

Cite as Det. No. 14-0338, 34 WTD 234 (2015)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

[1] RULE 254; RCW 82.04.470, RCW 82.32.100: B&O TAX – USE TAX – RESALE CERTIFICATES – RESELLER PERMITS – BURDEN OF PROVING A WHOLESALE SALE IS ON THE SELLER. The burden of proving a sale is at wholesale lies with the seller. Moreover, the burden is on the taxpayer to provide documents and other evidence that a tax assessment is incorrect.

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.

Weaver, A.L.J. – A contractor, engaged in the custom construction of concrete structures, walkways, and roads, challenges an assessment of retail sales tax, retailing business and occupation (B&O) tax on unreported income, and use tax and/or deferred sales tax on construction materials. Because the contractor has not provided records documenting its unreported income or receipts proving it paid retail sales tax on materials used in its public road construction jobs, we deny the petition.¹

ISSUES

1. Whether, under RCW 82.32.100 and WAC 458-20-254, a contractor was correctly assessed retail sales tax and retailing B&O tax on amounts it underreported to the Department.
 2. Whether, under RCW 82.32.100 and WAC 458-20-254, a contractor was correctly assessed use tax and/or deferred sales tax when the taxpayer did not keep records showing it paid retail sales tax on materials used in its public road construction jobs.

FINDINGS OF FACT

[Taxpayer] is engaged in the custom construction of concrete structures, walkways, and roads. The Audit Division (Audit) of the Department of Revenue (Department) examined Taxpayer's books and records for the period of January 1, 2009 through June 30, 2012. Audit compared amounts recorded in Taxpayer's business records with the amounts reported to the Department

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

on Taxpayer's excise tax returns. The taxable differences between the two were classified by Audit as unreported retail sales, and retail sales tax and retailing B&O tax was assessed on those amounts. Taxpayer maintains it reported tax on all its gross receipts, but has offered no explanation for the discrepancy between the amounts recorded in its business records and the amounts reported on its excise tax returns.

Audit also identified certain Taxpayer's contracts as public works construction contracts. Taxpayer reported wholesaling B&O tax on the gross receipts from those contracts. Audit reclassified the gross receipts from Taxpayer's public works construction contracts under the public road construction tax classification. Audit correspondingly granted Taxpayer a credit for wholesaling B&O tax paid on gross receipts from Taxpayer's public works construction contracts.

Audit then assessed use tax and/or deferred sales tax on materials purchased by Taxpayer with respect to its public works construction business. Taxpayer did not provide records of materials purchased with respect to its public works construction jobs and it likewise did not provide records that sales tax was paid on materials used in its public works construction. In the absence of those records, Audit estimated the cost of materials incorporated in identified public works construction contracts. Audit estimated 25% of the total amounts awarded in each contract were used to purchase construction materials, which was in line with the costing guidelines for Taxpayer's industry. Audit assessed use tax and/or deferred sales tax on the estimated amount of those material purchases.

Taxpayer states it had its concrete vendor charge retail sales tax on materials used in its public road construction contracts. Taxpayer further states it identified which concrete deliveries were for public road construction, as opposed to Taxpayer's wholesaling business, on a job-by-job basis. However, Taxpayer kept no books and records to show retail sales tax was actually paid on its purchases of concrete for its public road construction jobs.

On September 26, 2013, Audit issued Assessment No. . . . to Taxpayer, totaling \$. . . . The assessed amount included \$. . . in retail sales tax, \$. . . in retailing B&O tax, a wholesaling B&O tax credit of \$. . . , \$. . . in use tax/deferred sales tax, \$. . . in public road construction tax, \$. . . in interest, and an assessment penalty of \$. . . . Taxpayer filed a timely appeal. Taxpayer did not provide any additional records on appeal.

ANALYSIS

RCW 82.08.020 imposes a retail sales tax on each retail sale in Washington. The term "retail sale" includes the constructing of structures on real property of or for consumers, including the construction of highways, easements, etc., on property owned by private persons. RCW 82.04.050(2)(a); WAC 458-20-170 (Rule 170). Rule 170 explains that prime contractors, who are persons performing construction for consumers, are making retail sales. Generally taxpayers who perform construction for prime contractors, are engaging in wholesaling activity (sales for resale). Purchases by these subcontractors of materials, which become part of the improvement to the real estate, are generally considered purchases for resale not subject to the retail sales tax.

