

Cite as Det. No. 19-0064, 40 WTD 157 (2021)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Refund)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 19-0064
)	
...)	Registration No. . . .
)	

[1] RCW 82.08.0273, RCW 82.32.070; WAC 458-20-254: RETAIL SALES TAX – NONRESIDENT EXEMPTION – RECORDS. Taxpayers must maintain records required under RCW 82.08.0273 for each nontaxable sale to nonresidents to qualify for that statutory exemption.

[2] RCW 82.08.0273, ETA 3054.2014: RETAIL SALES TAX – NONRESIDENT EXEMPTION – PARTS COSTS. To qualify for the retail sales tax exemption under RCW 82.08.0273, a seller must list the charges for the parts separately from labor and installation costs and the charges for the parts cannot exceed either the seller’s current publicly stated retail price for the parts or, if no publicly stated retail price is available, the seller’s cost for the parts.

[3] RCW 82.32.060: TAX REFUNDS – REFUNDS TO BUYERS FOR IMPROPERLY COLLECTED RETAIL SALES TAX. Retail sales taxes will not be refunded to a seller, even when erroneously collected, unless the seller first refunds those taxes to the buyer who paid them.

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.

Farquhar, T.R.O. – An automotive maintenance and repair company protests the Department’s assessment of retail sales tax on certain sales of auto parts on the grounds that it sold the parts to a nonresident. The company also seeks a refund of retail sales tax collected from Washington customers on sales that occurred while both the company and the customer were outside the state. We find that because the company charged the nonresident more than the company’s costs for the parts and failed to provide adequate documentation regarding the nonresident’s residency, an adjustment of the assessment is not warranted. We also find that the company is not entitled to a refund of the allegedly erroneously-collected sales tax because it did not first refund the taxes to its customers. Petition denied.¹

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

ISSUES

1. Whether certain sales of auto parts to nonresidents are exempt, under RCW 82.08.0273, when Taxpayer's charges for the parts exceeded Taxpayer's costs and Taxpayer failed to provide records regarding the buyer's residency?
2. Whether RCW 82.32.060 entitles Taxpayer to a refund of retail sales tax collected from buyers prior to Taxpayer first refunding the amounts collected to the buyers?

FINDINGS OF FACT

. . . [Taxpayer] is an automotive maintenance and repair company located in . . . , Washington. Taxpayer specializes in vintage racecars and its business activities include performing services and storing racecars at their [city] shop, transporting racecars to and from racing locations in Washington and other states, and providing on-site support at race tracks in Washington and other states.

In November of 2017, the Department's Audit Division ("Audit") began a review of Taxpayer's books and records for the period of January 1, 2014, through September 30, 2017 ("the Audit Period"). Audit sought to verify that Taxpayer was properly reporting its retail sales tax, business and occupation ("B&O") tax, and other tax liabilities. At Audit's request, Taxpayer provided excise tax returns, federal income tax returns, bank records, and select sales records.

Following its review of the records, Audit noted several instances in which Taxpayer had incorrectly reported its various tax liabilities. On July 27, 2018, Audit issued an assessment in the amount of \$. . . ("the Assessment"). The Assessment is comprised of \$. . . in taxes, an \$. . . penalty, and \$. . . in interest. To pay the Assessment, Taxpayer established a payment plan with the Department. Taxpayer completed the payment plan on November 26, 2018.

On August 28, 2018, Taxpayer submitted a timely petition for review. Initially, Taxpayer disputed the assessment of retail sales tax on the sales of auto parts to five nonresident customers. Taxpayer argued that, because the customers were nonresidents, the sales were exempt from Washington retail sales tax. However, at the hearing conducted on November 16, 2018, Taxpayer conceded that two of the five customers were subject to retail sales tax and said that it planned to submit additional documentation regarding sales to the other three customers.

On January 10, 2019, Taxpayer submitted additional documentation by email. The new records included an annotated copy of Exhibit A1 from Audit's Excel workbook and invoices documenting 14 transactions between Taxpayer and eight of its customers ("the invoices"). The customers referenced in the invoices include only one of the original five mentioned in Taxpayer's Review Petition. During a follow-up telephone conversation with Taxpayer conducted on February 6, 2019, Taxpayer stated that it only wished to [seek review of] the transactions documented in the invoices. Three of the invoices, which document sales to a nonresident, relate to the first issue in this case. The remaining 11 invoices, which document sales to eight Washington residents, relate to the second issue. For clarity, we will discuss the invoices as related to the two issues.

Sales to Nonresidents

Three of the invoices submitted by Taxpayer related to sales to a customer that purportedly lives in [out of state] (“... customer”). Taxpayer did not provide any documentation, such as a driver’s license or photo identification, showing the [out of state] customer’s home address.

