

Cite as Det. No. 19-0105, 40 WTD 195 (2021)

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

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| In the Matter of the Petition for Refund of) | <u>D E T E R M I N A T I O N</u> |
| Payment of Assessment of) | |
|) | No. 19-0105 |
|) | |
| ...) | Registration No. ... |
|) | |

[1] RCW 82.04.050(1)(a)(i); RCW 82.08.02806: RETAIL SALE – EXEMPTION – SALE OF HUMAN TISSUE – RESEARCH AND QUALITY CONTROL. To the limited extent that Taxpayer sells human tissue for the purposes of research and quality control, the sales are retail sales subject to retailing B&O tax and are exempt from retail sales tax.

[2] RULE 138; RULE 224; RCW 68.64.150(2); 42 U.S.C. § 274e(c)(2): SERVICE AND OTHER B&O TAX – MEDICAL SERVICES – SALE OF TRANSPLANTATION SERVICES. Taxpayer’s sales of its transplantation services fall within the exemptions from the National Organ Transplant Act and UAGA and are analogous to medical services, which are taxable as personal services under the Service and Other Activities B&O Tax Classification. This is so even though some tangible personal property – the tissue – is transferred as part of those personal services.

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.

Roberts, T.R.O. – Taxpayer, a for-profit [human tissue] bank, petitions for review of the Department’s adjustment of Taxpayer’s monthly excise tax returns, which reclassified certain income from . . . tissue related services from the Retailing Business and Occupation (“B&O”) Tax Classification and subject to retail sales tax to the Service and Other Activities B&O Tax Classification and denied deductions to retail sales tax for sales of prosthetic devices. Taxpayer’s petition is denied.¹

ISSUE

1. Should sales of [human] tissue for research and quality control be subject to retailing B&O tax and exempt from retail sales tax under RCW 82.08.02806?

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

2. Should income related to the transfer of [human] tissue for transplantation be subject to services and other activities B&O tax under RCW 82.04.290(2), WAC 458-20-138 (“Rule 138”), and WAC 458-20-224 (“Rule 224”)?

FINDINGS OF FACT

. . . , previously known as . . . (“Taxpayer”), is a for-profit subsidiary of a non-profit [human tissue] bank. [Bank] obtains, evaluates, and distributes [tissue] donated for use in . . . transplantation, research, and education. Under federal and state law, Taxpayer is prohibited from selling the . . . tissue for transplantation but may charge reasonable costs associated with the transplantation of the . . . tissue.

Taxpayer is tasked with processing and medically evaluating the . . . tissue, finding best matches for the tissue, and coordinating delivery to the third-party hospitals and research facilities that are responsible for any processing fees charged by Taxpayer. If appropriate tissue is not available from Taxpayer’s [Bank], Taxpayer may source tissue from another [tissue] bank to meet the needs of patients. Tissues that cannot be used for transplants are sold for research and training purposes, for which Taxpayer also provides additional services. Taxpayer also sells a line of surgical tools that are used in [tissue] transplantation.

. . .

On February 23, 2018, Taxpayer submitted amended excise tax returns for the tax period of October 2016 through January 2018. These amendments reclassified sales of . . . tissue from the Service and Other Activities B&O Tax Classification to the Retailing B&O Tax Classification, with a deduction to retail sales tax for sales of prosthetic devices. The Department rejected the amendments, determining that these sales were not retail sales, but part of the transplantation services provided.

On October 2, 2018, the Department adjusted Taxpayer’s February 2018 through July 2018 monthly excise tax returns, reclassifying all of Taxpayer’s reported retailing B&O tax and retail sales tax income for which Taxpayer claimed a deduction for sales of prosthetic devices to the Services and Other Activities B&O tax classification. The Department did not reclassify retail sales for sales of medical products.² As a result of these adjustments, additional services and other activities B&O tax was assessed during the Tax Period and \$. . . became due and owing by Taxpayer to the Department.³

On October 31, 2018, Taxpayer submitted a petition for review before the Department, protesting the entire \$. . . assessment. Taxpayer stated as follows:

. . . [T]he income from sales of . . . (human tissue) is exempt from sales tax under RCW 82.08.02806. Retailing B&O tax applies to this income. Therefore, we believe that all retail sales made by [Taxpayer] to third parties including . . . tissues will be subject to the Washington B&O tax under the retailing classification . . .

² Taxpayer reported no sales of . . . tissue for research or quality control purposes.

³ . . .

ANALYSIS

Washington imposes the Business and Occupation (“B&O”) tax on the privilege of engaging in business in this state. RCW 82.04.220. Depending on the nature of the business activity being conducted, the tax is levied upon the value of products, the gross proceeds of sales, or the gross income of the business. *Id.* Washington’s B&O tax applies to various tax classifications, including making sales at retail pursuant to RCW 82.04.250, and providing services pursuant to RCW 82.04.290. In addition to the B&O tax, RCW 82.08.020 imposes a retail sales tax on each retail sale in this state.