However, construction of roads owned by a municipal corporation, a political subdivision of the state, or the United States, is not classified as a retail activity. RCW 82.04.050(10). Generally, construction of roads owned by such entities is classified as “public road construction.” WAC 458-20-171 (Rule 171). Contractors and subcontractors constructing for those entities are themselves considered the consumers of the materials they incorporate as an ingredient or component of the public road or right-of-way. RCW 82.04.190(3). Therefore, the retail sales tax or use tax applies to sales of construction materials to those contractors and subcontractors engaged in public road construction.² RCW 82.08.020 and 82.12.020.

Taxpayers have a duty to maintain their records in such a manner their tax liabilities can be determined. RCW 82.32.070. This includes a specific obligation to generate, maintain, and preserve records and documentation necessary to establish tax liability. RCW 82.32.070(1); WAC 458-20-254(3)(b). Taxpayers must keep and preserve suitable records, and make them available for examination by the Department for five years. RCW 82.32.070; RCW 82.32A.030. Thus, according to these principles, the burden rests on Taxpayer to maintain records that establish whether its purchases of materials were purchased for resale or for public road construction subject to retail sales tax.

As an initial matter, Audit assessed retail sales tax and retailing B&O tax on gross receipts Taxpayer failed to report to the Department on its excise tax returns. Taxpayer contends Audit erred when it assessed retail sales tax on the additional income Audit determined the Taxpayer received. However, Taxpayer has not provided resale certificates, reseller’s permits, delivery records, or any other documentation to establish the nature of the unreported income.

Sellers making retail sales are required to collect and remit retail sales tax under RCW 82.08.050(1). If the seller fails to collect or remit the retail sales tax, the seller is liable for the tax. RCW 82.08.050(3). Taxpayer paid wholesaling B&O tax on all its gross receipts and contends it made no retail sales during the audit period.

The burden of proving a sale is a wholesale sale rather than a retail sale is on the seller. RCW 82.04.470(1). For sales occurring prior to January 1, 2010, sellers were required to obtain resale certificates to substantiate the wholesale nature of their sales. WAC 458-20-102A. For sales after December 31, 2009, a seller may meet its burden of proving a sale is a wholesale sale rather than a retail sale by taking from the buyer, at the time of sale or within a reasonable time after the sale as provided by rule of the department, a copy of a reseller permit issued to the buyer by the Department under RCW 82.32.780 or 82.32.783. RCW 82.04.470(1).

With respect to the unreported income, Taxpayer has not provided any resale certificates, reseller’s permits, delivery records, or any other documentation to establish the nature or location of the unreported sales. The law is clear. The burden of proving a sale is at wholesale lies with the taxpayer. RCW 82.04.470(1). Because the taxpayer has not met this burden, the sales are not exempt from retail sales. We conclude Audit properly assessed retail sales tax on the taxpayer’s unreported sales.

² In general, public road construction contractors are taxable under the public road construction B&O tax classification on the total contract price. Rule 171. Taxpayer reported B&O tax under the wholesaling B&O tax classification. Both classifications have rates of .00484. See <http://dor.wa.gov/content/findtaxesandrates/bandotax/bandorates.aspx> (last accessed September 23, 2014.)

Additionally, Taxpayer contests the assessment of use tax and/or deferred sales tax on materials related to its public works construction jobs. Audit estimated 25% of the total amounts awarded in each contract were used to purchase construction materials, which was in line with the costing guidelines for Taxpayer's industry. Audit assessed use tax and/or deferred sales tax on the estimated amount of those material purchases. Taxpayer contests the assessment of tax on those materials, claiming it paid its vendors retail sales tax on the materials at the time of purchase. However, Taxpayer has provided no books, records, or receipts to support the claim that it paid retail sales tax on those materials.

Tax assessments are presumed valid and the burden is upon the taxpayer to come forth and provide documents or other evidence that the tax assessment is incorrect. RCW 82.32.100; *see also* RCW 82.32.070; WAC 458-20-254; *Automobile Club of Washington v. Dep't of Revenue*, 27 Wn. App., 781, 786, 621 P. 2d 760 (1980). If records are not provided, RCW 82.32.100 authorizes the Department to proceed, "in such manner as it may deem best, to obtain facts and information on which to base its estimate of the tax." After reviewing the taxpayer's petition and the record, we conclude the taxpayer has not presented sufficient documents or other evidence for an adjustment of the tax assessment.

For those reasons, we deny the taxpayer's petition.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 24th day of October, 2014.