

Cite as Det. No. 17-0151, 36 WTD 607 (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. 17-0151
)	
... )	Registration No. . . .
)	

RCW 82.04.470(5); WAC 458-20-102(7)(h): RETAIL SALES TAX – BURDEN TO ESTABLISH SALE IS WHOLESALE WHEN NO RESELLER PERMIT OR UNIFORM EXEMPTION CERTIFICATE IS PROVIDED. Documentation from outside the audit period is insufficient to meet the burden of establishing that rentals were made at wholesale absent a reseller permit or uniform sales exemption certificate. Taxpayer bears the burden of providing documentation for each transaction it claims as wholesale.

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 business that rents portable horse-stalls protests an assessment resulting from the reclassification of its rentals from wholesale to retail, claiming that all of its customers re-rent the stalls at competitive horse events. Taxpayer also asserts that at some point a Department of Revenue (“Department”) employee orally advised it to report its stall rentals as “wholesale sales.” We deny Taxpayer’s petition.<sup>1</sup>

ISSUES

1. Has Taxpayer met its burden of establishing by facts and circumstances that it properly reported its horse-stall rentals as wholesale sales under RCW 82.04.470(5) and WAC 458-20-102(7)(h)?
2. Is the Department estopped from reclassifying Taxpayer’s rentals from wholesale to retail because it allegedly provided Taxpayer with oral advice that it did not need to charge retail sales tax on its portable horse-stall rentals?

FINDINGS OF FACT

. . . (“Taxpayer”) engages in a variety of business activities in Washington. It provides bookkeeping services, general freight services, and it rents portable horse-stalls. For the June 1,

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

2012, through March 31, 2016, tax period (“audit period”), Taxpayer reported all of its horse-stall rentals as wholesale sales on its Washington excise tax returns.

The Department’s Audit Division (“Audit”) conducted a partial audit of Taxpayer’s business records for the audit period. Audit concluded that Taxpayer failed to maintain documentation to support its treatment of income received from renting horse-stalls as “wholesaling” income. Accordingly, Audit reversed the amounts reported by Taxpayer as “wholesaling,” and calculated retailing [business and occupation (B&O)] tax and retail sales tax on the total income received from renting the horse-stalls. Audit also determined that Taxpayer failed to report income earned from providing bookkeeping services.<sup>2</sup> Accordingly, Audit calculated service & other income B&O tax on the income Taxpayer earned from bookkeeping. Based on these adjustments, Audit issued assessments against Taxpayer for \$ . . . in tax, corresponding interest, a delinquent penalty of \$ . . . , and a five percent assessment penalty of \$ . . . .<sup>3</sup>

Taxpayer petitioned for correction of the assessment on January 3, 2017.<sup>4</sup> Taxpayer claims that its portable horse-stall rentals during the audit period were not subject to retail sales tax because they were re-rented by its customers. Taxpayer also asserts that a Department employee orally advised it that it did not need to collect and pay retail sales tax on the rentals at issue.

A hearing was held on this matter on April 4, 2017. At the hearing, Taxpayer explained that it rents the horse-stalls at issue to organizers of competitive horse events. Taxpayer further explained that the event organizers re-rent the portable horse-stalls to individuals participating in the relevant events. Taxpayer argued that the re-rental of the horse-stalls, by event organizers to event participants, renders the rentals at issue in this case “wholesale sales.”

Upon request for documentation supporting its treatment of its horse-stall rentals during the audit period as wholesale sales, Taxpayer provided a copy of an excerpt from a portable horse-stall rental agreement. The agreement identifies . . . as the lessee [(Lessee)]. In the agreement, Taxpayer agrees to lease two hundred portable horse-stalls to [Lessee] at a rate of \$ . . . per stall. The agreement indicates that this rate applies to stall rentals in 2016 and 2017. The agreement indicates a “setup” date of “Aug 1,” but does not specify the applicable year. Taxpayer also provided a sample event information sheet pertaining to a horse event organized by [Lessee].<sup>5</sup> The information sheet does not indicate the date the event will be held. However, it does advertise a discounted registration fee for participants that register on or before “7/19.” The information sheet details key event features and contains a subsection entitled “Stabling/Veterinarian.” This subsection states the following:

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<sup>2</sup> Taxpayer confirmed at the hearing held on April 4, 2017, that it did not object to this aspect of the assessment.

<sup>3</sup> Audit issued two separate assessments against Taxpayer for the audit period. Audit issued the first assessment for the period June 1, 2012, through December 31, 2012, on December 1, 2016; and the second assessment for the period January 1, 2013, through March 31, 2016, on February 9, 2017. These figures represent the total combined amounts assessed.

<sup>4</sup> The Petition filed on January 3, 2017, protested the first assessment issued on December 1, 2016. Taxpayer’s petition was expanded to include the February 9, 2017, assessment during the course of the administrative review process.

