Cite as Det. No. 19-0307, 41 WTD 09 (2022)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Refund	)	D E T E R M I N A T I O N
	)	
	)	No. 19-0307
	)	
. . .	)	Registration No. . . .
	)	

[1] RCW 82.04.390; WAC 458-20-229: REFUNDS – RETAIL SALES TAX – REFUNDS OF OVER-COLLECTED SALES TAX TO SELLERS. A seller who erroneously collected retail sales tax from a buyer must first refund the amount of the erroneously collected tax to the buyer before the Department may issue a refund of the tax to the seller because the buyer is the party that paid the tax.

[2] RCW 82.04.390; WAC 458-20-229: REFUNDS – BUSINESS AND OCCUPATION TAX – AMOUNTS DERIVED FROM SALE OF REAL ESTATE – RENTALS OF RESERVED PARKING SPACES. A seller that paid business and occupation ("B&O") tax on the income it derived from rentals of reserved parking spaces for periods greater than 30 days is entitled to a refund of the B&O tax from the Department because such sales are considered sales of real estate and the associated income is not subject to B&O 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.

Farquhar, T.R.O. – A company that managed a parking garage protests the Department's denial of the company's request for a refund of retail sales tax and business and occupation ("B&O") tax. The company collected the retail sales tax from a customer on sales of reserved parking spaces, the prices for which the company listed as inclusive of retail sales tax, and remitted the taxes to the Department. The company also remitted retailing B&O tax on the income it generated from the same sales. The company later discovered that such sales are considered rentals of real estate and are exempt from retail sales tax. We find that the company is not entitled to a refund of the sales tax because it was the customer, not the company, that paid the tax and the company has not refunded the taxes to the customer. However, the company is entitled to a refund of the B&O tax it paid on its income from those sales because such sales are specifically exempt from B&O tax. The petition is denied in part, granted in part, and remanded to the operating division for adjustment.[1]

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

ISSUES

1. Whether RCW 82.32.060 entitles a seller to a refund of retail sales tax it collected in error from a buyer and remitted to the Department if the seller has not first refunded the tax to the buyer.

2. Whether RCW 82.32.060 entitles a taxpayer to a refund of [B&O] tax paid on income deemed to be exempt from B&O tax under RCW 82.04.390.

FINDINGS OF FACT

. . . ("Taxpayer") is a . . . company that formerly managed a parking facility known as the . . . ("the Garage") in . . . Washington. Taxpayer was responsible for "parking operations" at the Garage and its duties included collecting parking fees from customers. The Garage offered hourly parking spaces, as well as reserved spaces that could be rented for extended periods of time. The listed prices for parking in the Garage expressly included retail sales tax.

Between March 1, 2015, and December 31, 2017, . . . ("the Customer") rented 87 reserved parking spaces in the Garage for periods longer than 30 days ("the subject spaces"). The invoices provided to the Customer for the subject spaces stated that the price included retail sales tax. After collecting the tax-inclusive fees from the Customer for the subject spaces, Taxpayer allocated the amount dedicated for retail sales tax and remitted those funds to the Department. Taxpayer then transferred the remainder of the funds it had collected, less expenses and a fee for Taxpayer's management services, to a separate company that acted as the property manager for the Garage ("the Property Manager"). During the period at issue here, Taxpayer ultimately collected and remitted to the Department $ . . . in retail sales tax from the Customer on the Customer's purchases of the subject spaces. Taxpayer also paid retailing B&O tax on the income it generated from the sales to the Customer. Taxpayer reported and paid [B&O] tax on its management fees under the "service and other" B&O tax classification.

When Taxpayer's contract to operate the Garage eventually expired, a new company took over in its place. In reviewing Taxpayer's work, the new company discovered that Taxpayer should not have charged retail sales tax on rentals of reserved parking spaces for periods longer than 30 days because such rentals are exempt from retail sales tax. The new company informed the Property Manager of the error. The Property Manager then demanded Taxpayer pay the Property Manager the value of the erroneously-collected taxes under the notion that the Property Manager would have received those funds if Taxpayer had not given them to the Department. Taxpayer considered the issue and eventually agreed to pay the Property Manager an unknown amount to "make them whole." Letter accompanying Taxpayer's Review Petition ("the Letter"), pg. 1. Taxpayer did not return any funds to the Customer.

In May of 2018, Taxpayer submitted a refund request to the Department. Taxpayer sought a refund of $ . . . , which included the retail sales tax that it had erroneously collected from the Customer and the retailing B&O tax it paid on the income it generated from those sales. The Department's Audit Division ("Audit") reviewed the matter and, on October 12, 2018, issued a denial letter. In the letter, Audit stated that although the subject sales of reserved parking spaces were indeed exempt from retail sales tax, Taxpayer was not entitled to a refund of the sales tax because it had

not yet refunded the tax to the Customer. Audit's letter did not address the B&O tax portion of Taxpayer's refund request.

