

Cite as Det. No. 20-0015, 41 WTD 29 (2022)

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 and Refund of) | |
|) | No. 20-0015 |
|) | |
| ...) | Registration No. . . . |
|) | |

RCW 82.04.050; WAC 458-20-222 – SALES OF PET MEDICATIONS WITHOUT ACCOMPANYING VETERINARY SERVICES – The sales of prescription pet medications when the sale is not part of veterinary services (and therefore consumed in providing veterinary services) are subject to retail sales tax and retailing business and occupation 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.

Fisher, T.R.O. – An online retailer protests the disallowance of exemptions taken on retail sales of prescription pet medications. The retailer also protests the estimate of uncollected retail sales tax. The petition is denied.¹

ISSUES

1. Are sales of pet medications exempt from retail sales tax under RCW 82.08.0281 and WAC 458-20-222?
2. Did the Department properly estimate the amount of uncollected retail sales tax under RCW 82.32.070, RCW 82.32.100, and WAC 458-20-254?

FINDINGS OF FACT

. . . (“Taxpayer”) is in the business of selling health products for [pets], including prescription and non-prescription pet medications, online.

. . .

On July 30, 2018, the Department sent Taxpayer a . . . filing frequency letter . . . which notified Taxpayer that the Department changed its excise tax filing frequency to monthly effective July 1,

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

2018. The Department further notified Taxpayer that the due date for the July 2018 period would be August 29, 2018.²

Taxpayer timely filed its July 2018 excise tax return. The Department reviewed the July 2018 excise tax return and noted that Taxpayer took a deduction for prescription drugs for pets. The Department reached out to Taxpayer to give Taxpayer the option of amending the July 2018 excise tax return to remove the deduction for prescription drugs. Taxpayer responded by arguing it was entitled to a deduction from retail sales tax when selling prescription drugs for pets.

Taxpayer then timely filed its August, September, October, and November 2018 excise tax returns taking a deduction for prescription drugs sold for pets.

On October 5, 2018, the Department disallowed the deduction on the July 2018 excise tax return, and assessed Taxpayer \$. . . in unremitted retail sales tax, \$. . . in a substantial underpayment penalty, and \$. . . in interest for a total of \$. . . [which included a] credit to Taxpayer for \$. . .³ Because the Department did not have sourcing information for the individual retail sales, the Department estimated the local portion of the retail sales tax

On January 3, 2019, the Department issued an assessment for the July 2018, August 2018, and September 2019 excise tax periods in Document No. The assessment included \$. . . for the July 2018 period,⁴ \$. . . for the August 2018 period,⁵ and \$. . . for the September 2018 period,⁶ along with \$. . . in an additional assessment penalty on the September 2018 period.⁷

On January 9, 2019, the Department issued an assessment for the October 2018 period in Document No. The assessment included \$. . . in uncollected retail sales tax, \$. . . in a substantial underpayment penalty, \$. . . in interest, and credited Taxpayer with having paid \$. . . in excise taxes and \$. . . in deductions the Department did not disallow.

On January 9, 2019, the Department also issued an assessment for the November 2018 period in Document No. The assessment included \$. . . in unremitted retail sales tax, a \$. . . substantial

² As noted in the . . . filing frequency letter, this was an extended due date. Typically, monthly returns are due on the 25th day of the month following the final day of the taxable period; when the 25th day falls on a weekend or legal holiday, the due date extends to the next business day. *See* WAC 458-20-228(4).

³ The credit consisted of the \$. . . in tax Taxpayer previously paid on its July 2018 excise tax return . . . , \$. . . , which represented the amount of overpayment on Taxpayer's December 2017 excise tax return, and . . . \$. . . , which represented the tax attributable to the bad debt deductions and return allowances Taxpayer took on its July 2018 excise tax return that the Department did not disturb.

⁴ The January 3, 2019, Assessment included the 25% assessment penalty. At the time of the October 5, 2018, Assessment, only the 5% substantial underpayment penalty had accrued.

⁵ The Department assessed Taxpayer \$. . . for the August 2018 period, which included \$. . . in unremitted retail sales tax, a \$. . . additional assessment penalty, and \$. . . in interest, along with credits of \$. . . in taxes previously paid and \$. . . in tax attributable to the deductions the Department did not disallow.

⁶ The Department assessed Taxpayer \$. . . for the September 2018 period, which included \$. . . in tax, \$. . . in a 15% additional assessment penalty, and \$. . . in interest, along with credits of \$. . . in taxes previously paid and \$. . . in tax attributable to the deductions the Department did not disallow.

