

Cite as Det. No. 14-0409, 36 WTD 323 (2017)

BEFORE THE APPEALS 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. 14-0409
)	
...)	Registration No. . . .
)	

[1] RCW 82.08.050(9); RCW 82.08.055: USE TAX – SUCCESSORSHIP – ASSET PURCHASE – RETAIL SALES TAX NOT SEPARATELY STATED. There is a conclusive presumption that the selling price does not include retail sales tax, and RCW 82.04.055 “tax included” language applies only to “advertising.”

[2] RCW 822.04.050(10): UNCOLLECTED RETAIL SALES TAX – PREDECESSOR AGREEMENT TO PAY – PREDECESSOR BANKRUPTCY. The Department was not a party to the contract wherein predecessor agreed to pay one half of the retail sales tax, and is not bound by it and may pursue either the buyer or seller for any unpaid retail sales taxes.

[3] RCW 82.12.020(3)(b): RETAIL SALE TAX – ASSESSED AS USE TAX – VALIDITY OF ASSESSMENT. Use tax applies if retail sales tax has not been paid.

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.

Bauer, A.L.J. – The purchaser of the assets of Washington businesses objects to the imposition of use tax/deferred retail sales tax. The assessment is upheld.¹

ISSUES

1. Under RCW 82.08.050(9) and RCW 82.08.055, did Taxpayer’s payment for corporate assets include retail sales tax?
2. Should retail sales tax liability assessed against Taxpayer be waived because the Department failed to assert a claim against Seller for uncollected sales tax when Seller declared bankruptcy?

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

3. Does RCW 82.12.020 preclude the assessment of use tax because retail sales tax applied to the sale?

FINDINGS OF FACT

The Audit Division (Audit) of the Department of Revenue (Department) conducted a partial compliance audit at the primary business location of [Taxpayer].² The audit was limited in scope to a review of business assets Taxpayer purchased.

Audit assessed the following amounts of use tax on tangible personal property for the period January 1, 2009, through March 31, 2013 (audit period):

Use Tax and/or Deferred Sales Tax	\$. . .
Interest	. . .
Total Assessed and Due	\$. . .

Taxpayer appealed the entire assessment, which has not been paid, on December 19, 2013.

Taxpayer sells sporting goods. During the audit period, Taxpayer purchased the assets of several ongoing sports stores in Washington from . . . and . . . (collectively, “Seller”). The assets included real properties, fixtures, inventory, and other tangible personal property required to run the businesses. The Asset Purchase Agreement was executed on November 17, 2008. Relevant portions of that agreement provided:

Page 1, subsection A: The purchase was for “substantially all of the property and assets used by Seller in carrying on the purchased businesses.”

Page 9, subsection (cccc): “‘Purchased Assets’ means the following assets owned or held by [Seller] . . . : (i) the Personal Property; (ii) the Inventory; (iii) the Assumed Contracts; (iv) the Licenses; to the extent they are transferable; (v) the Goodwill; (vi) the Prepaid Expenses; (vii) the Deposits; (viii) the Telephone Numbers; and the Books and Records.

Page 14, subsection 2.1: “[Seller] hereby agrees to sell, convey, assign, transfer and deliver to [Taxpayer], and [Taxpayer] hereby agrees to purchase and accept from [Seller], on the Closing Date, the Purchased Assets, free and clear of all Encumbrances, other than Permitted Encumbrances.”

Page 14, subsection 2.2: “Subject to adjustment as herein provided, the aggregate purchase price payable by [Taxpayer] to [Seller] hereunder for the sale to [Taxpayer] of the Purchased Assets and the performance by [Seller] of its obligations hereunder shall be equal to the sum . . . of:

- (a) \$. . . ; plus
- (b) 93% of the Inventory Ledger Amount on the Closing Date (such amount, subject to the adjustments provided for herein, being the “Inventory Purchase Price”).

² Formerly UFA Holdings’ Inc.

Page 15, subsection 2.4: “The Parties agree that the respective values allocated to the Purchased Assets in accordance with the terms hereof represent the respective fair market values of the Purchased Assets.”

