

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

In the Matter of the Petition) D E T E R M I N A T I O N
For Prior Determination of)
Tax Liability) No. 88-376
)
) Registration No. . . .
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- [1] **RCW 82.08.050:** RETAIL SALES TAX -- MEASURE --
SEPARATELY STATED -- CONCLUSIVE PRESUMPTION --
OBLIGATION TO COLLECT: Sellers must collect sales
tax in addition to and as a separate item over and
above the selling price.
- [2] **RCW 82.08.050:** RETAIL SALES TAX -- CONCLUSIVE
PRESUMPTION -- SETTLEMENT AGREEMENT: A settlement
agreement executed following the institution of
litigation is an "agreement" under RCW 82.04.050 so
that the conclusive presumption guidelines control.
- [3] **RCW 82.08.050:** RETAIL SALES TAX -- SEPARATELY
STATED -- CONCLUSIVE PRESUMPTION: Pomeroy v.
Anderson follows RCW 82.08.050 and requires the
sales tax to be addressed in the agreement. The
question of sales tax was not addressed by the
settlement agreement.
- [4] **RCW 82.08.010(1):** RETAIL SALES TAX -- MEASURE --
SELLING PRICE: The sales tax is calculated on the
full amount of a settlement agreement between
contractor and customer. The fact that the
agreement may have been designed to include
attorneys' fees, interest, and other costs, does not
reduce the measure of the 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.

NATURE OF ACTION:

The taxpayer requested a ruling on whether the retail sales tax applied to the proceeds paid to a contractor to settle litigation between the parties.

FACTS AND ISSUES:

Mastrodonato, A.L.J. -- . . . (taxpayer) is a municipal corporation previously known as The taxpayer serves the area known as the . . . east of . . . and north of

The taxpayer seeks guidance from the Department of Revenue regarding a sales tax question which has now arisen out of a construction contract, litigation relating thereto, and the settlement of that litigation. The following represents the facts pertinent to the issues presented.

In 1984 the taxpayer awarded a contract to [A] ("[A]") to install certain sewer facilities within the District at the contract price of \$

Thereafter, a dispute arose between the taxpayer and [A] when the taxpayer reduced the scope of the contract and deleted certain work. [A] then filed suit against the taxpayer seeking compensation for claims in excess of \$. . . together with interest, attorneys' fees and costs. The taxpayer has provided the Department with a copy of [A]'s complaint and it is incorporated herein by this reference.

On May 6, 1988, the taxpayer settled the litigation and all claims with [A] by payment of \$. . . to [A] in exchange for a "full discharge" from [A]. A copy of such Settlement Agreement has also been furnished.

Following the taxpayer's payment to [A] and dismissal of the litigation, [A] then made demand upon the taxpayer for additional funds in the amount of \$. . . as 8.1% sales tax on the \$. . . settlement funds.

In turn, the taxpayer responded that such sales tax was included in the settlement funds already provided to [A] for the following reasons:

1. The Settlement Agreement constituted a full and complete discharge of any claims [A] had against the taxpayer relating to the contract;

2. The \$. . . payment included and resolved all claims for contract damages, attorneys' fees, interest and costs; and

3. All prior taxpayer payments to [A] on the construction contract included sales tax payable at that time.

[A] again advised the taxpayer by letter that RCW 82.08.050 and Washington case law (Pomeroy v. Anderson, 32 Wn. App. 781, 649, P.2d 855 (1982)) obliged the taxpayer to pay sales tax on the settlement proceeds.

The taxpayer concedes that neither it nor [A] contests that sales tax is owing on contract payments/damages paid to [A] under the contract and relating to the litigation. On the other hand, the parties dispute whether the \$. . . settlement funds included sales tax which, pursuant to RCW 82.04.050, [A] is obliged to forward to the Department.

Accordingly, based on the foregoing, the taxpayer needs a ruling from the Department of Revenue regarding

A. Whether [A] is obliged to forward sales tax to the Department included in the \$. . . settlement funds or whether the taxpayer is now obliged to pay sales tax to the Department in addition to those funds previously paid [A]; and

B. If the Department determines that the sales tax was not included in the \$. . . and the taxpayer owes sales tax to the Department, upon what figure is the sales tax calculated (the \$. . . includes all contract claims/damages, attorneys' fees, costs, interest, etc.)?

DISCUSSION:

The taxpayer has completely set forth the pertinent facts and accurately outlined the issues presented. This portion of the Determination will respond to the questions raised.

[1] The Department of Revenue's position, relative to this particular issue, has been uniform and consistent over many years of tax administration, as the Revenue Act is succinct and concise upon the point. The law in effect for the period of the contract, subsequent litigation, and settlement required that sellers collect retail sales tax in addition to

and as a separate item over and above the selling price. The sales tax is asserted under the authority of RCW 82.08.050 which states:

. . . The tax required by this chapter [82.08 RCW] 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. (Emphasis supplied.)

The word "conclusively" was added immediately preceding the word "presumed" by an amendment to the statute effective in 1965 (see Laws of 1965, 1st Ex. Sess., ch. 173, sect. 15), and was expressly designed to dispel any doubts as to whether the prior law would allow sales tax to be included in prices. The statute is not permissive, and even where a transaction between the buyer and the seller is such that prices include sales tax, the Department has no alternative but to conclude that the sales tax has not been accounted for on the full gross selling price (RCW 82.08.010(1)), as required by law. See 3 WTD 188 (1987).

