

Cite as Det. No. 14-0310, 35 WTD 105 (2016)

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. 14-0310
)	
...)	Registration No. ...
)	

[1] RULE 230; RCW 82.32.050: STATUTE OF LIMITATIONS. When a taxpayer requests its tax account be closed, the taxpayer is treated as an unregistered taxpayer for periods after that request for purposes of applying the statute of limitations.

[2] RCW 82.04.050: RETAIL SALES TAX – PROMOTIONAL DISPLAYS. A taxpayer that designs and installs merchandise displays and promotional graphics inside retail stores is engaged in “decorating” existing buildings, and “installing” tangible personal property in existing buildings, and the decorating and installing are retail-taxable services.

[3] RULE 224; RCW 82.04.051: RETAIL SALES TAX – RETAILING B&O TAX – PREDOMINANT ACTIVITY – SITE SURVEYS. Providing site surveys is a service-taxable professional service. However, when the provision of site surveys is performed under the same contract as the installation of promotional displays, and the predominant activity of the contract is the installation of the promotional displays, then all the income earned under the contract is retail-taxable.

[4] RCW 82.08.010; RCW 82.04.050; RCW 82.04.070: RETAIL SALES TAX – TRAVEL EXPENSES NOT DEDUCTIBLE. A taxpayer may not deduct business expenses, such as its contractor’s travel expenses, from the measure of retail sales tax.

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.

Sohng, A.L.J. – Retail services provider argues that (i) the Department of Revenue’s assessment is barred by the statute of limitations; (ii) the installation of promotional displays inside retail stores is not a retail sale on the grounds that its customers are not “consumers”; [(iii)] the

performance of architectural site surveys is a professional service not subject to retail sales tax; and (iv) travel expense reimbursements are not subject to retail sales tax. The petition is denied.¹

ISSUES

1. Is the Department of Revenue (the “Department”) barred by the statute of limitations from assessing tax for the tax period 2006 and 2007 under RCW 82.32.050(4)(a)?
2. Is the installation of merchandise displays and promotional signage inside retail stores a retail sale under RCW 82.04.050(2)(b)?
3. Is the performance of architectural site surveys a service in respect to the decorating of buildings or other structures under RCW 82.04.051 and, therefore, subject to retail sales tax?
4. May taxpayer deduct travel expense reimbursements from its measure of tax?

FINDINGS OF FACT

[Taxpayer] is a corporation headquartered [out of state] that designs and installs merchandise displays and promotional graphics for clothing and accessory manufacturers inside retail stores. Taxpayer registered with the Department in May 2003, but its account was closed in September of that same year. The Department’s records contain a note in Taxpayer’s account, dated September 22, 2003, which states “CLS PER [Taxpayer’s president].” . . . is Taxpayer’s president. Taxpayer claims that this note is “contrary to [Taxpayer’s president’s] recollection” and that it did not request that the Department close its account.² Taxpayer did not file any returns during the period in which it had an active registration with the Department (May – September 2003).

Taxpayer’s customers are brand name designers, such as . . . (the “Customers”) whose marketing and promotional campaigns change frequently. Examples of Taxpayer’s services include the installation of merchandise displays, shelving, and graphics; hanging banners and signage; placing Christmas lights in or around display windows; and placing new lettering or text on display windows.

Taxpayer hires a general contractor located in . . . , Washington (“Contractor”) to physically perform all of its services in Washington. Contractor’s license and bond as a construction contractor are active with the Washington Department of Labor & Industries. Projects begin with architectural site surveys (the “Site Surveys”), during which Contractor physically visits the retail stores to describe and record in detail where and how the merchandise and/or graphics are currently being displayed. Contractor delivers the architectural site surveys in AutoCAD³ drawings and photographs, which the Customers review to determine how the displays should be

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

² Taxpayer’s Appeal Petition at 2.

³ AutoCAD is a commercial software application for two- and three-dimensional computer-aided design (“CAD”) and drafting. AutoCAD is used across a wide range of industries and professions, including architects, engineers, designers, project managers, and others. See <http://www.autodesk.com/products/autocad/overview>.

installed. After the Site Survey is complete, Taxpayer, through Contractor, works with the Customers to implement the necessary changes and to install the promotional displays, graphics, and any banners or signage (the “Promotional Displays”) according to the Customers’ specifications. The Promotional Displays typically consist of free standing tables and shelving units on which merchandise is displayed. In some instances, the Promotional Display consists of a “duratran,” which is a free-standing back-lit display graphic that is powered by electricity. The Customers create and retain title to all materials that comprise the Promotional Displays.

