

Cite as Det. No. 16-0307, 36 WTD 291 (2017)

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. 16-0307
)	
...)	Registration No. . . .
)	

RULE 102; RCW 82.32.291: PENALTY – MISUSE OF RESELLER PERMIT. The penalty for the misuse of a reseller permit is applicable when the buyer previously provided its reseller permit to the sellers, the taxpayer knew that the sellers were operating under the assumption that all sales to the taxpayer were for resale, and the taxpayer did not inform the sellers when certain sales were not for resale and subject to retail sales 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.

Eckholm, T.R.O – A taxpayer that engages in custom construction and speculative construction, where its subcontractors and vendors maintained its reseller permit on file, did not pay retail sales tax on purchases related to its speculative construction projects. The Department assessed deferred retail sales tax on the speculative construction purchases and imposed a penalty for improper use of the reseller permit, under RCW 82.32.291. The taxpayer sought review of the penalty, asserting that it did not affirmatively provide its reseller permit in making the purchases; therefore, it did not improperly use its reseller permit and the penalty does not apply. The taxpayer’s petition is denied.¹

ISSUE

Does RCW 82.32.291 require the Department to impose the penalty for improper use of a reseller permit where a taxpayer that engages in both custom and speculative construction, was aware that its subcontractors and vendors had its reseller permit on file, and did not pay retail sales tax on purchases related to its speculative construction projects?

FINDINGS OF FACT

[Taxpayer] is a general contractor specializing in residential remodeling, including design and consulting services. The taxpayer performs both custom construction and speculative construction, and uses the same subcontractors and vendors for both types of construction. The

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

Department of Revenue (Department) Audit Division reviewed the taxpayer's records for excise tax purposes for the period January 1, 2010, through December 31, 2013. The auditor discovered that the taxpayer had not paid retail sales tax on charges for subcontractor services and materials for certain speculative construction projects. The taxpayer indicated that the subcontractors and vendors had its reseller permit number on file and its permit was reflected in the taxpayer's billing profiles. The taxpayer did not inform its subcontractors and vendors when purchases were related to its speculative construction projects and subject to retail sales tax. The subcontractors and vendors did not charge retail sales tax on those sales. The taxpayer did not report any deferred retail sales tax on its excise tax returns during the audit period. The auditor assessed deferred retail sales tax on the untaxed speculative construction sales, in addition to, other assessments not at issue in this review. Following the taxpayer's submission of additional records, a post adjustment assessment was issued in the amount of \$. . . , which included a reseller permit misuse penalty of \$²

The taxpayer filed a petition for review that asserted the reseller permit misuse penalty did not apply. The taxpayer does not dispute that it owes retail sales tax on the subcontractor services and vendor purchases for its speculative construction projects. The taxpayer asserts that RCW 82.32.291(1) provides that the reseller permit misuse penalty only applies where the buyer "improperly uses" a reseller permit in making purchases subject to retail sales tax and it did not provide the sellers its reseller permit specific to its speculative construction projects; therefore, it did not improperly use its reseller permit.³ The taxpayer asserted that it was the sellers' responsibility to verify the nature of the sales and they should not have relied on its previously provided reseller permit.

ANALYSIS

All Washington sales of tangible personal property to consumers are subject to retail sales tax unless the sales are otherwise exempt from tax. RCW 82.08.020(1); RCW 82.04.050(1). Retail sales tax does not apply to sales for resale and a buyer may use a reseller permit when making such purchases. RCW 82.04.050(1)(a)(i); RCW 82.04.060; WAC 458-20-102(6).

