Cite as Det. No. 14-0410, 35 WTD 126 (2016)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 14-0410
. . .	)	Registration No. . . .

[1] RCW 82.08.050: RETAIL SALES TAX – B&O TAX – SEPARATELY STATED – OVER-COLLECTED – UNREMITTED. A contractor that added its B&O tax to retail sales tax that it billed its customers as sales tax, must remit the excess amount collected as sales tax to the Department.

[2] RULE 111; RCW 82.04.500: B&O TAX – BUYER LIABILITY. A seller may not recoup B&O tax imposed upon the seller by adding its B&O tax to the buyer's contract price.

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 building contractor protests retail sales tax assessed when it over-billed its Washington customers for sales tax by including its business and occupation (B&O) tax in the sales tax billed to its customers. [The] contractor must remit over-collected sales tax as retail sales tax (not B&O tax) to the Department of Revenue (Department). The contractor must also include permit fees for which it was financially liable in its measure of tax, even though the owner was liable to pay the contractor for the fees. We deny the taxpayer's petition.[1]

ISSUES

1. Under RCW 82.08.050, must the contractor remit over-collected sales tax to the Department as retail sales tax?

2. Under RCW 82.04.500, could the contractor bill its customers for B&O tax along with sales tax?

3. . . .

4. Under WAC 458-20-111 (Rule 111), could the contractor exclude permit fees from its measure of [B&O] tax when the owner was obligated to pay the contractor for the fees?

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

FINDINGS OF FACT

[Taxpayer] builds large retail structures (box stores) throughout the United States. The taxpayer contracted to build the box stores for a lump sum, including taxes, payable on a percentage of completion basis. Its large, corporate customers required the taxpayer to vary its billing practices, which in some instances resulted in the taxpayer including the B&O tax rate with the sales tax rate in its billings. Consequently, the taxpayer over-billed those customers for sales tax. When the taxpayer filed its excise tax returns, it computed the correct sales tax rate, which it remitted as sales tax, and remitted the excess sales tax collected as B&O tax to the Department.

The Department's Audit Division examined the taxpayer's records for the period of January 1, 2010 through June 30, 2013. As a result of the audit, on December 30, 2013, the Audit Division issued the assessment referenced above, which totaled $ . . . . The taxpayer appealed $ . . . in retail sales tax (plus interest) assessed by the Audit Division on Schedule 3 of the assessment as overbilled, but unremitted retail sales tax. The taxpayer also objects to the Audit Division's instruction that it could not itemize its B&O tax on sales invoices to recoup the cost of the B&O tax. Finally, the taxpayer questions whether the Audit Division properly included permit fees, which an owner agreed to pay, in the taxpayer's measure of sales tax and B&O tax in the assessment.

Our first issue involves retail sales tax over-collected by the taxpayer. The Audit Division reconciled the retail sales tax collected through a comparison of the amounts recorded in the taxpayer's records with the amounts reported on the taxpayer's excise tax returns. The taxable differences resulted from adding the .00471 B&O tax rate to the sales tax rate collected. The taxpayer explains that it billed some customers in this manner at their request. Regardless of how it billed its customers, the total paid by the customers was the same because the lump-sum contracts included all taxes. The Audit Division reduced the total received by the taxpayer by the appropriate sales tax amount to determine the measure of taxes (retail sales tax and B&O tax). The taxpayer did not disagree with the measure of tax determined by the Audit Division (other than the permit fee issue raised after the hearing and discussed later). The taxpayer disputes $ . . . retail sales tax assessed, which the Audit Division explained was the excess of retail sales tax billed by the taxpayer that was remitted as B&O tax. The taxpayer contends that since it remitted all the taxes collected, and did not charge its customers more on its "all taxes included" contracts, that it should not have to pay additional retail sales taxes, because it did not hold those taxes in trust.

. . .