Taxpayer provided a sample estimate that it submits to potential customers. The estimate includes an itemized description of the work to be performed, as well as a lump-sum cost. The estimate provides, in relevant part, as follows:

ASSEMBLE/INSTALLATION

- Remove existing [logos], [signs], and dispose off-site.
- Cut and apply wheat paste graphics to bleacher wood panels, and/or alcove graphic backers.
- Mount [3D letters] with acrylic backers to bleacher wood, with hidden screws.
- Mount plywood Platform Headers, with pegs.
- Install [neon signs], and plug in to existing power source. Assumption is that no electrician will be required for this element.
- Place five (5) wooden glorifier graphics in the alcoves, or (1) large alcove backer graphic.
- Set five (5) black risers in the alcove.
- Place select metal shelves and magnetic blades on the [walls].

POST-INSTALL

- Clean up and inspect shops.
- Obtain signature of representative or store personnel.
- Photograph completed shops.

TOTAL FEE: \$. . .

The Department’s Compliance Division examined Taxpayer’s books and records for the period January 1, 2006 through December 31, 2012. During the examination, Taxpayer submitted a Washington Business Activities Questionnaire (“WBAQ”) to the Compliance Division, which stated the following:

- We subcontract construction labor to do repairs in retail stores + install window displays.
- We hire Washington State based contractors to work on projects in Washington State.
- We install window displays and repair store fixtures.

Taxpayer provided Contractor’s invoices for work performed in Washington in 2012. Contractor did not charge, and Taxpayer did not pay, retail sales tax on the work that Contractor performed. The invoices separately itemize charges for Site Survey work and Promotional Display

installation. Examples of the work descriptions provided on the invoices include the following statements:

- Remove old promotion and install new . . . elements at . . . location;
- Remove past promotion and install new . . . elements at . . .;
- Install . . . fixtures at . . . ;
- Retro existing fixture with new vertical standards bolted through from one side to the other. Inserted misc. shelves and brackets to make sure they worked within the new standards;
- Install . . . Fixtures at . . . ;
- Repairs to 96 T-Fixtures;
- Clean up and haul away debris of any old fixtures;
- Repair damaged scan units and add laminate to the side edge.

Based on the invoice descriptions, the Compliance Division stated that “The majority of the invoices provided by Taxpayer includes installations, removal, or repair activities. These activities listed are subject to retail sales tax as specified in Rule 224 and RCW 82.04.050.”⁴ On July 17, 2013, the Compliance Division issued the following assessments against Taxpayer:

Tax Period	Jan. 1, 2006 – Dec. 31, 2010	Jan. 1, 2011 – Dec. 31, 2012	Total
Assessment No.	
Tax ⁵	\$...	\$...	\$...
Penalties	\$...	\$...	\$...
Interest	\$...	\$...	\$...
Total	\$...	\$...	\$...

The Compliance Division asserted retailing business and occupation (“B&O”) tax and retail sales tax on all of Taxpayer’s Washington revenue on the grounds that Contractor performed “construction, repair and installation work” on Taxpayer’s behalf, which are retail sales. Taxpayer, on the other hand, argues that it should be taxable under the service and other activities classification of the B&O tax.

ANALYSIS

1. Statute of Limitations

RCW 82.32.050(4) provides that the statute of limitations for assessments issued by the Department is four years after the close of the tax year, except against taxpayers who have not registered with the Department. WAC 458-20-230 (“Rule 230”) is the Department’s administrative rule [addressing] the statute of limitation. Rule 230 provides, in relevant part:

(3) **Unregistered taxpayer.** Except for evasion or misrepresentation, if the department of revenue discovers any unregistered taxpayer doing business in this state, the department will assess taxes, interest, and penalties for a period of seven years plus the current year.

⁴ Compliance Division Response to Taxpayer’s Appeal Petition at 5 (Nov. 19, 2013).