<sup>5</sup> The information sheet lists an individual as the “organizer.” However, the URL [. . .](#) is displayed at the top of the sheet.

Limited. First come, first serve - \$ . . . . Stalls will be assigned in order received. Temp stalls on grounds. Bring stall guards. Early arrivals/late departures must be set-up with organizer prior to arrival – extra nights \$ . . . per stall. Stall doors/initial bedding provided. Haul-in fee, \$ . . . per horse. Veterinarian: Names & number will be posted at office.

Taxpayer submits that the sample agreement and information sheet provided support for its position that its horse stall rentals, during the audit period, constituted wholesale sales.

## ANALYSIS

### Burden to Establish a Sale is Wholesale

In Washington, the term “sale” includes a “lease or rental.” RCW 82.04.040(1). The term “retail sale” or “sale at retail” includes the “renting or leasing of tangible personal property to consumers,” unless the lease or rental is for the purpose of sublease or subrent. RCW 82.04.050(4)(a), (b). Any sale that is not a “sale at retail” is a “wholesale sale.” RCW 82.04.060.

The burden is on the seller to prove that a sale is wholesale rather than retail. RCW 82.04.470; WAC 458-20-254(3). *See* Det. No. 12-0349, 33 WTD 45 (2014); Det. No. 87-47, 2 WTD 235 (1986). RCW 82.04.470(1) provides that a seller can meet its burden of proving that a sale is wholesale “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.” *See also* Rule 102(7).

If the seller cannot provide a copy of the reseller permit, RCW 82.04.470(2) states that a seller may instead accept from a buyer required to be registered with the Department, a “uniform exemption certificate approved by the streamlined sales and use tax agreement governing board” or any other “exemption certificate as may be authorized by the department.”

RCW 82.04.470(3) addresses sales to a buyer *not* required to be registered with the Department and states that a seller may accept from a buyer a “uniform sales and use tax exemption certificate developed by the multistate tax commission,” a “uniform exemption certificate approved by the streamlined sales and use tax agreement governing board,” or any other “exemption certificate as may be authorized by the department.”

If the seller cannot provide a copy of a reseller permit or an exemption certificate, it will be liable for retail sales tax on the sale unless it can demonstrate facts and circumstances that show the sale was properly made at wholesale or that it captured the relevant data elements as allowed under the Streamlines Sales and Use Tax Agreement [(SSUTA)].<sup>6</sup> RCW 82.04.470(4) and (5); WAC 458-20-102(7). *See* Det. No. 13-0031, 33 WTD 336 (2014).

Irrespective of the manner in which a seller supports its treatment of a sale as a wholesale sale, whether it be pursuant to a reseller permit, uniform exemption certificate, or via other “facts and circumstances,” RCW 82.32.070(1) imposes an obligation on the seller to keep and preserve for a period of five years, suitable records as may be necessary to determine the person’s tax liability.

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<sup>6</sup> RCW 82.58.030 provides, “The department shall enter into the streamlined sales and use tax agreement with one or more states to simplify and modernize sales and use tax administration. . . .”

Here, Taxpayer's customers did not provide it with reseller permits for the portable horse-stall rentals at issue. Taxpayer's customers also did not provide uniform exemption certificates for the rentals. There is no indication that Taxpayer collected the relevant data elements outlined in the [SSUTA].<sup>7</sup> Accordingly, Taxpayer bears the burden of demonstrating through "facts and circumstances" that its horse-stall rentals during the audit period were "made at wholesale."

Rule 102(7)(h), the Department's rule that sets forth the criteria it will consider when evaluating whether the taxpayer has met its burden of proving that a sale was a wholesale sale rather than a retail sale by demonstrating facts and circumstances, provides as follows:

**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.

In this case, the horse show event organizers represent the "buyers." The rental of the portable horse-stalls is consistent with the business conducted by the horse show event organizers. However, we are unable to conclude from this fact alone, that Taxpayer meets its burden of establishing that all of its horse-stall rentals during the audit period constituted wholesale sales. In regards to the nature of the items rented, Taxpayer does not present any specific information or documentation that would allow us to conclude that its customers, horse event organizers, normally

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<sup>7</sup> [SSUTA] is a multi-state agreement to simplify sales and use tax collection and administration by retailers and states. *What is the Streamlined Sales and Use Tax Agreement*, Streamlined Sales Tax Governing Board, Inc., available at [http://www.streamlinedsalestax.org/index.php?page=gen\\_1](http://www.streamlinedsalestax.org/index.php?page=gen_1) (last accessed November 9, 2016). SSUTA attempts to create, among other things, uniformity among tax exemption administration. *How Does the Agreement Simplify Sales Tax Administration*, Streamlined Sales Tax Governing Board, Inc., available at [http://www.streamlinedsalestax.org/index.php?page=gen\\_4](http://www.streamlinedsalestax.org/index.php?page=gen_4) (last accessed November 9, 2016). SSUTA Governing Rule 317.1(A)(1) indicates what SSUTA requires for sellers claiming exemption from tax:

Unless waived by a state pursuant to [Governing Rule 317.1(B)(7)], a seller shall obtain the following information from a purchaser who claims exemption from tax: its name, address, type of business . . . reason for exemption . . . ID number required by the state to which the sale is sourced, state and country issuing ID number, and, if a paper form is used, a signature of the purchaser.

rent stalls for their events at wholesale. Therefore, the nature of the items rented provides no assistance in determining whether the rentals at issue constituted “wholesale sales.”

