

Cite as Det. No. 16-0233, 36 WTD 108 (2017)

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

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| 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. 16-0233 |
|) | |
| ...) | Registration No. . . . |
|) | |

RCW 82.04.065(27); WAC 458-20-245 (“Rule 245”)(103) – TELEPHONE, TELECOMMUNICATIONS, AND ANCILLARY SERVICES: The 800-toll-free number services the taxpayer purchased from a vendor does not qualify for the “data processing and information services” telecommunications services exclusion under RCW 82.04.065(27)(a) and Rule 245(103)(b). The processed data or information used in connection with the 800-toll-free number services is incidental to the telecommunications services that the taxpayer purchased. The manipulation of raw data to generate reports pertaining to the callers’ information is not the integral and necessary part of the 800-toll-free number services the taxpayer purchased from the vendor.

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.

Callahan, T.R.O. – An out-of-state corporation (“Taxpayer”) that provides apartment listing services to property owners and property management companies protests the Department of Revenue’s (the “Department’s”) assessment [of] use tax/deferred sales tax on the toll-free number service purchased from a vendor. Taxpayer argues that the sales are not retail sales because the primary purpose of its purchases is to collect the data from the callers and, thus, the sales qualify for the data processing and information services [exclusion] under RCW 82.04.065(27)(a). We deny the petition.¹

ISSUE

Under RCW 82.04.065(27)(a) and WAC 458-20-245 (“Rule 245”) (103)(b), are the toll-free number services Taxpayer purchased data processing and information services and, therefore, not subject to retail sales tax under RCW 82.08.020?

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

FINDINGS OF FACT

Taxpayer is an out-of-state corporation that maintains offices and employees in Washington. Taxpayer provides apartment complex listing services to property owners [and] property management companies (“Property Owners”) on Taxpayer’s website named “. . .” . . . Each apartment complex [listing] contains a different 800-toll-free number for the renters to inquire the availability of the apartments.² The calls to the toll-free numbers are routed directly to the Property Owners. Taxpayer does not have any contact with the callers [and] the renters.

Taxpayer contracts with a vendor, . . . (the “Vendor”), to [provide] the 800-toll-free numbers, which the Vendor labeled as . . . services. The . . . services allow the Property Owners to request the call detail report and geographic mapping report based on the information recorded on the toll-free numbers through the Vendor’s web portal. Taxpayer asserts that the Property Owners use the processed data or information, i.e., the average duration of calls, the callers’ geographical locations, the call dates and times, and the callers’ numbers contained in the reports to measure the effectiveness of Taxpayer’s property listing services. Taxpayer bills the Property Owners monthly flat fees for the apartment complex listing services. An advertisement typically runs from four weeks to three months. Taxpayer does not charge the Property Owners separately for the access to the 800-toll-free numbers. Taxpayer reports its income from providing the apartment listing services to the Property Owners under the service and other activities business and occupation (“B&O”) income classification to the Department.

Taxpayer provided a copy of the “Master User Services Agreement” that it entered with the Vendor. In relevant part, the agreement provided the following:

1. Service. [Vendor] will provide the products and services (individually and collectively, “Services”) identified on Exhibit A to this Agreement which shall by this references be incorporated herein and made a part hereof.

...

6. TFNs and Local Numbers. . . . all toll-free numbers or local numbers provisioned by [Vendor] and used in connection with the Services are/will be owned exclusively by [Vendor] as part of [Vendor’s] telecommunications network and tracking system (“. . .”). Subject to the terms of this Agreement, [Vendor] grants Taxpayer a non-exclusive, non-transferrable, limited license, without right of sublicense, to access and use each [Vendor] owned or provisioned Number solely in connection, with receiving and using the Services.

In relevant part, Exhibit A . . . referenced in the agreement, contained the following:

[T]he parties agree that billing for minutes will be in 6 second increments with a minimum of 15 seconds per call. [Vendor] shall offer local numbers when available at the same rate as national toll-free numbers, provided that pricing for numbers outside of Level 3 or CLEC territory will be subject to regional charges. [Taxpayer] has the option to buy full

² . . .

ownership in and port any and all numbers at any time for a fee of \$. . . per each such number.

The service package provided that Taxpayer paid [Vendor] a flat per minute rate of \$. . . a minute, and \$. . . per month per recorded number for call recording.

The Department's Audit Division performed a partial audit on Taxpayer for the period of January 1, 2011, through December 31, 2014 (the "audit period".) Taxpayer provided Audit the invoices the Vendor issued to Taxpayer during the audit period for review. The amounts on the invoices [varied depending] on geographical locations of the calls and minutes used during the billing periods.³ The invoices did not contain retail sales tax charges. Taxpayer did not pay retail sales tax on its purchases from the Vendor. Audit assessed use tax/deferred sales tax on Taxpayer's purchases because Audit determined the services the Vendor provided were "telecommunications services" or/and "ancillary services," defined in RCW 82.04.065, which are subject to retail sales tax under RCW 82.04.050(5).

