

Cite as Det. No. 16-0097, 35 WTD 568 (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. 16-0097
)	
. . . )	Registration No. . . .
)	

[1] RCW 82.04.040; RCW 82.04.090: RETAIL SALES TAX – DEFINITION OF SALE – THE SALE OF MARIJUANA: A retailer of marijuana cannot avoid the retail sales tax by providing marijuana in exchange for money that the retailer labeled as “donations.” The money was not donated, but given in exchange for tangible personal property, making the sales subject to retail sales tax.

[2] RCW 82.32.070; RCW 82.08.050(4); WAC 458-20-254: RETAIL SALES TAX – RECORDKEEPING: A retailer is subject to retail sales tax unless it can provide records of its exempt or nontaxable transactions.

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.

M. Pree, A.L.J. – A Washington nonprofit corporation disputes an assessment of retail sales tax on receipts from its customers in exchange for marijuana. Because the marijuana was exchanged for money, a sale occurred. Because the corporation did not provide records of nontaxable transactions, retail sales tax was properly assessed on total sales. We deny the petition.<sup>1</sup>

### ISSUES

1. Under RCW 82.04.040 and RCW 82.04.090, did the corporation sell marijuana to its customers?
2. Under RCW 82.08.050(4) and WAC 458-20-254 (Rule 254), did the corporation maintain and provide records to the Department of Revenue (Department) of exempt or nontaxable transactions?

### FINDINGS OF FACT

[Taxpayer] is a Washington nonprofit corporation that provides naturopathic and holistic counseling to patients. The taxpayer also dispenses herbs and marijuana to its patients.

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

According to the taxpayer, clients only pay for services. It does not charge the patients for goods, but accepts donations from them. The taxpayer filed combined excise tax returns on which it reported its receipts under the service and other activities business and occupation (B&O) tax classification.

The Department examined the taxpayer's activities for the May, 2013 through June 30, 2014 period (audit period). On November 14, 2014, the Department's Taxpayer Account Administration (TAA) Division issued Document No. . . . , which assessed \$ . . . in retail sales tax, and totaled \$ . . . .<sup>2</sup> The taxpayer disputes the total assessed.

The taxpayer points out that TAA reclassified all of the taxpayer's receipts from other B&O tax classifications (e.g. nonprofit hospital) to the retailing B&O tax classification, and assessed it retail sales tax. The taxpayer states that 80% of its charges were for services, holistic counseling, and medical massage. TAA responded that in a voice mail left by the taxpayer's president, the president explained that the holistic counseling was provided in conjunction with marijuana distributions. TAA added that the massage revenues were reported under a different UBI number, and not associated with this assessment.<sup>3</sup>

Most of the taxpayer's business was from walk-in customers who were not billed, but left what the taxpayer refers to as "donations" in a jar. Unlike "green-cross" dispensaries, the taxpayer states it primarily offered counseling and most of the products it provided were herbs, not marijuana. The taxpayer did not give its patients invoices for its services or goods, nor did it provide receipts for their "donations." It entered an amount in its QuickBooks, which it reported on its excise tax returns under the service and other activities B&O tax classification.

The taxpayer advertises products and prices online including a large menu of marijuana, marijuana infused edibles, and marijuana infused oils.<sup>4</sup> The taxpayer also advertises that it sells marijuana on a sign in its office. TAA notes that the taxpayer also has an expansive online presence, and some of the websites where the taxpayer has appeared are . . . .

The taxpayer's business license application states they are a retail courier service delivering medication. The schedule of gross income (SGI) submitted by the taxpayer states they are selling herbs and not collecting sales tax but are instead paying it themselves. The owner has multiple business accounts, including a massage business, and reports massage revenues under another account.

## ANALYSIS

Washington imposes retail sales tax on sales of tangible personal property in this state unless the property is purchased for resale in the regular course of business, or otherwise exempt. RCW

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<sup>2</sup> The assessment included B&O tax and offsetting credits under various classifications, plus a five percent assessment penalty of \$ . . . and \$ . . . in interest.

<sup>3</sup> . . . (UBI . . . ) provided massage services and offered a "well spa." . . . . The taxpayer explained that the income for the other entity was for treating patients who were often referred from hospitals, and charges for their treatment were paid from Medicare, insurance, or the Veterans' Administration.

<sup>4</sup> See: . . . (last visited 1/11/16).

82.08.020; *see also* RCW 82.04.050. With respect to the [B&O] tax, Washington imposes a B&O tax “for the act or privilege of engaging in business” here. RCW 82.04.220. “Business” for B&O tax purposes includes “all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly.” RCW 82.04.140. Persons engaged in making sales at retail are subject to the B&O tax under the retailing tax rate on the gross proceeds of their sales. RCW 82.04.250. If the taxpayer sold marijuana or other tangible personal property, those sales would be retail sales under RCW 82.04.050 subject to retail sales tax under RCW 82.08.020 unless the sales were exempt under our excise tax law (Title 82 RCW).

Persons are also responsible for collecting and remitting the sales tax on retail sales. RCW 82.08.050(1). If any seller fails to collect the retail sales tax or, having collected the tax, fails to pay it to the Department, whether such failure is the result of the seller’s own acts or the result of acts or conditions beyond the seller’s control, the seller is, nevertheless, personally liable to the state for the amount of the sales tax. RCW 82.08.050(3). Sellers are not relieved from personal liability for the amount of the tax unless they maintain proper records of exempt or nontaxable transactions and provide those to the Department when requested. RCW 82.08.050(4).