After the hearing, the taxpayer asked whether permit fees, which an owner agreed to pay, should have been included in the taxpayer's measure of sales and B&O tax in the assessment. As stated in the owner's pre-bid conference notes, the contractor would be asked to secure the building permit at the owner's expense and include all other one-time permits in its base bid.[2] Both the

[2] From §1.05 in . . . pre-bid conference notes distributed July 14, 2014, in the taxpayer's exhibit D submitted October 24, 2014.

owner and the taxpayer, as the contractor, are named on the permit. The permit application states that both the owner and contractor take full financial and all other liability for the permit.[3]

ANALYSIS

Washington imposes a retail sales tax on each "retail sale" in this state. RCW 82.08.020. "Retail sale" is broadly defined to include sales of tangible personal property and certain services. RCW 82.08.050 explains that retail sales tax is held in trust until remitted to the Department:

> (2) The tax required by this chapter, to be collected by the seller, shall be deemed to be held in trust by the seller until paid to the department, and any seller who appropriates or converts the tax collected to his or her own use or to any use other than the payment of the tax to the extent that the money required to be collected is not available for payment on the due date as prescribed in this chapter is guilty of a gross misdemeanor.
>
> (3) In case any seller fails to collect the tax herein imposed or, having collected the tax, fails to pay it to the department in the manner prescribed by this chapter, whether such failure is the result of his or her own acts or the result of acts or conditions beyond his or her control, he or she shall, nevertheless, be personally liable to the state for the amount of the tax,….

Retail sales taxes must be remitted to the Department within the time and in the manner specified by RCW 82.32.045. When a seller does not remit collected retail sales tax it becomes personally liable for the tax, even if the failure to remit it was a result of circumstances beyond its control. RCW 82.08.050(3).

All retail sales taxes, even if over collected or collected in error, must be remitted to the Department, and can be refunded or credited to the seller only if the seller has first refunded the overpaid tax to its customers. *Kitsap-Mason Dairymen's Ass'n v. Washington State Tax Commission,* 77 Wn.2d 812, 816, 467 P.2d 312 (1970); WAC 458-20-229(3)(b). In *GTE v. Dep't of Revenue,* 49 Wn. App. 532, 535 (1987), GTE had charged, collected, and remitted more retail sales taxes than were due, while underreporting its own B&O taxes. GTE argued it should be able to offset the over-reported retail sales taxes it had collected and remitted against its own under-reported B&O taxes. The Court of Appeals, however, relying on RCW 82.08.050, disagreed, and held that the sales tax overpayment was not the GTE's, but the buyer's. The court further reasoned that because GTE was a trustee for collection of the tax, it followed that GTE was a trustee of the refund as well. As such, GTE could not use the overpaid trust funds it had charged and collected to reduce the impact of its own B&O tax liability. *Id.*; *see also Kaeser v. Everett,* 47 Wn.2d 666, 289 P.2d 343 (1955); *Urban Constr. Co., Inc. v. Seattle Urban League,* 12 Wn. App. 935, 533 P.2d 392, *review denied,* 85 Wash.2d 1018 (1975); *Kitsap-Mason Dairymen's,* 77 Wn.2d at 816; Excise Tax Advisory 3106.2009 ("Refunds of Over Collected Retail Sales Tax").

[3] From the taxpayer's Exhibit E submitted October 24, 2014.

The taxpayer's bills show that by adding the B&O tax rate to the retail sales tax rate, the taxpayer charged and collected more sales tax than was due for its retail construction services. The taxpayer did not pay the additional sales tax to the Department as its customers' retail sales tax, but paid the over-collected amount as its own B&O tax.

Because the taxpayer charged and collected "retail sales tax" in excess of the amount lawfully due, the taxpayer is not entitled to either the refund of the excess amounts or to use those amounts to pay its own B&O tax liability. Only the taxpayer's customers are entitled to the refund from the taxpayer, because they paid the separately-stated retail sales tax. We, therefore, conclude that under RCW 82.08.050(3), the taxpayer was liable to remit the over-collected sales tax to the Department as retail sales tax.

The taxpayer argues that it should receive a credit against the retail sales tax assessed for the B&O tax collected as sales tax and remitted to the Department as B&O tax. The taxpayer states that it remitted the correct amount of tax due, even though the B&O tax portion may have been combined with the retail sales tax. We disagree that the correct amount was paid. Retail sales tax is a tax imposed upon the buyer, not the seller. *See* RCW 82.08.050. The amounts at issue were collected as "tax," in the same manner as retail sales tax. B&O tax, as discussed below, is not collected from buyers. The amounts at issue were also lumped together with retail sales tax. Therefore, we cannot presume that the excess amounts are B&O taxes.

Washington imposes B&O tax "for the act or privilege of engaging in business" in this state. RCW 82.04.220. Washington law imposes separate B&O tax rates on various activities conducted in this state, including on "every person engaging within this state in the business of making sales at retail." RCW 82.04.250. RCW 82.04.500 provides:

> It is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers, but that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons.

