

Cite as Det. No. 16-0403, 36 WTD 435 (2017)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS 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. 16-0403
)	
...)	Registration No. . . .
)	

RCW 82.08.050 – RETAIL SALES TAX – MEASURE – SEPARATELY STATED – The advertised price may not be considered the selling price when a taxpayer properly advertises the price as including the retail sales tax.

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.

Stojak, T.R.O. – A computer sales and repair shop petitions for correction of an assessment of retail sales and business and occupation (“B&O”) tax, contending that it properly paid tax on amounts net of the retail sales tax collected from its customers because its prices were advertised as “tax included.” The weight of the evidence supports Taxpayer’s position that all sales were advertised as tax-included. Accordingly, Taxpayer’s petition is granted.¹

ISSUE

Whether, under RCW 82.08.050(9), Taxpayer properly advertised its prices as including retail sales tax, such that the advertised price may not be considered the selling price?

FINDINGS OF FACT

[Taxpayer] is a computer sales and service shop in . . . Washington owned by The Department of Revenue’s (“Department”) Audit Division (“Audit”) audited Taxpayer’s records for the January 1, 2012, through December 31, 2015 tax period. During the course of the audit, Audit discovered that Taxpayer backed out the retail sales tax from its sales total for purposes of calculating its retail sales and B&O tax liability. Taxpayer did not separately state retail sales tax on its invoices until migration to a “point-of-sale” (“POS”) computer system in December of 2015.

Throughout the course of the audit, Taxpayer maintained that during the timeframe covered by the audit, signs were posted at its business indicating that all sales were “tax-included.” However, Audit noted the absence of such signage during a site visit. In addition, Audit obtained an invoice from one of Taxpayer’s customers, Invoice # . . . for \$. . . , and noted that the sales tax was not

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

separately stated. Audit further noted that a copy of the same invoice received from Taxpayer during the audit did separately state the retail sales tax. Based on this observation, Audit concluded that Taxpayer generated the invoice during the audit process.² Ultimately, Audit concluded that Taxpayer failed to separately state the retail sales tax on its invoices as required under RCW 82.08.080(1) and WAC 458-20-107 (“Rule 107”). Accordingly, on August 3, 2016, Audit issued Taxpayer an assessment totaling \$. . . , which included \$. . . in retail sales tax, \$. . . in retailing B&O tax, \$. . . in use tax,³ and \$. . . in interest for the period of January 1, 2012, through December 31, 2015.

Taxpayer timely submitted a Petition for Correction (“Petition”) under RCW 82.32.160. Taxpayer’s Petition claims that it advertised its prices during the audit period, as “tax-included.” Taxpayer submitted copies of advertisements for its business posted to Craigslist from January 2012 through November 2014. A date is not indicated on the Craigslist advertisements other than a date handwritten by Taxpayer for purposes of the Petition. Taxpayer also submitted a . . . specification sheet for an Acer Aspire laptop, which states that the sales price is inclusive of tax. The sheet does not indicate a date, but Taxpayer contends it was issued on November 28, 2011. Taxpayer’s Petition also offered an explanation for the lack of “tax included” signage at its store, at the time of the auditor’s [subsequent] site visit. Taxpayer explained that its method of “backing out the taxes” ended with the implementation of the POS computer system, and that therefore, the signs advertising “tax-included” sales were removed upon its implementation.

On October 11, 2016, Taxpayer wrote a letter to the Administrative Hearings and Review Division and provided further documentation to support its position. Taxpayer provided letters from six of its regular customers during the audit period. The letters attest to the fact that Taxpayer prominently advertised sales as tax-included, via signs posted at the business. The letters also attest that Taxpayer verbally informed customers that all sales were tax included. Taxpayer also provided a printout from its Craigslist account, which includes a column for items advertised on Craigslist with a corresponding column that reflects a date, which at least ostensibly, is the date the advertisement was published.⁴ The dates listed correspond to the handwritten dates reflected on the Craigslist postings, included with Taxpayer’s Petition, that advertise prices as “tax-included.”

In addition to this documentation, Taxpayer offered an explanation pertaining to the seeming inconsistency noted by Audit, in regards to invoice # Taxpayer explained that the reason the invoice provided to Audit separately stated the retail sales tax when the original copy from the customer did not, was due to the fact that the invoice was specifically recreated on January 5, 2016, upon request by the customer for the specific purpose of showing that the sales tax had been paid. (The customer was undergoing its own audit at that time, according to Taxpayer.)

² The relevancy of this observation to Audit’s findings in this case is unclear. It does not appear that Taxpayer claimed during the audit process, that the sales tax was separately stated on its invoices during the audit period. Instead, Taxpayer simply maintained that its prices were advertised as tax included. However, it appears . . . that Audit may have considered this observation in assessing Taxpayer’s credibility.

³ Taxpayer does not dispute the use tax included in the assessment.

⁴ From the printout of the Craigslist account page provided by Taxpayer, the heading to the various columns is not visible. However, that the column with chronological dates represents the “published date” is the most logical conclusion to be drawn from viewing the printout.

