

Cite as Det. No. 18-0088, 39 WTD 198 (2020)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS 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. 18-0088
	)	
...	)	...
	)	

Rule 102; RCW 82.04.470; RETAIL SALES TAX – WHOLESALING – RETAILING – SUBSTANTIATION – RESELLER PERMIT –FACTS AND CIRCUMSTANCES. Where a valid reseller permit or alternate acceptable documentation is not available, to substantiate a wholesale sale under the facts and circumstances test the seller must provide detail for each individual sales transaction at issue. General information about the nature of the customers’ business or general use of supplies is not sufficient to substantiate a wholesale sale.

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, T.R.O. – A company selling restaurant supplies and other packaging products protests the reclassification of sales reported as wholesale to retail due to the lack of reseller permits. We affirm the adjusted assessments as issued, because the Taxpayer has not provided sufficient documentation to substantiate the nature of the contested sales. The Taxpayer’s petition is denied.<sup>1</sup>

ISSUES

1. Whether sales for which the Taxpayer did not obtain a reseller permit from the buyer or provide alternate documentation to substantiate the nature of the sale were properly reclassified from wholesale to retail under RCW 82.04.470(1) and WAC 458-20-102.
2. Whether general information on similar sales, some to the same customer, is sufficient to classify sales as wholesale under a facts and circumstances analysis allowed by WAC 458-20-102(7)(h).

FINDINGS OF FACT

... (Taxpayer) is a Washington corporation engaged in the business of selling packaging and restaurant supplies. The Audit Division of the Department of Revenue (Department) audited the

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

Taxpayer's Washington business activities and identified additional tax due. The Audit Division issued two assessments to the Taxpayer. The first assessment, Document No. . . . (Invoice . . . ), in the amount of \$ . . . , covered 2012.<sup>2</sup> The second assessment, Document No. . . . (Invoice . . . ), in the amount of \$ . . . covered Washington business activity between . . . , 2013, and . . . , 2015.<sup>3</sup> The Taxpayer timely filed petitions seeking review of each assessment, which were consolidated for review.

The majority of the tax assessed on both assessments was due to the re-categorization of income from sales that had been reported as wholesale transactions to retail sales and the assessment of retail sales tax on those amounts, because insufficient records were available to substantiate the sales as wholesale. On review, the Taxpayer provided additional records and information that the Audit Division reviewed and found sufficient to support adjustment to both assessments. Post Assessment Adjustments (PAAs) reducing the total tax due were issued for both assessments. Invoice . . . was adjusted to \$ . . . and Invoice . . . was adjusted to \$ . . . .<sup>4</sup>

Taxpayer did not initially produce electronic records during the audit, and once made available, were not available for the full audit period. Taxpayer produced electronic records for 2014 and 2015 and the Audit division used the information from review of this data to generate an error percentage that it applied to 2012 and 2013.

The Audit Division accepted reseller permits for customers where the customer's business or trade name (d/b/a) differed from their legal or entity name, but there was detail to link a particular d/b/a with the name on a reseller permit. The Audit Division also did not assess tax on sales to customers where there may have been a lapse between valid reseller permits, but it was possible to confirm that the reseller permit was subsequently renewed. However, the Audit Division reclassified sales to retail where the customer did not have a reseller permit during the timeframe that the sales were made, but later acquired a reseller permit (the Audit Division did not reclassify the sales made when that customer had a valid reseller permit). Similarly, sales to customers who had a permit lapse during the audit period and did not subsequently renew their permit were also only treated as wholesale for the period of time that the permit was valid.

The Audit Division also noted that, in reviewing receipts, the sale of consumable items such as bleach and rolls of paper towels, items that should have been classified as retail sales, were treated as wholesale. In the Audit Division's view, this error showed that Taxpayer did not carefully or consistently track retail and wholesale sales.

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<sup>2</sup> Invoice . . . was comprised of \$ . . . in retail sales tax, \$ . . . in retailing business and occupation (B&O) tax, a credit for (\$ . . . ) in wholesaling B&O tax, interest of \$ . . . , and an assessment penalty of \$ . . . .