⁵ The tax assessed consists of retailing business and occupation (“B&O”) tax and retail sales tax.

(Emphasis added.) Thus, the [Department may assess] unregistered taxpayers doing business in Washington [for up to] seven years [plus the current year]. Taxpayer claims that it was not unregistered and did not request that its account be closed in September 2003. Our review of available records does not support Taxpayer's contentions. The Department's Taxpayer Account Administration Division ("TAA") keeps a contemporaneous record of actions that it takes with respect to taxpayers' accounts, including the closure of accounts. Here, the Department's records note that Taxpayer's president requested that its account be closed on September 22, 2003. The note identifies [Taxpayer's president] by name and contains his telephone number. Although Taxpayer claims that it does not recall closing the account, Taxpayer has not provided any evidence to contradict the Department's records. It is unlikely that TAA would have made such a notation in Taxpayer's account had Taxpayer not actually requested that its account be closed. We give more weight to the Department's contemporaneous record kept in the ordinary course of its business than to Taxpayer's unsubstantiated recollection of events from 2003. Because Taxpayer was unregistered at the time the assessments were issued, the Department's assessment may reach back seven years to 2006 and 2007. The petition is denied as to this issue.

2. Promotional Displays

The next issue is whether the installation of the Promotional Displays is a retail sale. RCW 82.04.050(2)(b) provides that a retail sale includes charges made for labor and services rendered in respect to:

The constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation;

(Emphasis added.) The statute does not define "decorating." When statutory terms are not defined in the statute, we turn to their ordinary dictionary meaning. *See, e.g., Western Telepage, Inc. v. City of Tacoma*, 140 Wn. 2d 599, 609, 998 P.2d 884 (2000); *Palmer v. Dep't of Revenue*, 82 Wn. App. 367, 372, 917 P.2d 1120 (1996); *Garrison v. Wash. State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). Non-technical terms may be given their dictionary definitions. *State v. Fjermestad*, 114 Wn.2d 828, 835, 791 P.2d 897 (1990). The dictionary definition of the word "decorate" is "to furnish or adorn with something becoming, ornamental, or striking: EMBELLISH, DECK." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 587 (3rd ed. 1993).

Here, the installation of the Promotional Displays meets the dictionary definition of "decorate" set forth above because Taxpayer furnishes or adorns the retail stores with "something becoming, ornamental, or striking." *Id.* Taxpayer's activities of installing the Promotional Displays constitute the decorating of buildings or other structures upon real property under RCW 82.04.050(2)(b). Furthermore, RCW 82.04.050(2)(b) specifically provides that installing tangible personal property in or on real property is a retail sale, even if such tangible personal property doesn't become part of the real property. Thus, the installation of the Promotional Displays

(tangible personal property) inside the retail stores (real property) is a retail sale, even though the Promotional Displays do not become part of the real property.

Taxpayer argues that the installation of Promotional Displays does not meet the “of or for consumers” portion of the definition of “retail sale” found in RCW 82.04.050(2)(b) because the Customers are not “consumers.” In support of this argument, Taxpayer cites RCW 82.04.190(4), which provides that the term “consumer” includes “Any person who is an owner, lessee or has the right of possession to or an easement in real property which is being constructed, repaired, decorated, improved, or otherwise altered by a person engaged in business” While we agree that the Customers are not owners, lessees, or have any rights of possession to the retail stores that Taxpayer decorates, we emphasize that RCW 82.04.190(4) is only one of approximately a dozen definitions of the term “consumer.” In particular, RCW 82.04.190(1) provides that the term “consumer” also means:

Any person who purchases, acquires, owns, holds, or uses any article of tangible personal property irrespective of the nature of the person's business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers

(Emphasis added.) Here, because the Customers own the materials that comprise the Promotional Displays (such as signs and banners), which are articles of tangible personal property used in Washington, the Customers are “consumers” under RCW 82.04.190(1). Taxpayer’s petition is denied with respect to this issue.