A hearing was held on this matter on November 17, 2016. At the hearing, Taxpayer reiterated all of the points made in the Petition. Overall, Taxpayer provided credible testimony during the hearing, that its sales were advertised as “tax included” during the time frame covered by the audit.

ANALYSIS

Washington imposes retail sales tax on each retail sale in this state. RCW 82.08.020. The retail seller is required to collect retail sales tax from the buyer and remit it to the department. RCW 82.08.050(1). Once collected, the retail sales tax “is deemed to be held in trust by the seller until paid to the department.” RCW 82.08.050(2). The tax is levied on the “selling price” of each retail sales. RCW 82.08.010(1).

RCW 82.08.050(9) governs when the retail sales tax collected by the seller is properly excluded from the total “selling price” for purposes of computing retail sales tax liability. It states:

[T]he tax required by this chapter to be collected by the seller must be stated separately from the selling price in any sales invoice or other instrument of sale . . . Except as otherwise provided in this subsection, for purposes of determining the tax due from the buyer to the seller and from the seller to the department it must be conclusively presumed that the selling price quoted in any price list, sales document, contract or other agreement between the parties does not include the tax imposed by this chapter. But if the seller advertises the price as including the tax or that the seller is paying the tax, the advertised price may not be considered the selling price.

RCW 82.08.050(9) (emphasis supplied). On the matter of the taxability of an advertised tax-included selling price, the Court of Appeals [has held:]

[T]he plain language of former RCW 82.08.050 mandates that when the seller advertises that the price includes the tax, the Department may not consider the advertised price to be the selling price.

[*Dep’t of Revenue v. Bi-Mor, Inc.*, 171 Wn. App. 197, 207, 286 P.3d 417, 433 (2012).⁵] RCW 82.08.050 creates a conclusive presumption that “the selling price quoted in any price list, sales document, contract or other agreement between the parties does not include the tax imposed by this chapter. . . .” However, the statute allows taxpayers to rebut the presumption with proof that

⁵ The Court of Appeals, in *Bi-Mor*, was interpreting the 2001 version of RCW 82.08.050, which read as follows:

The tax required by this chapter to be collected by the seller shall be stated separately from the selling price in any sales invoice or other instrument of sale. On all retail sales through vending machines, the tax need not be stated separately from the selling price or collected separately from the buyer. For purposes of determining the tax due from the buyer to the seller and from the seller to the department it shall be conclusively presumed that the selling price quoted in any price list, sales document, contract or other agreement between the parties does not include the tax imposed by this chapter, but if the seller advertises the price as including the tax or that the seller is paying the tax, the advertised price shall not be considered the selling price.

RC W 82.08.050 (2001). This version of the statute did not change in any significant respect until January 1, 2010, when the statute was amended to read in the manner quoted in the text above. *See* RCW 82.08.050(9).

they advertise that the price includes sales tax. WAC 458-20-107(3) (“Rule 107”); *see also Bi-Mor, Inc.*, 171 Wn. App. at 207, 286 P.3d at 422.⁶

Here, Taxpayer concedes that the invoices issued during the audit period did not separately state the sales tax. Absent invoices or other instruments of sale separately stating the tax, RCW 82.08.050(9) presumes the total price charged customers was exclusive of the sales tax. However, as discussed in *Bi-Mor*, proof that that the price was advertised as “tax-included” can rebut this presumption.

In this case, the balance of evidence persuades us that Taxpayer advertised sales as “tax included.” Taxpayer provided signed letters from a number of its customers, attesting to the fact that Taxpayer advertised all sales as “tax-included.” The Craigslist postings provided by Taxpayer, and the corresponding printout of its Craigslist account activity, bolster the statements made by the customers in their letters.⁷ In addition, Taxpayer provided plausible and credible explanations in response to the inconsistencies noted by Audit, pertaining to Invoice # . . . and the lack of “tax-included” signage at its business at the time of the site visit. Therefore, based on the evidence presented, we conclude that Taxpayer met the requirement of advertising that its prices included sales tax. Accordingly, we grant Taxpayer’s Petition.

DECISION AND DISPOSITION

Taxpayer’s Petition for correction of the assessment is granted.

Dated this 21st day of December 2016.

⁶ Amendments to Rule 107 became effective on December 12, 2013. The version of Rule 107 cited by Audit, was the version prior to these amendments. The previous version of Rule 107 relied upon by Audit, stated in relevant part, “[e]ven when prices are advertised as including the sales tax, the actual sales invoices . . . must list the retail sales tax as a separate charge[.]” As aptly noted by Taxpayer, the amendments to Rule 107 incorporate the *Bi-Mor* holding that former Rule 107 “created more tax liability than the legislature authorized,” and that therefore, this portion of the rule was “ultra vires and void as a matter of law.” *Id.* at 206.

⁷ The “tax included” language included in Taxpayer’s Craigslist postings directly follows the advertised price and is in the same font and size as the advertised price in accordance with RCW 82.08.055(1).