<sup>3</sup> Invoice . . . was comprised of \$ . . . in retail sales tax, \$ . . . in retailing B&O tax, a credit for (\$ . . . ) in wholesaling B&O tax, \$ . . . in use tax, interest of \$ . . . , and an assessment penalty of \$ . . . .

<sup>4</sup> The PAA of Invoice . . . is comprised of \$ . . . in retail sales, \$ . . . in retailing B&O tax, a credit for (\$ . . . ) in wholesaling B&O tax, interest of \$ . . . , and an assessment penalty of \$ . . . ; and the PAA of Invoice . . . is comprised of . . . in retail sales tax, \$ . . . in retailing B&O tax, a credit for (\$ . . . ) in wholesaling B&O tax, interest of \$ . . . , and an assessment penalty of \$ . . . .

## ANALYSIS

Washington law imposes retail sales tax on every retail sale in this state. RCW 82.08.020. The definition of “retail sale” excludes “purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person.” RCW 82.04.050(1)(a)(I). Washington also imposes a B&O tax on various tax classifications, including making retail sales under RCW 82.04.250 and wholesale sales under RCW 82.04.270. A “wholesale sale” is defined as “any sale, which is not a sale at retail.” RCW 82.04.060(1).

Unless a seller has taken from a buyer a reseller permit, the burden of proving that a sale is a wholesale sale rather than a retail sale is upon the person who made it. RCW 82.04.470(1). If a seller does not receive a reseller permit at the time of the sale, have a reseller permit on file at the time of the sale, or obtain a reseller permit from the buyer within a reasonable time after the sale, the seller shall remain liable for the retail sales tax. *Id.* RCW 82.04.470(2). All sales are treated as retail sales unless the seller takes from the buyer a properly executed reseller permit or other documentation described below. WAC 458-20-102(5) (Rule 102(5)). A taxpayer may prove the exempt nature of a transaction (using an exemption certificate or other means) within 90 days of the sale, 120 days of the Department’s request, or a longer period as provided by Department rule. RCW 82.08.050(7).

RCW 82.08.050 defines “exemption certificate” to mean documentation furnished by a buyer to a seller to claim an exemption from sales tax and includes a reseller permit or other documentation authorized by RCW 82.04.470. RCW 82.08.050(11)(a). WAC 458-20-102 (Rule 102) is the administrative regulation addressing reseller permits and expressly authorizes the use of alternate certificates including “a properly completed uniform exemption certificate approved by the streamlined sales and use tax agreement governing board.” Rule 102(7)(a)(i).

In instances where a specific form was not relied upon, the taxpayer has the burden of providing information that characterizes a sale as a wholesale sale. Rule 102(7)(f).

The Rule provides for alternate information to substitute for the identified certificates, specifically detailing data elements that are required to be supplied. Rule 102(7)(f).<sup>5</sup> Finally, the rule provides a general facts and circumstances provision to show that sales was properly made at wholesale:

**(h) 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

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<sup>5</sup> Rule 102(7)(f) provides:

In lieu of obtaining a reseller permit or the documentation in (a) or (d) of this subsection, RCW 82.08.050 authorizes a seller to capture the relevant data elements as allowed under the streamlined sales and use tax agreement. “Data elements” are the information required to be supplied on the actual Streamlined Sales and Use Tax Agreement Certificate of Exemption including: Name, address, type of business, reason for exemption, reseller permit number as applicable in this rule, identification number required by the state to which the sale is sourced, state and country issuing identification number, and if a paper form is used, the signature of the purchaser. See Streamlined Sales Tax Governing Board, Inc. Rule 317.1 for more information.

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); *see also* Det. No. 14-0170, 34 WTD 030 (2015).

In conjunction with these provisions directly addressing substantiating wholesale sales, there is also the general obligation that taxpayers are required to maintain suitable records to establish their tax liability. RCW 82.32.070(1).<sup>6</sup>

Here the Taxpayer asserts that the nature of the articles sold, packaging and take-out containers, and the nature of its customers, restaurants making retail sales, should be sufficient to substantiate that the sales at issue were properly reported as wholesale sales under the facts and circumstances test. Taxpayer asserts that the "facts and circumstances" test is particularly applicable to customers that did have a valid reseller permit on file for a portion of the audit period.

