permit cannot be used to purchase: . . . Materials and contract labor for public road construction or U.S. government contracting (see Definitions on back).” The back of the form states, “Public road construction’ refers to a prime contractor or subcontractor building, repairing, or improving a roadway owned by the federal government, municipal corporation, or political subdivision.” Any vendor can go to the Department’s website and enter the taxpayer’s name to obtain the taxpayer’s reseller permit number.<sup>5</sup>

After the hearing, the vendor sent the taxpayer a letter, which stated, “prior to the commencement of the [road] project, [the vendor] did not receive a reseller permit applicable to the aforementioned project.”<sup>6</sup> We asked the taxpayer to obtain a statement from the vendor regarding whether the vendor used electronic means to verify that the taxpayer had a reseller permit prior to billing the taxpayer for the project. The vendor explained that the individual responsible for billing the project died on February 7, 2014, and the vendor did not know the method used to determine taxability.

## ANALYSIS

Road construction performed on land owned by a municipal corporation, a political subdivision of the state, or the United States, is not classified as a retail activity. RCW 82.04.050(8).

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<sup>3</sup> Attached to the taxpayer’s June 15, 2012 order to the vendor.

<sup>4</sup> Note dated November 26, 2013 for vendor’s \$ . . . check number . . . , signed Nov. 27, 2013.

<sup>5</sup> The web page does not contain the public road construction limitation on the form itself. See <http://www.dor.wa.gov/content/doingbusiness/registermybusiness/brd/Default.aspx> (Last visited July 11, 2014).

<sup>6</sup> Letter from the vendor, dated March 24, 2014.

Generally, construction on property owned by such entities is classified as “public road construction.” WAC 458-20-171 (Rule 171). Contractors and subcontractors constructing for those entities are themselves considered the consumers of the materials, equipment, and supplies the contractors/subcontractors purchase for incorporation in the public right-of-way. RCW 82.04.190(3). Therefore, the retail sales tax applies to sales of construction materials to those contractors and subcontractors engaged in public road construction. Retail sales tax/use tax was due on the materials that taxpayer purchased from the vendor. Either the subcontractor, in this case the vendor who delivered the concrete and other materials to the project, or the taxpayer, as the contractor, could pay the sales or use tax on the materials used. *See* Rule 171 and RCW 82.04.190(3), which defines consumer as “*any* person engaged in the business of contracting . . . .” (Emphasis added).

Because the vendor did not charge the taxpayer sales tax,<sup>7</sup> the Audit Division concluded that the taxpayer improperly used its reseller permit, and assessed a 50% penalty under RCW 82.32.291, which provides in part:

(1) Except as otherwise provided in this section, if any buyer improperly uses a reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 to purchase items or services at retail without payment of sales tax that was legally due on the purchase, the department must assess against that buyer a penalty of fifty percent of the tax due, in addition to all other taxes, penalties, and interest due, on the improperly purchased item or service.

...

(3) A buyer that purchases items or services at retail without payment of sales tax legally due on the purchase is deemed to have improperly used a reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 to purchase the items or services without payment of sales tax and is subject to the penalty in subsection (1) of this section if the buyer:

(a) Furnished to the seller a reseller permit number, a reseller permit or copy of a reseller permit, or other documentation authorized under RCW 82.04.470 to avoid payment of sales tax legally due on the purchase; or

(b) Made the purchase from a seller that had previously used electronic means to verify the validity of the buyer's reseller permit with the department and, as a result, did not require the buyer to provide a copy of its reseller permit or furnish other documentation authorized under RCW 82.04.470 to document the wholesale nature of the purchase. In such cases, the buyer bears the burden of proving that it

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<sup>7</sup> The contract provided the vendor would pay all taxes. This is insufficient evidence to show that the taxpayer advertised that the price included retail sales tax under RCW 82.08.050(9). Because of this, the conclusive presumption of that statute applies, which is that “it must be conclusively presumed that the selling price quoted in any . . . contract . . . between the parties does not include [sales tax].” RCW 82.08.050(9). However, this does not change the fact that the taxpayer likely believed the vendor would pay the sales tax on the materials, and therefore, did not need to provide a reseller’s permit to the vendor.

did not improperly use its reseller permit to make the purchase without payment of sales tax.

The “goal in statutory interpretation is to effectuate the legislature’s intent.” *Burns v. City of Seattle*, 161 Wn.2d 129, 140, 164 P.3d 475 (2007). When a statute’s meaning is “plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). “[A]ll that the Legislature has said in the statute and related statutes” should be part of the plain language analysis. *Id.* at 11. “Language is unambiguous only when it is not susceptible to two or more reasonable interpretations.” *State v. Delgado*, 148 Wn.2d 723, 726-27, 63 P.3d 792 (2003). However, “a statute is not ambiguous merely because different interpretations are conceivable.” *State v Hahn*, 83 Wn. App 825, 831, 924 P.2d 392 (1996).

RCW 82.32.291(1) requires the imposition of the penalty, “if any buyer improperly uses a reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 to purchase items or services at retail . . . .” This clause provides that the buyer must improperly use the certificate for the penalty to apply.

