

BEFORE THE INTERPRETATIONS AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	<u>F I N A L</u>
Assessment of)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 95-078R
)	
...)	Registration No. ...
)	FY ... /Audit No. ...
)	FY ... /Audit No. ...
)	

RULE 102; RULE 170; RCW 82.04.470; RCW 82.04.050; RCW 82.08.050:
RETAIL SALES TAX – RESALE CERTIFICATES – CONSTRUCTION: When
a contractor’s customers use the contractor’s resale certificate to purchase
materials and/or labor for use in home construction and pay the vendors directly,
the contractor is liable for retail sales tax due on the transactions if the customers
fail to pay retail sales tax to the vendors. Such transactions are considered retail
sales of materials and/or labor by the contractor to the customers because of the
use of the resale certificate.

Headnotes are provided as a convenience for the reader and are not in anyway a part of the
decision or in any way to be used in construing or interpreting this Determination.

NATURE OF ACTION:

A sole proprietor (the taxpayer) protests the assessment of sales tax and use tax resulting from
constructing homes.¹

FACTS:

De Luca, A.L.J. -- The facts are stated in Det. No. 95-078 and will be restated only where
necessary. The taxpayer explained that he acted as a construction consultant to real property
owners who were constructing their own homes. The Department of Revenue (the Department)
reviewed the taxpayer’s books and records for two audit periods (January 1, 1987 through
December 31, 1987, and January 1, 1988 through December 31, 1989, respectively,) and found

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

that numerous materials and services were purchased in the taxpayer's name from several third-party suppliers and subcontractors. The records revealed that in many instances sales taxes had not been separately stated from the selling prices. Furthermore, the Department's Audit Division (Audit) was unable to verify that sales tax or use tax had been paid on the items and services. Many of the items were purchased from vendors who had the taxpayer's resale certificates on file.

Consequently, Audit assessed retail sales tax and use tax after reviewing records that concerned two homes (. . .) chosen as test samples for the audits. Audit found that the two homeowners had purchased \$. . . of construction materials and retail services from the taxpayer without paying sales taxes or use taxes. From that amount, Audit projected the amount of purchases that were made without paying taxes by all of the taxpayer's customers. Audit then assessed the taxpayer approximately \$. . . in use taxes and \$. . . in sales taxes, plus interest, for both audit periods. The taxpayer appealed the assessments.

In short, we ruled on numerous items in Det. No. 95-078 and remanded the matter to Audit to make the appropriate adjustments. We held that a presumption of sales tax liability exists against the taxpayer if his resale certificates were on file with vendors who billed him for goods and services and he failed to collect sales tax from his customers. This presumption is not overcome unless he can show he was not personally liable to the vendors for payments of these goods and services.

Upon remand, Audit significantly reduced the assessments due to the taxpayer's lack of personal liability on many purchases. However, the taxpayer and Audit continue to disagree over the question of the taxpayer's liability for tax pertaining to certain transactions. Specifically, Audit did not delete tax on sales by . . . Construction Co. because an invoice from that company was billed to the taxpayer and revealed no sales tax was charged by the vendor. As a purchaser, the taxpayer owed sales tax on the transaction unless he provided the vendor with a resale certificate. If he did provide a resale certificate, then the taxpayer was required to collect sales tax from his customer. Either way, the taxpayer has failed to show that sales tax was paid or remitted by him.

Audit also reviewed records of deposits that the taxpayer made into his bank accounts. It determined that many of the deposits were not taxable because they were unrelated to his business. However, other deposits included checks from some of the taxpayer's customers who had reimbursed him for payments that he made to third-party vendors, including one to " . . ." for plumbing parts. Similarly, Audit found an "invoice" and a "statement" from the taxpayer to one of the two sample homeowners instructing them to pay third-party vendors, including a " . . ." and . . . , for materials. Audit denied the taxpayer's request to deduct these amounts from the assessments because it was unable to determine that the taxpayer had not been reimbursed for those amounts as he had been reimbursed by other customers for purchases from those vendors. Moreover, the taxpayer's "invoice" and "statement" to the sample customer did not separately state sales tax from the selling prices.

Audit further assessed the taxpayer on the basis of an invoice for \$. . . from “ . . . ” to one of the two sample homeowners for installation of a power pole. Audit could not find any business registered with the Department under that name or under any of the names of the taxpayer’s sons who operated the business. Therefore, Audit did not deduct that amount from the audit test.

Audit also reviewed a \$. . . check from the taxpayer’s bank account to one of his sons and included it in the audit test as a taxable item. The taxpayer and his records did not identify why he made the payment. Audit treated the payment as an expense by the taxpayer for services rendered by his son relating to construction and taxable under WAC 458-20-170 (Rule 170).

The last items that Audit did not deduct from the audit test were purchases of materials from . . . Lumber Co. Audit found these purchases were made by the taxpayer’s customers with the taxpayer’s resale certificate. There is no evidence that they paid sales tax to either the taxpayer or the vendor.