In this case, the nature of the restaurant customers' businesses supports a finding that the Taxpayer made wholesale sales. The nature of the items purchased by Taxpayer's customers is less conclusive because, as was noted by the Audit Division, some of the invoices reviewed showed that consumable supplies, such as paper towels, that should have been subject to retail sales tax, were occasionally sold at wholesale. Furthermore, some of the articles in the invoices could have been used either as consumables or resold. However, we note that Rule 102 does allow a buyer purchasing property that can be both consumed and resold to purchase such items using a reseller permit provided that the buyer generally resells the articles. Rule 102(12).<sup>7</sup> Thus, for example, if

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<sup>6</sup>RCW 82.32.070(1) provides:

Every taxpayer liable for any tax collected by the department must keep and preserve, for a period of five years, suitable records as may be necessary to determine the amount of any tax for which the taxpayer may be liable. Such records must include copies of all of the taxpayer's federal income tax and state tax returns and reports. All of the taxpayer's books, records, and invoices must be open for examination at any time by the department of revenue. . . . The administrative regulation addressing records WAC 458-20-254 (Rule 254), also describes the specific types of records that taxpayers must maintain, including records of original source documents establishing the nature of a sale, such as sales invoices. Rule 254(3)(c)

<sup>7</sup>Rule 102(12) provides:

the principal use of a container is for retail take-out orders, rather than for food storage by the restaurant, it would be proper to provide a reseller permit for the full order and it would be the purchaser's obligation to remit deferred sales tax on the articles that it consumes.

The Taxpayer has identified a number of customers as retail stores or restaurants and has asserted that certain types of products, such as food containers and utensils, are sold as part of the customer's food sales. The Taxpayer included copies of several invoices for sales to a restaurant customer detailing purchases. These invoices, do include items that may be commonly sold at wholesale, but no clarifying information to substantiate that characterization was included. Additionally, the invoice detail provided appears to be for a customer where the Audit Division allowed adjustment in the PAA so it is possible that these invoices were removed from the assessment in the PAA.

The invoice detail available lacks some important information to identify that the sales were properly made at wholesale. The main problem with these invoices is the descriptions of the items sold. While some of the items on the invoices, such as foam trays or lids, are most likely used for to-go containers or as single use serving items, others items have more general descriptions, . . . which do not indicate whether these are consumables or wholesale items. The Taxpayer has not provided information to detail the nature of the particular items being sold. We note that the specific "facts and circumstances" references in Rule 102(7)(h) use "the sale" and "the sales transaction itself" as singular terms. Thus, in the absence of a valid reseller permit or alternate acceptable documentation it is the seller's obligation to provide facts and circumstances for each individual sales transaction at issue.

Here, the Taxpayer has made assertions about the general nature of its customers and generalizations about categories of supplies. What is lacking is detail that substantiates that the specific products being sold are indeed products that are generally purchased at wholesale and the additional documentation necessary to establish that these particular products were sold to the specific restaurant customers. Accordingly, we conclude that the Taxpayer has not provided sufficient detail to substantiate that the remaining contested sales were wholesale sales under the facts and circumstances test in Rule 102(7)(h) and we hold that those sales were properly reclassified by the Audit Division to retail. We affirm the PAAs as issued.

If the Taxpayer can provide additional records that would be sufficient to characterize a particular sale as a wholesale sale under the provisions of Rule 102, it may pay the tax and 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.

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Purchases for dual purposes. A buyer normally engaged in both consuming and reselling certain types of tangible personal property, and not able to determine at the time of purchase whether the particular property purchased will be consumed or resold, must purchase according to the general nature of the buyer's business. RCW 82.08.130. If the buyer principally consumes the articles in question, the buyer should not give a reseller permit for any part of the purchase. If the buyer principally resells the articles, the buyer may furnish a reseller permit for the entire purchase. For the purposes of this subsection, the term "principally" means greater than fifty percent.

DECISION AND DISPOSITION

The Taxpayer's petition denied.

Dated this 28th day of March 2018.