

Cite as Det. No. 18-0147, 39 WTD 006 (2020)

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. 18-0147
)	
...)	Registration No. . . .
)	

RULE 107; RCW 82.08.020; RCW 82.08.050: RETAIL SALES TAX -
- CONTRACT PRICE - SEPARATELY STATED TAX. The taxpayer is liable for
retail sales tax on the total contract amount where the tax was not separately
stated and the taxpayer failed to defeat the presumption that the price did not
include 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.

Margolis, T.R.O. – [Taxpayer] protests the assessment of retail sales tax on charges for parking
lot reconstruction, on grounds that it paid the appropriate tax to the construction contractor in
accordance with the contract. We deny the petition.¹

ISSUE

Whether, under RCW 82.08.050(9), Taxpayer is liable for retail sales tax on the total contract
amount where the tax was not separately stated in any sales invoice or other instrument of sale.

FINDINGS OF FACT

Taxpayer is On June 1, 2016, . . . (Contractor) executed a bid proposal to Taxpayer for
providing . . . (Project). The Project includes Taxpayer-owned parking lot reconstruction. The
proposal includes a schedule listing unit costs and notes that “[w]ork is subject to State Sales Tax
Rule 171. All Washington State Retail Sales Taxes shall be included in the unit bid item prices.”
Bid Proposal, Page P-5.

Taxpayer accepted Contractor’s bid. The parties executed a Public Works Agreement commencing
on July 12, 2016, and entered into a contract governed by Contract Documents. These Contract
Documents include both Special Provisions and Amendments to the Standard Specifications. The
Amendments to the Standard Specifications with regards to state taxes include the following:

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

1-07.2 State Taxes

This section is revised to read: . . .

[Taxpayer] will not adjust its payment if the Contractor bases a Bid on a misunderstood tax liability. . . .

1.07.2(1) State Sales Tax: Work Performed on City, County, or Federally-Owned Land

This section including title is revised to read:

1-07.2(1) State Sales Tax: WAC 458-20-171 – Use Tax

For Work designated as Rule 171, **Use Tax**, the Contractor shall include for compensation the amount of any taxes paid in the various unit Bid prices or other Contract amounts. Typically, these taxes are collected on materials incorporated into the project and items such as the purchase or rental of; tools, machinery, equipment, or consumable supplies not integrated into the project. . . .

Contractor's bid schedules detail a gross contract price of \$. . . and make no provision for or reference to separately-stated retail sales tax. Contractor completed the work in November 2016, and Taxpayer submitted an original Notice of Completion of Public Works Contract (NCPWC) to the Department of Revenue (Department) showing a contract amount of \$ The notice did not show any retail sales tax amount. Contractor invoices show that it did not charge Taxpayer retail sales tax.

The Department's Audit Division (Audit) advised Taxpayer's . . . Program Manager that retail sales tax was due on Contractor's charges for the parking lot reconstruction. In response, Taxpayer revised the NCPWC. NCPWC #3 shows a contract amount of \$. . . , but also shows sales tax of \$ Taxpayer now claims that this was incorrect and asks the Department to accept NCPWC #4, which shows a contract amount of \$. . . , reducing the original gross contract price by the amount of sales tax due on the retail portion of the project.

Audit declined to accept the newly-proffered contract price, and on April 14, 2017, assessed Taxpayer \$ The assessment is comprised of \$. . . in retail sales tax, and \$. . . in interest. Taxpayer appeals the assessment on grounds that Contractor was required to include any applicable sales tax in invoice billings for work under the contract, so the amounts charged included retail sales tax and it already paid the retail sales tax. Taxpayer has not produced any of the invoices from Contractor showing the collection of retail sales tax.

ANALYSIS

RCW 82.08.020 imposes retail sales tax on each retail sale taking place within this state. Generally, the seller must collect the tax from the buyer and then remit it to the Department. RCW 82.08.050. Where a buyer fails to pay the seller the retail sales tax, the Department may, at its discretion, proceed directly against the buyer for the collection of the tax. RCW 82.08.050(6).

The term “retail sale” is defined in RCW 82.04.050 and includes construction activities. WAC 458-20-170 (Rule 170) is the administrative rule that explains tax liability for the constructing or repairing of structures on real property. It explains that retail sales tax is due on the full contract price. RCW 82.08.050(9) provides that retail sales tax must be separately stated, but if the seller advertises the price as including the tax or that the seller is paying the tax, the advertised price is not considered the selling price. WAC 458-20-107 (Rule 107) is the administrative rule that addresses the requirement. It explains as follows (in pertinent part):

(2) **Retail sales tax separately stated.** RCW 82.08.050 specifically requires that the retail sales tax must be stated separately from the selling price . . . This is required even though the seller and the buyer may know and agree that the price quoted is to include state and local taxes, including the retail sales tax.

