

Cite as Det. No. 20-0178, 41 WTD 199 (2022)

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. 20-0178
)	
...)	Registration No. . . .
)	

RCW 82.04.050; RCW 82.04.192: RETAIL SALES TAX – DIGITAL GOODS – PHOTOGRAPHY. Sales of digital photographs, which are produced and edited by the photographer before being electronically transferred to the end consumer, are considered retail sales regardless of whether the photographer retains any rights to the photographs after the transaction is completed.

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. – A portrait photography business protests the Department’s assessment of retail sales tax on its sales of digital photographs on the grounds that it provides “photography for hire” services, which are not subject to retail sales tax. However, the contract that the business has its customers sign before each transaction specifies that the sale includes edited images, which are produced and edited by the business before being electronically transferred to the customer. Because electronically transferred images are considered a “digital good,” and sales of digital goods are subject to retail sales tax, we conclude that the Department properly classified the business’s sales as retail sales. Petition denied.¹

ISSUE

Whether sales of digital photographs, which are produced and edited by the seller before being electronically transferred to the end consumer, are considered retail sales under RCW 82.04.050 and RCW 82.04.192.

FINDINGS OF FACT

. . . (“Taxpayer”) is a photography business based in . . . Washington. Taxpayer specializes in producing portrait photographs of high school seniors, couples, and families. . . . When a customer wishes to hire Taxpayer, the customer is required to sign a five-page contract entitled the “Client

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

Service Agreement”. Taxpayer provided a copy of the Agreement for our review. The Agreement includes the following relevant provisions:

1. Parties. . . . [Taxpayer] is in the business of providing *professional photography services* and the Client wishes to retain [Taxpayer’s] services for the session(s) set forth above.

2. Portrait Session. The client is guaranteed approximately 2 1/2 hours of shooting time for one Senior Portrait session at [to be determined].

...

4. Session Inclusions: [The Senior Portrait session] *will include 35 edited images, of the best from the photoshoot.*

...

5. Session Fee. The client agrees to pay the session fee set forth on page 1 of this Agreement to book Client’s session on [Taxpayer’s] calendar. Session fee is due before the session starts, no photos will be taken unless payment has been made in full. . . . The session fee includes back-up storage of images for a period of one year.

...

7. GALLERY PROOFING: . . . *A private, online digital gallery with all final edited images will be delivered to the Client within 10-14 days from the time of the photoshoot.*

...

11. Archive and Storage. . . . The Client is responsible for making electronic back-up copies of any digital files that are purchased from the Photographer and for keeping them in a safe place. [Taxpayer] *releases all intangible rights to digital images once received by the Client.*

...

14. Model Release. Client hereby grants to [Taxpayer] and [Taxpayer’s] legal representatives, heirs, and assigns, *the irrevocable and unrestricted right to use and publish photographs* of Client, Client’s likeness and photographs and likeness of all persons involved in the session, including Client’s minor children set forth on the first page of this Agreement, for marketing, advertising, portfolio, website, and other purposes, in any manner and to alter the same without restriction. The client hereby releases [Taxpayer] and [Taxpayer’s] legal representatives, heirs and assigns from any and all claims and liability relating to the photographs.

See generally, Agreement (emphasis added).

In 2017 and 2018, Taxpayer reported its income under the Service and Other Activities business and occupation (“B&O”) tax classification and did not collect retail sales tax on any of its sales.² In January 2019, the Department’s Taxpayer Account Administration Division (“TAA”) requested Taxpayer provide information about its business activities to determine whether Taxpayer was reporting its income correctly. Taxpayer submitted a description of its services, as well as a copy of the Agreement.

After reviewing the materials, TAA determined that Taxpayer’s sales constituted retail sales. TAA reclassified Taxpayer’s income and assessed retail sales tax on its sales for the 2017 and 2018 annual periods. TAA then issued two Notices of Balance Due (“the Assessments”). . . Taxpayer has not paid the Assessments.

...

On June 28, 2019, Taxpayer submitted a timely petition for review. The Petition reads, in pertinent part, as follows:

In January 2018 [Taxpayer] consulted with a CPA for assistance filing [its] initial excise return. At that time [Taxpayer] indicated that [it] charged a flat fee for services and made digital images av [sic] available to the client with the release to the rights to print them as they wish. The CPA consulted the DOR site and together [Taxpayer] and CPA determined that [Taxpayer’s] business model fell under the “Photography for Hire” classification for B&O purposes, due to the language that the photographer contractually agrees that all rights to the photos taken will belong to the customer and [Taxpayer] is hired solely for [its] services to create the photograph that is taking and editing and providing the photos via website for download.

...