The three invoices document the following transactions:

Invoice Date	Parts	Labor	Tax	Total
1/20/2014	\$...	\$...	“Exempt”	\$...
4/3/2014	\$...	\$...	“Exempt”	\$...
6/1/2014	\$...	\$...	“Exempt”	\$...

The invoices include separate charges for parts and labor and a list of each part that was included in the transaction along with its price. Next to some of the prices, Taxpayer hand-wrote the price Taxpayer paid to purchase the parts. In every instance, the amount Taxpayer charged the customer was more than the amount Taxpayer paid for the part. Taxpayer did not provide any receipts to document the wholesale price it paid for any of the parts. At the hearing in this case, Taxpayer’s representative stated that Taxpayer does not advertise retail prices for the parts it sells. Taxpayer also did not provide information as to how and where the [out of state] customer intended to use the vehicle after Taxpayer installed the parts.

Audit determined that the full amount of the sales to the [out of state] customer were subject to retail sales tax and included those amounts in the Assessment. Taxpayer argues that the parts portion of the sales (i.e. not the labor charges) are not subject to retail sales tax because the Department allows sellers to make tax-exempt sales of tangible personal property to customers that live in certain states...

Sales to Washington Residents

The remaining 11 invoices document sales to eight different Washington residents. The invoices included itemized charges for parts, labor, trackside support, storage, fees, and transportation. Each invoice included a subtotal of all of the charges, the amount of tax due (according to Taxpayer’s calculations), and a total amount due. Taxpayer identified some of the trackside support charges as having occurred outside of Washington. On each invoice, Taxpayer handwrote the location of where the out-of-state charges occurred. The locations included [multiple states]. The invoices are summarized as follows:

Customer Name	Invoice Date	Subtotal	Tax Due	Total Due	Out-of-State Portion
[Customer 1]	04/18/2016	\$...	\$...	\$...	\$...
[Customer 2]	09/10/2016	\$...	\$...	\$...	\$...
[Customer 3]	09/23/2015	\$...	\$...	\$...	\$...
[Customer 4]	04/18/2016	\$...	\$...	\$...	\$...
[Customer 5]	07/18/2015	\$...	\$...	\$...	\$...
[Customer 6]	04/22/2015	\$...	\$...	\$...	\$...

[Customer 7]	12/10/2015	\$...	\$...	\$...	\$...
[Customer 8]	09/22/2016	\$...	\$...	\$...	\$...
[Customer 9]	06/28/2016	\$...	\$...	\$...	\$...
[Customer 10]	07/23/2016	\$...	\$...	\$...	\$...
[Customer 11]	09/10/2016	\$...	\$...	\$...	\$...

Taxpayer argues that the out-of-state portions of the invoices are not subject to sales tax. As such, Taxpayer seeks a refund of the retail sales tax it collected on those sales. Taxpayer did not submit any documentation other than the invoices to support its argument that the charges were incurred outside of Washington. Taxpayer also did not provide any documentation showing that it has refunded any of the allegedly over-collected taxes to its customers.

ANALYSIS

1. Sales to Nonresidents

Generally, retail sales tax is imposed upon all retail sales in Washington. RCW 82.08.020. Sales of tangible personal property are subject to retail sales tax, “unless the sale is specifically excluded from the RCW 82.04.050 definition of retail sale.” RCW 82.08.020(1)(a). Certain services, including the “installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers,” are also subject to retail sales tax. RCW 82.08.020(1)(c); RCW 82.04.050(2)(a). When a seller makes a retail sale, it is obligated to collect retail sales tax and remit the funds to the state. RCW 82.08.050. If the seller fails to collect the retail sales tax, the seller becomes liable for the tax. *Id.*

Here, Taxpayer’s sales of auto parts constitute sales of tangible personal property and are subject to retail sales tax unless an exemption applies. RCW 82.08.020(1)(a), (c); RCW 82.04.050(2)(a).

RCW 82.08.0273 provides for an exemption from retail sales tax for sales of tangible personal property to nonresidents for use outside the state. RCW 82.08.0273 states that retail sales tax does not apply to sales of tangible personal property to nonresidents when:

- (a) The property is for use outside this state;
- (b) The purchaser is a bona fide resident of a province or territory of Canada or a state, territory, or possession of the United States, other than the state of Washington; and
 - (i) Such state, possession, territory, or province does not impose, or have imposed on its behalf, a generally applicable retail sales tax, use tax, value added tax, gross receipts tax on retailing activities, or similar generally applicable tax, of three percent or more; or
 - (ii) If imposing a tax described in (b)(i) of this subsection, provides an exemption for sales to Washington residents by reason of their residence; and

(c) The purchaser agrees, when requested, to grant the department of revenue access to such records and other forms of verification at his or her place of residence to assure that such purchases are not first used substantially in the state of Washington.