Page 14-16, subsections 2.2 – 2-6: The “purchase price” was to be \$. . . plus 93% of the inventory ledger amount on the closing date, modified by various described adjustments.

Pages 19-10, subsection 2.9: This subsection provided that Taxpayer and Seller would share equal responsibility for the sales tax and Seller would prepare and file the return:

2.9 Transfer Taxes

[Taxpayer] and [Seller] shall share on an equal basis all transfer, value added, excise, sales, use, consumption, retail sales or other similar Taxes (collectively, “Transfer Taxes”) payable under any Applicable Law on or with respect to the transfer of the Purchased Assets under this Agreement, provided that the Parties shall cooperate with each other in good faith and shall use commercially reasonable efforts to eliminate or reduce such Transfer Taxes. For greater certainty, Transfer Taxes shall exclude any income Taxes payable by [Seller] or any other member of the [Group] in respect of any income or gains arising as a result of the transfer of the Purchased Assets. [Seller] shall prepare and file any affidavits or returns required in connection with the foregoing at its own cost and expense.

(Emphasis added.) In addition to the Asset Purchase Agreement, Taxpayer has provided an “Officer’s Certificate” to Seller, an “Acknowledgment” from Seller, and a “Closing Statement” calculating final purchase price adjustments and calculating the final price paid.

The sale closed on March 10, 2009, when Taxpayer made its payment to Seller. The final purchase price was calculated to be as follows:

\$. . . – Set-off against outstanding loans
 . . . – 93% x inventory ledger Amount of \$. . .
- . . . – Various Adjustments
 \$. . . – Adjusted purchase price

None of the above-described documents provided that the Taxpayer’s asset purchase was tax-included. On the contrary, the Asset Purchase Agreement stated that the purchase price was based only on the “respective fair market values of the Purchased Assets” [and contained a separate provision regarding the payment of retail sales and other taxes].

Seller was not obligated to file an excise tax return reflecting this sale of assets until April 27, 2009, in accordance with RCW 82.12.045(1).³ Seller never provided Taxpayer with a copy of the

³ RCW 82.32.045(1) provides:

Except as otherwise provided in this chapter, payments of the taxes imposed under chapters 82.04, 82.08, 82.12, 82.14, and 82.16 RCW, along with reports and returns on forms prescribed by the department, are due monthly within twenty-five days after the end of the month in which the taxable activities occur.

required excise tax return, [and Taxpayer] was never apprised of the amount of use tax/deferred sales taxes due, nor asked to pay one-half of the amount owed.

On March 21, 2009 – eleven days after the closing for the sale of assets and before the excise tax return was due – [Seller] filed voluntary petitions for reorganization under Chapter 11 of Title 11 with the United States Bankruptcy Court for the District of On April 30, 2009, their petitions were joined. Seller’s bankruptcy petition stated that the “liability data was [calculated] as of the close of business on March 20, 2009;” that “inadvertent errors or omissions may have occurred;” and “Schedules and Statements remain subject to further review and verification by the Debtors.” Seller listed the Department as a creditor for an “undetermined” amount of “sales/use tax[es]” incurred on “various” claim dates. The Department’s Bankruptcy Unit did not enter a proof of claim.

On July 30, 2009, the [reorganization] plan was confirmed, and on May 22, 2013, the case was closed. Although Seller is still conducting business in Washington, Taxpayer complains that it is barred by Seller’s bankruptcy from recovering any of the retail taxes that Seller had contracted in the Asset Purchase Agreement to pay.

Seller did not issue, and Taxpayer did not receive, any sales invoice or other instrument of sale separately stating the amount of sales tax collected by Seller from Taxpayer. Taxpayer states, “[i]n effect, the sale treated one half of the tax as included in the price and the other half as absorbed by the seller.”