A person engaged in the business of constructing homes for consumers is a prime contractor. WAC 458-20-170(1)(a) (Rule 170(1)(a)). Sales to prime contractors of materials, which become part of the structure being built, are sales for resale and are not subject to the retail sales tax. RCW 82.04.050(1)(a)(ii); Rule 170(4)(b). Prime contractors are also not subject to retail sales tax on purchases of subcontract labor. RCW 82.04.050(2)(b). A person engaged in the business of constructing homes on land it owns is a speculative builder. Rule 170(2)(a). Speculative builders are required to pay retail sales tax on all materials purchased by them and all charges made by their subcontractors. Rule 170(2)(e). This is because the speculative builder is the consumer of the

² Document No. . . . , issued December 4, 2014, for the period January 1, 2010, through December 31, 2013, included assessments of retail sales tax of \$. . . , retailing business & occupation (B&O) tax of \$. . . , a credit of service and other activities B&O tax of \$. . . , use tax and/or deferred sales tax of \$. . . , resale cert/reseller permit misuse penalty of \$. . . , interest of \$. . . , for a total amount assessed of \$ With a credit of the taxpayer's payment of \$. . . and additional interest of \$. . . , the current total due is \$

³ The taxpayer does not seek waiver of the reseller permit misuse penalty under RCW 82.32.291(2) and WAC 458-20-102(12)-(13), by asserting that misuse of its permit was due to circumstances beyond its control or that it properly used its permit for purchases for dual purposes, and the evidence does not support such waiver.

materials and subcontractor services purchased, and they are not sales for resale, as in the case of the prime contractor. *See, e.g.*, Det. No. 13-0076, 32 WTD 238, 240 (2011).

RCW 82.32.291 requires the Department to impose a 50 percent penalty for improper use of a reseller permit, and provides, in part:

(1) Except as otherwise provided in this section, if any buyer improperly uses a reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 to purchase items or services at retail without payment of sales tax that was legally due on the purchase, the department must assess against that buyer a penalty of fifty percent of the tax due, in addition to all other taxes, penalties, and interest due, on the improperly purchased item or service.

...

(3) A buyer that purchases items or services at retail without payment of sales tax legally due on the purchase is deemed to have improperly used a reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 to purchase the items or services without payment of sales tax and is subject to the penalty in subsection (1) of this section if the buyer:

(a) Furnished to the seller a reseller permit number, a reseller permit or copy of a reseller permit, or other documentation authorized under RCW 82.04.470 to avoid payment of sales tax legally due on the purchase; or

(b) Made the purchase from a seller that had previously used electronic means to verify the validity of the buyer's reseller permit with the department and, as a result, did not require the buyer to provide a copy of its reseller permit or furnish other documentation authorized under RCW 82.04.470 to document the wholesale nature of the purchase. In such cases, the buyer bears the burden of proving that it did not improperly use its reseller permit to make the purchase without payment of sales tax.

The Department adopted WAC 458-20-102 (Rule 102) to administer RCW 82.32.291. Rule 102(9) mirrors the language in RCW 82.32.291(1) in respect to the improper use of a reseller permit, and states that the penalty can be imposed even when the buyer was not intending to evade paying retail sales tax. Rule 102(9); Det. No. 14-0404, 34 WTD 337, 338 (2015).

RCW 82.32.291(1) requires the imposition of the penalty “if any buyer improperly uses a reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 to purchase items or services at retail . . .” This clause provides that the buyer must improperly use the permit for the penalty to apply.

A buyer is deemed to have improperly used a reseller permit “when the buyer purchases items or services at retail without payment of sales tax legally due on the purchase . . .” under RCW 82.32.291(3). However, the statute then clearly explains that this deemed misuse of the reseller

permit only applies “if the buyer” misuses the permit. Under subsection RCW 82.32.291(3), buyers are deemed to have improperly used their permit under two circumstances, set forth in RCW 82.32.291(3)(a) and (3)(b). Buyers must either: (a) furnish “the seller a reseller permit number, a reseller permit or copy of a reseller permit, or other documentation authorized under RCW 82.04.470 to avoid payment of sales tax legally due on the purchase;” or (b) “purchase from a seller that had previously used electronic means to verify the validity of the buyer’s reseller permit with the department and, as a result, did not require the buyer to provide a copy of the reseller permit” RCW 82.32.291(3).

