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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. 21-0196
)	
...)	Registration No. . . .
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...)	Registration No. . . .
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RCW 82.04.050(8)(b): RETAIL SALE – SERVICES PROVIDED EXCLUSIVELY IN CONNECTION WITH DIGITAL AUTOMATED SERVICES. Telephone support and training and seminars provided exclusively in connection with digital automated services are included in the retail sale of digital automated services.

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.

Fisher, T.R.O. – Sellers of digital signature and document workflow services (“Taxpayers”) protest the reclassification of receipts for telephone support and training and seminars from the wholesaling business and occupation (B&O) tax classification to the retailing B&O tax classification, and the assessment of retail sales tax, on grounds that these receipts are for services not subject to retailing B&O tax and retail sales tax. Taxpayers also assert that the Department incorrectly assessed retail sales tax on sales to customers exempt from retail sales tax, and that the measure of taxes erroneously includes receipts for out-of-state seminar sponsorship. Taxpayers’ petition is denied in part and granted in part. We deny the petition with respect to Taxpayers’ claim that receipts for telephone support and training and seminars are not subject to retailing B&O tax and retail sales tax. We grant the petition to the extent Taxpayers have provided records showing that retail sales tax was assessed on sales to customers exempt from retail sales tax and taxes were assessed on receipts from seminar sponsorship not subject to Washington taxes. We remand this matter to the Audit Division for adjustment.¹

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

ISSUE

Did Taxpayers provide services exclusively in connection with digital automated services . . . that are retail sales under RCW 82.04.050(8)(b)?

FINDINGS OF FACT

Taxpayers sell a service that allows organizations to manage electronic agreements, letting users send, sign, and manage legally binding documents securely in the cloud. The Department of Revenue's Audit Division (Audit) examined Taxpayers' accounts for the periods January 1, 2016, through December 31, 2017 (Audit No. . . .), and October 1, 2017, through April 30, 2019 (Audit No. . . .), and on November 2, 2020, issued Notices of Balance Due for \$. . . , and \$. . . , respectively.^{2,3} For Audit No. . . ., the assessment was composed of a credit of \$. . . in wholesaling B&O tax, and liabilities of \$. . . in retailing B&O tax, \$. . . in retail sales tax, \$. . . in use/deferred sales tax, and \$. . . in interest. For Audit No. . . ., the assessment was composed of a credit of \$. . . in wholesaling B&O tax, and liabilities of \$. . . in retailing B&O tax, \$. . . in retail sales tax, \$. . . in use/deferred sales tax, and \$. . . in interest.

Taxpayers explain that they offer a variety of agreement management products, but the "flagship and most commonly purchased product is [its electronic signature product (Product)], representing over 90% of its revenue." Supplemental Brief, Page 2. . . . [On its website, a] video invites the website visitor to "See [Product] in action." The video is narrated as follows (in pertinent part):

. . . [The video demonstrates how the electronic signature product works, including using a computer or other device to upload the document to the cloud that needs to be signed, adding email recipients who need to sign it, adding signature tags and indicating requested fields, such as name, title, and date, then sending the document to recipients electronically. The recipients receive an email asking for a signature, and after they provide information requested and sign the document electronically, all parties are alerted, and the document is stored electronically where all parties can access it.]

Taxpayers' [Product] plans include . . . [personal, standard, and business plans]. In addition to plan charges, Taxpayers' invoices include separate line items for telephone support, data processing, data services, and training and seminars. Taxpayers reported receipts for these separate line items under the wholesaling B&O tax classification. Audit determined that these receipts were for services exclusively associated with the sale of [digital automated services], and based on this determination, reclassified the receipts to the retailing classification, and assessed retail sales tax on the receipts.

Taxpayers petitioned for correction of the assessments. Taxpayers assert that charges for telephone support and training and seminars were reclassified in error, and argue as follows:

² . . .

³ Amounts are rounded to nearest dollar.

During the Audit period, [Taxpayer's] Telephone Support and Training & Seminars services were stand-alone services that include telephone consulting, help desk services, remote diagnostic services, and other professional services. Since [Taxpayer's] Telephone Support and Training & Seminars services relate to the sale of [Product], which is remote access software, these services are taxable under the service and other activities B&O tax classification. . . .

Alternatively, if the Department determines that [Taxpayer's] Telephone Support and Training & Seminars are not services related to the sale of software, . . . [Taxpayer] asserts that its Telephone Support and Training & Seminars are excluded from the definition of digital automated services . . .

[Taxpayer's] Telephone Support and Training & Seminars services are separately purchased for an additional fee and are not exclusive to any of [Taxpayer's] solutions. . . . Since [Taxpayer's] Telephone Support and Training & Seminars services are not purchased exclusively in connection with digital automated services, such services will not be included in the retail sale of digital automated services. . . .

In addition, digital automated services do not include any service that primarily involves the application of human effort by the seller, where the human effort originated after the customer requested the service. . . .

Supplemental Brief, Pages 6-7 (footnotes omitted). At the hearing, Taxpayers conceded that the telephone support, training, and seminar services are only available to customers who purchase the . . . [P]roduct.

Taxpayers also assert that Audit erred in assessing retail sales tax on services sold to entities exempt from retail sales tax, and on receipts from seminar sponsorship not subject to Washington taxes. Taxpayers provided supporting documentation, and Audit agreed to adjust the assessments accordingly.