Finally, we are unable to conclude from the documentation provided that the rentals at issue constituted wholesale sales. The documentation provided by Taxpayer is limited to an incomplete, undated rental agreement that appears to pertain to rentals made outside the audit period,<sup>8</sup> and an information sheet describing a competitive horse event organized by the entity identified in the rental agreement that does not indicate the date of the event.<sup>9</sup> Without dates, a clear connection between the stalls covered in the rental agreement and the stalls offered at the horse event described in the information sheet cannot be drawn. Therefore, the documentation provided is insufficient, both narrowly, as it applies to the specific transaction governed by the rental agreement excerpt provided, and more widely, as it pertains to the remainder of Taxpayer’s portable horse-stall rentals during the audit period.

In summary, we find that Taxpayer fails to meet its burden in this case. Taxpayer fails to provide facts and circumstances that show that its portable horse-stall rentals during the audit period were made at wholesale as required by RCW 82.04.470(5) and Rule 102(7)(h).

#### Estoppel

Taxpayer asserts that it received oral advice from an unnamed Department employee that it did not need to collect retail sales tax on its portable horse-stall rentals. Although not articulated as such, Taxpayer’s assertion amounts to a claim that the Department’s previous oral advice estops it from assessing tax, interest, and penalties in this case.<sup>10</sup>

The Department addressed whether oral instructions are binding in Excise Tax Advisory 3065.2009, which read as follows:

RCW 82.32A.020 provides that the taxpayers of Washington have:

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<sup>8</sup> The audit period in this case ended March 31, 2016. The rental agreement indicates that the rate charged for the horse-stall rentals applies to 2016 and 2017. The information sheet provided indicates a preregistration date in July. Therefore, assuming that the rental agreement provided directly relates to the event detailed in the information sheet provided, it appears unlikely that the documentation provided by Taxpayer pertains to a period within the audit period.

<sup>9</sup> Without dates, a clear connection between the stalls covered in the rental agreement and the stalls offered at the horse event described in the information sheet cannot be drawn.

<sup>10</sup> The common law principle of equitable estoppel applies “when there has been an admission, statement or act” that has been justifiably relied on by another. *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 19, 43 P.3d 4 (2002). The Washington State Supreme Court addressed the requirements of equitable estoppel in *Dep’t of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). The court explained:

To establish equitable estoppel requires proof of (1) an admission, statement or act inconsistent with a claim later asserted; (2) reasonable reliance on that admission, statement, or act by the other party; and (3) injury to the relying party if the court permits the first party to contradict or repudiate the admission, statement or act.

*Id.* at 599; citing *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wash. 2d 816, 831, 881 P.2d 986 (1994).

The right to rely on specific, official written advice and written tax reporting instructions from the department of revenue to that taxpayer, and to have interest, penalties, and in some instances, tax deficiency assessments waived where the taxpayer has so relied to their proven detriment.

RCW 82.32A.020 does not authorize, nor does any other law permit, the Department to waive tax, interest, or penalties on the basis of a taxpayer's recollection of oral instructions by an agent of the department.

The Department gives consideration, to the extent of discretion vested in it by law, where it can be shown that failure of a taxpayer to report correctly was due to written instructions from the Department or any of its authorized agents. The Department cannot give consideration to claimed misinformation resulting from telephone conversations or personal consultations with a Department employee.

There are three reasons for this ruling:

- (1) There is no record of the facts which might have been presented to the employee for consideration.
- (2) There is no record of instructions or information imparted by the employee, which may have been erroneous or incomplete.
- (3) There is no evidence that such instructions were completely understood or followed by the taxpayer.

(Emphasis in original.) As explained in this ETA, Washington does not permit the waiver of tax when the alleged advice is oral. Without some form of written documentation or other corroboration, we are unable to confirm whether the taxpayer presented the relevant facts to the Department and the exact instructions provided based on the facts presented. *See* Det. No. 15-0151, 35 WTD 182 (2016); Det. No. 13-0059, 32 WTD 232 (2013). Accordingly, we are unable to waive the assessment in this case based on Taxpayer's claim that it received oral advice to treat the rentals at issue as wholesale sales.

#### DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 14th day of June 2017.