TAXPAYER’S EXCEPTIONS:

The taxpayer is unable to explain why . . . Construction Co. did not charge sales tax on the invoice or why the vendor billed it at all. The taxpayer denies it made the purchase and claims the customer only was liable for the purchase.

The taxpayer asserts that his two statements to his customers to pay third-party vendors . . . and . . . were merely “memos” reminding them to pay for the materials they bought, although the memos were written on his “invoice” and “statement” forms. The taxpayer insists both that the memos were not statements or invoices from him, and the third-party vendors were not working for him, but were working for his customers only.

The taxpayer explains that the \$. . . invoice from “ . . . ” for the power pole installation was charged directly by that business to the customer. The taxpayer insists he did not own, operate, or work for “ . . . ” Rather, it was a company owned by his son. The taxpayer argues the charge cannot not be deemed attributable to him because he did not order or provide the service. Similarly, the taxpayer contends the \$. . . check from him to his son has no tax consequences for him. The taxpayer insists there is no indication that it was payment for retail services or materials.

Lastly, the taxpayer asserts that records pertaining to the . . . Lumber Co. were not invoices from . . . Lumber, but were merely written estimates from the vendor.

ISSUE:

Is the taxpayer liable for sales tax or use tax incurred by the purchases of materials and services used in the construction of his customers' homes?

DISCUSSION:

As noted, the taxpayer cannot explain why the invoice from . . . Construction Co. to him did not contain charges for sales tax as required by WAC 458-20-107 (Rule 107). Nonetheless, the taxpayer denies making the purchase. We explained in Det. No. 95-078 that if the taxpayer had an account with a vendor and was invoiced as the purchaser, which happened in this instance, the presumption is that he is liable for the unpaid tax unless he can show that he was not personally liable for the debt. The taxpayer has failed to demonstrate his lack of liability for that transaction. We affirm the portion of the tax assessment pertaining to charges by . . . Construction Co.

Audit reviewed records that showed the taxpayer sent a "statement" in one instance and an "invoice" in the other instance to his customers (. . .) with specific amounts shown as due along with instructions to pay those amounts to vendors . . . and . . . The invoice and statement do not separately state any amounts for sales taxes. The taxpayer argues that these documents were merely memos to the customers. As noted, Audit found other records, including checks from other customers to the taxpayer, reimbursing him for payments he made to one of the same vendors.

We held in Det. No. 95-078 that:

If his [the taxpayer's] resale certificate was used to purchase materials and/or labor and the vendors invoiced him, but his customers directly paid the vendor the taxpayer would still be responsible to collect sales tax from his customers if they did not pay it to the vendor. Such transactions would be considered retail sales of materials or labor by the taxpayer to his customers because of the use of his resale certificate in purchasing the materials or labor for resale to his customers.

We find this holding is applicable to the present matter. The taxpayer had accounts with the vendors. They billed him for purchases on those accounts. He instructed his customers to pay the vendors directly, but he failed to instruct them to pay sales tax. Furthermore, he has provided no evidence that sales tax was charged by either him or the vendors and paid by the homeowners on the purchases. The taxpayer remains liable for the tax assessed on these purchases. Rule 170.

The next two items concern the \$. . . charge by . . . to one of the homeowners for the power pole installation and the \$. . . check issued by the taxpayer to his son.

We have no evidence that the taxpayer was an owner, partner, officer, or had any other interest in We have no proof that the taxpayer installed the power pole or ordered the installation. In short, we do not have a basis to assess sales tax or use tax against the taxpayer as either the

vendor, contractor, or consumer of the power pole. The fact that the taxpayer's son did not register his business with the Department does not, by itself, cause the taxpayer to be liable for the taxes.

Audit assessed tax on the \$. . . check from the taxpayer to his son because it considered the payment to be for goods or services rendered in respect to construction. Rule 170. Both the taxpayer and his son operated in an industry that is subject to sales tax on the purchases of goods and services rendered in respect to construction. The taxpayer wrote the check on an account that he used to pay construction expenses. We sustain the assessment because the taxpayer has not provided sufficient records showing that the payment was for purposes other than the purchase of goods or services rendered in respect to construction. RCW 82.32.070.

Finally, we address the . . . Lumber Co. documents that the taxpayer insists were merely written estimates of materials costs. Audit responds by stating that these documents were actually "bills" that were retained by the taxpayer to show what materials had been purchased. Sales tax was not separately stated. The larger of the two documents was paid in full by the homeowner by check #654 on May 9, 1989 without any indication that sales tax was paid. That information is plain on the face of the document.

We find that the taxpayer and his customer treated the documents as bills or invoices because the charges were paid as they were stated on the documents. Furthermore, Audit found that homeowner used the taxpayer's resale certificate on file with . . . Lumber to make his purchases. Audit also found many instances of other homeowners using the taxpayer's resale certificate with . . . Lumber to make their purchases of materials without paying sales tax. We explained above that when homeowners used the taxpayer's resale certificate with his knowledge, he became liable for collecting sales tax from them and remitting it to the Department if they failed to pay the tax to the vendor. His failure to collect the tax makes him liable for it as the seller of these items. Rule 170.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part.

Dated this 30th day of June, 1997.