⁷ The additional assessment penalty goes from 15% to 25% if the assessment is not paid 30 days after the due date. RCW 82.32.090(2). Here, the 15% penalty was included in the September 2018 total assessment, with the remaining 10% of the penalty listed with "additional interest and penalty" section of the January 3, 2019, Assessment.

underpayment penalty, \$. . . in interest, and credited Taxpayer with having paid \$. . . in excise taxes and \$. . . in deductions the Department allowed.

Taxpayer timely sought administrative review. Taxpayer explains that its computer system did not allow it to collect retail sales tax on prescription pet medication until November of 2018, and it did its best to comply with its Washington tax laws. Taxpayer also disputes the Department's calculation of the local sales tax portion of the assessments.

ANALYSIS

Washington imposes a B&O tax on “every person that has a substantial nexus with this state . . . for the act or privilege of engaging in business activities” in this state. RCW 82.04.220. . . . RCW 82.04.250 imposes the retailing B&O tax on entities making sales at retail. In addition, persons making sales at retail must collect and remit retail sales tax. RCW 82.08.020, RCW 82.08.050. The sale of tangible personal property is generally a retail sale, with certain exceptions. RCW 82.04.050(1)(a).

Taxpayer's prescription pet medications are tangible personal property, and Taxpayer's sales thereof are subject to retail sales tax unless an exception applies. RCW 82.08.0281 provides a retail sales tax exemption for sales of prescription drugs for human use: [“(1) The tax levied by RCW 82.08.020 does not apply to sales of drugs for human use dispensed or to be dispensed to patients, pursuant to a prescription.”] Because Taxpayer's pet medications are for use by pets, and not humans, Taxpayer's sales of pet prescription drugs are not exempt from retail sales tax under RCW 82.08.0281.

[WAC 458-20-222 is the Department's rule addressing tax liability with respect to the sale of medicines and supplies for use in the care of animals.] WAC 458-20-222(3) provides that the retail sales tax applies to all the retail sales identified in WAC 458-20-222(2), unless a specific exemption applies. WAC 458-20-222(2)(b) explains that sales of drugs, medicines, or other substances or items of personal property to consumers are retail sales when the sale is not part of veterinary services. Taxpayer does not assert that it is a veterinarian [who would consume the drugs in providing veterinarian services]. Therefore, Taxpayer's sales of pet prescription drugs are not exempt from retail sales tax [as explained in] WAC 458-20-222.

Taxpayer also protests the Department's calculation of the local sales tax portion of its tax liability. RCW 82.32.070(1) requires taxpayers to keep and preserve suitable records as may be necessary to determine the amount of tax for which the taxpayer may be liable for a period of five years. *See also* RCW 82.32A.030(3) (Taxpayers are responsible to keep complete business records). WAC 458-20-254(3)(b) further requires that taxpayers “keep and preserve all records in a systematic manner conforming to accepted accounting methods and procedures.”

Here, Taxpayer did not provide the Department with information relating to where it shipped its sales of prescription pet medications in Washington for the Department to determine where the sales should be sourced. Based on this, the Department reasonably determined Taxpayer's books and records were not suitable under RCW 82.32.070(1) regarding the location of its sales.

If a person fails to keep and preserve suitable records, then RCW 82.32.100(1) provides:

If any person fails or refuses to make any return or to make available for examination the records required by this chapter, the department shall proceed, in such manner as it may deem best, to obtain facts and information on which to base its estimate of the tax; and to this end the department may examine the records of any such person as provided in RCW 82.32.110.

The Department has authority to assess taxes based on a reasonable estimate. *See* Det. No. 14-0106, 33 WTD 402 (2014); Det. No. 13-0302R, 33 WTD 572 (2014); Det. No. 03-0279, 23 WTD 252 (2004); Det. No. 97-134R, 18 WTD 163 (1999).

Taxpayer protests that the Department overestimated Taxpayer's local sales tax liability because the aggregate sales tax liability adds up to 10.4%. The Department estimated the location of Taxpayer's sales [to three different local jurisdictions and averaged those local sales tax rates]: . . .^[8] The state retail sales tax rate is 6.5% for sales of tangible personal property. RCW 82.08.020(1)(a). The combined state and [estimated] local tax rate is therefore 10.4%. Given the fact that the Taxpayer failed to keep suitable records for the Department to determine the actual situs of its sales, the Department's estimate was reasonable.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 15th day of January 2020.

⁸ *See* Local Sales and Use Tax Rates by City/County, Quarter 4 2018, https://dor.wa.gov/sites/default/files/legacy/Docs/forms/ExcsTx/LocSalUseTx/LocalSlsUseFlyer_18_Q4_alpha.pdf; *see also* Local Sales and Use Tax Rates by City/County, Quarter 3 2018, https://dor.wa.gov/sites/default/files/legacy/Docs/forms/ExcsTx/LocSalUseTx/LocalSlsUseFlyer_18_Q3_alpha.pdf (last visited January 13, 2020).