ANALYSIS

1. Under RCW 82.08.050(9) and RCW 82.08.055, did Taxpayer’s payment for corporate assets include retail sales tax?

Retail sales tax is imposed on the retail sale in this state of tangible personal property. RCW 82.08.020(1). The tax is imposed on the buyer and paid to the seller who, in turn, holds it in trust and is then required to remit it to the Department. RCW 82.08.050(1) and (2). Although the seller must generally separately state the amount of the retail sales tax on invoices and other documents of sale, RCW 82.08.050(9) provides an exception for prices that are advertised as including the tax:

The tax required by this chapter to be collected by the seller shall be stated separately from the selling price in any sales invoice or other instrument of sale. . . . For purposes of determining the tax due from the buyer to the seller and from the seller to the department it shall be conclusively presumed that the selling price quoted in any price list, sales document, contract or other agreement between the parties does not include the tax imposed by this chapter, but if the seller advertises the price as including the tax or that the seller is paying the tax, the advertised price shall not be considered the selling price.

(Emphasis added.) RCW 82.08.055 further provides methods by which one may advertise a tax-included sale:

A seller may advertise the price as including the tax or that the seller is paying the tax, subject to the following conditions:

- (1) Unless the advertised price is one in a listed series, the words "tax included" are stated immediately following the advertised price and in print size at least half as large as the advertised price;
- (2) If the advertised prices are listed in a series, the words "tax included in all prices" are placed conspicuously at the head of the list and in the same print size as the advertised prices;
- (3) If a price is advertised as "tax included," the price listed on any price tag shall be shown in the same manner; and
- (4) All advertised prices and the words "tax included" are stated in the same medium, be it oral or visual, and if oral, in substantially the same inflection and volume.

In accordance with these provisions, the general rule, absent documentation separately stating the retail sales tax charged by the seller, is that the Department may conclusively presume that no retail sales tax has been paid by the buyer. In this case, retail sales tax was not separately stated in the Asset Purchase Agreement or the closing documents; thus, Audit presumed that no sales tax was included in the amount paid by Taxpayer.

Taxpayer argues that one half of the Department's assessment is invalid because it paid its own agreed-upon one-half of the retail sales tax liability to Seller as part of the "aggregate purchase price" and Seller failed to remit it to the Department."⁴ Taxpayer's authority for this position is *Dep't of Revenue v. Bi-Mor, Inc.*, 171 Wn. App. 197, 286 P.3d 417 (2012), *review denied*, 300 P.3d 415 (2013) (*Bi-Mor*), which construed RCW 82.08.050(9). *Bi-Mor* operated a chain of retail stores where advertising was a key component of its business model. *Bi-Mor* broadly advertised that its prices included all applicable sales taxes, or that it absorbed the sales tax (i.e., "Always No Tax"). The court held that under RCW 82.08.050(9) and the facts of that case, the Department could not "conclusively presume" that properly advertised "tax-included" selling prices did not include retail sales tax.

Taxpayer's reliance on *Bi-Mor*, however, is misplaced. The exception in RCW 82.08.050(9) allowing for tax-included sales is applicable only when a "seller advertises the price as including the tax or that the seller is paying the tax" (emphasis supplied). Further, RCW 82.08.055 details the conditions under which a seller may advertise the price as including tax. Because the Legislature in RCW 82.08.050(9) used the word "advertises" instead of "states" or "indicates" or some other word, the Department believes a reasonable interpretation of the statute is that the Legislature was aware that not all retail sellers "advertise" their prices (with or without retail sales price), and thus not all retail sellers will be able to take advantage of this provision. Requiring the "advertisement" of prices in tax-included sales, in accordance with the terms of RCW 82.08.055, makes it clear to all concerned – the buyer, the seller, and the Department in administering the tax – that the exception applies and the selling price includes the tax. Not only does the statutory scheme support the view that the Legislature intended that this exception apply only to sellers who actually advertise to the buying public in the manner required, but having a narrow exception is

⁴ Taxpayer's Petition for Correction of Assessment dated December 19, 2013.

consistent with the concept of the conclusive presumption that the selling price does not include the tax.

This case involved a private contract. There was no advertising. Although the Asset Purchase Agreement and documents executed at closing indicate agreement that Taxpayer and Seller would each pay one half of the retail sales tax liability, the Asset Purchase Agreement is devoid of any language to indicate that this was a tax-included purchase and that Taxpayer's half of the tax due was already included in the purchase price of the assets. The Asset Purchase Agreement specifically provides that the assets Buyer purchased, were valued at their respective fair market values – not their fair market values plus retail sales taxes thereon.