A buyer is deemed to have improperly used a reseller permit “when the buyer purchases items or services at retail without payment of sales tax legally due on the purchase . . . .” under RCW 82.32.291(3). Once we determine that the buyer made purchases at retail without the payment of retail sales tax, RCW 82.32.291(3) then clearly explains that this deemed misuse of the reseller permit only applies “if the buyer” misuses the permit. Under subsection RCW 82.32.291(3), buyers are deemed to have improperly used their permit under two circumstances, set forth in RCW 82.32.291(3)(a) or (3)(b). Buyers must either, under (a), furnish, “the seller a reseller permit number, a reseller permit or copy of a reseller permit, or other documentation . . . .;” or (b) “purchase from a seller that had previously used electronic means to verify the validity of the buyer's reseller permit with the department and, as a result, did not require the buyer to provide a copy of the reseller permit . . . .” RCW 82.32.291.

The taxpayer states that it did not provide a reseller permit, and the vendor states it did not receive a reseller permit for the applicable project. We have no evidence to suggest otherwise. The taxpayer believed that its contract provided that the vendor’s pricing included any required taxes. The later settlement, whereby the vendor paid the taxpayer for what the taxpayer claims were the disputed taxes, corroborates the taxpayer’s misunderstanding that the price included retail sales tax. There is no evidence that the taxpayer misused its permit under RCW 82.32.291(3)(a). Therefore, we must consider whether the taxpayer misused its permit under RCW 82.32.291(3)(b).

RCW 82.32.291(3)(b) addresses the situation where a taxpayer who is the purchaser failed to disclose the true nature of the purchase to the seller who previously used electronic means to verify the taxpayer’s reseller permit. In such a situation, the seller would be selling property under the false assumption that the sale is for resale in the regular course of business. For imposition of the penalty under RCW 82.32.291(3)(b), “the buyer bears the burden of proving that it did not improperly use its reseller permit to make the purchase without payment of sales tax.” WAC 458-20-102 adds the following about this burden:

[T]he buyer bears the burden of proving that the purchases made without payment of sales tax were qualified purchases or the buyer remitted deferred sales tax directly to the department. The buyer not realizing that sales tax was not paid at the time of purchase is not a reason for waiving the penalty.

WAC 458-20-102(9)(a)(ii). This provision also requires the taxpayer to show that its vendor did not look up its reseller permit information electronically under RCW 82.32.291(3)(b). Unless otherwise mandated by statute or due process principles, Washington applies the preponderance of evidence standard in administrative proceedings. *Nguyen v. Dep't of Health Medical Quality Assurance Comm'n*, 144 Wn.2d 516, 535, 29 P.3d 689, 698 (2001); citing *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 797, 982 P.2d 601 (1999). Because the legislature did not specify the burden of proof that is required for RCW 82.32.291, we conclude that the burden is on the taxpayer to prove that its vendors did not previously look up its permit by a preponderance of the evidence.

In this case, under RCW 82.32.291(3)(b), if the vendor previously used electronic means to verify the taxpayer's reseller permit and did not charge retail sales tax on the current sales, the penalty would apply.<sup>8</sup> Therefore, for this provision to apply, the vendor would have to have a previous selling relationship with the taxpayer. *Id.* In this case, the taxpayer alleges that its first purchases from the vendor were the sales at issue. We have no evidence to show otherwise. [If true, this] would mean that the taxpayer's first purchase from the vendor could not be subject to the reseller permit misuse penalty [under RCW 82.32.291(3)(b)]. However, all subsequent purchases made under the contract at issue could be subject to the penalty if the taxpayer misused its permit under RCW 82.32.291(3)(b).

. . . [W]e do not have direct evidence to establish whether the vendor checked electronically for a reseller permit. However, the circumstantial evidence . . . supports that it did not. The vendor entered into a contract with the taxpayer that said that the vendor would pay all taxes on the project. If the vendor indeed agreed to pay the sales tax, it would have no reason to look up the permit. Although the vendor did not pay sales tax to the Department on this project, it did pay the taxpayer a \$ . . . settlement of a contract dispute that arose when the taxpayer contacted the vendor inquiring why it did not pay sales tax to the Department. [Similarly, the purchases at issue were the first purchases between the parties, further supporting that the vendor did not previously use electronic means to look up the seller's reseller permit.] Based on this objective evidence, we conclude that the taxpayer has shown that it did not misuse the reseller permit under RCW 82.32.291(3)(b).

#### DECISION AND DISPOSITION

We grant the taxpayer's petition and cancel the "Reseller Permit Misuse" penalty of \$ . . . .

Dated this 4th day of November, 2015.

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<sup>8</sup> In January of 2010, before the language of RCW 82.32.291(3)(b) was added to the statute, the Department added reseller permit information to its electronic Business Records Database, meaning that, as of that date, taxpayers could look up on the Department's website whether a business had a reseller permit. The Department later added other ways that a [seller] could electronically look up a business' reseller permit.