[2] In this case, we believe that the Settlement Agreement is an "agreement" within the meaning of RCW 82.08.050. Furthermore, the Settlement Agreement is silent as to sales tax. Therefore, it is the Department's position that it must be conclusively presumed that the retail sales tax was not included as part of the Settlement Agreement executed between the taxpayer and [A]. Consequently, the taxpayer remains obligated to pay and, in fact, owes retail sales tax upon the settlement figure of \$

[3] This conclusion finds additional support in Pomeroy v. Anderson, supra. In Pomeroy, the parties entered into a contract for the remodeling of a building. Later a dispute arose concerning whether the contract price included sales tax. The contract stated as follows:

The Contractor [Pomeroy] shall pay all sales, consumer, use and other similar taxes required by law and shall secure all permits, fees and licenses necessary for the execution of the work.

While the trial court concluded that the sales tax was included in the total contract price and that the seller [Pomeroy] must bear the burden of paying the tax, the Court of Appeals reversed that decision. Relying on the conclusive presumption in RCW 82.08.050, the Court held that the presumption controlled because the parties did not address the question of sales tax during the bidding process and did not enter into a contract stating that the price included sales tax. The Court went on to state the following:

The [contract] provision [quoted above] does not say anything about the contract price. It merely provides that the seller (Pomeroy) "shall pay all sales . . . taxes required by law." This is ambiguous language that can reasonably be read to mean that Pomeroy must pay the sales tax to the State as required by law, that is, by collecting it from the buyer (Anderson) and paying it to the State. RCW 82.08.050.

. . .

In our view the statutory presumption was designed precisely for situations such as this where neither party was at fault, the parties did not discuss sales tax and the contract did not clearly provide that the price included sales tax. Under the facts of this case, we hold that RCW 82.08.050 controls, and for purposes of determining the tax due from the buyer (Anderson) to the seller (Pomeroy), the selling price quoted in the contract does not include sales tax.

The same essential facts are present here, except that the Settlement Agreement here does not even mention or discuss the sales tax in any of its provisions. The Settlement Agreement merely provided that the Agreement constituted a full and complete discharge of any claims [A] had against the taxpayer relating to the contract and that the \$. . . payment to [A] was intended to include and resolve all claims for contract damages, attorneys' fees, interest, and costs. There is simply nothing in the Settlement Agreement that clearly meant to include sales tax in the settlement amount. Furthermore, we do not find the language in the Settlement Agreement to be ambiguous, because it does not contain any reference at all to the sales tax.

Thus, the statutory presumption controls. It does not appear that the parties considered or discussed the sales tax and the

Settlement Agreement did not clearly provide that the settlement amount of \$. . . included sales tax. Under these facts, we hold that the conclusive presumption of RCW 82.08.050 controls, and for purposes of determining the tax due from the buyer (taxpayer) to the seller ([A]), the settlement amount (\$. . .) agreed to by the parties in the Settlement Agreement did not include sales tax.

[4] Again, and as previously mentioned, the sales tax is calculated and due upon the entire amount of the settlement proceeds (i.e., \$. . .), notwithstanding the fact that this amount includes all contract claims/damages, attorneys' fees, costs, interest, etc. The retail sales tax is imposed by RCW 82.08.020 upon "each retail sale in the state" and is measured by the "selling price". The term "selling price" is defined by RCW 82.08.010(1) to mean

. . . the consideration, whether money, credits, rights, or property except trade-in property of like kind, expressed in the terms of money paid or delivered by a buyer to a seller without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes other than taxes imposed under this chapter if the seller advertises the price as including the tax or that the seller is paying the tax, or any other expenses whatsoever paid or accrued and without any deduction on account of losses; . . .

It is clear from the above that, if an item or transaction is subject to the sales tax (see RCW 82.04.050), the total consideration paid is the measure of the tax. Consequently, such items as damages, attorneys' fees, costs and interest "in respect to" a construction contract (see RCW 82.04.050(2)(b)), are subject to sales tax. Again, the sales tax is calculated on the entire \$. . . settlement figure.

Finally, the taxpayer indicated that if the Department determines that it owes additional tax as a result of the contract and Settlement Agreement with [A], the taxpayer will pay the amount directly to the Department. While the normal procedure would involve the taxpayer paying the sales tax to [A] and the latter remitting that tax to the Department, we will accept direct payment of the tax obligation from the taxpayer. This can be accomplished by either attaching a check in the amount of \$. . . to a copy of this Determination and sending both items to the Department, or by referring to this Determination in correspondence directed to

the Department together with a check in the above amount. If this amount is paid within 20 days of the date of this Determination, no interest or penalties will be assessed.

This legal opinion maybe relied upon for reporting purposes and as support of the reporting method in the event of an audit. This ruling is issued pursuant to WAC 458.20.100(18) and is based upon only the facts that were disclosed by the taxpayer. In this regard, the Department has no obligation to ascertain whether the taxpayer has revealed all of the relevant facts or whether the facts disclosed are actually true. This legal opinion shall bind this taxpayer and the Department upon these facts. However, it shall not be binding if there are relevant facts which are in existence but have not been disclosed at the time this opinion was issued; if, subsequently, the disclosed facts are ultimately determined to be false; or if the facts as disclosed subsequently change and no new opinion has been issued which takes into consideration those changes. This opinion may be rescinded or revoked in the future, however, any such rescission or revocation shall not affect prior liability and shall have a prospective application only.

DECISION AND DISPOSITION:

In conclusion, it is the opinion of the Department of Revenue that the sales tax was not included in the settlement funds, and the taxpayer's tax liability should be reported in accordance with the instructions contained herein.

DATED this 7th day of October 1988.