Thus, we hold that the tax-included exception, in accordance with RCW 82.08.050(9), does not apply, and that the Department was not barred, under RCW 82.08.050(9) or *Bi-Mor*, from conclusively presuming that retail sales tax was properly due on the aggregate purchase price of all tangible personal property purchased in Washington.

Taxpayer's petition as to this issue is therefore denied.

2. Should retail sales tax liability assessed against the [Taxpayer] be waived because the Department failed to assert a claim against the seller for uncollected sales tax when it declared bankruptcy?

RCW 82.08.050 provides:

(3) [I]f any seller fails to collect the tax imposed in this chapter . . . , the seller is, nevertheless, personally liable to the state for the amount of the tax. . . .

(10) Where a buyer has failed to pay to the seller the tax imposed by this chapter and the seller has not paid the amount of the tax to the department, the department may, in its discretion, proceed directly against the buyer for collection of the tax.

Thus, under this provision, the Department may assess either the buyer or seller for uncollected retail sales taxes. Det. No. 11-0280, 32 WTD 107 (2013).

Taxpayer complains that one half of the retail sales tax owed was Seller's responsibility under the Asset Purchase Agreement. Taxpayer [argues] that it should not be liable for those taxes because the Department had the opportunity to proceed against Seller in the bankruptcy court for that portion and chose not to do so. Taxpayer [adds that] it is now foreclosed by the bankruptcy from going after Seller for its one half of the retail sales tax owed, but the Department could still do so under the fraud provisions of the Bankruptcy Act for Seller's failure to reveal the value of the Department's unsecured unliquidated priority claim in its filing.

Taxpayer argues that in a Chapter 11 bankruptcy, a debtor either ends up with a confirmed plan of reorganization or passes into Chapter 7 bankruptcy. Under 11 U.S.C. Section 1141(d)(6)(B), a confirmed plan of reorganization discharges tax debts, unless the debtor makes a fraudulent return or willfully attempts to evade the tax. Taxpayer argues that Seller's failure to file a return and set

forth the liquidated amount [of] its tax debt in its filing was tantamount to making a fraudulent return or was a willful attempt to evade the tax. Thus, Taxpayer argues that the Department should proceed against Seller for its one half of the retail sales tax by petitioning to re-open Seller's bankruptcy filing.

Taxpayer's arguments are problematic. Even though Taxpayer and Seller may have agreed that each would be liable for one half of the retail sales taxes in the Asset Purchase Agreement, the Department was not a party to that contract and is therefore, not bound by it. The Department, under RCW 82.08.050 and in the absence of either a separately-stated tax amount on an invoice or a legitimate tax-included sale, is free to pursue either the buyer or the seller for retail sales taxes that are due. . . . Det. No. 94-090, 14 WTD 244 (1995).

Taxpayer's petition as to this issue is denied.

3. Does the Revenue Act preclude the assessment of "use tax" in this case?

RCW 82.12.020(3)(b) provides:

The tax imposed by this chapter does not apply: (i) If the sale to, or the use by, the present user . . . has already been subjected to the [retail sales] tax under chapter 82.08 RCW or this chapter and the [retail sales] tax has been paid by the present user . . .

Excise Tax Advisory 3097.2009 (First Revision), issued December 28, 2009, also provides:

The use tax does not apply when the acquisition or sale of the property has been previously subjected to the retail sales tax.

(Emphasis added.) Taxpayer argues that retail sales tax applied to its purchase because the assets in the Washington stores were located in Washington, were sold and purchased in Washington, and were "sourced" in Washington under WAC 458-20-145. Taxpayer then reasons that the "use tax does not apply if the sales tax applies." RCW 82.12.020(3)(b), however, does not provide that use tax does not apply if sales tax applies. RCW 82.12.020(3)(b) provides that use tax does not apply if the retail sale tax has been paid. The corollary is that use tax does apply if retail sales tax has not been paid.

Taxpayer's petition as to this issue is denied.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 23rd day of December 2014.