Excise Tax Advisory 3054.2014 (“ETA 3054”), which is an interpretive statement from the Department that applies the statutory language, specifies that residents of [out of state] constitute “eligible nonresidents” for the purposes of RCW 82.08.0273.^[2]

RCW 82.08.0273 imposes a duty on nonresident purchasers who seek to make tax-exempt purchases. The statute states, in part, the following:

(3)(a) Any person claiming exemption from retail sales tax under the provisions of this section must display proof of his or her current nonresident status as herein provided.

(b) Acceptable proof of a nonresident person’s status shall include one piece of identification such as a valid driver’s license from the jurisdiction in which the out-of-state residency is claimed or a valid identification card which has a photograph of the holder and is issued by the out-of-state jurisdiction. Identification under this subsection (2)(b) must show the holder’s residential address and have as one of its legal purposes the establishment of residency in that out-of-state jurisdiction.

RCW 82.08.0273(4)(a)³ specifically lists the documents sellers must keep to substantiate a sale is qualified for this exemption:

Nothing in this section requires the vendor to make tax exempt retail sales to nonresidents. A vendor may choose to make sales to nonresidents, collect the sales tax, and remit the amount of sales tax collected to the state as otherwise provided by law. If the vendor chooses to make a sale to a nonresident without collecting the sales tax, the vendor shall, in good faith, examine the proof of nonresidence, determine whether the proof is acceptable under subsection (2)(b) of this section, and maintain records for each nontaxable sale which shall show the type of proof accepted, including any identification numbers where appropriate, and the expiration date, if any.

Thus, if the seller chooses to make tax-exempt sales, the seller also accepts certain statutorily-defined responsibilities to do all of the following: (1) examine the proof of nonresidence; (2) determine whether the proof is acceptable; and (3) maintain records for each nontaxable sale, which shall show the type of proof accepted, including any identification numbers and expiration dates. RCW 82.08.0273(4)(a). The seller must fulfill all of these responsibilities to qualify the sale as exempt from retail sales tax. We note that exemptions are strictly construed in favor of

² [Starting July 1, 2019, the retail sales tax exemption for qualified non-residents is no longer available at the point of sale. Consumers pay the tax and may request a refund. *See* Laws of 2019 ch. 423 § 101].

³ RCW 82.08.0273(4)(b) and (c) provide alternative options to substantiate that a sale to a nonresident qualifies as tax-exempt. Taxpayer did not comply with either such section.

application of the tax and the burden of proof is on the person claiming the exemption. *Budget Rent-A-Car, Inc. v. Dep't of Revenue*, 81 Wn.2d 171, 174-175, 500 P.2d 764 (1972).

ETA 3054 contains the following specific instructions to sellers who choose to make tax-exempt sales to nonresidents pursuant to RCW 82.08.0273:⁴

Sellers making exempt sales to eligible nonresidents must:

1. Examine one piece of identification that establishes proof of nonresidency. The identification must be a valid driver's license issued by the jurisdiction in which the out-of-state residency is claimed or a valid identification card issued by the out-of-state jurisdiction. The identification must A) bear the photograph of the holder B) show the holder's residential address, C) identify the holder's name, and D) be issued for the purpose of establishing residency.
2. Maintain a record of the type of documentation accepted as establishing nonresidency in (1) immediately above, including identification numbers, expiration dates, the purchaser's name, and the purchaser's state of residency.
3. Record the documentation accepted as establishing nonresidency on the invoice or other written evidence of sale and retain the information or maintain a legible photocopy of the documentation establishing nonresidency as part of the seller's accounting records for the statutory period of five years (refer to RCW 82.32.070). In the case of a seller making cash sales without issuing invoices (for example, retail hardware stores) and maintaining a log, such a log must identify the date and amount of sale, and the information described in (2) immediately above or in the case of corporate nonresidents the corporate nonresident permit number.

RCW 82.08.0273 also imposes specific restrictions on making tax-exempt sales of "parts or other tangible personal property" that are "installed by the seller during the course of repairing, cleaning, altering, or improving motor vehicles, trailers, or campers" ("auto parts"). In order for sales of auto parts to qualify for the exemption, the charges for the parts must be listed separately from labor and installation costs and the charges for the parts cannot exceed either the seller's current publicly stated retail price for the parts or, if no publicly stated retail price is available, the seller's cost for the parts. RCW 82.08.0273(2).

