

Cite as Det. No. 16-0345, 36 WTD 403 (2017)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS 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. 16-0345
)	
... )	Registration No. . . .
)	

RCW 82.08.050; WAC 458-20-107– USE TAX AND/OR DEFERRED RETAIL SALES TAX – VENDOR INVOICES – SEPARATELY STATED TAX. Retail sales tax must be separately stated on vendor invoices to be deemed charged and paid.

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.

Lewis, T.R.O. – A speculative builder petitions for correction of an assessment of use tax and/or deferred sales tax on materials and subcontractor services used in the construction of speculatively built homes. The assessment of tax is sustained.<sup>1</sup>

ISSUE:

Under RCW 82.08.050 and WAC 458-20-107 (“Rule 107”), was a taxpayer correctly assessed use tax and/or deferred sales tax on purchases when retail sales tax was not separately stated on vendors’ invoices?

FINDINGS OF FACT:

Taxpayer does custom and speculative construction. The Department of Revenue’s (Department’s) Audit Division audited Taxpayer’s business records for the period January 1, 2011, through December 31, 2014. On October 30, 2015, the Department issued a \$ . . . assessment.<sup>2</sup> Almost all of the \$ . . . use tax and/or deferred sales tax assessed was on purchases of materials and subcontractor services incorporated into speculative built homes. The Audit Division assessed tax on purchases where either the invoice did not show sales tax collected, or the sales tax was not separately stated.

Taxpayer disagreed with the assessment. On November 30, 2015, Taxpayer filed a petition for correction of the assessment. Taxpayer maintained that the Department should look to the seller,

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

<sup>2</sup> The \$ . . . assessment consisted of \$ . . . tax, \$ . . . interest, and \$ . . . assessment penalty.

and not to Taxpayer, for verification that tax was paid. Taxpayer relied on a “Master Subcontractor Agreement” (“Agreement”) that it maintained all its subcontractors signed. Specifically, Taxpayer relied on Section H of the Agreement, which required the vendors to charge retail sales tax on speculative projects:

Subcontractor is responsible for charging [Taxpayer] Washington state sales tax on all speculative projects owned by [Taxpayer]. Subcontractor shall not charge sales tax on any [Taxpayer] remodeling projects. It is the responsibility of the Subcontractor to request and keep on file a Reseller’s Permit from [Taxpayer].

#### ANALYSIS:

Speculative builders are persons who construct buildings for sale or rental on real property which they own. Speculative builders must pay the retail sales tax or use tax on all materials and subcontractor charges incorporated in structures they build. RCW 82.04.050(2)(b); RCW 82.08.020; WAC 458-20-170 (Rule 170); [*Bravern Residential II, LLC v. Dep’t of Revenue*, 183 Wn. App. 769, 777, 334 P.3d 1182 (2014)].

RCW 82.08.050(9) sets forth the evidentiary requirements for the determination of sales tax paid:

Except as otherwise provided in this subsection, [retail sales] tax required by this chapter to be collected by the seller must be stated separately from the selling price in any sales invoice or other instrument of sale. . . . Except as otherwise provided in this subsection, for purposes of determining the tax due from the buyer to the seller and from the seller to the department it must be conclusively presumed that the selling price quoted in any price list, sales document, contract or other agreement between the parties does not include [retail sales tax]. But if the seller advertises the price as including the tax or that the seller is paying the tax, the advertised price may not be considered the selling price. (Emphasis added.)

Rule 107 reiterates these requirements:

RCW 82.08.050 specifically requires that the retail sales tax must be stated separately from the selling price on any sales invoice or other instrument of sale, i.e., contracts, sales slips, and customer billing receipts. . . . This is required even though the seller and buyer may know and agree that the price quoted is to include state and local taxes, including the retail sales tax. The law creates a "conclusive presumption" that, for purposes of collecting the tax and remitting it to the state, the selling price quoted does not include the retail sales tax. This presumption is not overcome or rebutted by any written or oral agreement between seller and buyer. (Emphasis added.)

In cases where a taxpayer has failed to pay retail sales tax to the seller, RCW 82.08.050(10) provides:

Where a buyer has failed to pay [retail sales tax] to the seller . . . and the seller has not paid the amount of the tax to the department, the department may, in its discretion, proceed

directly against the buyer for collection of the tax. If the department proceeds directly against the buyer for collection of the tax as authorized in this subsection, the department may add a penalty of ten percent of the unpaid tax to the amount of the tax due for failure of the buyer to pay the tax to the seller, regardless of when the tax may be collected by the department. In addition to the penalty authorized in this subsection, all of the provisions of chapter 82.32 RCW, including those relative to interest and penalties, apply. For the sole purpose of applying the various provisions of chapter 82.32 RCW, the twenty-fifth day of the month following the tax period in which the purchase was made will be considered as the due date of the tax. (Emphasis added.)

The Department's position, relative to this particular issue, has been uniform and consistent over many years of tax administration as the Revenue Act is succinct . . . upon the point.<sup>3</sup> The law requires that sellers collect retail sales tax in addition to and as a separate item over and above the selling price. If sales tax is not separately stated, it may be asserted under the authority of RCW 82.08.050(9) in accordance with the conclusive presumption that the selling price in a contract or other agreement does not include retail sales tax. Det. No. 88-376, 6 WTD 433 (1988).

Taxpayer argues that its contract required vendors [and] subcontractors to charge [and] pay the tax, and that the tax was paid by [them]. RCW 82.08.050 is not permissive, and even where a transaction between the buyer and the seller is such that the contract price is supposed to include sales tax, the Department must conclude that the sales tax has not been accounted for on the full gross “selling price,” as defined in RCW 82.08.010(1)(a)(i).

Taxpayer has not provided any evidence that its vendors or subcontractors paid the claimed “tax included” amount. Thus, in accordance with RCW 82.08.050 and Rule 107, the contracts between Taxpayer and [its] vendors [and] subcontractors -- even had they been clearly written to shift the retail sales tax burden to Taxpayer’s subcontractors -- do not overcome the conclusive presumption that the total selling prices did not include sales tax. Taxpayer’s petition is denied.

#### DECISION AND DISPOSITION:

Taxpayer's petition is denied.

Dated this 1st day of November 2016.

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<sup>3</sup> We note that the exception concerning an “advertised price” is inapplicable to this case. In *Dep’t of Revenue v. Bi-Mor, Inc.*, 171 Wn. App. 197, 286 P.3d 417 (2012), . . . review denied, 300 P.3d 415 (2013), the court held that a store that advertised that its prices included retail sales tax, or that it was absorbing the sales tax, was not subject to the conclusive presumption that the selling price did not include retail sales tax. This case, on the other hand, involves private construction contracts, and there is nothing to indicate that Taxpayer’s vendors “advertised” that their prices included retail sales taxes. The execution of a private contract between private parties does not constitute “advertising” as that term is used in RCW 82.08.050(9). Det. No. 13-0370, 34 WTD 012 (2015).