ANALYSIS

RCW 82.08.020 imposes retail sales tax on each retail sale in this state. Income derived from making retail sales is subject to retailing business and occupation ("B&O") tax, which is measured by the seller's gross proceeds of sales. RCW 82.04.250. The retail sales tax is "to be collected by the seller" and is "deemed to be held in trust by the seller until paid to the [D]epartment." RCW 82.08.050(2). If a seller fails to collect the retail sales tax as required, the seller is "personally liable to the state for the amount of the tax." RCW 82.08.050(3).

RCW 82.04.050(8)(a) provides that sales of digital automated services . . . to consumers are retail sales. RCW 82.04.192(3)(a) defines [digital automated services] as "any service transferred electronically that uses one or more software applications." "Transferred electronically" means "obtained by the purchaser by means other than tangible storage media." RCW 82.04.192(8). [Digital automated services] include products such as online services that facilitate apartment

building management, photo sharing services, car history report services, and services that crawl the internet and gather, categorize, and store information. WAC 458-20-15503(203)(a); *see also* Tax Topics, “Digital products including digital goods,” available at www.dor.wa.gov (last accessed November 18, 2021).

Taxpayers’ video . . . makes clear that Taxpayers’ . . . [Product] is an online service that facilitates the signing of legally binding documents. The . . . [Product] is transferred electronically and uses one or more software applications. The . . . [Product] is [digital automated services]. RCW 82.04.192(3)(a).

RCW 82.04.050(8)(b) provides that the retail sale of [digital automated services] “includes any services provided by the seller exclusively in connection with the . . . [digital automated services], whether or not a separate charge is made for such services.” The term “exclusively” is not defined in the statute. Therefore, we look to its ordinary and common meaning. *John H. Sellen Constr. Co. v. Dep’t of Revenue*, 87 Wn.2d 878, 882, 558 P.2d 1342 (1976). “Exclusively” is commonly defined as “solely; only; in a manner limited to what is designated.” *See* www.dictionary.com (last accessed November 30, 2021). Thus, if Taxpayers’ telephone support and training and seminars were provided only in connection with the [digital automated services], charges for these services would also be subject to retailing B&O tax and retail sales tax.

Taxpayers assert that their flagship product, [Product], is remote access software, and Taxpayers were selling stand-alone services related to that software which are not retail sales because the services do not fall under the umbrella of a [digital automated services] transaction. Rule 15503(203)(a)(ii) explains that remote access prewritten software is solely prewritten software that is made remotely accessible from the vendor’s server or a third-party server, and when additional services are provided with the prewritten software, the sale may be the sale of [digital automated services]. Rule 15503(303)(h) lists remote access prewritten software as an exclusion from [digital automated services]. However, it notes that “software that is used in connection with a service that is transferred electronically would generally be included in the definition of . . . [digital automated services].” *Id.*

We find that [Product] is not solely prewritten software that is made remotely accessible from a server. It is a service that allows organizations to facilitate the execution of electronic agreements. It sends invitations to potential signatories, solicits signatures, and allows access to the signed documents. In Rule 15503(203)(a)(ii) Example 6, a seller of prewritten word processing software hosted on the seller’s computers is selling remote access prewritten software and not [digital automated services], even though the software includes access to clip-art image files that can be inserted in the documents created with the remotely accessed prewritten word processing software. However, Example 6 is not applicable here. Taxpayers’ [Product] is not akin to remote access prewritten software that includes access to image files. Taxpayers were not selling non-retail stand-alone services related to remote access software because they were selling [digital automated services], regardless of whether the [digital automated services] included an element of remote access prewritten software.

Taxpayers argue that the services at issue were not provided exclusively in connection with the [digital automated services]. We disagree. The telephone support and training and seminars were

billed in addition to plan charges, for the purpose of helping customers implement the [digital automated services]. Customers cannot access the support, training, or seminars without the purchase of the [Product]; Taxpayers conceded at the hearing that telephone support and seminars are not useful for persons who haven't purchased [the Product]. Taxpayers have provided no evidence that the services were provided in connection with some other product. Based on these facts, we conclude that Taxpayers' retail sales of [digital automated services] included these services. *See* Det. No. 18-0109, 38 WTD 189 (2019) (holding that where the taxpayer provided professional services, including help desk services, exclusively in connection with its [digital automated services], the services are retail sales); Det. No. 11-0001, 32 WTD 93 (2013) (holding that data processing services, otherwise subject to service and other activities B&O tax, were retail services and subject to use tax under RCW 82.12.020(1)(e)(i) because they were provided exclusively in connection with online property management ([digital automated services])).

Finally, Taxpayers argue that the receipts qualify for the exclusion for services that primarily involve human effort. RCW 82.04.192(3)(b) provides that [the term [digital automated services] does not include “[a]ny service that primarily involves the application of human effort by the seller, and the human effort originated after the customer requested the service.” However, RCW 82.04.050(8)(b) provides that the retail sale of [digital automated services] *includes any services* provided by the seller exclusively in connection with the [digital automated services]. Any services may include a service that primarily involves human effort. Because the services are provided in connection with Taxpayers' [digital automated services], RCW 82.04.050(8)(b) applies and Taxpayers are not entitled to relief.

Taxpayers also assert that Audit erred in assessing retail sales tax on services sold to entities exempt from retail sales tax, and on receipts from seminar sponsorship not subject to Washington taxes. Because Audit agreed to adjust the assessments to the extent that documentation supports these assertions, we find that these are no longer issues in controversy and do not address these assertions.

DECISION AND DISPOSITION

Taxpayers' petition is denied in part and granted in part.

Dated this 8th day of December 2021.