On November 22, 2015, Audit issued an assessment for the audit period, against Taxpayer. The assessment was in the amount of \$. . . , which consisted of use tax/deferred sales tax of \$. . . , and interest of \$ Taxpayer did not pay the assessment and petitioned the Department's Administrative Review and Hearings Division ("ARHD") for correction of the assessment.

Taxpayer argues that the . . . services it purchases from the Vendor qualify for the "data processing and information services" telecommunications services [exclusion] under RCW 82.04.065(27)(a) and Rule 245(103)(b). Taxpayer relies on *Qualcomm, Inc. v. Dep't of Revenue*, 171 Wn.2d 125, 137, 249 P.3d 167 (2011), and argues that the primary purpose of its purchases is not for the telecommunications services the Vendor provides to have access to the 800-toll-free numbers, but to obtain the processed data or information based on the information recorded on the toll-free numbers. Taxpayer alternatively argues that the . . . services that it purchases from the Vendor qualify for the "advertising services" digital automated service [exclusion] provided in RCW 82.04.192(3)(b)(xiii) because the toll-free numbers are used for the Property Owners' rental advertisements.

ANALYSIS

Washington imposes retail sales tax on sales in this state of tangible personal property, unless the property is purchased for resale or otherwise exempt. RCW 82.08.020; *see also* RCW 82.04.050. A consumer is subject to use tax if the consumer has not paid retail sales tax on the retail sale when purchased. RCW 82.12.020.

³ For example, the Vendor issued an invoice for ". . ." for the period of May 1, 2012, to May 31, 2012, for \$. . . , for a total minute usage of . . . , [and an] invoice for the period of July 1, 2012, to July 31, 2012, [for] \$. . . , for a total minute usage of An invoice for "-. . ." for the period of May 1, 2012, to May 31, 2012, [for] \$. . . , for a total minute usage of . . . , [and an] invoice for the period of August 1, 2012, to August 31, 2012, [for] \$. . . , for a total minute usage of

“Telecommunications Service” and “Ancillary Services,” in RCW 82.04.065:

The sale of. . . “telecommunications service” or “ancillary services,” as defined in RCW 82.04.065, to consumers [is a] retail sale. RCW 82.04.050(5). “Telecommunications service” means:

[T]he electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points. “Telecommunications service” includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether such service is referred to as voice over internet protocol services or is classified by the federal communications commission as enhanced or value added.

RCW 82.04.065(27).

“Ancillary services” means services that are associated with or incidental to the provision of “telecommunications services,” including but not limited to “detailed telecommunications billing,” “directory assistance,” “vertical service,” and “voice mail services.” RCW 82.04.065(3). The term “800 service” means “a telecommunications service that allows a caller to dial a toll-free number without incurring a charge for the call.” The service is typically marketed under the name “800,” “855,” “866,” “877,” and “888” toll-free calling, and any subsequent numbers designated by the federal communications commission.” RCW 82.04.065(1) (emphasis added). *See* Rule 245(103)(a).

However, “telecommunications service” *does not* include “data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser where such purchaser's primary purpose for the underlying transaction is the processed data or information.” RCW 82.04.065(27)(a) (emphasis added). *See* Rule 245(103)(b).

Here, Taxpayer contracts with the Vendor to get access to the 800-toll-free numbers. Taxpayer does not primarily contract with the Vendor to extract or process data. Taxpayer’s primary goal is to obtain access to the 800-toll-free numbers in order to provide the property listing services to the Property Owners.

The invoices from the Vendor and the “Master User Services Agreement” clearly provide that Taxpayer is charged by the minutes used with a flat per minute rate and a flat call-recording fee. Neither the invoices nor the agreement provides that Taxpayer is billed for data processing or information services. The data processing and information services telecommunications services [exclusion] provided in RCW 82.04.065(27)(a) and Rule 245(103)(b) are not applicable here because the processed data or information is incidental to the telecommunications services. The manipulation of raw data to generate reports pertaining to the callers’ information is not the integral and necessary part of the services that Taxpayer purchases from the Vendor. *See* Det. No. 14-0307, 35 WTD 51 (2016).

Therefore, Taxpayer purchases telecommunications services from the Vendor and the purchases are subject to retail sales tax. RCW 82.04.065; RCW 82.04.050(5). Because Taxpayer did not pay retail sales tax to the Vendor at the time of the purchases, Taxpayer's purchases are subject to the use tax/deferred sales tax. RCW [82.04.050(5) and 82.08.020].