The issue here is whether Taxpayer’s business activities concerning the sale of . . . tissue and certain related services constitute a (1) “retail sale” subject to the retailing B&O tax and retail sales tax, or (2) a “service” subject to the services and other activities B&O tax.

For purposes of both the retailing B&O tax and the retail sales tax, RCW 82.04.050 defines “sale at retail” or “retail sale.” “Sale at retail” generally includes “every sale of tangible personal property” RCW 82.04.050(1)(a)(i).

RCW 82.04.290(2) imposes the service and other activities B&O tax on “persons engaged in the business of rendering any type of service which does not constitute a ‘sale at retail’ or a ‘sale at wholesale.’”

Rule 138 and Rule 224 provide that certain personal or professional services to others are distinct from sales of tangible personal property or services that have been defined as “sales at retail” in RCW 82.04.050, such as cleaning, improvements, or alterations of tangible personal property. Rule 138 recognizes that these personal services that are not retail sales may involve some tangible personal property in the form of materials and supplies furnished or used in connection with such services. Rule 138 further provides, “The retail sales tax does not apply to the amount charged or received for the rendition of personal services to others, even though some tangible personal property in the form of materials and supplies is furnished or used in connection with such services.” Examples of personal services that are not retail sales include those performed by doctors, chemists, undertakers, and laboratory operators. Rule 224.

The federal National Organ Transplant Act prohibits any person from knowingly acquiring, receiving, or otherwise transferring any human organ for valuable consideration for use in human transplantation. 42 U.S.C. § 274e(a). Separately, Washington has codified the Revised Uniform Anatomical Gift Act (UAGA) under Chapter 68.50 RCW, which makes it a felony to knowingly purchase or sell an organ, . . . or tissue of a human being, if it is intended for transplantation or therapy. RCW 68.64.150. While it is illegal to sell human organs and tissue if the organ is intended for transplantation, reasonable costs associated with the removal, transportation, implantation, processing, preservation, quality control, and storage are exempt from these laws. 42 U.S.C. § 274e(c)(2); RCW 68.64.150(2).

. . . Tissue for Research or Qualify Control Purposes

Significantly, the National Organ Transplant Act and UAGA only concern the sales of human organs for use in human transplantation; they do not impact sales of whole cadavers or tissues used for research or education.

Thus, the sale of . . . tissue for research and quality control is a retail sale of tangible property under RCW 82.04.050(1)(a)(i). Amounts charged by Taxpayer for transfers of . . . tissue for educational or research purposes can include both the tissues themselves and any costs associated with preparing these samples. There is no state or federal prohibition on selling the tissue in such cases. This transfer is subject to retailing B&O tax and retail sales tax because it is a sale of tangible personal property to a consumer under RCW 82.08.020(1)(a) along with other related services. RCW 82.04.050, 82.08.010, 82.08.020.

These sales are additionally eligible for a retail sales tax exemption under RCW 82.08.02806, which provides that retail sales tax “shall not apply to sales of human blood, tissue, organs, bodies, or body parts for medical research and quality control testing purposes.”

To the limited extent that Taxpayer sells . . . tissue for the purposes of research and quality control, the sales are retail sales subject to retailing B&O tax and are exempt from retail sales tax under RCW 82.08.02806. . . .

. . . Tissue for Transplantation

As explained above, sales of human tissue intended for transplantation is expressly prohibited under the National Organ Transplant Act and UAGA. However, both laws exempt as part of the transplantation process, the cost of removal, transportation, implantation, processing, preservation, and storage of human tissue.⁴ 42 U.S.C. § 274e(c)(2); RCW 68.64.150(2). . . . Taxpayer processes and medically evaluates the tissue, finds the best matches for the tissue, and coordinates delivery with hospitals

Taxpayer operates in a highly regulated medical or laboratory setting and applies sophisticated professional skills in matching human tissues for transplant, preparing the tissues, coordinating delivery, and processing the tissue to make it suitable for transplant. These services are then sold in conjunction with the transfer of a . . . tissue. [Thus, Taxpayer’s sales of its transplantation services fall within the exemptions from the National Organ Transplant Act and UAGA described above and are analogous to medical services, which are taxable as personal services under the Service and Other Activities B&O Tax Classification.⁵ See Rule 138; Rule 224. This is so even though some tangible personal property – the . . . tissue – is transferred as part of those personal services. Rule 138.]

⁴ We assume Taxpayer complies with these legal limitations absent information to the contrary. [If illegal sales of tissue had been demonstrated, a different analysis would be required.]

⁵ As sales of . . . tissue for transplantation are [activities which are prohibited from being structured as retail sales under the National Organ Transplant Act and UAGA], the matter of eligibility for the prosthetic devices exemption from retail sales tax under WAC 458-20-18801 is immaterial.

Based on the foregoing, Taxpayer's sales of transplantation services of . . . tissue is considered part of the transplantation process and the associated fees shall be taxable under the Service and Other Activities B&O Tax Classification.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 9th day of April 2019.