On November 21, 2018, Taxpayer submitted a timely petition for review ("the Petition"). In it, Taxpayer requests a refund of $ . . . [2] in retail sales tax and retailing B&O taxes explained above. Taxpayer argues that the Customer was charged an "all-inclusive rate" as opposed to a "rate plus taxes." Letter, pg. 2. Because the Customer was charged an "all-inclusive rate," Taxpayer argues that the Customer would have paid the same price for its parking regardless of whether the charges were taxable or nontaxable and to return the funds to the Customer would mean that the Customer "would not have paid [Taxpayer the proper amount] for their parking." *Id*. Taxpayer concludes that the "taxes that were stripped off the revenue and remitted to [the Department] ultimately belonged to [the Property Manager.]" *Id*. at pg. 3. Taxpayer acknowledges that it has not returned any funds to the Customer. Taxpayer did not provide any arguments regarding the B&O taxes.

Along with the Petition, Taxpayer provided a copy of a notice it sent to the tenants of the Garage regarding new parking rates effective May 1, 2017 ("the Notice"). The Notice lists various rates for parking in the Garage and includes the following line, printed in the same type and size of font as the rest of the Notice: "All rates are inclusive of Washington Sales Tax 10%."

ANALYSIS

RCW 82.32.060(1) authorizes the Department to issue a refund upon an application by a taxpayer where the Department determines that the taxpayer paid taxes in excess of what was properly due within the statutory period. Generally, "no refund or credit may be made for taxes, penalties, or interest paid more than four years prior to the beginning of the calendar year in which the refund application is made . . . ." RCW 82.32.060(1), (2).

Here, Taxpayer's retail sales and B&O tax refund requests are both within the statutory period. [. . .] We will address the two portions of the refund request individually.

1. Retail Sales Tax

Washington imposes retail sales tax on each retail sale in this state unless an exemption or exclusion applies. RCW 82.08.020. RCW 82.08.050(9) explains that retail sales tax "must be stated separately from the selling price or collected separately from the buyer." The statute presumes that the selling price stated on an invoice or other "sales document" between the buyer and seller 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." RCW 82.08.050(9). A seller may advertise the price as including the tax by adding the words "tax included" immediately following the advertised price in print at least half as large as the advertised price. RCW 82.08.055(1); WAC 458-20-107(3)(a)(i). The Department requires sellers to clearly state whether tax is included in the price because "buyers have the right to know whether retail sales tax is being included in advertised prices or not and that the tax is not to be used for the competitive advantage or disadvantage of retail sellers." WAC 458-20-107(3)(c).

[2] We note that this amount is $ . . . less than the total referenced in Taxpayer's original refund request. Taxpayer did not explain why the Petition references a lesser amount, nor did it provide a breakdown of the amount by tax type.

The seller is required to collect retail sales tax from the buyer and remit it to the department. RCW 82.08.050(1). When a seller collects retail sales tax from customers, the amount "is deemed to be held in trust by the seller until paid to the department." RCW 82.08.050(2). Sellers are specifically prohibited from appropriating or converting the tax collected to the seller's own use or to any other use other than remitting the tax to the Department. *Id*. In *Kitsap-Mason Dairymen's Ass'n v. Wash. Tax Comm'n*, 77 Wn.2d 812, 817, 467 P.2d 312 (1970), the Washington Supreme Court explained the unique nature of the retail sales tax scheme: "[i]nherent in RCW 82.08 is the fact that taxes collected in the name of the state are not property of the seller . . . . The integrity of the entire taxing system demands that funds collected as taxes be remitted to the state."

Retail sales taxes will not be refunded to a seller, even when erroneously collected, unless the seller first refunds those taxes to the buyer who paid them. This is because RCW 82.32.060 limits refunds only to those who "paid" the tax. Retail sales taxes collected from customers are "paid" by those customers for purposes of RCW 82.32.060. *See Kitsap-Mason Dairyman's Association v. Tax Commission*, 77 Wn.2d 812, 467 P.2d 312 (1970). Thus, where a seller has erroneously collected retail sales tax from customers, the seller must first refund the retail sales tax collected from its customers in error and then seek a refund or credit from the Department. *See* Det. No. 87-110, 3 WTD 21 (1987) ("If the taxpayer establishes that it has made refunds to [its customers], it will be entitled to a corresponding refund."); WAC 458-20-229(4)(a).

There is no dispute that Taxpayer collected retail sales tax from the Customer. Taxpayer advertised the price as including retail sales tax and remitted the amounts it collected to the Department. Pursuant to RCW 82.08.050(1), the Customer, as the buyer, was the party that paid the subject taxes. There is also no dispute that Taxpayer has yet to refund to the Customer any of the taxes it collected. The law on this issue is clear: because the funds that are the subject of Taxpayer's refund request represent retail sales tax, Taxpayer is not entitled to a refund unless and until it first refunds the money to the Customer. RCW 82.32.060; WAC 458-20-229(4)(a). To allow Taxpayer to obtain a refund of taxes paid by the Customer would violate the prohibition against sellers appropriating or converting sales taxes for their own use. RCW 82.08.050(2).