Taxpayer relies on *Qualcomm, Inc. v. Dep't of Revenue*, 171 Wn.2d 125, and argues that the primary purpose of its purchases from the Vendor is to collect the data pertaining to the rental advertisement responses. We find Taxpayer's reliance on *Qualcomm* is misplaced.

The Washington Supreme Court in *Qualcomm* addressed the income classification issue for services between "network telephone services" and "information services." In reaching its conclusion, the Court applied the "primary purpose test" and concluded that Qualcomm, Inc.'s ("Qualcomm") service was "information service" and income derived was subject to the service B&O tax rate.

Qualcomm sold a tracking system to trucking companies. The system provided information about the location of vehicles on the road, performance of drivers, and operation of the trucks and trailers. *Qualcomm*, 171 Wn.2d at 128. The system had three components: first, mobile terminals in the trucks (hardware); second, messaging and position information transmitted to Qualcomm, which was processed and stored by Qualcomm, until retrieved by the trucking company; and third, software installed on the company's computers, which allowed the company's dispatchers to use the data. The Court recognized that each component was useless without the other two components. Qualcomm conceded the charges for the hardware and software components were retail sales. Qualcomm separated the charges for those components, and charged retail sales tax. *Id.* However, Qualcomm did not charge its customers retail sales tax on the second component.

The Department concluded that Qualcomm provided a network telephone service with respect to the second component described above and assessed retail sales tax and retailing B&O tax on the sales of the service.⁴ 171 Wn.2d at 131. Qualcomm appealed the Department's assessment. To analyze the second component, the Court applied the primary purpose test and found that the trucking company's primary goal of this service was to acquire specific, useful information about [its] trucks on the road. *Id.* at 142-143. The service itself, as it was most commonly used, was actually creating the location information, and obtaining that location information was the primary purpose of the purchaser. *Id.* at 143 (emphasis added). The Court recognized that Qualcomm's service (under the second component) should be taxed as an information service, which was not subject to retail sales tax. *Id.*

Unlike in *Qualcomm*, the collection of raw data to generate reports is not what Taxpayer contracts with the Vendor to provide. Pursuant to the "Master User Services Agreement," the Vendor grants Taxpayer "a non-exclusive, non-transferrable, limited license, without right of sublicense, to access and use each [Vendor] owned or provisioned Number solely in connection, with receiving and using the Services" for a flat minute rate and a flat monthly call recording fee. The primary purpose of the purchaser, Taxpayer here, is to get access to the 800-toll-free numbers the Vendor [provides] in order to provide the apartment listing services.

⁴ In 2007, the legislature amended RCW 82.04.065 and replaced the phrase "network telephone service" with "telecommunication service." Laws of 2007, ch.6, § 1002(8).

Digital Automated Service RCW 82.04.192(3)(a):

Taxpayer alternatively argues that the services at issue qualify for the “advertising services” digital automated service [exclusion] provided in RCW 82.04.192(3)(b)(xiii), because the toll-free numbers are used for the Property Owners’ rental advertisements. We disagree.

The terms “sale at retail” and “retail sale” includes “sales to consumers of “digital automated services”, “digital goods,” and “digital codes.” RCW 82.04.050(8)(a). . . . Digital automated service means, “any service transferred electronically that uses one or more software applications.” RCW 82.04.192(3)(a). “Transferred electronically” means obtained by means other than tangible storage media. RCW 82.04.192(8). Digital automated service does not include telecommunications services and this is a telecommunications service. RCW 82.04.192(3)(b)(vi).

RCW 82.04.192(3)(b)(xiii) provides digital automated service *does not* include “advertising services,” which is defined as:

Advertising services. For purposes of this subsection (3)(b)(xiii), "advertising services" means all services directly related to the creation, preparation, production, or the dissemination of advertisements. Advertising services include layout, art direction, graphic design, mechanical preparation, production supervision, placement, and rendering advice to a client concerning the best methods of advertising that client's products or services. Advertising services also include online referrals, search engine marketing and lead generation optimization, web campaign planning, the acquisition of advertising space in the internet media, and the monitoring and evaluation of web site traffic for purposes of determining the effectiveness of an advertising campaign. Advertising services do not include web hosting services and domain name registration;

RCW 82.04.192(3)(b)(xiii).

Taxpayer does not purchase any of the advertising services listed in the statute above. It is clear from the evidence that Taxpayer purchases telecommunications service from the Vendor. Therefore, the services at issue do not qualify for the “advertising services” digital automated service [exclusion] provided in RCW 82.04.192(3)(b)(xiii). We deny Taxpayer’s petition.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 22nd day of July 2016.