In *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 157 P.3d 847 (2007), Washington's Supreme Court held that because the B&O tax is not a tax on customers, but a tax on business and part of the operating overhead, a seller may (1) itemize B&O tax as part of the final purchase price, (2) disclose a B&O charge to customer during the course of negotiating a purchase price, or (3) later identify any claimed element of overhead. A seller may not, however, add a B&O charge as one of several fees and taxes after the seller and customer negotiate and agree upon a final purchase price. Thus, the seller's inclusion of its B&O tax along with the separately-stated retail sales tax owed by its customers was not in accordance with Title 82 RCW.

We further note that, since the prior audit, the Washington Supreme Court as has held that under RCW 82.04.500, even if disclosed, a seller is prohibited from recouping its B&O taxes by collecting a surcharge in addition to its monthly service fee. *Peck v. AT&T Mobility,* 174 Wn.2d 333, 275 P.3d 304 (2012). In *Peck* the Court stated:

> . . . [T]he seller could not add the B&O charge on the agreed-to purchase price. [*Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 181, 157 P.3d 847 (2007).] Put simply, whether disclosed or not, the seller could properly pass the B&O tax through as an overhead line itemization, but not as an added charge.

174 Wn.2d at 340. The Department now recognizes on its web-site that a seller cannot recoup its B&O tax liability as an added charge to its sales price, whether or not it discloses the added charge. http://dor.wa.gov/content/getaformorpublication/publicationbysubject/taxtopics/itemizebotax.aspx (last visited Dec. 10, 2014). Therefore, the taxpayer cannot add Washington's B&O tax to its contract price in its billings, but may include the B&O tax as overhead if it itemizes its overhead.

. . .

Finally, regarding the permit fee issue raised by the taxpayer after the hearing, Rule 111 recognizes that in certain instances amounts received by a taxpayer are not "gross proceeds of sales" or "gross income of the business." This rule provides that amounts received as "reimbursements" [by a taxpayer acting as an agent] may be "excluded from the measure of tax" where the "money . . . is received by a taxpayer as reimbursement of an advance in accordance with the regular and usual custom of its business." *Id.*

Rule 111 explains:

> The foregoing is limited to cases wherein the taxpayer, as an incident to the business, undertakes, on behalf of the customer . . . the payment of money . . . to a third person, or in procuring a service for the customer which the taxpayer does not or cannot render and for which no liability attaches to the taxpayer . . . .

The permit application clearly attaches liability to the contractor, in this case, the taxpayer. While the taxpayer may be entitled to charge the permit fee to the owner, if the owner fails to pay, the taxpayer remains secondarily liable for the permit. Under Rule 111, fees for which the taxpayer is secondarily liable are not excludable reimbursements:

> The word "reimbursement" as used herein, means money or credits received from a customer or client to repay the taxpayer for money or credits expended by the taxpayer in payment of costs or fees for the client.
>
> The words "advance" and "reimbursement" apply only when the customer or client alone is liable for the payment of the fees or costs *and when the taxpayer making the payment has no personal liability therefor, either primarily or secondarily, other than as agent for the customer or client . . .*

No charge, which represents a payment on the purchase price of an article or a cost of doing or obtaining business, even though such charge is made as a separate item, will be construed as an advance or reimbursement. *See* Rule 111. The Department has held that the reimbursement of building permit fees to a construction contractor are not deductible from the measure of the

contractor's retail sales tax absent a showing that the contractor has no primary or secondary liability for such fees. Det. No. 88-256, 6 WTD 133 (1988). Obtaining permits or other services, as a designee of the owner, does not establish that the taxpayer was acting merely as an agent of the property owner for tax purposes. *Id.* at 136-137. Those receipts constitute a part of gross sales or gross income of the business. Rule 111 provides an example for contractors:

> For example, no exclusion is allowed with respect to amounts received by . . . (4) a manufacturer or contractor for materials purchased in his own name or in the name of his customer if the . . . contractor is obligated to the vendor for the payment of the purchase price, regardless of whether the customer may also be so obligated . . . .

Because the taxpayer was financially obligated for the permit, it could not exclude the permit fee even though the owner was obligated to pay the taxpayer for the fee. Therefore, we conclude that the Audit Division properly included the permit fees in the taxpayer's measure of tax.

DECISION AND DISPOSITION

We deny the taxpayer's petition.

Dated this 23rd day of December, 2014.