(a) The law creates a “conclusive presumption” that, for purposes of collecting the tax and remitting it to the state, the selling price quoted does not include the retail sales tax. *This presumption is not overcome or rebutted by any written or oral agreement between seller and buyer. . . .*

(3) **Advertising prices including tax.**

(a) RCW 82.08.055 provides that a seller may advertise prices as including the sales tax or that the seller is paying the sales tax under the following conditions:

(i) The words “tax included” are stated immediately following the advertised price . . .

(c) The scope and intent of the foregoing is that buyers have the right to know whether retail sales tax is being included in advertised prices or not and that the tax is not to be used for the competitive advantage or disadvantage of retail sellers.

Rule 107 (italics added).

The bid proposal notes that the work is subject to [WAC 458-20-171 (Rule 171)], the administrative rule regarding public road construction, and that retail sales tax shall be included. . . . Under Rule 171, contractors pay retail sales tax on materials, equipment, and supplies used or consumed in the performance of public road construction contracts, and do not charge retail sales tax [to their customers]. Thus, [while] the bid proposal stating that retail sales tax is included in bid item prices makes sense in the context of public road construction[,] . . . the tax at issue is not in connection with public road construction. [Instead, the tax at issue is on parking lot reconstruction, which is covered by Rule 170. Under Rule 170(4), prime contractors are required to collect from consumers the retail sales tax measured by the full contract price.]

[Here, while] the bid proposal provides that retail sales tax shall be included, [the contract referenced Rule 171’s tax requirements (which do not require payment of sales tax) and did not reference the correct tax requirements under Rule 170 (which do require payment of sales tax). The presumption therefore is that retail sales tax was not collected from Taxpayer. Nothing in the record overcomes this presumption by demonstrating that the contractor collected sales tax from Taxpayer, and no invoices make clear that sales tax was included. The only evidence purporting to show the payment of retail sales tax is an after-the-fact amendment to the contract. However], the Department is not a party to the contract and is not bound by its terms[, and Rule 107 specifically states that a written agreement between the buyer and seller does not overcome the

presumption]. The underlying work at issue was subject to retail sales tax, and liability is established by statute.²

Taxpayer contracted for parking lot reconstruction. It is liable to the Department for retail sales tax on the contract price. RCW 82.08.050; Rule 170. The contract price did not separately state retail sales tax. This price is conclusively presumed not to include retail sales tax, and the presumption is not defeated by the contract language. RCW 82.08.050(9); Rule 107; Det. No. 16-0345, 36 WTD 403 (2017); Det. No. 13-0370, 34 WTD 012 (2015); Det. No. 90-170, 9 WTD 286-61 (1990); Det. No. 88-280, 6 WTD 205 (1988); Det. No. 88-373, 6 WTD 427 (1988). Because Taxpayer has not defeated the presumption, we conclude that Taxpayer has not paid retail sales tax on the parking lot reconstruction to Contractor and sustain the assessment.³

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 4th day of June 2018.

² Similarly, contract language under which the [C]ontractor furnished bonds allegedly including state sales tax and Taxpayer was not to adjust its payment if contractor bids were based on a misunderstanding of tax liability is not determinative as to whether Taxpayer is liable for retail sales tax.

³ Taxpayer argues that it should be granted relief based on *Kaeser v. City of Everett*, 47 Wn.2d 666, 289 P.2d 434 (1955) and *Dep't of Revenue v. Bi-Mor, Inc.*, 171 Wn.App.197, 286 P.3d 417 (2012). In *Kaeser*, the contract provided that sales tax was to be included in the prices of the unit bid price. The contractor paid the sales tax and demanded reimbursement from the city. The Court affirmed that the contractor could not obtain reimbursement, noting that to require otherwise would require the city to pay its sales tax twice. Because *Kaeser* was decided prior to the addition of language in RCW 82.08.050, creating a conclusive presumption that a contract price does not include sales tax, it is not controlling. See Laws of 1965, 1st Ex. Sess., ch. 173, s 15, p. 2747. In *Bi-Mor*, the retailer broadly advertised that its prices included sales tax or that it absorbed the sales tax. The Court held that the Department could not conclusively presume that properly advertised "tax-included" selling prices did not include retail sales tax. As we held in Det. No. 13-0370, 34 WTD 012 (2015), "[t]he execution of a private contract between private parties does not constitute 'advertising' as that term is used in RCW 82.08.050(9)." See also Det. No. 14-0409, 36 WTD 323 (2017). Because the holding in *Bi-Mor* is in regards to a seller that advertised its prices to the buying public, it does not apply here.