Here, the taxpayer admitted that it had previously provided its reseller permit to the sellers for prior custom construction projects, but we have no evidence that the taxpayer furnished its reseller permit to the sellers to avoid payment of sales tax legally due on the purchases at issue; therefore, RCW 82.32.291(3)(a) does not apply.

In regards to RCW 82.32.291(3)(b), the Department recently published a determination applying that provision to facts similar to those presented here. In Det. No. 15-0284, 34 WTD 595 (2015), the taxpayer was assessed deferred retail sales tax on purchases from vendors from whom it had regularly purchased items at retail without paying retail sales tax, and was assessed the reseller permit misuse penalty. The taxpayer in 34 WTD 595 asserted that the reseller permit misuse penalty did not apply because it did not recollect providing its reseller permit to any of the vendors, and it did not represent to those vendors that the purchases were made for resale and exempt from sales tax. 24 WTD at 596. The taxpayer in that determination also stated that it did not know whether the vendors obtained its reseller permit electronically through the Department’s database. *Id.* Here, we have similar facts and the additional fact that the taxpayer previously provided its reseller permit to the sellers.

34 WTD 595 explains the taxpayer’s burden under RCW 82.32.291(3)(b), as follows:

RCW 82.32.291(3)(b) addresses the situation where a taxpayer who is the purchaser failed to disclose the true nature of the purchase to the seller who previously used electronic means to verify the taxpayer’s reseller permit. In such a situation, the seller would be selling property under the false assumption that the sale is for resale in the regular course of business. For imposition of the penalty under RCW 82.32.291(3)(b), “the buyer bears the burden of proving that it did not improperly use its reseller permit to make the purchase without payment of sales tax.” WAC 458-20-102 adds the following about this burden:

[T]he buyer bears the burden of proving that the purchases made without payment of sales tax were qualified purchases or the buyer remitted deferred sales tax directly to the department. The buyer not realizing that sales tax was not paid at the time of purchase is not a reason for waiving the penalty.

WAC 458-20-102(9)(a)(ii). This provision also requires the taxpayer to show that its vendor did not previously look up its reseller permit information electronically under RCW 82.32.291(3)(b). Unless otherwise mandated by statute or due process principles, Washington applies the preponderance of evidence standard in administrative proceedings. *Nguyen v. Dep’t of Health Medical Quality Assurance Comm’n*, 144 Wn.2d 516, 535, 29

P.3d 689 (2001); *citing Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 797, 982 P.2d 601 (1999). Because the legislature did not specify the burden of proof that is required for RCW 82.32.291(3)(b), *we conclude that the burden is on the taxpayer to prove that its vendors did not previously look up its permit by a preponderance of the evidence.*

34 WTD at 600 (emphasis added).

RCW 82.32.291(3)(b) relates to the situation where the taxpayer and the seller have a previous selling relationship, and the seller did not charge retail sales tax on purchases because of a prior electronic verification of the buyer's reseller permit. 34 WTD at 600. In 34 WTD 595, the Department held that, "[i]t is the taxpayer's burden to show that these vendors, from whom it regularly purchased items at retail without paying retail sales tax, did not previously use electronic means to look up the taxpayer's reseller permit." 34 WTD at 600.

Similarly, here, the taxpayer has not provided evidence that the sellers did not previously use electronic means to check the taxpayer's permit. Moreover, we have the additional facts that the taxpayer admits to previously providing its reseller permit number to the sellers, the taxpayer knew that the sellers continued to maintain the taxpayer's reseller permit on file, and that the sellers operated under the false assumption that all sales were for resale as related to the taxpayer's custom construction. The taxpayer did not correct this false assumption by informing the sellers that the sales at issue were related to its speculative construction projects and subject to retail sales tax.⁴

The taxpayer has not met its burden of proving that it did not improperly use its reseller permit in making the purchases in question; therefore, the penalty under RCW 82.32.291(3)(b) applies. The taxpayer's petition is denied.

DECISION AND DISPOSITION

The taxpayer's petition is denied.

Dated this 27th day of September 2016.

⁴ [We note that the guidance in WAC 458-20-102(12), as it relates to "dual purpose sales," also supports the result here.]