3. Site Surveys⁶

With respect to the Site Surveys, RCW 82.04.290(2) generally provides a service and other activities B&O tax classification for taxpayers engaged in business activities not explicitly taxed elsewhere. RCW 82.04.290(2). WAC 458-20-224(2)(“Rule 224”) provides that taxpayers providing personal or professional services, such as accountants, architects, attorneys, physicians, engineers, and teachers are subject to tax under the service and other activity classification of the B&O tax. Rule 224(2) states:

Persons engaged in any business activity, other than or in addition to those for which a specific rate is provided in the statute, are taxable under a classification known as service and other business activities, and so designated upon return forms. In general, it includes persons rendering professional or personal services to persons (as distinguished from services rendered to personal property of persons) such as accountants, aerial surveyors and map makers, agents, ambulances, appraisers, architects . . . and numerous other persons.

(Emphasis added.)

⁶ We note that the services at issue here do not fall under the bundled transaction rules because they constitute “services to real property” under RCW 82.08.190(1)(a).

As discussed above, constructing, repairing, decorating, or improving buildings of or for a consumer is a retail activity. RCW 82.04.050(2)(b). In contrast, providing professional services, such as engineering or architectural services, is generally not classified as a retail activity. Under certain circumstances, however, a service ordinarily classified as professional service is considered a retail activity. In those circumstances, the gross receipts received for providing those services are subject to retailing B&O tax and retail sales tax. Accordingly, services rendered *in respect to* constructing are retailing activities. RCW 82.04.051(1) clarifies that the phrase “services rendered in respect to” to mean:

[T]hose services that are directly related to the constructing, building, repairing, improving, and decorating of buildings or other structures and that are performed by a person who is responsible for the performance of the constructing, building, repairing, improving, or decorating activity. The term does not include services such as engineering, architectural, surveying, flagging, accounting, legal, consulting, or administrative services provided to the consumer of, or person responsible for performing, the constructing, building, repairing, improving, or decorating services.

(Emphasis added.) The provision of Site Surveys is a professional service enumerated in Rule 224(2), above, and standing alone, would fall under the service and other activities classification of the B&O tax under RCW 82.04.290(2). Moreover, RCW 82.04.051(1) expressly excludes architectural services (such as the Site Surveys) from the definition of “services rendered in respect to” constructing, repairing, decorating, etc., which is a retail sale in RCW 82.04.050. However, because Taxpayer’s performance of the Site Surveys and the installation of the Promotional Displays are delivered under a single contract (i.e., the signed estimates between Taxpayer and Customers), RCW 82.04.051(2) applies:

A contract or agreement under which a person is responsible for both services that would otherwise be subject to tax as a service under RCW 82.04.290(2) and also . . . decorating activities that would otherwise be subject to tax under another section of this chapter is subject to the tax that applies to the predominant activity under the contract or agreement.

(Emphasis added). Here, we conclude that the “predominant activity” that Taxpayer performs (via Contractor) is the installation of the Promotional Displays, a retail activity, not the Site Surveys. The Site Surveys are a small portion of Taxpayer’s activities in Washington and only serve as a starting point from which the installation of the Promotional Displays takes place. Thus, Taxpayer’s Site Surveys are subject to retail sales tax and the retailing classification of the B&O tax, not the service and other activities classification of the B&O tax.

4. Travel Expense Reimbursements

Taxpayer provided invoices that Contractor submitted to Taxpayer for payment. These invoices separately itemize travel expenses that Taxpayer reimbursed to Contractor. Taxpayer argues that such reimbursements are not subject to retail sales tax. Taxpayer is essentially arguing that it should be permitted to deduct travel expenses from its measure of tax. RCW 82.08.020 levies retail sales tax on the “selling price on each retail sale.” RCW 82.08.010(1)(a)(i) defines “selling price” as:

[T]he total amount of consideration . . . for which . . . services or anything else defined as a "retail sale" under RCW 82.04.050 are sold, leased, or rented, valued in money, whether received in money or otherwise. No deduction from the total amount of consideration is allowed for the following: (A) The seller's cost of the property sold; (B) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller; (C) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges; (D) delivery charges; and (E) installation charges.

(Emphasis added.) Taxpayer may not deduct business expenses, such as Contractor's travel expenses, from its measure of retail sales tax. [Neither may it deduct such expenses from the measure of the retailing B&O tax classification. RCW 82.04.070 (definition of "gross proceeds of sales").] The petition is denied.

DECISION AND DISPOSITION

The petition is denied.

Dated this 25th day of September, 2014.