In this case, Taxpayer argues that its sales to the [out of state] customer are exempt from retail sales tax because the customer lives in [out of state]. While we agree that [out of state] residents may qualify for the exemption pursuant to RCW 82.08.0273 and ETA 3054, Taxpayer has not presented any documentation regarding the customer's residency. RCW 82.08.0273(3) and (4), as

⁴ ETA 3054 allows for alternative documentation, not at issue here. It states: "In lieu of furnishing proof of a purchaser's nonresident status as described in (1) above, a seller may accept from the purchaser a properly completed uniform exemption certificate approved by the streamlined sales and use tax agreement governing board. The certificate must include the purchaser's driver's license number or other state-issued identification number and the state of issuance; or the seller may capture the relevant data elements as allowed under the streamlined sales and use tax agreement. The "Buyers' Retail Sales Tax Exemption Certificate" can be found on Department of Revenue's web site at DOR.WA.GOV."

well as ETA 3054, require that a taxpayer review, and retain copies of, residency documentation when making tax-exempt sales to nonresidents. While we have no reason to suspect that the [out of state] customer does not actually live in [out of state], the statute is clear: Taxpayer must retain actual documentation, such as a driver's license or identification card, to support any tax-exempt sale to a nonresident.

However, even if Taxpayer produced evidence that the [out of state] customer is indeed an [out of state] resident, the subject sales would still not qualify for the exemption because of the prices Taxpayer charged for the parts. Because Taxpayer does not advertise retail sales prices for the parts it sells, RCW 82.08.0273(2) states that, for the sale to be tax-exempt, Taxpayer cannot charge its customers more than what Taxpayer paid for the parts. Thus, because Taxpayer charged the [out of state] customer more than what Taxpayer paid for the parts, the sales cannot be tax-exempt.

Finally, we also note that Taxpayer did not provide any evidence regarding how and where the [out of state] customer used the vehicle after Taxpayer installed the parts. RCW 82.08.0273(1)(a) states that the exemption is only for property that will be used outside of Washington. The statute also mandates that the purchaser retain "records and other forms of verification" to show that the property was "not first used substantially in the state of Washington." RCW 82.08.0273(1)(c). Thus, even if Taxpayer had retained proper residency documentation and not charged more than its costs for the parts, it would still need to show that the subject parts were not "first used substantially" in Washington following installation.

2. Refunds for Over-Collected Retail Sales Tax

Retail sales taxes will not be refunded to a seller, even when erroneously collected, unless the seller first refunds those taxes to the buyer who paid them. This is because RCW 82.32.060 limits refunds only to those who "paid" the tax.⁵ A seller does not "pay" retail sales tax; it merely holds the retail sales taxes it collects in trust before remitting the taxes to the Department. *See Kitsap-Mason Dairyman's Association v. Tax Commission*, 77 Wn.2d 812, 467 P.2d 312 (1970) ("Inherent in RCW 82.08 is the fact that taxes collected in the name of the state are not [the] property of the seller."). Retail sales taxes collected from customers have been "paid" by those customers for purposes of RCW 82.32.060. Thus, absent prior refunds to the buyers, there can be no refund to the seller. Det. No. 87-110, 3 WTD 21 (1987) ("If the taxpayer establishes that it has made refunds to [its customers], it will be entitled to a corresponding refund."); *see also* WAC 458-20-229(4)(a) (stating that purchasers should seek retail sales tax refunds from the seller before seeking refund from the Department).

⁵ RCW 82.32.060(1) provides:

If, upon receipt of an application by a taxpayer for a refund . . . it is determined by the department that within the statutory period for assessment of taxes, penalties, or interest prescribed by RCW 82.32.050 any amount of tax, penalty, or interest *has been paid* in excess of that properly due, the excess amount paid within, or attributable to, such period must be credited to the *taxpayer's account or must be refunded to the taxpayer*, at the taxpayer's option. Except as provided in subsection (2) of this section, no refund or credit may be made for taxes, penalties, or interest 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.

(Emphasis added.)

Here, Taxpayer has not shown that it has refunded its customers for any retail sales tax Taxpayer believes it collected in error. Thus, Taxpayer is not entitled to a refund under RCW 82.32.060 and WAC 458-20-229(4)(a). Because Taxpayer failed this initial element, we decline to evaluate whether each line item identified by Taxpayer is actually tax-exempt. However, we note that the documentation Taxpayer provided is likely inadequate to support such a conclusion. The invoices contain little, if any, information about where the charges took place. Taxpayer may benefit from supplying additional documentation to support its position that the charges occurred outside of Washington, but any such documentation would be immaterial to a refund request unless and until Taxpayer first refunds the amount of the taxes to its customers.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 1st day of March 2019.