

Cite as Det. No. 13-0370, 34 WTD 012 (2015)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition for Correction of ) Assessment of ) ) ) . . . ) ) )	<u>D E T E R M I N A T I O N</u>  No. 13-0370  Registration No. . . .
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[1] RULE 107; RCW 82.08.020, RCW 82.08.050: RETAIL SALES TAX – CONTRACT PRICE – ADVERTISED PRICE INCLUDING 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. The presumption is not overcome or rebutted by any written or oral agreement between seller and buyer. The taxpayer did not provide evidence to rebut the presumption that the quoted selling price included retail sales tax. Taxpayer is, however, entitled to an adjustment for invoices provided where it can show that retail sales tax was 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.

Sohng, A.L.J. – General contractor protests retail sales tax imposed on amounts paid to subcontractors for which sales tax was included in the contract price. The petition is denied in part and remanded in part.<sup>1</sup>

ISSUE

Does a party who enters into a private agreement that provides that sales tax is included in the contract price “advertise the price as including tax” under RCW 82.08.050(9)?

FINDINGS OF FACT

[Taxpayer] is engaged in the business of custom and speculative building as a general contractor. Taxpayer hired subcontractors for framing, painting, plumbing, electrical, and other services. The agreements between Taxpayer and the subcontractors with respect to speculative building projects expressly stated that the contract price included sales tax. Taxpayer worked with many of the same subcontractors for its custom building work as well (which were not retail sales) and had provided them with resale certificates and/or reseller permits.

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

Taxpayer states that it entered into these “sales tax included” contracts “because sales tax rates were constantly changing and may well have changed during the period the subcontractor was to perform its services.”<sup>2</sup> Taxpayer attempted to contact the subcontractors in order to obtain a seller’s declaration that they collected retail sales tax from Taxpayer. However, most of the subcontractors contacted had either gone out of business or did not respond to Taxpayer’s request. The few subcontractors who did respond treated the transactions at issue as wholesale sales, on the basis that they had a valid resale certificate from Taxpayer. Taxpayer states that it advised the subcontractors that those resale certificates applied to custom jobs only and that “the subcontractors had no right to treat their sales or services for such speculative construction projects as wholesale sales.”<sup>3</sup>

On appeal, Taxpayer also provided 18 invoices from the following subcontractors to show that sales tax was paid on those transactions: [Subcontractor A], [Subcontractor B], [Subcontractor C], [Subcontractor D], [Subcontractor E], and [Subcontractor F].

The Department of Revenue’s (the “Department”) Audit Division examined Taxpayer’s books and records for the period January 1, 2007, through December 31, 2010 (the “Audit Period”). On October 25, 2012, the Audit Division issued an assessment in the amount of \$ . . . , including \$ . . . in use tax/deferred sales tax, \$ . . . in penalties, and \$ . . . in interest. The Audit Division asserted retail sales tax on the speculative jobs, including the jobs for which the contracts stated that retail sales tax was included in the contract price.

#### ANALYSIS

RCW 82.08.020 imposes a retail sales tax on each retail sale in this state. RCW 82.08.020. The tax is imposed on the buyer, but is normally collected and remitted to the Department by the seller. RCW 82.08.050. However, where a buyer fails to pay to the seller the retail sales tax, and the seller has not remitted it to the Department, the Department may proceed directly against the buyer for collection of the tax. RCW 82.08.050(10).

RCW 82.08.020(9) generally requires retail sales tax to be separately stated on any instrument of sale. It provides:

Except as otherwise provided in this subsection, the 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. On all retail sales through vending machines, the tax need not be stated separately from the selling price or collected separately from the buyer. 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 the tax imposed by this chapter. 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.)

<sup>2</sup> Taxpayer’s Appeal Petition, dated December 19, 2012, at 3.

<sup>3</sup> *Id.*

RCW 82.08.020(9) provides ... a conclusive presumption that the quoted selling price does *not* include retail sales tax. However, the last sentence of RCW 82.08.020(9) provides an exception to the conclusive presumption if the seller *advertises* the price as including sales tax. Taxpayer argues that this exception applies because the subcontractors “advertised” the contract price as including tax. The Audit Division counters that the contract prices were not “advertised” because there was no public notice; rather, the sales price was a contract negotiated between two private parties.

RCW 82.08.050 does not define the word “advertise.” When statutory terms are not defined in the statute, we turn to their ordinary dictionary meanings. *See, e.g., Western Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 609, 998 P.2d 884 (2000); *Palmer v. Dep’t of Revenue*, 82 Wn. App. 367, 372, 917 P.2d 1120 (1996); *Garrison v. Wash. State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). Non-technical terms may be given their dictionary definitions. *State v. Fjermestad*, 114 Wn.2d 828, 835, 791 P.2d 897 (1990). The dictionary definition of the word “advertise” is as follows: “(1) to give public notice of - announce publicly esp. by a printed notice or through a radio or television broadcast;” and “(2) to call public attention to esp. by emphasizing desirable qualities so as to arouse a desire to buy or patronize.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 31 (3<sup>rd</sup> ed. 1993). Here, the subcontractors did not publicly announce their contract prices to arouse a public desire for their services. Instead, Taxpayer and the subcontractors entered into private contracts that stated that sales tax was included. The execution of a private contract between private parties does not constitute “advertising,” as that term is used in RCW 82.08.050(9).

Our conclusion is supported by WAC 458-20-107 (“Rule 107”), the administrative rule implementing RCW 82.08.050. Rule 107(2)(a) provides:

(a) 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.) Thus, under Rule 107, the contracts between Taxpayer and the subcontractors do not overcome the conclusive presumption that a quoted selling price does not include sales tax.

Because [the sellers (subcontractors)] did not “advertise” [their] contract prices as including sales tax, the exception to the conclusive presumption contained in RCW 82.08.020(9) does not apply. Therefore, there is a conclusive presumption that contract price did *not* include sales tax (i.e., that the buyer did not pay sales tax to the seller). Under RCW 82.08.050(10), the Department may proceed directly against Taxpayer (as the buyer) for unpaid and unremitted sales tax.

With respect to the additional invoices Taxpayer submitted to show that it paid sales tax to its subcontractors, the Audit Division has agreed to adjust the assessment as it relates to purchases from [Subcontractor A] and [Subcontractor D]. We are remanding the case to the Audit Division for adjustment to the assessment. However, with respect to invoices from [Subcontractor B], [Subcontractor C], [Subcontractor E], and [Subcontractor F], the Audit Division has already

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credited Taxpayer for these transactions as sales tax paid and no further adjustment is warranted. The petition is denied as to these vendors.

DECISION AND DISPOSITION

The petition is denied in part and remanded in part.

Dated this 27th day of November 2013 .