The taxpayer argues that it did not sell the marijuana, but gave it away. For B&O and retail sales tax purposes, RCW 82.04.040(1) defines “sale” as, “[A]ny transfer of the ownership of, title to, or possession of property for a valuable consideration . . . .” RCW 82.04.090 provides “value proceeding or accruing” means “consideration, whether money, credits, rights, or other property expressed in terms of money, actually received or accrued.” RCW 82.04.090. The taxpayer’s customers took possession of the taxpayer’s marijuana and exchanged it for money, valuable consideration.

The money received in exchange for tangible personal property (in this case, marijuana) constitutes valuable consideration for purposes of RCW 82.04.040(1). The taxpayer’s sales of marijuana were subject to retail sales tax under RCW 82.08.020, unless a specific exemption applied.<sup>5</sup>

[T]ax exemptions are narrowly construed. Taxation is the rule and exemption is the exception. *Budget Rent-A-Car, Inc. v. Dep’t of Revenue*, 81 Wn.2d 171, 174, 500 P.2d 764 (1972). Anyone claiming a benefit or deduction from a taxable category has the burden of showing that he qualifies for it. *Id.* at 174-75.

The taxpayer argues that the money it received from its customers were donations not subject to B&O tax. RCW 82.04.4282 provides an exemption for B&O tax if the amounts received are bona fide contributions or donations:

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<sup>5</sup> Even if we were to find that under RCW 82.04.040 no sale occurred, the patients would still be liable for use tax on tangible personal property acquired by gift or donation. *See* WAC 458-20-178(7)(b). [RCW 82.12.020.] The taxpayer may also be liable to collect use tax from the patients under WAC 458-20-221. [RCW 82.12.040.] We have previously ruled that donors of free samples of pharmaceuticals were liable for use tax on the drugs. *See* Det. No. 87-363, 4 WTD 331 (1987); Det. No. 86-176A, 3 WTD 393 (1987). [RCW 82.12.010(1) (definition of “consumer” subject to use tax includes persons who distribute or display articles of tangible personal property “the primary purpose of which is to promote the sale of products or services”).]

In computing tax there may be deducted from the measure of [B&O] tax amounts derived from bona fide . . . donations, . . . . This section may not be construed to exempt any person, association, or society from tax liability upon selling tangible personal property, digital goods, digital codes, or digital automated services, or upon providing facilities or other services for which a special charge is made to members or others.

The term “donations” means “any other transfer of money or other property by a donor, provided the donor receives no significant goods, services, or benefits in return for making the gift.” WAC 458-20-169(g)(iii) . . . . In this case, the taxpayer argues its customer was the “donor” of money in the taxpayer’s jar. Yet the customer received marijuana, a significant good, when the customer left money.

There was no contribution or donation. Funds do not qualify as “contributions” or “donations” if the funds are not provided for a gratuitous purpose. *Analytical Methods v. Dep’t of Revenue*, 84 Wn. App. 236, 243, 928 P.2d 1123 (1996); *see also* Det. No. 13-0156R, 33 WTD 199, 202 (2014). In *Analytical Methods*, the federal agency providing the funds received certain intellectual property rights [in return for those funds]. In our case, the customers received marijuana. The money the customers gave the taxpayer when the taxpayer gave them marijuana did not qualify as a contribution or donation because it was not gratuitous. Therefore, its sales were not exempt under RCW 82.04.0282.

The taxpayer also argues that the assessment includes non retail sales. RCW 82.32.070 requires taxpayers to maintain suitable records as may be necessary for the Department to determine a person’s tax liability. RCW 82.32.070(1) states:

Every person liable for any fee or tax imposed by chapters 82.04 through 82.27 RCW shall keep and preserve, for a period of five years, suitable records as may be necessary to determine the amount of any tax for which he may be liable, which records shall include copies of all federal income tax and state tax returns and reports made by him. All his books, records, and invoices shall be open for examination at any time by the department of revenue. . . .

The Department adopted WAC 458-20-254 (Rule 254) to administer RCW 82.32.070. Rule 254 defines taxpayers’ requirements for the maintenance and retention of books, records, and other sources of information. Rule 254(3) states, in relevant part:

- (a) Every taxpayer liable for a tax or fee imposed by the laws of the state of Washington for which the department of revenue has primary or secondary administrative responsibility . . . must keep complete and adequate records from which the department may determine any tax liability for such taxpayer.
- (b) It is the duty of each taxpayer to prepare and preserve all records in a systematic manner conforming to accepted accounting methods and procedures. Such records are to be kept, preserved, and presented upon request of the department or its authorized representatives which will demonstrate:

- (i) The amounts of gross receipts and sales from all sources, however derived, including barter or exchange transactions, whether or not such receipts or sales are taxable. These amounts must be supported by original source documents or records including but not limited to all purchase invoices, sales invoices, contracts, and such other records as may be necessary to substantiate gross receipts and sales.

...

- (c) The records kept, preserved, and presented must include the normal records maintained by an ordinary prudent business person. Such records may include general ledgers, sales journals, cash receipts journals, bank statements, check registers, and purchase journals, together with all bills, invoices, cash register tapes, and other records or documents of original entry supporting the books of account entries. The records must include all federal and state tax returns and reports and all schedules, work papers, instructions, and other data used in the preparation of the tax reports or returns.

Here, the taxpayer failed to provide suitable records as required under RCW 82.32.070 to show that it had income from sources other than selling tangible personal property. We cannot relieve [the taxpayer] from personal liability for the amount of the uncollected retail sales tax under RCW 82.08.050(4) because the taxpayer did not maintain proper records of exempt or nontaxable transactions. Therefore, we uphold the assessment.

#### DECISION AND DISPOSITION

We deny the taxpayer's petition.

Dated this 15th day of March, 2016.