Our ruling here is consistent with prior determinations that dealt with similar issues. For example, we addressed a refund request for over-collected sales tax in Det. No. 00-092, 2 WTD 47 (2001) as follows:

> If sales tax was erroneously collected from the taxpayers' customers, then the over-reported sales tax comes from customers' funds. These are trust funds collected from customers for the benefit of the state. The money does not belong to the taxpayers and cannot be returned to the taxpayers until the taxpayers have refunded the over-collected sales tax to their customers.

24 WTD at 51; *see also* Det. No. 14-0108, 33 WTD 444 (2014).

The Washington Supreme Court also addressed this issue in *Kitsap-Mason Dairymen's Ass'n v. Tax Comm'n*, 77 Wn.2d 812, 467 P.2d 312 (1970). In that case, a seller over-collected retail sales tax and failed to remit the excess taxes to the state. The Court held that the seller could not retain the over-collected sales tax for its own use. *Id.* at 816. The case at hand is similar, except that

Taxpayer has already remitted the over-collected taxes. To refund the funds to Taxpayer and allow Taxpayer to retain them would violate RCW 82.08.050(2) and the holding in *Kitsap-Mason*.

Taxpayer argues that if we deny its refund request, the Customer will have effectively under-paid for its parking because the Customer was charged an "all-inclusive rate" and should have paid the same amount for parking whether the price included tax or not. Letter, pg. 2. In effect, Taxpayer believes it should be allowed to retroactively change its "all-inclusive rate" to a non-inclusive rate now that it knows the sales were tax-exempt. Doing so would allow Taxpayer to retain the full value of each sale. Taxpayer has not presented any authority that the Department may allow a taxpayer to retroactively change its prices to capture funds that were initially intended as retail sales tax and that the Customer believed to be retail sales tax at the time of sale. We find the argument unpersuasive because it would allow Taxpayer to violate the prohibition on converting sales tax to personal use found in RCW 82.08.050(2). Furthermore, allowing a seller to retroactively change the makeup of a tax-included price would violate the buyer's right to know whether the price they paid included tax. WAC 458-20-107(3)(c).

Therefore, because the Customer, not Taxpayer, paid the taxes at issue here and Taxpayer has not yet refunded to the Customer any of the taxes it collected, Taxpayer is not entitled to a refund of the retail sales tax under RCW 82.32.060 and WAC 458-20-229. Taxes collected in the name of the state must be remitted to the Department or refunded to the party that paid them, where appropriate. A taxpayer cannot convert them to its own use for any reason, even if it later believes its customers underpaid for the services the taxpayer sold. Accordingly, we deny Taxpayer's request for a refund of retail sales tax.

2. Business and Occupation Tax

Taxpayer also requests a refund of the retailing B&O tax it paid on the income it derived from its rentals of reserved parking spaces. RCW 82.04.390 states that B&O tax does not apply to "gross proceeds derived from the sale of real estate." WAC 458-20-118, the Department's administrative rule regarding sales and rentals of real estate, clarifies that B&O tax does not apply to sales *or rentals* of real estate. WAC 458-20-118(1). The Department stated in ETA 3030.2009, which addresses parking fees as income from the rental of real estate, that renting reserved parking spaces for periods greater than 30 days constitutes the rental of real estate and "[i]ncome from such rentals is . . . exempt from the business and occupation tax." ETA 3030.2009.

Here, a portion of Taxpayer's income was derived from the fees it collected from the Customer on the Customer's rentals of the subject spaces. There is no dispute that renting the subject spaces constituted the rental of reserved parking spaces for periods greater than 30 days, which is considered in Washington to be the rental of real estate. . . . WAC 458-20-118 and ETA 3030.2009 state that income generated from the sale, or rental or real estate is not subject to B&O tax, thus Taxpayer improperly reported and paid retailing B&O taxes on that income. As such, Taxpayer is entitled to a refund of the retailing B&O tax it paid on the income it generated from the sales of the subject spaces, plus interest from the date Taxpayer paid the tax through the date the refund is processed. RCW 82.32.060.[3]

[3] To be clear, Taxpayer is only entitled to a refund of any B&O tax it paid on income generated from parking rentals that constitute the rental of real property. *See* . . . WAC 458-20-118, and ETA 3030.2009. Taxpayer is not entitled to

DECISION AND DISPOSITION

Taxpayer's petition is granted in part and denied in part. We grant the petition with respect to Taxpayer's request for a refund of B&O taxes paid on tax-exempt income. We deny the petition with respect to Taxpayer's request for a refund of retail sales tax.

Dated this 26th day of November 2019.

a refund of retailing B&O tax paid on income generated by short-term and non-reserved parking, which is subject to retail sales tax and retailing B&O, or on the income it generated from management fees, which is subject to B&O tax under the "service and other" classification.