[Taxpayer] specifically intended to only provide services to [its] clients and chose [its] contract wording carefully to convey that. [Taxpayer’s] client contract specifically mentions that the client wishes to hire the vendor to “provide services” that includes a two-and-a-half hours photo session, editing of photos and upload to a website for the client to download, store, and print by whomever they choose. [Taxpayer] assumes no liability for the photos once they’ve been provided to the client and the service [sic] fee also includes backup storage for one year of the photos, at which time they are deleted. [Taxpayer] retains no rights to the photos and there are no subsequent sale of photos to the customer.

² It is unclear whether Taxpayer derived income from any source other than the type of transaction described in the Agreement. Taxpayer did not present any arguments or evidence that its income was derived from any other source.

ANALYSIS

Washington imposes a retail sales tax on all retail sales in this state, unless a specific exemption or exclusion applies. RCW 82.08.020(1)(c). The definition of “retail sale” includes sales of tangible personal property and digital goods to consumers. RCW 82.04.050(1)(a); RCW 82.04.050(8)(a). “Digital goods” include “images” that are transferred electronically from a seller to the end user. RCW 82.04.192(6)(a).

Sellers that make retail sales are required to collect retail sales tax from their customers on all taxable transactions and remit those funds to the Department. RCW 82.08.050(1). If a seller fails to collect the tax or, having collected the tax, fails to remit it to the Department, the seller is liable to the state for the amount of the tax, regardless of “whether such failure is the result of the seller’s own acts or the result of acts or conditions beyond the seller’s control[.]” RCW 82.08.050(3). Furthermore, a seller will not be relieved of personal liability for the tax “unless they maintain proper records of exempt or nontaxable transactions and provide them to the department when requested.” RCW 82.08.050(4).

Here, Taxpayer’s Agreement makes clear that it is engaged in the business of creating photographs in exchange for a fee, because the Agreement requires Taxpayer to deliver images. Taxpayer’s process, which is described in the Agreement, begins with an in-person photography session where Taxpayer takes various photographs of an individual or group. Taxpayer then edits and modifies the photographs, pursuant to the terms of the Agreement, before posting them on a website for the customer to retrieve and use at their discretion. The end result of the process is the set of finished photographs that are transferred to the customer via the internet. The Agreement makes clear that Taxpayer is being paid for such delivery of images.

RCW 82.04.192(6)(a) states that “images,” such as the photographs Taxpayer produces, are considered “digital goods” when they are transferred electronically to an end consumer. Therefore, when Taxpayer transfers the finished photographs to its customer by a “private, online digital gallery” in exchange for a fee, as set forth in each Agreement, Taxpayer has engaged in the sale of a digital good. *See also* Det. No. 13-0339, 33 WTD 372 (2014) (charges for “Photoshop enhancement” performed on digital photographs are subject to retail sales tax). Sales of digital goods are considered “retail sales” under RCW 82.04.050(8)(a) and, therefore, Taxpayer is required to collect retail sales tax on each transaction.

Taxpayer argues that its services constitute “photography for hire,” which is described in the Department’s photography tax guide as a service that is not subject to retail sales tax. *See* <https://dor.wa.gov/education/industry-guides/photography-tax-guide/photography-hire>. Taxpayer points to the portion of the tax guide that states that photography for hire “is distinguished from other types of photography in that the photographer for hire is selling his or her services to create the photograph, *but never owns the intangible rights to the photograph they have created.*” *Id.* (emphasis added). Taxpayer argues that its services constitute “photography for hire” because paragraph 11 of the Agreement states that Taxpayer “releases all intangible rights to digital images once received by the Client.”

We do not find this argument persuasive. As discussed above, the object of Taxpayer's sales is the photographs themselves, the sales of which constitute retail sales of digital goods. If Taxpayer does not deliver the images in accordance with the Agreement, it will not be paid by its customers. Because the Agreement states that Taxpayer is selling digital products (images), whether Taxpayer retains any rights to the photographs after the transaction is immaterial; Taxpayer is required to collect retail sales tax on retail sales. [See also RCW 82.04.192(6)(b)(iv)(B) and WAC 458-20-15503(302)(d), which state that a human effort exclusion from the definition of "digital sale" does not apply to photographers in respect to amounts received for taking photographs transferred electronically to its customer.]

However, even if we disregard the discussion on retail sales, the Agreement indicates that Taxpayer does indeed retain intangible rights to the photographs it creates. Pursuant to paragraph 14 of the Agreement, Taxpayer retains "the *irrevocable and unrestricted right to use and publish . . . photographs and likeness of all persons involved in the session . . . for marketing, advertising, portfolio, website, and other purposes, in any manner and to alter the same without restriction.*" Agreement, Paragraph 14 (emphasis added). While Taxpayer claims Paragraph 11 releases all intangible rights to the customer, Paragraph 14 effectively nullifies that release. Taking the Agreement as a whole, each transaction results in Taxpayer retaining an "irrevocable and unrestricted" right to use, publish, and modify the photographs it creates. As such, Taxpayer's business operations do not constitute "photography for hire."

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 26th day of June 2020.